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PROVIDING FOR LOAN REPAYMENT FOR PROSECUTORS AND PUBLIC DEFENDERS

APRIL 10, 2007.—Ordered to be printed

Mr. LEAHY, Chairman of the Committee on the Judiciary, submitted the following

R E P O R T

together with

ADDITIONAL VIEWS

[To accompany S. 442]

[Including cost estimate of the Congressional Budget Office]

The Committee on the Judiciary, to which was referred the bill (S. 442), to provide for loan repayment for prosecutors and public defenders, having considered the same, reports favorably thereon with amendments and recommends that the bill as amended do pass.

CONTENTS

I. PURPOSE AND NEED FOR S. 442

For our criminal justice system to function effectively, we need a sufficient number of dedicated and competent attorneys working in prosecutor and public defender offices. However, prosecutor and public defender offices are having serious difficulties recruiting and

retaining qualified attorneys. The John R. Justice Prosecutors and Defenders Incentive Act creates a targeted student loan repayment assistance program that will bolster the ranks of attorneys in the criminal justice system, enhancing the quality of that system and the public's confidence in it.

According to a National Survey of Prosecutors conducted by the Bureau of Justice Statistics, 24 percent of state and local prosecutor offices reported problems in 2005 recruiting new attorneys, and 35 percent reported problems retaining attorneys. This problem is particularly severe in large prosecutor offices—over 60 percent of prosecutor offices that serve populations of 250,000 or more reported problems with attorney retention.[1]

The same is true for public defender offices. State and local governments are obligated to provide indigent defense services in order to satisfy criminal defendants' constitutional right to counsel. But a survey administered by Equal Justice Works and the National Legal Aid & Defender Association in 2002 found that over 60 percent of public interest law employers, including state and local public defender offices, reported difficulty in attorney recruitment and retention.[2] As an example of the strain that public defender offices are under, several days before the Committee on the Judiciary considered S. 442, the Associated Press reported that the public defender system in the state of Missouri had grown so overloaded that that the state commission that oversees it was considering whether to stop accepting new clients.[3]

When prosecutor and public defender offices cannot attract new lawyers or keep experienced ones, their ability to protect the public is compromised. Such offices may find themselves unable to take on new cases due to staff shortages, and existing staff may be forced to handle unmanageable workloads. Cases may suffer from lengthy and unnecessary delays, and some cases may be mishandled by inexperienced or overworked attorneys. As a result, innocent people may sit in jail, and criminals may go free.

Large student debt is a factor that deters many law school graduates from pursuing public service careers. In 2005, the average annual tuition was $28,900 for private law schools, $22,987 for nonresident students at public law schools, and $13,145 for resident students at public law schools.[4] Over 80 percent of law students borrow funds to finance their legal education, and, according to the American Bar Association, the average cumulative educational debt for law school graduates in the class of 2005 was $78,763 for private school graduates and $51,056 for public school graduates.[5] Two-thirds of law students also carry additional unpaid debt from their undergraduate studies.[6] In light of these statistics, it is not surprising that 66 percent of respondents in a recent na-

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[1] Prosecutors in State Courts, 2005, NCJ 213799, 3 (U.S. Dep't of Just. July 2006).

[2] Mary Mulvenon, Equal Justice Works, Financing the Future: Equal Justice Works 2004 Report on Law School Loan Repayment Assistance and Public Interest Scholarship Programs, at 16 (Susan Wampler, ed., 2004).

[3] Jim Salter, Missouri Public Defender System May Stop Accepting New Clients, The Associated Press State & Local Wire, Feb. 26, 2007.

[4] American Bar Association, Legal Education Statistics, available at *http://www.abanet.org/legaled/statistics/charts/tuition.pdf.*

[5] American Bar Association, Legal Education Statistics, available at *http://www.abanet.org/legaled/statistics/charts/averageborrowed.pdf.*

[6] National Center for Education Statistics, Student Financing of Graduate and First-Professional Education, 1999–2000, NCES 2002–166 at 103 (U.S. Dep't of Ed. 2002), available at *http://www.nces.ed.gov/pubs2002/2002166.pdf.*

tional survey of law students stated that law school debt prevented them from even considering a public interest or government job.[7]

