

# Background

No. 2069  
September 13, 2007



Published by The Heritage Foundation

## A Sleeper Amnesty: Time to Wake Up from the DREAM Act

*Kris W. Kobach*

Just three months after the Senate immigration bill met its well-deserved end, amnesty advocates in the U.S. Congress resumed their efforts. Recently, Senator Richard Durbin (D-IL) announced on the Senate floor his intention to offer the Development, Relief, and Education for Alien Minors (DREAM) Act as an amendment to the defense authorization bill.

The DREAM Act (S. 774) is a nightmare. It is a massive amnesty that extends to the millions of illegal aliens who entered the United States before the age of 16. The illegal alien who applies for this amnesty is immediately rewarded with “conditional” lawful permanent resident (green card) status, which can be converted to a non-conditional green card in short order. The alien can then use his newly acquired status to seek green cards for the parents who brought him in illegally in the first place. In this way, it is also a back-door amnesty for the millions of illegal aliens who brought their children with them to the United States.

What is less well known about the DREAM Act is that it also allows illegal aliens to receive in-state tuition rates at public universities, discriminating against U.S. citizens from out of state and law-abiding foreign students. It repeals a 1996 federal law that prohibits any state from offering in-state tuition rates to illegal aliens unless the state also offers in-state tuition rates to all U.S. citizens.

On its own, the DREAM Act never stood a chance of passing. Every scientific opinion poll on the subject has shown over 70 percent opposition to giving in-state tuition benefits to illegal aliens.

### Talking Points

- The Senate’s DREAM Act would create a massive amnesty by opening a wide path to citizenship for any alien who entered the country before the age of 16, has been in the country for at least five years, and has earned a high school diploma or a GED in the United States.
- The bill also would repeal a 1996 federal law that prohibits any state from offering in-state tuition rates to illegal aliens unless the state also offers in-state tuition rates to all U.S. citizens.
- Ten states have enacted laws in violation of that policy. The DREAM Act provisions would retroactively change federal law, pardoning the states for violating federal law.
- Allowing in-state tuition for illegal aliens encourages the violation of federal immigration law and is unfair to legal aliens and out-of-state U.S. citizens.

This paper, in its entirety, can be found at:  
[www.heritage.org/Research/Immigration/bg2069.cfm](http://www.heritage.org/Research/Immigration/bg2069.cfm)

Produced by the B. Kenneth Simon  
Center for American Studies

Published by The Heritage Foundation  
214 Massachusetts Avenue, NE  
Washington, DC 20002-4999  
(202) 546-4400 • [heritage.org](http://heritage.org)

Nothing written here is to be construed as necessarily reflecting the views of The Heritage Foundation or as an attempt to aid or hinder the passage of any bill before Congress.

Not surprisingly, the DREAM Act languished in committee for five years after it was first introduced in 2001—until the opportunity arose to hitch it to the Senate’s “comprehensive” immigration bills of 2006 and 2007.

To understand just what an insult to the rule of law the DREAM Act is, it is important to look at the history behind it.

## A Brief History of the In-State Tuition Debate

In September 1996, Congress passed the landmark Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA). Led by Lamar Smith (R–TX) in the House of Representatives and Alan Simpson (R–WY) in the Senate, Congress significantly toughened the nation’s immigration laws. To his credit, President Bill Clinton signed the bill into law.

Open-borders advocates in some states—most notably California—had already raised the possibility of offering in-state tuition rates to illegal aliens who attend public universities. To prevent such a development, the IIRIRA’s sponsors inserted a clearly worded provision that prohibited any state from doing so unless it provided the same discounted tuition to all U.S. citizens:

Notwithstanding any other provision of law, an alien who is not lawfully present in the United States shall not be eligible on the basis of residence within a State (or a political subdivision) for any postsecondary education benefit unless a citizen or national of the United States is eligible for such a benefit (in no less an amount, duration, and scope) without regard to whether the citizen or national is such a resident.<sup>1</sup>

Members of Congress reasoned that no state would be interested in giving up the extra revenue from out-of-state students, so this provision would ensure that illegal aliens would not be rewarded with a taxpayer-subsidized college education. The IIRIRA’s proponents never imagined that some states might simply disobey federal law.

