September 30, 1986

CONGRESSIONAL RECORD — SENATE

S 14295

This year I supported bills to combat money laundering and new designer drugs, which have been incorporated into this package. But these address very specific problems. We desperately need a comprehensive strategy that attacks the source of our drug problem, from their source to their youngest victims.

That is what this bill does. I will not take the time to describe the many provisions of this bill. Other Senators have already done a fine job of it. I will limit myself to mentioning the sections which I am especially pleased about.

The first is the new section on forfeiture. Fighting drugs is expensive. The forfeiture amendments we passed 2 years ago provide for the seizure and forfeiture of the profits of the drug trade and property used in connection with it—businesses, airplanes, and so forth. But under those laws, no more than $20 million of forfeited assets can be used to fund law enforcement. This bill removes that cap, and requires that all money remaining in the Customs and Justice Departments’ forfeiture funds after paying administrative costs, be used to fund federal and State drug programs—for law enforcement, education, treatment, and rehabilitation. This program is expected to net $160 million in 1986, to help pay the cost of this bill.

The bill also closes a loophole in the current law, by permitting the seizure and forfeiture of substitute assets if a drug trafficker has transferred his profits to a third party or placed them beyond the jurisdiction of the court.

Another important section of this bill squarely addresses the need to stop production of drugs at the source. It cuts off all foreign aid to countries that have not taken significant steps to stop illegal drug production and prosecute drug traffickers.

A major part of this bill involves deterrence. Of special importance to a former State prosecutor like myself is a $1 million matching grant program for State and local law enforcement for each of the next 3 years. These grants will be available to States that have developed their own strategies for prosecuting, punishing, and treating drug offenders.

Two years ago I supported the Armed Career Criminal Act which provided for enhanced penalties for dangerous repeat offenders. This bill expands the scope of that act to include a mandatory 15 year minimum sentence for drug offenders who have three prior convictions for crimes of violence.

It also includes mandatory sentences of 20 years to life for major drug traffickers.

It creates a new offense with enhanced penalties for using children to traffic drugs, and for manufacturing illegal drugs within 1,000 feet of a school.

These penalties are appropriately aimed at the drug kingpins. They will
deter any would-be trafficker who is capable of being deterred.

I want to make special mention of the other parts of this legislation that deal with education, treatment, and rehabilitation.

We must stop the demand for drugs, as well as the supply.

The Administrator of DEA has called prevention the long-term solution to the Nation's drug problem. I agree. It supports longer jail sentences for traffickers and better equipment to catch them, but for too long we have neglected what I believe should be the cornerstone of our fight against drug abuse—education of our children about the dangers of alcohol and drugs, and treatment for those who are hooked.

This bill attacks these monumental tasks head on. It establishes a new $150 million State-administered grant program to establish drug free schools and communities. That is fifty times what we are currently spending. Eighty percent of these funds would be divided among the States to teach children about the dangers of drugs and alcohol, and to train parents, teachers, and law enforcement officials to take an active part in that process.

It also provides for model programs for young people who are particularly at risk of becoming drug or alcohol abusers—including school dropouts, pregnant teenagers, and the children of drug users.

Education is vital—parents, teachers, and school administrators have to intervene between children and drugs. We need to act before the drug problem begins. The do drugs message school children receive from their peers, and the easy access to drugs in our society, must be stopped. We need to send a stronger message to our children—drugs kill.

One thing we can expect from this crackdown on drugs is a wave of new customers for drug treatment programs. Thousands of drug addicts are out of work as a result of the Administration's cuts in funding for drug treatment and rehabilitation. Everywhere I go I hear stories of children on drugs who are waiting to get help, whose families cannot afford the high cost of treatment. The American public wants treatment, and this bill reauthorizes the Alcohol, Drug Abuse and Mental Health Services Block Grant Program at higher funding levels of $76.5 million. Eighty percent will be used for alcohol and drug treatment and rehabilitation services.

Mr. President, Americans consume 60 percent of the world's illegal drugs. Drug use costs our economy over $1.5 billion per year. Sophisticated drug rings will reap profits of $100 billion from the sale of illegal drugs this year.