Many law students graduate with a deep commitment to pursuing a career in public service. But many law graduates who initially accept public service jobs leave after a few years after finding that they cannot pay off their student loan debts as well as pay all their other living expenses on a prosecutor or public defender salary. According to the National Association for Law Placement (NALP), the median entry-level salary for public defenders is $43,000, increasing to $65,500 for defenders with 11 to 15 years experience. The salaries for state prosecuting attorneys are similar, starting at approximately $46,000 and progressing to approximately $68,000 for those with 11 to 15 years experience.[8] By comparison, NALP reported that the median *starting* salary for private law firms in 2005 was $100,000.[9]

The John R. Justice Prosecutors and Defenders Incentive Act of 2007 seeks to help alleviate some of the problems with attorney recruitment and retention that our criminal justice system faces. The bill is named after the late John Justice, former solicitor for the Sixth Judicial Circuit in South Carolina and president of the National District Attorneys Association, who was a strong supporter of student loan repayment assistance programs for public sector attorneys.

The legislation would establish, within the Department of Justice, a program of student loan repayment assistance for borrowers who agree to remain employed for at least three years as state or local criminal prosecutors, or as state, local, or federal public defenders in criminal cases. Borrowers could enter into another agreement, after the required three-year minimum period, for an additional period of service. The bill would provide repayment assistance for student loans made, insured, or guaranteed under the Higher Education Act of 1965, and would authorize the Attorney General to make direct payments of up to $10,000 per year on behalf of a prosecutor or defender borrower to the holder of the loan. The maximum aggregate value of payments made on behalf of a borrower by the Department of Justice would be limited to $60,000.

In addition to covering those who agree to serve in state and local prosecutor and defender offices, the Act makes federal public defenders eligible for loan repayment assistance, as well. In this way, the bill complements loan relief programs that are currently available for federal prosecutors.

The bill is modeled on existing loan repayment programs that cover federal executive branch employees and the Department of Justice. Federal law currently permits federal executive branch agencies to repay an employee's student loans, up to $10,000 in a year and up to a lifetime maximum of $60,000, if the employee agrees to remain with the agency for at least three years. According to the Office of Personnel Management, during Fiscal Year 2005 there were 479 lawyers working in federal agencies who re-

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[7] Equal Justice Works, National Association for Law Placement, and Partnership for Public Service, From Paper Chase to Money Chase: Law School Debt Diverts the Road to Public Service, 19 (2002) (surveying 1,622 students from 117 law schools).

[8] National Association for Law Placement, 2006 Public Sector and Public Interest Attorney Salary Report, press release available at *http://www.nalp.org/press/details.php?id=63.*

[9] National Association for Law Placement, 2005 Associate Salary Survey, press release available at *http://www.nalp.org/press/details.php?id=56.*

ceived loan repayments under this program, and federal agencies reported that the program has been beneficial in recruiting and retaining attorneys.[10] Also, the Department of Justice operates an attorney-specific student loan repayment program, which provided repayments to a total of 182 attorneys in Fiscal Year 2006.

The public interest is harmed when communities face a shortage of attorneys who can effectively prosecute cases and provide criminal defendants with their constitutional right to counsel. Sadly, these situations occur all too frequently. The John R. Justice Prosecutors and Defenders Incentive Act will strengthen our criminal justice system by bolstering the ranks of qualified and experienced attorneys who serve in that system.

II. LEGISLATIVE HISTORY

In the 108th Congress, on May 21, 2003, Senator Durbin introduced the Prosecutors and Defenders Incentive Act of 2003 (S. 1091). The bill was referred to the Committee on Health, Education, Labor, and Pensions, but was not considered by that Committee. In the 109th Congress, Senator Durbin introduced the Prosecutors and Defenders Incentive Act of 2005 (S. 2039) on November 17, 2005. The bill was cosponsored by 19 Senators and reported favorably by the Committee on the Judiciary by voice vote on May 25, 2006. The bill was placed on Senate legislative calendar but did not receive Senate consideration.

On January 31, 2007, Senator Durbin introduced the John R. Justice Prosecutors and Defenders Incentive Act of 2007. It was cosponsored by Senator Specter, Chairman Leahy, and Senators Smith, Kerry, and Collins. It now has 17 Senate cosponsors.

