Testimony of Kris W. Kobach

Before the United States Senate Committee on the Judiciary

Hearing on Comprehensive Immigration Reform Legislation

April 22, 2013

Mr. Chairman and Members of the Committee, although I serve as Kansas Secretary of State, I come before you today chiefly in my capacity as former Counsel to United States Attorney General John Ashcroft, and as an attorney representing cities and states that have successfully reduced illegal immigration within their jurisdictions. I also represent the ten ICE agents who are suing Secretary Napolitano for the reason that her directive of June 2012 directly orders the agents to violate federal law. That case is *Crane v. Napolitano*, No. 3:12-cv-03247-O (N.D. Tex.).

The legislation pending before this committee has been portrayed as a balanced bill that combines an amnesty with significant enforcement measures. That portrayal is completely inaccurate. In the testimony that follows I will offer three significant vulnerabilities created by the amnesty provisions and six reasons why the enforcement components of this bill are illusory.

Three Flaws in the The Bill's Amnesty Provisions.

(1) The Background Checks Are Insufficient to Prevent Terrorists from Gaining Amnesty.

The background check provisions of the bill in Section 2101(b)(8) contain no requirement that amnesty applicants actually provide government-issued documentation proving who they say they are. That means that any illegal alien can invent a new name with a totally clean record and present that name when applying for the amnesty. Immigration officials will have absolutely no way to force the alien to disclose his real identity. In other words, an alien who has a terrorist background can call himself "Rumpelstiltskin" without having to prove that that is his real name. Indeed, under Section 2101(b)(12), the terrorist alien gains a new photo-ID document issued by the federal government that gives credibility to his fictitious identity. He also gains legal immigration status and the ability to travel outside of the United States to coordinate with international terrorist groups and then to return to the United States. *As marathon bomber Tamerlan Tsarnaev demonstrated, an alien's ability to travel internationally and gain terrorist training before returning to the United States can have deadly consequences for innocent Americans.*

It should also be pointed out that even if a terrorist uses his real name when seeking the amnesty, a background check is in most cases unlikely to produce information sufficient to stop the granting of legal status. Again, the case of Tamerlan Tsarnaev illustrates the point. Although Tsarnaev entered the country legally, he was compelled to undergo background checks

similar those that amnesty applicants would undergo. Tsarnaev cleared those background checks. He was also interviewed by FBI agents in 2011 at the request of a foreign government. The FBI found no links to terrorism and released him. That is far more scrutiny than applicants for the amnesty offered by this legislation would receive.

The United States has granted amnesty to terrorists before. That is exactly what happened in 1986 when we last granted an amnesty to millions of illegal aliens. Under that amnesty, the United States granted legal status to Mahmoud "The Red" Abouhalima, who fraudulently sought and obtained the amnesty for seasonal agricultural workers. He was actually working as a cab driver in New York City. He was a ringleader in the 1993 terrorist attack against the World Trade Center, and he used his new legal status to travel abroad for terrorist training. His brother Mohammed, another participant in the 1993 attack, also gained legal status under the 1986 amnesty.

(2) Absconders and Aliens Who Have Already Been Deported Claim the Amnesty.

One provision of the bill is particularly counterproductive with respect to immigration enforcement. Unlike the amnesty of 1986, and unlike the various smaller amnesties that have been enacted since then (such as the "Section 245i" amnesty), this bill actually allows illegal aliens who have already been deported from the United States to return and gain the amnesty. Sections 2101(b)(6)(B)-(C) do so. Theses provision are a waste of the millions of dollars in immigration court proceedings and other costs that were spent in the process of removing those aliens from the United States.

Worse, the bill allows alien absconders who have remained in the United States as fugitives, despite the fact that a removal order has been issued to them by an immigration court, to receive the benefit of the amnesty. Sections 2101(c)(7)(C)(i) and 2211(b)(5)(C)(i) grant this benefit to absconders. This would create a significant and perverse incentive for aliens who are removed in the future. Any alien who is ordered removed after this bill is enacted would be effectively told, "Ignore your removal order and remain in the United States until the next amnesty." This provision would make a mockery of immigration court proceedings.

(3) The Bill Legalizes Dangerous Aliens Who Received Deferred Action Under DACA.

Sections 2101(b)(13 and 2103(b)(2)(C) permits beneficiaries of Secretary Napolitano's unlawful DACA directive of June 2012 to become eligible for the amnesty and for lawful permanent resident status. The DACA Directive was issued by Secretary Napolitano in direct violation of federal law, specifically 8 U.S.C. § 1225, which requires that immigration officials place certain aliens into removal proceedings. 8 U.S.C. § 1225(a)(1) requires that "an alien present in the United States who has not been admitted … shall be deemed for purposes of this chapter an applicant for admission." This designation triggers 8 U.S.C. § 1225(a)(3), which requires that all applicants for admission "shall be inspected by immigration officers." This in turn triggers 8 U.S.C. § 1225(b)(2)(A), which mandates that "if the examining immigration

officer determines that an alien seeking admission is not clearly and beyond a doubt entitled to be admitted, the alien shall be detained for a proceeding under section 1229a of this title." The proceedings under 8 U.S.C. § 1229a are removal proceedings in United States Immigration Courts.

