

“(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 nonimmigrant 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 Su-

preme 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 in *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