On February 27, 2007, the Judiciary Committee held a hearing on the bill chaired by Senator Durbin. The hearing was titled "Strengthening Our Criminal Justice System: The John R. Justice Prosecutors and Defenders Incentive Act of 2007." The witnesses at the hearing were Paul A. Logli, State's Attorney for Winnebago County, Illinois, and chairman of the board of the National District Attorneys Association; George B. Shepherd, Professor of Law at Emory University School of Law; and Jessica A. Bergeman, Assistant State's Attorney, Cook County State's Attorney's Office, Cook County, Illinois. Another listed witness, Michael P. Judge, the Chief Public Defender of Los Angeles County, was unable to attend the hearing due to an injury.

III. VOTE BY THE COMMITTEE

The Senate Committee on the Judiciary, with a quorum present on March 1, 2007, considered S. 442. The Committee adopted five amendments by voice vote, and then approved the bill, as amended, by voice vote.

The following amendments were adopted by the Committee:

• An amendment offered by Senator Sessions that revised the definitions of "prosecutor" and "public defender" in the bill. As introduced, the bill's definition of "public defender" could have been construed to permit loan repayments to attorneys who work in non-

[10] Federal Student Loan Repayment Program FY 2005: Report to the Congress (Office of Personnel Management, May 2006) at 6, available at *https://www.opm.gov/oca/pay/studentloan/html/fy05Report.pdf*.

profit defender organizations that provide indigent defense services under contract with a state or local government, but who do not actually perform any indigent defense work. This amendment clarified that repayment benefits will be made available to full-time employees of non-profit defender organizations who devote substantially all of their full-time employment to providing legal representation to indigent persons in criminal cases. The amendment also makes clear that prosecutors and public defenders who engage in supervision, education or training of other prosecutors or public defenders would not be excluded from eligibility under the bill because of such work.

- An amendment offered by Senator Durbin, which clarified that the term "criminal cases" in the bill includes juvenile delinquency cases.
- An amendment offered by Senator Durbin, which provided that the Attorney General shall determine a fair allocation of program funds among prosecutors and defenders, and among employing entities nationwide.
- An amendment offered by Senator Hatch that provided that the Government Accountability Office shall study and report to the Congress on the impact of law school accreditation requirements and other factors on law school costs and access, including the impact on racial and ethnic minorities.
- An amendment offered by Senator Cardin that provided that the Attorney General shall provide repayment benefits under the program giving priority to borrowers who have the least ability to repay their loans.

IV. SECTION-BY-SECTION ANALYSIS

The John R. Justice Prosecutors and Defenders Incentive Act of 2007, as amended, now provides as follows:

Section 1 contains the short title of the John R. Justice Prosecutors and Defenders Incentive Act of 2007.

Section 2 amends Title I of the Omnibus Crime Control and Safe Streets Act of 1968 (42 U.S.C. 3711 et seq.) by adding a new section 3111, authorizing grants for student loan repayment assistance for prosecutors and public defenders. References below are to subsections (a) through (i) of this new section 3111.

Subsection (a) states that the purpose of this section is to encourage qualified individuals to enter and continue employment as prosecutors and public defenders.

Subsection (b), as amended, defines "prosecutor" and "public defender" to include full-time employees of state or local agencies who are continually licensed to practice law and who prosecute criminal cases or provide legal representation to indigent persons in criminal or juvenile delinquency cases. The definitions, as amended by the Sessions amendment, make clear that an employee can engage in supervision, education or training of other prosecutors or public defenders while still falling within the definitions of "prosecutor" or "public defender."

The definition of "public defender," as modified by the Sessions amendment, includes full-time employees of non-profit organizations operating under a contract with a state or local government who devote substantially all of their full-time employment to providing indigent criminal defense services. Such individuals are in-

cluded in the definition because numerous communities across the nation, including New York City, Philadelphia, Seattle, Detroit, and Louisville, contract out the bulk of their indigent defense services to non-profit organizations, having determined it to be in the public interest to do so.

The definition of "public defender" also includes federal public defenders.

This subsection defines "student loan" to include loans made under the Higher Education Act of 1965. 20 U.S.C. 1071 et seq.

Subsection (c) authorizes the Attorney General to establish a program whereby the Department of Justice shall make direct payments on behalf of an individual prosecutor or public defender to the holder of the individual's loan, provided the individual is not in default on the loan, and subject to the provisions in the rest of the Act.