As was recently revealed in an April 8, 2013, hearing before the U.S. District Court for the Northern District of Texas, *DHS has employed that unlawful DACA Directive to release numerous aliens who have been arrested, but not yet convicted, of very serious felonies* including: assault on a federal officer, sexual assault on a minor, and trafficking in cocaine. If this bill is enacted, those dangerous aliens will be eligible for the amnesty; no provision of the bill disqualifies criminals who have been arrested but not yet convicted.

Six Reasons Why The Bill's Enforcement Provisions are not Serious.

(1) The So-Called Enforcement "Triggers" in the Bill are Trivial.

The bill is contains two triggers that have been described as ensuring enforcement of our immigration laws. They do no such thing. The first trigger (in Section 3(c)(1)) is simply the submission of written strategies to Congress by the Homeland Security Secretary. After submitting these pieces of paper, DHS may begin accepting applications and offering immediate legal status to illegal aliens. The second trigger (in Section 3(c)(2)), which allows DHS to adjust the legalized aliens' status to lawful permanent resident is equally insubstantial. It is merely a statement from the Secretary that the strategies are "substantially deployed and substantially operational." These terms are not defined in the bill and have no concrete meaning. Indeed the Obama Administration's current border enforcement strategy is "substantially deployed and substantially operational." But it is largely ineffective. In addition, DHS must implement a "mandatory employment verification system," but that too is left undefined and is so vague that the current I-9 paper system could be said to qualify. Finally, DHS must implement an "electronic exit system" at air and sea ports of entry. Arguably, the current U.S. Visit kiosks already satisfy this vague description. *Moreover an exit verification system that does not include land ports of entry is utterly pointless, since DHS can never conclusively determine whether or not an alien has left if the land ports of entry are not included.*

(2) The 90 Percent Metric is Completely Meaningless.

Even more misleading is the bill's promise to achieve an "effectiveness rate" of 90 percent or higher in "high risk border sectors." The bill requires that, within five years after enactment, DHS must certify that it is catching or turning around 90 percent of all border crossers in these sectors. If not, a Border Commission will be created to reshape DHS strategy at the border. The first problem with this metric is that it is sheer fantasy to imagine that we can calculate that percentage. We have no idea how many people the Border Patrol doesn't catch.

And we likely never will. Thus, it is impossible to know whether we have achieved 90 percent or not, because we have absolutely no idea what the denominator is.

The second problem with this metric is that it is only applied at a few so-called "high risk border sectors" where the annual number of apprehensions is over 30,000. Only three of the nine border sectors meet that definition at present. As illegal immigration patterns over the last two decades demonstrate, smugglers constantly adjust their routes in response to Border Patrol activity. If by some miracle, the Border Patrol manages to deploy complete video surveillance and improved security in the three high risk sectors, the smugglers will simply move their operation to the other sectors. In which case, DHS will be declaring 90 percent success in a sector that the smugglers have long abandoned, while smuggling traffic surges elsewhere.

Finally, even if calculating this metric were possible and it were to be done across the entirety of the southern border, the DHS under current leadership has demonstrated that it cannot be trusted to fairly report its statistics. For the past two years, we have heard DHS repeatedly claim that deportations are at an all-time high. It sounds pretty impressive: almost 410,000 removals in FY 2012 alone. However, we now know that DHS has been cooking the books. In FY 2011, DHS started transporting many of the aliens who were caught at the border (and who would have counted as "voluntary returns," not "removals") to a different border sector before releasing them. But DHS decided to count these voluntary returns as "removals" since ICE had control of the alien for a short period of time during transit. And that little accounting trick made all of the difference. In FY 2012, there were about 86,000 of these cases. Take them out of the total, and the claimed 410,000 removals shrinks to 324,000. Given their track record, we simply cannot trust current DHS leadership to fairly calculate their success percentages.

(3) The Bill Hobble State Enforcement Efforts in the Workplace.

For the past four years, the only meaningful enforcement against illegal labor in the workplace has occurred at the state level. The Obama Administration essentially brought a halt to worksite enforcement in 2009 (with the exception of I-9 "audits"). Those state efforts have been particularly effective. Most notably, in Arizona, the Legal Arizona Workers Act resulted in a 36 percent decrease in the population of illegal aliens in the state between 2008 and 2011, when the nationwide population decreased only one percent.

