ADDITIONAL STATEMENTS

OMNIBUS APPROPRIATIONS BILL—AMERICAN COMPETITIVENESS AND WORKFORCE IMPROVEMENT ACT

• Mr. ABRAHAM. Mr. President, during debate on final passage of the Omnibus Appropriations bill, in which the American Competitiveness and Workforce Improvement Act was included as Title IV of Subdivision C, I asked unanimous consent to have a number of documents printed in the RECORD. These included two documents I received from the Administration during the negotiations, whose inclusion I was seeking to help illuminate the meaning of some of the provisions of the legislation. One of the key points about these documents is the changes from the July 30 version to the September 14 version. On the copies that I submitted, these changes were marked by redlining markings. Unfortunately, however, because I submitted a copy of the only version I had, which was a copy of a fax, these markings appear to have had the effect of making the September 14 version unintelligible, resulting in the printing of a garbled text that also did not contain the markings showing the changes. Accordingly, I ask that the corrected version of these documents that I am now submitting appear in the final issue of the RECORD of the 105th Congress. On the copy of the September 14 document that I am submitting, material that appeared in the July 30 version but was deleted in the September 14 version is in black brackets and material that was not included in the July 30 version and was added in the September 14 version is printed in italic.

The corrected version follows:

JULY 30, 1998—PROPOSED ADMINISTRATION REVISIONS TO H.R. 3736 (THE JULY 29, 1998 VERSION)

1. Require either a $500 fee for each position for which an application is filed or a $1,000 fee for each nonimmigrant. Fee to fund training provided under JTPA Title IV. In addition, a small portion of these revenues should fund the administration of the H–1B visa program, including the cost of arbitration.

2. Define H–1B-dependent employers as:

a. For employers with fewer than 51 workers, that at least 20% of their workforce is H–1B; and

b. For employers with more than 50 workers, that at least 10% of their workforce is H–1B.

3. The recruitment and no lay-off attestations apply to: (1) H–1B dependent employers; and (2) any employer who, within the previous 5 years, has been found to have willfully violated its obligations under this law.

4. H–1B dependent employers attest they will not place an H–1B worker with another employer, under certain employment circumstances, where the other employer has displaced or intends to displace a U.S. worker (as defined in paragraph (4)) during the period beginning 90 days before and ending 90 days after the date the placement would begin.

5. DOL would have the authority to investigate compliance either: (1) pursuant to a complaint by an aggrieved party; or (2) based on other credible evidence indicating possible violations.

6. Establish an arbitration process for disputes involving the laying-off of any U.S. worker who was replaced by an H–1B worker, even of a non-H–1B dependent employer. This arbitration process would be largely similar to that laid out in H.R. 3736 except that it would be administered by the Secretary of Labor. The arbitrator must base his or her decision on a ''preponderance of the evidence.''

7. Reference in the bill to ''administrative remedies'' includes the authority to require back pay, the hiring of an individual, or reinstatement.

8. There must be appropriate sanctions for violations of ''whistleblower'' protections.

9. Close loopholes in the attestations:

a. Strike the provision that ''[n]othing in the [recruitment attestation] shall be construed to prohibit an employer from using selection standards normal or customary to the type of job involved.''

b. Clarify that job contractors can be sanctioned for placing an H–1B worker with an employer who subsequently lays off a U.S. worker within the 90 days following placement.

c. Do not exempt H–1B workers with at least a master's degree or the equivalent from calculations of the total number of H–1B employees.

d. Define lay-off based on termination for ''cause or voluntary termination,'' but exclude cases where there has been an offer of continuing employment.

10. Consolidate the LCA approval and petition processes within DOL, rather than within INS.

11. Broaden the definition of U.S. workers to include aliens authorized to be employed by this act or by the Attorney General.

12. Include a provision that prohibits unconscionable contracts.

13. Include a ''no benching'' requirement that an H–1B nonimmigrant in ''non-productive status'' for reasons such as training, lack of license, lack of assigned work, or other such reason (not including when the employee is unavailable for work) be paid for a 40 hour week or a prorated portion of a 40 hour week during such time.

14. Increase the annual cap on H–1B visas to 95,000 in FY 1998, 105,000 in FY 1999, and 115,000 in FY 2000. After FY 2000, the visa cap shall return to 65,000.

15. Eliminate the 7500 cap on the number of non-physician health care workers admitted under the H–1B program to make the bill consistent with our obligations under the GATS agreement.

SEPTEMBER 14, 1998—ADMINISTRATION PACKAGE

1. Require [either] a $500 fee for each position for which an application is filed or [a $1,000 fee for each nonimmigrant] *renewed.* Fee to fund training provided under JTPA Title IV. In addition, a small portion of these revenues should fund the administration of the H–1B visa program, including the cost of [arbitration] *enforcement.*

2. Define H–1B-dependent employers as:

a. For employers with fewer than 51 workers, that at least 20% of their workforce is H–1B; and

b. For employers with more than 50 workers, that at least [10%] *12%* of their workforce is H–1B.