Subsection (d) discusses the terms of a written agreement that an individual must enter into in order to be eligible to receive repayment benefits. Among the terms of such an agreement, the individual must commit to remain employed as a prosecutor or public defender for not less than three years (agreements with a required period of service of more than three years are permissible if mutually agreed upon). The individual must also agree that if he or she is involuntarily separated from employment on account of misconduct or voluntarily separates before the end of the period specified in the agreement, the individual will repay the Attorney General for any benefits already received pursuant to the agreement. Student loan repayments under this section are also limited to $10,000 for any individual in any calendar year, and an aggregate total of $60,000 for any individual.

It is the intent of this subsection for each written agreement to be between the individual and the Department of Justice. However, because the Department of Justice must ensure that each borrower will "remain employed" as a prosecutor or public defender for at least three years in order to provide loan repayment benefits, there is a practical need for the Department also to coordinate with employing prosecutor and public defender offices while making and monitoring such written agreements. For example, it will be important for the Department of Justice to know which prosecutor or public defender office employs an individual before the Department provides repayment benefits on the individual's behalf. Similarly, because the Act does not require an individual to remain employed with the same prosecutor or public defender office throughout the duration of the individual's agreement, it will be important for the Department to know whether an individual has left one employer for another.

Subsection (e) provides that on the completion of an individual's first required period of service under an agreement with the Attorney General, the individual and the Attorney General may enter into an additional agreement. Such agreements may be for less or for more than three years, although loan repayments under an additional agreement are still limited to a maximum of $10,000 per individual per year, and a total lifetime maximum of $60,000 per individual.

Subsection (f), as amended by the Cardin and Durbin amendments, provides the Attorney General with instructions on the

awarding of loan repayment benefits under the program. As originally introduced, this subsection stated that the Attorney General would provide repayment benefits on a first-come, first-served basis, subject to the availability of appropriations. The Cardin amendment replaced this first-come, first-served provision with a provision stating instead that the Attorney General shall prioritize those who have the least ability to repay their student loan debt when determining to whom the Department should provide loan repayment benefits. The Durbin amendment added language providing that the Attorney General shall make repayments subject to the Attorney General's determination of a fair allocation of loan repayment benefits among prosecutors and defenders, and among employing entities nationwide.

In considering the ability of an individual to repay their student loan debt, it is the intent of this subsection, as amended, that the Attorney General should consider such factors as the total student loan debt held by the individual, the individual's participation in other loan forgiveness programs and the value of any payments made through those programs, the salary of the individual, other non-salary assets held by the individual, the cost of living in the individual's area of employment and area of residence, and additional extraordinary and justifiable expenses that the individual may be required to pay, such as expenses for health needs or family care.

The Durbin amendment to this subsection provided that the Attorney General shall determine a fair allocation of loan repayment benefits among prosecutors and defenders, and among employing entities nationwide. The intention of this amendment was to ensure that the benefits of this program do not become excessively concentrated either among prosecutors or public defenders, or among certain individual prosecutor or defender employers. The Attorney General should devise a fair allocation system via the rulemaking process. Since the Attorney General will already need to coordinate with employing prosecutor and public defender offices when reaching agreements with individuals, it will be feasible for the Attorney General to follow this fair allocation system when deciding to whom it will administer loan repayment benefits.

This subsection also states that the Attorney General shall give priority in any fiscal year to a borrower who received repayment benefits during the previous fiscal year and who has completed less than the minimum three years of required service. Under this subsection, in light of the fact that repayment benefits pursuant to this program are subject to the availability of appropriations, the Attorney General's obligation in any fiscal year is first to provide repayment benefits to those individuals who have already reached initial written agreements with the Department of Justice and have completed less than three years of required service. After all such individuals have received benefits pursuant to their agreements, the Attorney General may use remaining appropriations to provide benefits to other individuals, including those who have formed initial agreements for more than three years of service, those who have formed additional agreements, and those who seek to form new initial agreements.

Subsection (g) authorizes the Attorney General to issue such regulations as may be necessary to carry out the provisions of this section.

Subsection (h) authorizes $25 million in appropriations to carry out this section in Fiscal Year 2008 and such sums as may be necessary for each succeeding fiscal year.

Subsection (i) was added by the Hatch amendment and provides that, not later than one year following enactment, the Government Accountability Office shall provide the Congress with a report assessing the impact of law school accreditation requirements and other factors on law school tuition costs and access by minorities to the legal profession.

