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Lower Court Judge Rules Against U.S. Citizens; In Favor of Illegal Aliens in Kansas Tuition Suit

FAIR to Appeal Decision to Tenth Circuit Court of Appeals

In a July 5 decision, U.S. District Judge Richard D. Rogers ruled against some two dozen U.S. citizens who are being denied the same in-state tuition benefits the state of Kansas provides to illegal aliens. Judge Rogers determined plaintiffs in the case known as *Day v. Sibelius* lacked "standing" on five specific claims, necessary to challenge a Kansas law enacted in 2004 that allows illegal aliens to attend state-run universities and colleges at reduced in-state tuition rates (See side-bar story, "Fighting for the Rights of Americans").

On behalf of about two dozen U.S. citizen students who are being denied in-state tuition benefits at state-run colleges and universities, FAIR filed suit in July 2004 challenging the Kansas law on constitutional grounds as well as violations of federal law which requires states to make benefits provided to illegal aliens available to all U.S. citizens and legal residents. The students are being represented by Kris Kobach, a law professor at the University of Missouri at Kansas City and a former official of the U.S. Department of Justice.

Each of the plaintiffs in the case is forced to pay substantially higher rates of tuition to attend Kansas-run universities than students who are illegally in the country, but who had graduated from a Kansas high school. Nevertheless, Judge Rogers ruled that the plaintiffs have no "legally connected interest" to the section of the immigration law under which the suit was filed. Further, he concluded that the U.S. citizen students are "not affected by any of the specifically cited immigration laws or the general immigration laws in any particularized way...Such circumstances fail to establish standing."

Judge Rogers found that the plaintiffs met the requirements for standing on one of the claims in the suit based on a specific federal statute (8 USC 1623) that requires states to provide non-resident U.S. citizens any benefit it makes available to illegal aliens. However, the judge dismissed this count of the lawsuit as well on the grounds that, in his opinion, the law does not provide for individual "right of action." While the law passed by Congress in 1996 is meant to insure that U.S. citizens receive at least as favorable treatment as illegal aliens, in Judge Rogers' opinion "no support can be found for the idea that Congress intended to grant enforcement rights to any private citizens for the alleged violation asserted" in the lawsuit. Rather, only the Secretary of Homeland Security is designated to challenge laws such as the one in Kansas.

Judge Rogers also threw out the claim in the suit that challenged the Kansas law as violating the equal protection clause of the U.S. Constitution. In his ruling he wrote that "legislatures are presumed to have acted within their constitutional power despite the fact, in practice, their laws result in some inequality." Moreover, he ruled, the students again lacked standing to assert an equal protection claim. While dismissing the legal standing of the U.S. citizen plaintiffs in the case, Judge Rogers ruled that two associations representing an anonymous illegal alien did meet the standing requirements in this case.

Next Stop Tenth Circuit Court of Appeals

Lead attorney Kobach and FAIR's on-staff legal counsel Michael Hethmon are in the process of preparing an appeal of Judge Rogers' decision. That appeal will be heard before the Tenth Circuit Court of Appeals in Denver. According to Kobach and Hethmon, Judge Rogers "made multiple legal errors in his decision that could and should be overturned" by the Tenth Circuit. A ruling by the Appeals Court is not expected until at least late 2005.

McCain Offers to Debate FAIR "Any Time, Any Place"

At a June 20 luncheon of the American League of Lobbyists discussing the illegal aliens amnesty legislation he introduced with Senator Edward Kennedy (D-Mass.), Senator John McCain (R-Ariz.) offered to debate FAIR "any time, any place in a respectful manner." McCain called immigration "the most important issue" facing America, emphasizing the crisis is even more urgent than other national issues such as Social Security and tax reform.

McCain made his offer to debate FAIR in response to a direct question posed to him by FAIR's legal counsel, Michael Hethmon. Citing the failure of guest worker programs in Europe and Australia, Hethmon asked the senator to justify his legislation which, in addition to granting amnesty to millions of illegal aliens and their families, would also significantly increase the number of "guest workers" admitted to the U.S. each year.