Another major flaw in this bill is the "preemption" clause found in Section 274a(h) on page 496 of the bill. This provision guts almost all state laws prohibiting the knowing employment of unauthorized aliens. A State also would not be able to fine an employer for failing to use the verification system. The clause preempts everything except for "business licensing…as a penalty for failure to use the System." This preemption clause is extremely broad and overturns the penalties that already exist in numerous states. Under this clause, no state may pass a law that penalizes employers for knowingly hiring or continuing to employ unauthorized aliens. This huge preemption clause is problematic because it permits employers

who knowingly hire or continue to employ illegal aliens to avoid any kind of enforcement by State and local governments. If this bill were really intended to be tough on employers and illegal immigration, it would expand, not restrict, the authority that states already have to discourage illegal immigration. What is more, that weakness is exacerbated by the lengthy phase-in period of the verification system. During that entire period, a State has absolutely no authority to discourage the hiring of unauthorized labor.

(4) The Employment Provisions Exempt Large Categories of Labor.

The definition of "employer," found in the amendment to INA Section 274A(b)(3) on page 402 of the bill exempts any employment that is "casual, sporadic, irregular, or intermittent." In other words, the express definition of "employer" excludes anyone that hires someone in any of those situations. Currently, many of the ways in which illegal immigrants obtain labor will thus no longer be unlawful. Likely any kind of day labor would easily fit within this definition. No employer would have to verify the work authorization status of any such employee, nor even refuse to hire the worker if the employer had knowledge of the person's unlawful work authorization. What is more, even if it weren't large enough of a loophole to allow illegal labor, the bill expressly allows the DHS Secretary to define the terms as the Secretary sees fit. The term "intermittent" alone is so broad that many construction employers could hire illegal aliens on an as needed basis, and potentially not violate the statute.

The bill also contains a huge loophole for illegal labor employed by subcontractors. The proposed INA 274a(a)(3) on page 396 of the bill, only prohibits "obtaining labor…while knowing that the alien is unauthorized." Therefore, under typical contractor bidding, a general contractor will take proposals from subcontractors to perform work. As long as the general contractor is not contracting with a subcontractor to obtain the worker "while knowing that the alien is unauthorized," the general contractor is not implicated. What is more, the "continuing" employment provision will not prohibit the contractor from continuing the contract with the subcontractor, even if the general contractor learns of the unlawful labor during the performance of the contract. The contractor is not "employing" the illegal aliens, so the general contractor is not violating 274A(a)(1) or (2). And the contractor did not "obtain" the unauthorized labor through contract, so the general contractor is not violation of INA 274a(a)(3).

(5) The Bill Scraps and Replaces the Proven E-Verify System.

One of the big selling points made by some lawmakers has been that this bill would mandate the use of E-Verify. Repeatedly, employers who use E-Verify give high grades to the system and successive administrations admit that E-Verify is the best way to ensure a lawfully authorized work force. Yet, rather than simply mandating nationwide E-Verify use, this bill scraps the entire E-Verify system. Section 3101(e) of the bill (Pages 503-04). E-Verify is a system that is already used by more than 400,000 employers. Several states already mandate its use by all employers (Arizona, Mississippi, South Carolina, and Alabama), and many more states

mandate its use by public employers and the recipients of government contracts. There does not seem to be a significant difference between the current E-Verify system and the system that the bill mandates must be created. So, one has to wonder why this bill would scrap the successful E-Verify system which billions of dollars has already been spent.

Furthermore, the prolonged phase-in requirement for the replacement system does not start at the time of the bill's *enactment*, but after the regulations implementing the new system are in place. INA 274a(d)(D), (E), (G). The only deadline seems to be in the trigger section, which requires that "the Secretary has implemented a mandatory employment verification system to be used by all employers to prevent unauthorized workers from obtaining employment in the United States." Bill Sec. 3(c)(2)(A). In other words, it does not appear that *any* employers will be required to even use the new system before the newly amnestied aliens (Registered Provisional Immigrants or "RPIs") may be converted to LPR status. Instead, under the terms of the statute, the system only needs to be in place so that it is "to be used" by employers.

In short, this bill is not a good-faith effort to implement a national electronic verification system for employers. If it were, the bill would follow the example of several states and immediately require E-Verify usage by large employers within a one-year period after enactment and by all employers within a two or three year period. There is absolutely no reason to scrap the E-Verify system and replace it with another—other than to delay any meaningful enforcement in the workplace.

(6) The Bill Exempts Current Employees from Verification.

A final major flaw of the bill is that it does not require, or even permit (except when ordered by the DHS Secretary due to a pattern and practice of violations), the electronic verification of existing employees. INA § 274a(d)(I)(ii). Furthermore, it is deemed an "unfair immigration-related employment practice" to "use the System to reverify the employment authorization of a current employee…" Section 3105(a) (amending INA § 274B(a)(4)(C) (page 514). If this bill were truly intended to protect American workers against unfair competition from illegal labor, it would subject existing employees to electronic verification.