## States Subsidizing the College Education of Illegal Aliens

However, that is precisely what happened. In 1999, radical liberals in the California legislature pushed ahead with their plan to have taxpayers subsidize the college education of illegal aliens.

Assemblyman Marco Firebaugh (D) sponsored a bill that would have made illegal aliens who had resided in California for three years during high school eligible for in-state tuition rates at California community colleges and universities. In August 2000, the California legislature passed his bill. However, Democrat Governor Gray Davis vetoed the bill in September 2000, stating clearly in his veto message that the bill would violate federal law:

[U]ndocumented aliens are ineligible to receive postsecondary education benefits based on state residence.... IIRIRA would require that all out-of-state legal residents be eligible for this same benefit. Based on Fall 1998 enrollment figures...this legislation could result in a revenue loss of over \$63.7 million to the state.<sup>2</sup>

Undeterred, Firebaugh introduced his bill again, and the California legislature passed it again. In 2002, facing flagging poll numbers and desperate to rally Hispanic voters to his cause, Governor Davis signed the bill.

Meanwhile, similar interests in Texas had succeeded in enacting their own version of the bill. Since then, interest groups lobbying for illegal aliens have introduced similar legislation in most of the other states. The majority of state legislatures had the good sense to reject the idea, but eight states followed the examples of California and Texas, including some states in the heart of “red” America. Today, the 10 states that offer in-state tuition rates to illegal aliens are: California, Illinois, Kansas, Nebraska, New Mexico, New York, Oklahoma, Texas, Utah, and Washington. (The legislatures of Maryland and Connecticut passed similar bills in 2007, but the governors of those states rightly vetoed the bills.)

1. 8 U.S.C. § 1623.

2. Gray Davis, veto message to California Assembly on AB 1197, September 29, 2000, at [info.sen.ca.gov/pub/99-00/bill/asm/ab\\_1151-1200/ab\\_1197\\_vt\\_20000929.html](http://info.sen.ca.gov/pub/99-00/bill/asm/ab_1151-1200/ab_1197_vt_20000929.html) (August 10, 2006).

In most of these 10 states, the law was passed under cover of darkness because public opinion was strongly against subsidizing the college education of illegal aliens at taxpayer expense. The governors even declined to hold press conferences or signing ceremonies heralding the new laws.

Not surprisingly, when voters themselves decide the question, a very different result occurs. In November 2006, Arizona voters passed Proposition 300, which expressly *barred* Arizona universities from offering in-state tuition rates to illegal aliens—71.4 percent voted in favor.

The American people realize the injustice of giving illegal aliens a taxpayer-subsidized education when out-of-state U.S. citizens and law-abiding foreign students have to pay the full cost of their education.

This strong public sentiment against giving illegal aliens access to in-state tuition rates is powerful enough to swing the results of an election. In Nebraska, the last of the 10 states to pass the law, that is exactly what happened. During the 2006 session, Nebraska's unicameral legislature passed an in-state tuition bill for illegal aliens. Governor Dave Heineman vetoed the bill because it violated federal law and was bad policy. In mid-April the legislature, which included an unusually large number of lame-duck Senators, overrode his veto by a vote of 30 to 19.

The veto would become an issue in the 2006 Republican gubernatorial primary. Heineman's opponent was the legendary University of Nebraska football coach and sitting U.S. Representative Tom Osborne, a political demigod in the Cornhusker State. Osborne had never received less than 82 percent of the vote in any election. Heineman, on the other hand, had not yet won a gubernatorial election. He became governor in 2005 when Governor Mike Johanns resigned to become U.S. Secretary of Agriculture.

Few believed that Heineman had a chance of winning the primary. He was behind in all of the polls. But then Coach Osborne fumbled. During a debate, he stated that he favored the idea of giving subsidized tuition to illegal aliens. Heineman seized the opportunity, and highlighted this difference of opinion between the candidates in his political ads.