3. The recruitment and no lay-off attestations apply to: (1) H–1B dependent employers; and (2) any employer who, within the previous 5 years, has been found to have willfully violated its obligations under this law.

4. H–1B dependent employers attest they will not place an H–1B worker with another employer, under certain employment circumstances, where the other employer has displaced or intends to displace a U.S. worker (as defined in paragraph (4)) during the period beginning 90 days before and ending 90 days after the date the placement would begin.

5. DOL would have the authority to investigate compliance either: (1) pursuant to a complaint by an aggrieved party; or (2) based on other credible evidence *from a source which is likely to have knowledge of an employer's practices, employment conditions, or compliance with the labor condition application* indicating possible violations.

[6. Establish an arbitration process for disputes involving the laying-off of any U.S. worker who was replaced by an H–1B worker, even of a non-H–1B dependent employer. This arbitration process would be largely similar to that laid out in H.R. 3736 except that it would be administered by the Secretary of Labor. The arbitrator must base his or her decision on a ''preponderance of the evidence.''

[7. Reference in the bill to ''administrative remedies'' includes the authority to require back pay, the hiring of an individual, or reinstatement.]

8. There must be appropriate sanctions for violations of ''whistleblower'' protections.

9. Close loopholes in the attestations:

a. Strike the provision that ''[n]othing in the [recruitment attestation] shall be construed to prohibit an employer from using selection standards normal or customary to the type of job involved.''

Sen. Abraham would have a colloquy or there would be report language clarifying the intent of the recruitment attestation.

b. Clarify that job contractors can be sanctioned for placing an H–1B worker with an employer who subsequently lays off a U.S. worker within the 90 days following placement.

c. Do not exempt H–1B workers with at least a master's degree or the equivalent from calculations of the total number of H–1B employees.

d. Define lay-off based on termination for ''cause or voluntary termination,'' but exclude cases where there has been an offer of continuing employment.

10. [Consolidate the] *Maintain status quo with regard to* LCA approval and petition processes [within DOL, rather than within INS.].

11. Broaden the definition of U.S. workers to include aliens authorized to be employed by this act or by the Attorney General.

12. Include a provision that prohibits unconscionable contracts *(with civil fines).*

13. Include a ''no benching'' requirement that an H–1B nonimmigrant in ''non-productive status'' for reasons such as training, lack of license, lack of assigned work, or other such reason (not including when the employee is unavailable for work) be paid for a 40 hour week or a prorated portion of a 40 hour week during such time.

14. Increase the annual cap on H–1B visas to 95,000 in FY 1998, 105,000 in FY 1999, and 115,000 in FY 2000. After FY 2000, the visa cap shall return to 65,000.

15. Eliminate the 7500 cap on the number of non-physician health care workers admitted under the H–1B program to make the bill consistent with our obligations under the GATS agreement.

16. Three-year debarment for willful violation plus a $35,000–$40,000 fine.

In addition, we would require the prevailing wage attestation be permanently changed to the following:

Sec. . Definitions.

Section 212(n) (8 U.S.C. 1182(n)) is amended by inserting after subsection(2) the following new subsection:

''(3) As used in this section—

''(A) 'actual wage' means total compensation, including base pay (whether expressed as an hourly rate or a salary), equity, and health, life, disability, and other insurance plans, and retirement and savings plans provided to regular employees. If the employer offers a benefit plan which enables employees to choose among options, then the employer's plan shall be deemed to be acceptable provided the same plan and options are offered to all employees in the occupational classification in which the nonimigrant is intended to be (or is) employed.

''(B) 'prevailing wage' means total compensation, including the rate of pay as determined based on the best information available as of the time of filing the application (whether expressed as an hourly rate or a salary), equity, and health, life, disability, and other insurance plans, and retirement and savings plans provided to regular employees. If the employer offers a benefit plan which enables employees to choose among options, then the employer's plan shall be deemed to be acceptable provided the same plan and options are offered to all employees in the occupational classification in which the nonimmigrant is intended to be (or is) employed.''●

INDEPENDENT COUNSEL LAW AND KENNETH STARR'S INVESTIGATION

● Mr. LEVIN. Mr. President, on October 8th I made a statement on the Senate floor regarding the independent counsel law and Kenneth Starr's investigation of President Clinton. I want to take the opportunity today to clarify one aspect of that statement to ensure that my words and their import are accurate.

I stated on October 8th that the so-called Starr Report failed to mention Ms. Lewinsky's testimony ''that when she asked President Clinton whether she should get rid of his gifts to her in light of the Jones subpoena, his response was 'I don't know' '' and her testimony that the President said he didn't want to see Ms. Lewinsky's affidavit when she offered to show it to him. The reference in my statement should have been to Mr. Starr's analysis of the evidence which is the key part of his report instead of the overall report. Mr. Starr did make reference to such testimony in the part of the report where he summarized the evidence. My criticism of Mr. Starr's report is that he left such exculpatory evidence out of or dismissed it in the key part of his report which analyzes the evidence and explains why he believes the evidence ''may constitute grounds for impeachment.''