V. COST ESTIMATE

S. 442—John R. Justice Prosecutors and Defenders Incentive Act of 2007

Summary: S. 442 would authorize the appropriation of $25 million for fiscal year 2008 and such sums as may be necessary for each subsequent year for the Attorney General to establish a program to repay student loans for certain prosecutors and public defenders who agree to serve for at least three years in those positions. In addition, S. 442 would require the Government Accountability Office (GAO) to conduct a study on the effects of accreditation requirements on law school costs and accessibility. Assuming appropriation of the necessary amounts, CBO estimates that implementing the bill would cost about $90 million over the 2008–2012 period. Enacting S. 442 would not affect direct spending or revenues.

S. 442 contains no intergovernmental or private-sector mandates as defined in the Unfunded Mandates Reform Act (UMRA) and would impose no costs on state, local, or tribal governments.

Estimated cost to the Federal Government: The estimated budgetary impact of S. 442 is shown in the following table. For this estimate, CBO assumes that the authorized amount of $25 million will be appropriated for 2008 and that similar amounts, adjusted for anticipated inflation, will be appropriated for each subsequent year. CBO expects that the GAO report would cost less than $500,000 over the next year, assuming the availability of appropriated funds. For this estimate, CBO assumes that outlays will follow the historical rate of spending for similar programs. The cost of this legislation falls within budget function 750 (administration of justice).

	By fiscal year, in millions of dollars—				
	2008	2009	2010	2011	2012
CHANGES IN SPENDING SUBJECT TO APPROPRIATION					
Estimated authorization level	25	26	27	27	28
Estimated outlays	6	13	19	23	27

Intergovernmental and private sector impact: S. 442 contains no intergovernmental or private-sector mandates as defined in UMRA and would impose no costs on state, local, or tribal governments.

Estimate prepared by: Federal costs: Mark Grabowicz; Impact on state, local, and tribal governments: Melissa Merrell; Impact on the private sector: Paige Piper/Bach.

Estimate approved by: Peter H. Fontaine, Deputy Assistant Director for Budget Analysis.

VI. Regulatory Impact Statement

The passage of S. 442 will require the Department of Justice to promulgate regulations governing the administration of the loan repayment assistance program.

VII. Changes in Existing Law

In compliance with paragraph 12 of rule XXVI of the Standing Rules of the Senate, changes in existing law made by S. 442, as reported, are shown as follows (new matter is printed in italic, and existing law in which no change is proposed is shown in roman):

The Omnibus Crime Control and Safe Streets Act of 1968 (42 U.S.C. 3711 et seq.)

TITLE I

PART JJ—LOAN REPAYMENT FOR PROSECUTORS AND PUBLIC DEFENDERS

SEC. 3111. GRANT AUTHORIZATION.

(a) PURPOSE.—The purpose of this section is to encourage qualified individuals to enter and continue employment as prosecutors and public defenders.

(b) DEFINITIONS.—In this section:

(1) PROSECUTOR.—The term 'prosecutor' means a full-time employee of a State or local agency who—

(A) is continually licensed to practice law; and

(B) prosecutes criminal or juvenile delinquency cases at the State or local level (including supervision, education, or training of other persons prosecuting such cases).

(2) PUBLIC DEFENDER.—The term 'public defender' means an attorney who—

(A) is continually licensed to practice law; and

(B) is—

(i) a full-time employee of a State or local agency who provides legal representation to indigent persons in criminal or juvenile delinquency cases (including supervision, education, or training of other persons providing such representation);

(ii) a full-time employee of a non-profit organization operating under a contract with a State or unit of local government, who devotes substantially all of his or her full-time employment to providing legal representation to indigent persons in criminal or juvenile delinquency cases, (including supervision, education, or training of other persons providing such representation); or

(iii) employed as a full-time Federal defender attorney in a defender organization established pursuant to

subsection (g) of section 3006A of title 18, United States Code, that provides legal representation to indigent persons in criminal or juvenile delinquency cases.

(3) STUDENT LOAN.—The term 'student loan' means—

(A) a loan made, insured, or guaranteed under part B of title IV of the Higher Education Act of 1965 (20 U.S.C. 1071 et seq.);

(B) a loan made under part D or E of title IV of the Higher Education Act of 1965 (20 U.S.C. 1087a et seq. and 1087aa et seq.); and

(C) a loan made under section 428C or 455(g) of the Higher Education Act of 1965 (20 U.S.C. 1078–3 and 1087e(g)) to the extent that such loan was used to repay a Federal Direct Stafford Loan, a Federal Direct Unsubsidized Stafford Loan, or a loan made under section 428 or 428H of such Act.