We cannot win this war we have to fight it on every front.

Turning this country off of drugs will take a massive effort. Not just by government, but also by the private sector, the medical community, religious institutions, by teachers and school administrators, and most importantly, by parents. We have launched that effort with this bill, and I am very pleased to have played a part in writing it.

Mr. President, I would also like to discuss two amendments of mine which were adopted on Saturday night.

I am very pleased that the Senate adopted the Leathy-Mathias communication privacy legislation as an amendment to the Anti-Drug Abuse Act of 1986.

This legislation is good for law enforcement. It strengthens the Federal wiretap statute and sets clear standards for law enforcement agencies to obtain access to electronic communications and an electronic communications system's records.

It is good for American businesses because business people need to know their proprietary and other business communications are secure.

It is good for private citizens who are using new technology like cellular telephones and computer links every day.

It is good for America's high technology industry because it will encourage continued technological innovation.

That is why this legislation is supported by a broad coalition which includes everyone from the Justice Department to the ACLU to America's leading telecommunications and computer companies.

This legislation is needed because right now the laws designed to protect the security and privacy of business and personal communications do not cover cellular telephones, computer links, and a wide variety of other new forms of communications and computer transmissions.

Let me just pose a few examples to illustrate my point. In the first example, the business people are discussing their company's financial data over the telephone. They do not know it, but a member of a competitor company is listening in on their conversation by means of a phone tap. Across town, a drug enforcement agent has a hunch that Jane Doe is involved in drug trafficking. He goes to the Post Office and tells postal officials that he wants to tap and read Ms. Doe's mail and then have it resealed and delivered. In the third, two reporters are working together on a fast-breaking story. One picks up the telephone and calls the other with some new information. That phone call is intercepted by means of a wiretap.

I think all of my colleagues would agree that in each example, the eavesdropper's conduct is wrong. It is also illegal.

Now let me change my examples just a little bit to bring them into the 1960's.

In the first case, instead of discussing financial matters over the telephone, the two business people use a video teleconference system which displays their proprietary data on their video screens. Again, their competitor sees all of her messages. In the third case, instead of speaking on the telephone, the reporter uses a computer keyboard to type a message to his colleague who picks it up on his terminal screen. Again, that message is intercepted.

In each case, the eavesdropper's conduct is still wrong. However, it is not clear that it is also illegal. The Leathy-Mathias Electronic Communications Privacy Act, which is now a part of the Anti-Drug abuse Act of 1986, amends the Federal wiretap statute to bring it into the computer age and address these new communications media.

It is designed to provide a reasonable level of Federal privacy protection to individuals in terms of their use of electronic communications, computer technology like electronic mail, computer-to-computer data transmissions, remote computing services, and private video teleconference services.

At the same time, it protects legitimate law enforcement needs. The Justice Department wants it because it will be particularly helpful in our fight against drug trafficking and drug abuse.

Let me point out that a summary of the Leathy-Mathias communication privacy amendment has been printed in the CONGRESSIONAL RECORD for Saturday, September 27. The relevant legislative history is the Senate Judiciary Committee's report on S. 2575.

Finally, let me discuss the provisions concerning the Freedom of Information Act in the bill, and the Leathy-Hatch-Denton amendment to that section of the bill.

Section 1801 of the bill amends paragraph (b)(7) of the FOIA to modify the scope of the exemption for law enforcement records, codify certain explanatory case law, and clarify congressional intent with respect to the agency's burden in demonstrating the probability of harm from disclosure.

The language of the amended provisions is identical to that proposed in section 105(b) of H.R. 774, proposed FOIA reform legislation which passed the Senate, but was not acted upon in the House, during the 89th Congress. The meaning and intended effect of the amendments was carefully explained in the introduction of that legislation in the Senate Judiciary Committee report on S. 774; Senate Report 88-221. This report sets out the legislative history which should be consulted to determine the scope of the section as we amended it in the bill.