FAIR immediately accepted Senator McCain's offer to debate any time, any place in a respectful manner. In a letter to the Arizona Senator, FAIR president Dan Stein proposed holding the debate at the National Press Club in Washington, DC prior to the August congressional recess. The McCain-Kennedy legislation will likely be considered by the Senate this Fall. Stein made it clear that he is prepared to hold the debate in McCain's home state, or anywhere else in the country.

At the time of completion of this newsletter, Senator McCain's office had still not replied to FAIR's proposal to set a firm date to debate. FAIR will continue to reach out to Senator McCain to fulfill this commitment to engage in an open and respectful debate.

FAIR Fighting for the Rights of Americans

Most of the claims of the plaintiffs in the *Kansas Day v. Sibelius* lawsuit were dismissed by Judge Richard D. Rogers on the grounds the students bringing the suit lacked legal standing. In doing so, the judge consciously avoided the legal merits of the suit and instead focused on the question of whether the plaintiffs themselves were qualified to challenge Kansas' law granting in-state university tuition benefits to illegal aliens.

What is Legal "Standing"?

Standing is the technical term for an inquiry that a court must make at the outset of every case. Essentially, the court asks whether the plaintiffs have suffered personal injury to their legal interests. If the plaintiffs lack standing in the court's opinion, then it declines to consider the case on its merits. Unfortunately, the standing issue has now become a tool of the courts to use when denying the rights of U.S. citizens to sue to get immigration laws enforced.

In immigration-related cases, courts have consistently denied standing to U.S. citizens who claim to have been injured by the government's failure to control illegal immigration, while granting standing to illegal aliens themselves. Illegal aliens challenging California's Proposition 187 and Arizona's Proposition 200 have been granted standing by the courts, for example. However, U.S. citizens who are harmed by illegal immigration are routinely denied standing. FAIR pledges to continue to fight for the rights of U.S. citizens in our courts.

Judge Avoids Dealing with Substantive Issues in Kansas Lawsuit

While Judge Richard D. Rogers' dismissal of the suit brought by FAIR on behalf of U.S. citizen students in Kansas universities is disappointing, the basis for his ruling leaves us hopeful the decision will be overturned on appeal. Essentially, the judge made a ruling about the students who challenged the Kansas law, rather than about the law itself or the constitutional issues raised by the lawsuit.

Judge Rogers failed to rule on whether Kansas violated federal law and the U.S. Constitution when it granted in-state tuition benefits to illegal aliens, but denied those same benefits to non-resident U.S. citizens. Avoiding the substance of the lawsuit entirely, Judge Rogers invoked procedural obstacles to prevent the students from challenging the Kansas law.

Left unresolved by the judge's refusal to decide the case on its merits are the important constitutional and legal issues the suit was meant to address. The two most important of these are:

First, that the Kansas law clearly violates section 8 USC 1623 of the federal immigration statute that requires states that make a benefit available to illegal aliens to make that same benefit available to all citizens of the United States, irrespective of where they live.

Second, that the Kansas law clearly violates the equal protection clause of the U.S. Constitution. Because illegal aliens have no right to be in the United States, they cannot legitimately be considered residents of any state. Therefore, the state of Kansas cannot legally treat them any differently than other non-residents.

Judge Rogers' decision also inexplicably denies the plaintiffs have suffered any injury as a result of having to pay significantly higher tuition rates than they would if the state had treated them the same way it treats illegal aliens.

FAIR intends to press the students' claims before the Tenth Circuit Court of Appeals and, if necessary, to the U.S. Supreme Court.

FAIR Warns that CAFTA Could Lead to Still More Illegal Immigration

While FAIR's efforts to effect immigration reform have generally focused on domestic policies that attract illegal aliens to this country, many of our members also believe it is important to look at those policies that cause people to migrate from their homelands. With Congress considering ratification of the Central American Free Trade Agreement (CAFTA), FAIR is urging Congressional leaders to carefully consider "the negative implications of the CAFTA provisions for illegal immigration to the United States."