(c) PROGRAM AUTHORIZED.—The Attorney General shall establish a program by which the Department of Justice shall assume the obligation to repay a student loan, by direct payments on behalf of a borrower to the holder of such loan, in accordance with subsection (d), for any borrower who—

(1) is employed as a prosecutor or public defender; and

(2) is not in default on a loan for which the borrower seeks forgiveness.

(d) TERMS OF AGREEMENT.—

(1) IN GENERAL.—To be eligible to receive repayment benefits under subsection (c), a borrower shall enter into a written agreement that specifies that—

(A) the borrower will remain employed as a prosecutor or public defender for a required period of service of not less than 3 years, unless involuntarily separated from that employment;

(B) if the borrower is involuntarily separated from employment on account of misconduct, or voluntarily separates from employment, before the end of the period specified in the agreement, the borrower will repay the Attorney General the amount of any benefits received by such employee under this section;

(C) if the borrower is required to repay an amount to the Attorney General under subparagraph (B) and fails to repay such amount, a sum equal to that amount shall be recoverable by the Federal Government from the employee (or such employee's estate, if applicable) by such methods as are provided by law for the recovery of amounts owed to the Federal Government;

(D) the Attorney General may waive, in whole or in part, a right of recovery under this subsection if it is shown that recovery would be against equity and good conscience or against the public interest; and

(E) the Attorney General shall make student loan payments under this section for the period of the agreement, subject to the availability of appropriations.

(2) REPAYMENTS.—

(A) IN GENERAL.—Any amount repaid by, or recovered from, an individual or the estate of an individual under

this subsection shall be credited to the appropriation account from which the amount involved was originally paid.

(B) MERGER.—Any amount credited under subparagraph (A) shall be merged with other sums in such account and shall be available for the same purposes and period, and subject to the same limitations, if any, as the sums with which the amount was merged.

(3) LIMITATIONS.—

(A) STUDENT LOAN PAYMENT AMOUNT.—Student loan repayments made by the Attorney General under this section shall be made subject to such terms, limitations, or conditions as may be mutually agreed upon by the borrower and the Attorney General in an agreement under paragraph (1), except that the amount paid by the Attorney General under this section shall not exceed—

(i) $10,000 for any borrower in any calendar year; or

(ii) an aggregate total of $60,000 in the case of any borrower.

(B) BEGINNING OF PAYMENTS.—Nothing in this section shall authorize the Attorney General to pay any amount to reimburse a borrower for any repayments made by such borrower prior to the date on which the Attorney General entered into an agreement with the borrower under this subsection.

(e) ADDITIONAL AGREEMENTS.—

(1) IN GENERAL.—On completion of the required period of service under an agreement under subsection (d), the borrower and the Attorney General may, subject to paragraph (2), enter into an additional agreement in accordance with subsection (d).

(2) TERM.—An agreement entered into under paragraph (1) may require the borrower to remain employed as a prosecutor or public defender for less than 3 years.

(f) AWARD BASIS; PRIORITY.—

(1) AWARD BASIS.—Subject to paragraph (2), the Attorney General shall provide repayment benefits under this section—

(A) giving priority to borrowers who have the least ability to repay their loans, except that the Attorney General shall determine a fair allocation of repayment benefits among prosecutors and public defenders, and among employing entities nationwide; and

(B) subject to the availability of appropriations.

(2) PRIORITY.—The Attorney General shall give priority in providing repayment benefits under this section in any fiscal year to a borrower who—

(A) received repayment benefits under this section during the preceding fiscal year; and

(B) has completed less than 3 years of the first required period of service specified for the borrower in an agreement entered into under subsection (d).

(g) REGULATIONS.—The Attorney General is authorized to issue such regulations as may be necessary to carry out the provisions of this section.

(h) STUDY.—Not later than 1 year after the date of enactment of this section, the Government Accountability Office shall study and report to Congress on the impact of law school accreditation require-

ments and other factors on law school costs and access, including the impact of such requirements on racial and ethnic minorities.

(i) AUTHORIZATION OF APPROPRIATIONS.—There are authorized to be appropriated to carry out this section $25,000,000 for fiscal year 2008 and such sums as may be necessary for each succeeding fiscal year.