The Congressional Research Service of the Library of Congress recently analyzed the proposed amendments...
of discuss the tele
provision Leach-

Summary of

Section 1802(a)(3) of the FOIA requests for in-

the Court of

conclusion: The

three categories of

requests for purposes of assessing fees. First, when requests are made for commercial use, fees shall be limited to reasonable standard charges for document search, duplication, and review. This provision allows for the charging of review costs for the first time, but review costs may only be charged to commercial users. A commercial user is one who seeks information solely for a private, profit-making purpose. Requests for which the FOIA requires payment of fees are not exempt under FOIA section 552(b)(6). A request from an individual or a public interest group may not be presumed to be for commercial use unless the requester can demonstrate that it qualifies for a different fee schedule. A request from an individual or a public interest group may not be presumed to be for commercial use unless the requester can demonstrate that it qualifies for a different fee schedule.
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South from the Government is not a commercial use.

Review costs include only the direct
costs incurred during the initial exami-
nation of a document for the pur-
pose of determining whether the docu-
ment must be disclosed. Review
costs are not intended to include any
costs incurred in resolving issues of
law and policy that may be raised in
the course of processing a request.

Second, when records are not sought
for commercial use and are requested
by (a) an educational or noncom-
mercial scientific institution whose pur-
purpose is scholarly or scientific research, or
(b) a representative of the news media,
fees shall be limited to reasona-
able standard charges for document du-
plication. A request made by a profes-
sor or other member of the profes-
sional staff of an educational or noncom-
mercial scientific institution should be
presumed to have been made by the
institution. A request by a reporter or
other person affiliated with a newspa-
paper, magazine, or broadcast organi-
tation, or other entity that is in the busi-
ness of publishing or otherwise dis-
seminating information to the public
qualifies under this provision.

It is the intention of the most favorable
fee provision for those in the informa-
tion dissemination business because the use of the FOIA for public dis-
semination of information in Govern-
ment facilities is in the public interest. The
fact that a newspaper or publisher
seeks to make a profit through publish-
dation does not affect the public inter-
est nature of the information dissem-
nation. It is critical that the phrase
"representatives of the news media" be
easily interpreted if the act is to work as expected. As new technolo-
gies expand, there are new methods of
communications which disseminate in-
formation through means other than tra-
ditional print or broadcast media, and these entities should be
considered as "representatives of the
news media," even though their organizations may have other functions. Certainly, American Legion magazine, Common Cause maga-
zine or Consumer Reports are "repre-
sentatives of the news media," even
though their parent organizations
engage in activities other than publish-
ing magazines. In fact, any person or
organization which regularly pub-
lishes or disseminates information to
the public through print or elec-
tronically, should qualify for waivers
as a "representative of the news media."

Third, for all other requesters, fees
and procedures for payment of standard
charges for document search and dup-
lication. This is current law.

All of the fees chargeable to any re-
quester may be waived or reduced if
obtained from the information is in the public interest and would con-
tribute significantly to public un-
derstanding of the operations or ac-
tivities of the Government and is not
primarily in the commercial interest
of the requester. This is a change in
the current fee waiver language and
is specifically intended to overturn the
January 1983 Justice Department fee
waiver guidelines.

It is important to restate that fee
waivers play a substantial role in the
effective use of the FOIA, and they
should be liberally granted to all re-
questers other than those who are
commercial users.

A major problem identified during
our earlier Judiciary Committee hear-
ings on FOIA legislation was the fact
that the 1983 Department of Justice
guidelines construing the "primarily
benefiting the general public" lan-
guage took an unduly restrictive
approach to the legislation. This
approach was criticized by the Senate
Judiciary Committee when it reported
out S. 774 in the last Congress, and it
has also been criticized by the House
Government Operations Committee in
its report on H.R. 4862, which recently
passed the House. By making a change
in the fee waiver guidelines, our inten-
tion is to repudiate the 1983 Department of Justice guidelines on fee
waivers and to enact a broader and
more precise standard which will
make it easier for noncommercial re-
quests to get waivers.