In a letter to the Republican and Democratic leaders of the House, Tom DeLay and Nancy Pelosi, FAIR noted that NAFTA a 1994 treaty that includes the U.S., Mexico and Canada has resulted in a sharp increase in illegal immigration. "Illegal immigration from Central America is already too numerous without adopting trade policies that will likely displace and motivate more subsistence farmers from that region to seek work illegally in our country," FAIR cautioned. Moreover, ratification of CAFTA could provide Central American governments with additional leverage to demand that the U.S. make still more visas available to their citizens.

The immigration pressures created by NAFTA make it necessary for Congress and the Administration to consider the potential for large increases in illegal immigration as a result of trade pacts. Because of the experience of NAFTA, FAIR believes it is necessary to scrutinize all trade agreements for their likelihood to generate more illegal immigration, or subject U.S. immigration policies to international tribunals.

Around the Country

Arizona

Local activists who helped pass Proposition 200 and created the successful Minuteman effort continue to press their demands for enforcement of immigration laws. More than 200 immigration reform activists braved the summer heat to attend a rally outside the State Capitol in Phoenix to hear from leaders of the Prop. 200 campaign and to demand that state officials enforce the will of the voters. The Arizona Republic, the state's leading newspaper, reports that the involvement of State Representative Randy Pearce and Randy Pullen in the immigration reform effort has helped propel them to political prominence in Arizona.

Texas

The Minuteman phenomenon is spreading across the country, and immigration reform activists are planning to set teams of observers in Houston who will monitor the informal hiring of day laborers on the city's streets. The Minutemen who peacefully observed illegal activities along the Arizona-Mexico border in April are inspiring citizens, like the ones in Houston, to monitor illegal activities in their own communities. While the Houston Minutemen have drawn fire from illegal alien rights groups, they are gaining support from local businesses. According to one Houston business owner, the growing number of illegal aliens seeking employment on street corners "mess up the surroundings with their trash, and they are very aggressive, which scares the customers."

New York

Activist groups that FAIR has worked closely with in Suffolk County on the eastern end of Long Island have won another battle in their ongoing effort to protect their communities from mass illegal immigration. Groups that have successfully blocked the construction of day laborer hiring sites have prevailed on the county to enforce fire and housing codes against unscrupulous landlords who house dozens of illegal aliens in rented houses or apartments. Suffolk County Executive Steve Levy said that the county effort is intended to "send a strong message to slumlords." The Mexican consulate in New York, however, has protested Suffolk County's efforts to enforce local housing and safety codes.

Virginia

In the Northern Virginia community of Herndon, immigration reformers and groups with close ties to FAIR are waging an effort to prevent \$170,000 of Fairfax County money from being used to open a day laborer hiring site. More than 250 people turned out for a contentious hearing of the town's planning commission on July 11, most of whom opposed construction of the site. Other immigration reform activists protested outside the Herndon Municipal Center, carrying placards opposing the use of public funds to assist illegal alien day laborers.

London Attacks a Grim Reminder Our Own Borders Remain Vulnerable

The July 7 attacks that took the lives of more than 50 commuters in London remind us that four years after the attacks of 9/11, America's borders remain vulnerable to the infiltration of international terrorists. Recent government and court documents reveal that Tijuana has become a significant staging ground for Middle Easterners attempting to enter the United States illegally. To the north, lax Canadian immigration and asylum laws also invite potential terrorists and offer a backdoor to the U.S.

A Tijuana café, run by a Lebanese expatriate, has become an important destination on the itineraries of Middle Eastern illegal aliens on their way to the U.S. According to government records, the owner of the Tijuana café and other smugglers have brought hundreds, if not thousands, of illegal aliens from the Middle East across the border, including some with ties to Hezbollah.

With our largely unguarded northern border, Canada's absurdly lax asylum policies are providing terrorists easy access to the U.S. According to David Harris, the former chief of strategic planning for the Canadian Security Intelligence Service, "Canada has essentially said, if you put your foot in Canada and you declare yourself a refugee, then by and large you are...All of that has implications; it means that we're quite susceptible to penetration."