VIII. ADDITIONAL VIEWS

ADDITIONAL VIEWS OF SENATORS KYL AND HATCH

While the bill reported by this Committee will help reduce the burden of the heavy law-school student loans borne by many young prosecutors and public defenders, this legislation treats only the symptoms, not the source, of this problem. The source of the problem—the cause of the excessive cost of becoming eligible to practice law in the United States today—was identified in testimony before this Committee by George B. Shepard, an associate professor of law at Emory University School of Law. In his testimony on February 27, Professor Shepard endorsed the John R. Justice Act, but went on to note that:

> we need to recognize that passage of the Act is necessary partly because of the [law-school] accreditation system; without the accreditation system, many more students would graduate from law school with no loans or much smaller ones, so that they would not need to use the benefits that the Act provides. With the accreditation system, the Act will, in effect, transfer much taxpayers' money from the federal government to overpriced law schools.

Professor Shepard went on to describe exactly how the American Bar Association's law-school accreditation rules substantially and unnecessarily increase the cost of becoming eligible to practice law:

> The ABA's accreditation requirements increase the cost of becoming a lawyer in two ways. First, they increase law school tuition. They do this by imposing many costs on law schools. For example, accreditation standards effectively raise faculty salaries; limit faculty teaching loads; require high numbers of full-time faculty rather than cheaper part-time adjuncts; and require expensive physical facilities and library collections. The requirements probably cause law schools' costs to more than double, increasing them by more than $12,000 per year, with many schools then passing the increased costs along to students by raising tuition. The total increase for the three years of law school is more than $36,000.
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> The impact of the increased costs from accreditation can be seen by comparing tuition rates at accredited schools and unaccredited schools. Accredited schools normally charge more than $25,000 per year. Unaccredited schools usually charge approximately half that amount. One example of the many expensive accreditation requirements is the ABA's requirement that an accredited school have a

large library and extensive library collection. Insiders confirm that the ABA requires a minimum expenditure on library operations and acquisitions of approximately $1 million per year. This is more than $4,000 per student in an averaged-sized school.

The second way that the ABA requirements increase students' cost of entering the legal profession is as follows. The ABA requires students to attend at least six years of expensive higher education: three years of college and three years of law school. Before the Great Depression, a young person could enter the legal profession as an apprentice directly after high school, without college or law school. Now, a person can become a lawyer only if she can afford to take six years off from work after high school and pay six years of tuition.

The requirement of six years of education is expensive. The sum of the tuition payments and foregone income can easily exceed $300,000, or more. For example, a conservative estimate is that attending a private college and law school for six years would cost approximately $25,000 per year for a total of $150,000. In addition, let's assume conservatively that a student who could qualify for college and law school would have earned only $25,000 per year if the student had not attended college and law school. The amount of income that the student sacrifices for six years to become a lawyer is $150,000. The total is $300,000.

In addition to the John R. Justice Act, there are two other means by which the problem of the excessive cost of becoming eligible to practice law in this country could be addressed. First, the states themselves could liberalize their law-school accreditation requirements. This would directly reduce the cost of becoming a lawyer in all cases, not just for prosecutors and public defenders. In his February 27 testimony, Professor Shepard recommended that:

> the accreditation system's restrictions should be loosened. For example, law schools might be permitted to experiment with smaller libraries, cheaper practitioner faculty, and even shorter programs of two years rather than three, like business school. Or the requirements might be eliminated completely; students without a degree from an accredited law school would be able to practice law.
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> Removing the flawed, artificial accreditation bottleneck would not in fact be a drastic change, and it would create many benefits but few harms. The current system's high-end qualities would continue, while a freer market for variety would quickly open up. To Rolls-Royce legal educations would be added Buicks, Saturns, and Fords. The new system would develop a wider range of talent, including lawyers at $60, $40, and even $25 an hour, as well as those at $300 and up. This would fit the true diversity of legal needs, from simple to complex. With cheaper education available to more people, some lawyers for the first time would be willing and able to work for far less than at present.