The requirement that the disclosure
be "likely to contribute significantly
in the public understanding of the opera-
tions or activities of the Government"
should be liberally construed in favor
of requesters for noncommercial requesters. We do not mean that waivers are appro-
riate only for items of compelling
public interest at a given time, such as
articles that are being prominently
covered in the news media. Nor are we
saying that the information sought
must, standing alone, provide a com-
plete and thorough understanding of
the issue involved. The fact that agen-
cies will grant fee waivers when they
receive requests for many categories of
information that contribute to public
understanding in any meaningful way,
even if the request is for a limited amount of information and even if the request covers only one
facet of an issue. As one court put it,
"a single document can substantially
enrich the public domain." Eudey v.
CIA, 478 F. Supp. 1173, 1178 (D.D.C.
1978).

Nor do we mean that a waiver is ap-
propriate only if the requester intends
to use the requested information
widely to the public. Our democ-
racy depends on a knowledgeable citi-
zenry, and public understanding of the
operations or activities of Government
is greatly enhanced every time that
a single citizen uses the FOIA to
obtain records which help that person under-
stand what Government is doing on an
issue of concern to that person.

It is important for agencies to ad-
just their requests for access to infor-
mation in an objective manner and should not rely on their own, subjective view as to
the value of the information requested
to the public. A good example is the
case of Better Government Associ-
vation v. Department of State, 780 F.2d
89 (D.C. Cir. 1986), where the requester
sought information about how U.S.
Embassies are spending money and
people, and to entertain visiting
dignitaries. That is information which
should qualify for a fee waiver under
the current standard and should con-
tinue to qualify under this bill.

In closing, I note the phrase "opera-
tions and activities of the govern-
ment" should be broadly construed.
Agencies deal with private entities
on a range of regulatory, enforcement,
procurement and other activities, and
the information which cast light on
those relationships should be routinely
made available with a waiver. It is impos-
sible to understand the "operations and
activities" of the Food and Drug Ad-
ministration, for example, without
looking at the record of the compa-
ies which the FDA regulates.

In addition, there is a legitimate
public interest in being able to obtain,
a fee waiver in order to learn about
Government inaction, as well as Gov-
ernment action. If, for example, a re-
quester is seeking records because it
wishes to learn if an agency has been
less than vigorous in working to pro-
tect public health and safety or to
see how effectively procurement dollars
are being spent, a waiver should be
granted. Indeed, experience suggests
that agencies are most resistant to
granting fee waivers when they sus-
pect that the information sought may
make them appear less than flattering
or may lead to proposals to reform
their practices. Yet that is precisely
the type of information which the
FOIA is supposed to disclose, and
we hope that agencies will be guided
by the spirit of the law and make use of
fees as an offensive weapon against re-
questers seeking access to Government
information to learn about what Gov-
ernment is not doing, as well as what
it is doing.

A request can qualify for a fee
waiver if the issue is not of interest
to the public-at-large. Public un-
derstanding is enhanced when infor-
mation is disclosed to the subset of
the public most interested, concerned, or
affected by a particular action or mat-
ter.

The bill includes several general limi-
tations on the imposition of fees to
agencies. First, fee schedules can only
provide for the recovery of direct costs
of search, duplication, or review.
Second, no fee may be charged if the
costs of routine collecting and process-
ning the fee allowable under the FOIA
are equal to or exceed the cost of the
amount of the fee.

Third, except for requests for com-
mercial use that are subject to review
charges, an agency may not charge
any requester for the first 2 hours of
search and duplication.

The proposed fee amount is based on
the assessed cost of the document, but
some early studies have found that
many documents can be obtained for
less than $1 per page. A requester may
file multiple requests at the same time
and receive a waiver for each.
September 30, 1986

CONGRESSIONAL RECORD — SATURDAY, SEPTEMBER 28, 1986 — S 14299

CONGRESSMAN OF THE 5TH DISTRICT OF NEW YORK, ELLIS B. FUGATE, IS THE AUTHOR OF THIS ARTICLE.

Each seeking portions of a large document solely in order to avoid payment of all fees. However, if requests for such materials are made more than 30 days apart, each request must be treated separately.