The voters reacted negatively to Osborn's position, and Heineman surged ahead in the final weeks of the race. He beat Osborn by 50 percent to 44 percent in the primary election on May 9, 2006. After the vote, both candidates said that the in-state tuition issue had been decisive.

### State-Subsidized Lawbreaking

In all 10 states, the in-state tuition laws make for shockingly bad policy.

*First*, providing in-state tuition rates to illegal aliens amounts to giving them a taxpayer-financed education. In contrast, out-of-state students pay the full cost of their education. This gift to illegal aliens costs taxpayers a great deal of money at a time when tuition rates are rising across the country. For example, in California, a lawsuit on the matter has revealed the staggering cost to the taxpayer: The state pays more than \$100 million annually to subsidize the college education of thousands of illegal aliens.

*Second*, these states are encouraging aliens to violate federal immigration law. Indeed, in some of the states, breaking federal law is an express prerequisite to receive the benefit of in-state tuition rates. Those states expressly *deny in-state tuition to legal aliens* who have valid student visas. And in all 10 states, an alien is eligible for in-state tuition rates only if he remains in the state in violation of federal law and evades federal law enforcement. In this way states are directly rewarding this illegal behavior.

This situation is comparable to a state passing a law that rewards residents with state tax credits for cheating on their federal income taxes. These states are providing direct financial subsidies to those who violate federal law.

*Third*, not only are such laws unfair to aliens who follow the law, but they are slaps in the faces of law-abiding American citizens. For example, a student from Missouri who attends Kansas University and has always played by the rules and obeyed the law is charged three times the tuition charged to an alien whose very presence in the country is a violation of federal criminal law.

This gift to illegal aliens comes at a time when millions of U.S. citizens have had to mortgage their future to attend college. During 2002–2007, college

costs rose 35 percent after adjusting for inflation. Two-thirds of college students now graduate with debt, and the amount of debt averages \$19,200. In a world of scarce education resources, U.S. citizens should be first in line to receive a break on college costs—not aliens who break federal law.

Even if a good argument could be made for giving in-state tuition benefits to illegal aliens, the bottom line is that the policy violates federal law. These 10 states have brazenly cast aside the constraints imposed by Congress and the U.S. Constitution.

### Pending Lawsuits

In July 2004, a group of U.S. citizen students from out of state filed suit in federal district court in Kansas to enjoin the state from providing in-state tuition rates to illegal aliens.<sup>3</sup> They pointed out that Kansas is clearly violating federal law, as well as violating the Equal Protection Clause of the U.S. Constitution by discriminating against them in favor of illegal aliens.

The district judge did not render any decision on the central questions of the case. Instead, he avoided the issues entirely by ruling that the plaintiffs lacked a private right of action to bring their statutory challenge and lacked standing to bring their Equal Protection challenge. The case is currently before the U.S. Court of Appeals for the Tenth Circuit.

Meanwhile, in December 2005, another group of U.S. citizen students filed a class-action suit in a California state court.<sup>4</sup> They too maintain that the state is violating federal law and the U.S. Constitution. Pursuant to a California civil rights statute, they are also seeking damages to compensate them for the extra tuition that they have paid above that charged to illegal aliens.

### The DREAM Act Amnesty

Now, just when it looks as if U.S. citizens might vindicate their rights under federal law and the wayward states might be held accountable, Senator Durbin and his pro-amnesty allies are seeking to

offer the offending states a pardon.

The DREAM Act grants an unusual reprieve to the 10 states that have ignored federal law. The Act retroactively repeals the 1996 federal law that the 10 states violated, making it as though the provisions in the 1996 law never existed.

On top of this insult to the rule of law, the DREAM Act includes a massive amnesty, as noted above. This amnesty opens a wide path to citizenship for any alien who entered the country before the age of 16 and has been in the country for at least five years. The guiding notion seems to be “The longer you have violated federal law, the better.”