> The addition of many more lawyers would produce little additional legal malpractice or fraud, and the quality of legal services decline little, it at all. Private institutions would arise within the market for legal services to ensure that each legal matter was handled by lawyers with appropriate skills and sophistication. For example, large, expensive law firms would continue to handle complicated, high-stakes transactions and litigation. However, law companies that resembled H&R Block would open to offer less-expensive legal services for simple matters. Accounting and tax services are available not only for $300 per hour at the big accounting firms, but also for $25 per hour at H&R Block. The new law companies would monitor and guarantee the services of their lawyer-employees.
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> Elimination of the accreditation requirement is a modest, safe proposal. It merely reestablishes the system that exists in other equally-critical professions, a system that worked well in law for more than a century before the Great Depression. Business and accounting provide comforting examples of professions without mandatory accreditation or qualifying exams. In both professions, people may provide full-quality basic services without attending an accredited school or passing an exam. Instead, people can choose preparation that is appropriate for their jobs. A person who seeks to manage a local McDonald's franchise or to prepare tax returns need not attend business school or become a CPA first. Yet there is no indication that the level of malpractice or fraud is higher in these fields than in law. Likewise, there is no indication that malpractice and fraud were any more frequent during the century before accreditation and the bar exam, when lawyers like Abraham Lincoln practiced. Lincoln never went to law school.

Second, in response to those who have turned to Congress to address this problem, I would note that Congress already *has* acted. It acted in 1868, by enacting the Privileges and Immunities Clause of the Fourteenth Amendment. That Clause was understood at the time of the nation's founding "to refer to those fundamental rights and liberties specifically enjoyed by English citizens and, more broadly, by all persons." *Saenz* v. *Roe*, 526 U.S. 489, 524 (Thomas, J., dissenting)—a meaning that carried over to the Fourteenth Amendment as well, see id. 526—27. Legal scholars and civil-rights organizations such as the Institute for Justice have in the past presented compelling arguments that the fundamental rights and liberties protected by the Privileges and Immunities Clause include a right to pursue a career or profession. And that right is in clear tension with the apparently protectionist nature of the current accreditation regime. As Professor Shepard noted in his testimony:

> Strict accreditation requirements are a relatively recent phenomenon, having begun in the Great Depression. What seems normal now after 70 years was in fact a radical change from a much more open system that had functioned well for more than a century before then. Until the

> Great Depression, no state required an applicant to the bar to have attended any law school at all, much less an accredited one. Indeed, 41 states required no formal education whatsoever beyond high school; 32 states did not even require a high school diploma. Similarly, bar exams were easy to pass; they had high pass rates.
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> During the Depression, state bar associations attempted to eliminate so-called "overcrowding" in the legal profession; they felt that too many new lawyers were competing with the existing ones for the dwindling amount of legal business. They attempted to reduce the number of new lawyers in two ways. First, they decreased bar pass rates. Second, they convinced courts and state legislatures to require that all lawyers graduate from ABA-accredited law schools.

The protectionist nature of the current accreditation regime not only is at odds with the Privileges and Immunities Clause; it also has a disproportionate impact on the very minority groups that the Fourteenth Amendment was originally designed to protect. Several of the witnesses who testified before the Committee emphasized the negative effects that escalating tuition costs have on minority participation in the legal profession and on access to legal services in minority communities. Jessica Bergeman, an Assistant State's Attorney for Cook County, Illinois, stated:

> I truly believe that it is good for the communities of Chicago to see Assistant State's Attorneys of color. Unfortunately, it is often we who are most burdened with educational debt. People like me who are forced to leave the office because they cannot afford to stay cannot be categorized as just a personal career set-back, but rather it has the potential to further the divisions between the prosecutors and so many of the people they prosecute.

Professor Shepard seconded this point in his testimony, noting that "the system has excluded many from the legal profession, particularly the poor and minorities. It has raised the cost of legal services. And it has, in effect, denied legal services to whole segments of our society."

Simple legal planning plays an important role in individuals' efforts to provide for their families, start businesses, and plan for their economic futures. Lower and middle-income citizens' lack of access to legal services makes it more difficult for them to make the informed choices that will improve their lives. And existing law-school accreditation requirements play a significant role in driving up the cost of legal services. Recognizing the significance of these phenomena, the Committee adopted an amendment to this legislation that will require the Government Accountability Office to report to Congress on the impact that law-school accreditation requirements have on law-school tuition, including the effect that the elevated cost of legal services has on members of minority groups.

The bill reported by this Committee addresses a real problem. It is a problem, however, that should also be addressed by other, more direct means.

JON KYL.
ORRIN G. HATCH.

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