Fourth, no agency may require additional payment of a fee unless the requester has previously failed to pay fees in a timely fashion or unless the agency has determined that the fee will exceed $250. This to prevent agencies from using fee policies to harass or frustrate requesters.

The fee schedules in the FOIA do not supersede fees charged under a statute that specifically provides for setting of a level of fees for particular types of records. This provision does not change current law.

Finally, in any action brought by a requester regarding the waiver of fees, the court shall determine the matter in the context of all of the circumstances, and in the course of the matter shall be limited to the record before the agency. The purpose of this provision is to allow the courts to exercise independent judgment on the issue of whether a requester is entitled to a fee waiver.

In closing, I should like to thank Senator Hatch, the distinguished chairman of the Subcommittee on the Constitution, for working with me to fashion a balanced amendment which meets the needs of law enforcement and improves the fee and fee waiver provisions of the act for the news media and public interest users of FOIA. We should all be grateful that while preserving all of the essential features of the act, I compliment him and his staff for their tireless work on this issue.

EXHIBIT 1

CONGRESSIONAL RESEARCH SERVICE,
THE LIBRARY OF CONGRESS,
WASHINGTON, D.C.
MARCH 1986.

TO: House Government Operations Subcommittee on Information, Justice, and Agriculture.
FROM: Congressional Research Service.

The Freedom of Information Act (FOIA) exempts from mandatory disclosure investigating records compiled for law enforcement purposes, but only to the extent that the production of such records would... (See page 28 of the exhibit for full text).

The proposed amendment to Exemption 7 of the Freedom of Information Act provides that disclosure of the contents of any governmental records, in whole or in part, that would disclose information about the identity of a confidential source, except to persons, pointing to references in the legislative history of the provision to individual, Ferguson v. Kelley, 464 F. Supp. 919 (N.D.Mich. 1979); Hearing 455 F. Supp. 324 (N.D.Ill. 1978); Katz v. Department of Justice, 498 F. Supp. 177 (S.D.N.Y. 1980). Enforcement agencies may be a constitutional source but not private institutions. However, these records have been rejected by the majority of courts, including Courts of Appeals and District Courts in the district in which the cases arose. The Seventh Circuit, which embraced the District of Illinois noted in the cases cited above and in the application of Exemption 7 to commercial institutions and non-federal law enforcement agencies without citing Ferguson v. Kelley, 455 F. Supp. 214, 216 (7th Cir. 1979). District Courts in New York have also held that the exemption protects institutional confidential sources, including commercial entities such as banks and credit bureaus. Silverman v. Federal Bureau of Investigation, 528 F. Supp. 210 (E.D.N.Y. 1982); Malitzia v. Department of Justice, 519 F. Supp. 336, 350 (S.D.N.Y. 1981).

This Court is devoted to the notion of the protection of confidential sources and the non-restrictive plain meaning of the term "source" in holding that the exemption is applicable only to institutional confidential sources and public private. See Johnson v. Department of Justice, 793 F.2d 141 (3rd Cir. 1986) (local law enforcement agencies). Levine v. Department of Justice, 563 F.2d 472 (D.C.Cir. 1980) (state and local law enforcement agencies); Bees v. Department of Justice, 497 F.2d 1256 (D.C.Cir. 1970) (foreign agencies); Foundation Church of Scientology v. Regan, 670 F.2d 1183 (D.C.Cir. 1981) (amend); Keene v. Federal Bureau of Investigation, 672 F.2d 114 (5th Cir. 1982) (local law enforcement agencies); Levenson v. Department of Justice, 597 F. Supp. 84, 86 (E.D.Pa. 1984) (institutional foundation; Founding Church of Scientology of New York v. Agostini, 974 F.2d 1060, 1063 (1992) (local law enforcement agency) and the FBI and local law enforcement agencies have testified that the act would enable the exemption placed undue restrictions on agency attempts to protect against the harms specified in Exemption F's subpart.

The burden of proof is therefore on the agencies in the context of showing that a particular disclosure "would interfere with enforcement procedures, substantial to the act, he is the author of this amendment with the identity of a confidential source, substantially contributing to the "perception" problem of sources doubting the FBI's inability to protect their identities from disclosure through FOIA. See Rept. No. 95-221 at 23.4.