Otherwise it was the imbalanced analysis of the evidence where Mr. Starr failed to address the significance or relevance of exculpatory facts such as these which is so disturbing.●

APPLICATION OF STATE LAW TO FEDERAL PROSECUTORS

● Mr. ABRAHAM. Mr. President, I rise to register serious concern over a provision in the Omnibus Appropriations bill, included as I understand it over the protest of the Senate. This is a legislative provision appended to the Commerce, Justice, State Appropriations portion of the bill that subjects federal prosecutors and other ''attorneys for the Government'' to State laws and rules governing attorneys ''to the same extent and in the same manner as other attorneys in that State.''

Now please understand, Mr. President. I think I am as much of a believer in federalism as anyone here. But federalism does not mean that control of all matters should be ceded to the States. One area where I think it is pretty clear that the national government should be the principal source of law is in setting rules of professional conduct for its own officers. To leave that question to the States, it seems to me, is to cede a very large portion of the control for how federal law is to be enforced to the States. That power can then be used to frustrate the enforcement of federal law. The risk that this will happen is significantly greater where the power is being turned over not to the States' elected representatives, but to bar associations vested with the States' powers, but without the accountability to the people of the States that elections generate.

I believe that we can be pretty sure that this provision imposing State laws and rules on federal prosecutors will be used to frustrate federal law simply by looking at the rules the State bars already have adopted that will have this effect. I believe this trend will only accelerate once those opposed to certain aspects of federal law know, as a result of our adoption of this provision, that they have this new tool at their disposal.

For many years members of the criminal defense bar have been sponsoring rules adopted in State codes of professional responsibility that trench upon legitimate and essential practices of federal prosecutors. The best known example involves rules of States such as California, Missouri, and New Mexico, as well as the District of Columbia, that limit prosecutors' contacts with represented persons in a way that can seriously complicate undercover investigations. The problem with this prohibition is that a low-level member of an organized crime ring may well be represented by counsel retained by the leaders of the ring. As a result, counsel's principal interest may be in preventing his or her ''client'' from giving useful information about those leaders to law enforcement—even if doing so would be in the client's interest because the client might get less prison time.

But the ''represented parties'' context is not the only one where State rules governing attorneys raise problems. Colorado, New Hampshire, Pennsylvania, and Tennessee have ''ethics'' rules requiring prior judicial approval of subpoenas of attorneys, even though federal case law has (for good reason) adopted no such requirement. Colorado also has a rule requiring submission of exculpatory evidence to grand juries, which it adopted shortly after the Supreme Court found in United States versus Williams that federal courts could not use their ''supervisory powers'' to impose such an obligation. And, at least according to the 10th Circuit's vacated Singleton opinion, it is an ''unethical'' practice, under Kansas state rules, for an Assistant U.S. Attorney to offer leniency in exchange for truthful testimony. Even assuming the 10th Circuit does not reinstate that portion of the panel opinion when it rules en banc, hardly an inevitable outcome, the suggestion the opinion made will continue to chill any federal prosecutor practicing in Kansas. It will continue to do so regardless of what the 10th Circuit does, since Kansas could adopt this theory even if the Tenth Circuit abandons it. Indeed, any State bar will be free to declare that offering leniency to accomplices to obtain their testimony is ''unethical'' and, under the provision we have unwisely adopted, that rule will control federal prosecutions. The result will be a drastic reduction in the effectiveness of federal efforts to combat crime.

State bar associations have adopted the rules I have described despite previously grave doubt about their legal authority to make these rules binding on federal prosecutors. It seems to me that now that we have established as a matter of federal law that six months from now, rules like this will indeed govern federal prosecutors' conduct, these rules will only multiply further. For example, States could ban as unethical the forfeiture of cash intended to pay a defense lawyer—indeed, the ABA came very close to doing just that in an attempt effectively to overrule the Supreme Court's holding Caplin & Drysdale. States could rule it ''unethical'' to examine a witness in the grand jury room without his attorney being present, or to adduce evidence of one party-consent tape recordings—proposals the Senate, of course, rejected last month during the CJS debate. The potential list is limited only by the criminal defense bar's imagination.

To be sure, the Department of Justice can argue its case to the bar associations considering such rules. But that is no solution. At best, it will require an inordinate expenditure of effort and resources that could instead be used to lock up dangerous criminals. At worst, and more likely in my view, the Department will lose the argument much of the time, and we will end up with constraints on federal officers that bear no connection with the federal policies those officers are charged with enforcing.

This is not to say that I am opposed to requiring that lawyers who work for the federal government behave professionally. I am not. In fact, I am strongly for it. But I believe that it makes no sense to have the judgment about what ''professional conduct'' consists of be made by State bar associations. Of necessity these associations have little or no stake in securing the enforcement of the federal laws with which these