U.S. intelligence believes our porous borders and lack of interior immigration enforcement are being exploited by radical terrorist groups and that sleeper cells, like the one that exploded four bombs on London's public transportation system, exist here.

The Danger is Real, So Must Be Our Response

The attacks in London, which took the lives of more than 50 innocent civilians, were tragic and hardly surprising. FAIR has warned for years that lax immigration policies and enforcement are an open invitation to terrorists. The London bombings, and the statements from security officials that another attack in the United States is inevitable, remind us of the dangerous gap between rhetoric and action when it comes to protecting the homeland security of this country.

Both before and since 9/11, FAIR analyzed the security threats posed by our lax immigration policies and proposed concrete actions that must be taken by the government to minimize our vulnerability to attack. In a series of publications, FAIR has pointed out the weaknesses in our border security, visa issuance policies, and in the way vital identity documents are issued. In addition, we have issued specific recommendations — many of which mirrored the conclusions and recommendations of the 9/11 Commission.

In the aftermath of the tragedies in London, it is imperative the government act on these recommendations. The extensive research and policy recommendations about immigration reforms that will enhance our homeland security are available at www.fairus.org.

FAIR Unveils “Seven Principles of True Comprehensive Immigration Reform”

For more than two decades, as FAIR built the case that America’s immigration policies were badly in need of reform, apologists for mass legal and illegal immigration refused to acknowledge this country even had an immigration problem. In recent years, as it became incontrovertibly evident that U.S. immigration policies are failing to protect the interests of the nation and the American people, those same apologists for mass immigration have attempted to re-label policies that promote open borders, amnesty and more guest workers as “immigration reform.”

In response to this deliberate attempt to muddy the waters and pass abandonment of immigration control off as reform, it became necessary for FAIR to define the concept of comprehensive immigration reform, as most Americans believe reform to be. Each of the seven principles defined by FAIR begins from the basic premise that the primary purpose and responsibility of U.S. immigration policy is to serve the interests of the nation and American citizens.

These [seven principles](#), we believe, are the yardstick against which any legislation purporting to be "comprehensive immigration reform" should be measured:

1. Reduce overall levels of immigration and, to the greatest extent possible, end illegal immigration.
2. No amnesty for illegal aliens and no massive new guest worker programs.
3. Protect the jobs, wages and standards of living of American workers.
4. Reinststitute immigration enforcement in the interior of the country, led by vigorous enforcement of employer sanctions.
5. End abuse of our humanitarian political asylum laws.
6. Institute an immigration time-out.
7. Ensure equal treatment under the law for all.

These are the principles that FAIR and immigration reform advocates all across the country have been fighting for for years. These are the principles we will continue to struggle for as Congress, we hope, finally addresses this critical issue for our nation.

FAIR Joins with Congressman Norwood as He Introduces CLEAR Act

FAIR president Dan Stein joined Representative Charlie Norwood (R-Georgia) at a Capitol Hill news conference as he announced the introduction of the Clear Law Enforcement for Criminal Alien Removal (CLEAR) Act. Also present at the news conference were two of the bill's co-sponsors, Representatives Steve King (R-Iowa) and J.D. Hayworth (R-Ariz.).

The legislation would greatly increase federal enforcement resources at the border and in the interior, and would expand federal detention space to hold criminal and other illegal aliens. More importantly, the legislation bolsters the authority of state and local law enforcement to cooperate with federal authorities to enforce immigration law. Also included in the legislation are provisions to provide federal resources to cooperating state and local enforcement agencies and withholding resources from states and jurisdictions that maintain "don't ask, don't tell" sanctuary laws. In addition, the legislation would require federal authorities to take custody of illegal aliens apprehended by state and local police agencies.

The CLEAR Act would implement the kind of integrated enforcement policies that FAIR first recommended in the publication "Ten Steps to Controlling Illegal Immigration."