Beyond that, all the alien needs is a high school diploma or a GED earned in the United States. If he can persuade an institution of higher education in the United States—any community college, technical school, or college—to admit him, that will suffice. Any illegal alien who meets these conditions (or who can produce fraudulent papers indicating that he meets the conditions) gets immediate legal status in the form of a “conditional” green card good for six years, according to Section 4(a)(1).

It is important to recognize just how sweeping this amnesty is.

- There is no upper age limit. Any illegal alien can walk into a U.S. Customs and Immigration Services office and declare that he is eligible. For example, a 45 year old can claim that he illegally entered the United States 30 years ago at the age of 15. There is no requirement that the alien prove that he entered the United States at the claimed time by providing particular documents. The DREAM Act’s Section 4(a) merely requires him to “demonstrate” that he is eligible—which in practice could mean simply making a sworn statement to that effect. Thus, it is an invitation for just about every illegal alien to fraudulently claim the amnesty.
- The alien then has six years to adjust his status from a conditional green card holder to a non-

3. See *Day v. Sebelius*, 376 F. Supp. 2d 1022 (2005).

4. See Stuart Silverstein, “Out-of-State Students Sue over Tuition: Plaintiffs Are Challenging California Practices That Require Them to Pay Higher College Costs Than Some Illegal Immigrants,” *Los Angeles Times*, December 15, 2005, p. B3.

conditional one. To do so, he need only complete two years of study at an institution of higher education. If the alien has already completed two years of study, he can convert to non-conditional status immediately (and use his green card as a platform to bring in family members). As an alternative to two years of study, he can enlist in the U.S. military and spend two years there. This provision allows Senator Durbin to claim that the DREAM Act is somehow germane to a defense authorization bill.

- An illegal alien who applies for the DREAM Act amnesty gets to count his years under “conditional” green card status toward the five years needed for citizenship. (Section 5(e)) On top of that, the illegal alien could claim “retroactive benefits” and start the clock running the day that the DREAM Act is enacted. (Section 6) In combination, these two provisions put illegal aliens on a high-speed track to U.S. citizenship—moving from illegal alien to U.S. citizen in as little as five years. Lawfully present aliens, meanwhile, must follow a slower path to citizenship.
- It would be absurdly easy for just about any illegal alien—even one who does not qualify for the amnesty—to evade the law. According to Section 4(f) of the DREAM Act, once an alien files an application—*any application*, no matter how ridiculous—the federal government is prohibited from deporting him. Moreover, with few exceptions, federal officers are prohibited from either using information from the application to deport the alien or sharing that information with another federal agency, under threat of up to \$10,000 fine. Thus, an alien’s admission that he has violated federal immigration law cannot be used against him—even if he never had any

chance of qualifying for the DREAM Act amnesty in the first place.

The DREAM Act also makes the illegal aliens eligible for federal student loans and federal work-study programs—another benefit that law-abiding foreign students cannot receive—all at taxpayer expense. A consistent theme emerges: Illegal aliens are treated much more favorably than aliens who follow the law. There is no penalty for illegal behavior.

## Conclusion

In addition to being a dream for those who have broken the law, the DREAM Act raises an even larger issue regarding the relationship between states and the federal government. The 10 states have created a 21st century version of the nullification movement—defying federal law simply because they do not like it. In so doing, they have challenged the basic structure of the republic. The DREAM Act would pardon this offense and, in so doing, encourage states to defy other federal law in the future.

One thing that we have learned in the struggle to enforce our nation’s immigration laws is that states cannot be allowed to undermine the efforts of the federal government to enforce the law. Only if all levels of government are working in concert to uphold the rule of law can it be fully restored.

—Kris W. Kobach is Professor of Law at the University of Missouri-Kansas City and a Visiting Fellow at The Heritage Foundation. He served as counsel and chief adviser on immigration law to U.S. Attorney General John Ashcroft from 2001 to 2003. He is representing the U.S. citizen plaintiffs in the Kansas and California lawsuits described in this paper, and has published a longer article explaining this issue, as well as the legal arguments involved, in the *New York University Journal of Legislation and Public Policy*, vol. 10, no. 3 (2006-07).