The effort "to clarify the definition of risk of harm. In particular, information which must be shown to justify withholding records under part of the 7(c) subsection and would have substituted the phrase "would disclose the identity of a confidential source" with "would tend to disclose..." See, Hearings on Freedom of Information Act Before the Subcomm. on the Constitution of the Senate Judiciary Comm., 97th Cong., 1st Sess. 491 (1981); FBI Proposals to Amend the Freedom of Information Act 31 (June 19, 1979).

The proposed amendment does not appear to have been adopted by the FBI because of the line of cases that have enunciated a contrary standard of the degree of risk of harm that must be shown to justify assertion of Exemption 7 (A), (B), (C), (D), (E) or (F). In the FBI's earlier proposals (those that employed the "tend to" phraseology) they were portrayed as doctrines that would be both more and the legislative history of the provision.

Exemption 7 was overhauled as part of the amendment to the Act. With respect to the protection of institutional confidential sources, the sponsor of the provision, Senator Hart, stated at the time of its introduce...
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Seabury, the Iowa senator, put the best face on it by saying, 'We can look for some
red Herrings,' but I think that he might have been a bit optimistic.

BIPARTISAN DRUG BILL

Mr. BYRD. Mr. President, I am proud to have joined the distinguished majority in offering the bipartisan drug control package. The package as introduced reflects our best efforts to negotiate a compromise between two bills which, in many places, were quite divergent in approach as well as in substance. But come together we did, because of the strong interest and commitment from both sides of the aisle in this body to address the drug abuse epidemic ravaging our country.

I want to give credit where credit is due to the very excellent, committed, and diligent work of the two co-chairs of the Democratic Working Group on Drug Abuse in this effort. I will state emphatically that we would not be at this point about to pass a bipartisan bill—if it had not been for Senators CHILES and BIDEN—and, of course, the other members of the working group—Senators CRANSTON, DeCONCINI, DODD, LEAHY, NUNN, SASSER, ROEMER, MITCHELL, and MOTEHAN. Also contributing directly to our efforts to produce this bipartisan bill were Senators KENNEDY, FELL, and MITZENBAUM and their staffs.

Mr. President, our bipartisan bill is a compromise between the Democratic bill we introduced September 9, and the bill the Republicans introduced early last week. As a compromise, it does not read precisely as we would wish in all sections—but, surprisingly, we would certainly have preferred our own Democratic bill—but this proposal is strong, it is comprehensive, and, I believe, it deserves our support.

Mr. President, I have been waiting to see stories in the press and on the electronic media suggesting that there may be an over-reaction to the drug abuse situation in our country. They suggest there may be a "media hype" situation occurring which is blowing the story out of realistic proportions. Well, Mr. President, I agree that some stories are the "flage" in the media right now. I agree that these stories may be scaring some people who otherwise would ignore the drug crisis.

But, Mr. President, I most emphatically do not agree to any suggestion or belief that the Administration should refrain from action in the expectation that the public's enthusiasm for drug control measures will wane. We have reports from reliable experts who sound the country documenting the extent of drug abuse and the numbers are truly frightening. I maintain that if there is only one child who is led into the pernicious world of drug abuse, that is one too many, and we in Congress cannot let even one step necessary and proper to try to keep that from happening. So, too, in the case of the boatload of illegal drugs reaching our shores, and one adult life ruined due to the ravages of cocaine abuse.

We must state unequivocally that we will not tolerate drug abuse and the illegal drug industry in our country, and then we must back that up with statement of concrete, comprehensive, and effective actions. I believe the bipartisan bill which we are about to pass today makes that statement and prescribes those actions.

It will provide new and urgently needed funds for our interdiction efforts, so that more illegal drugs will be stopped before they ever reach our borders. It provides funds for our international efforts directed at eradication and other programs to decrease demand, in other countries. It levies enhanced penalties and stronger sanctions on those who would import illegal drugs.

The bill provides for enhanced education, prevention, and treatment programs directed specifically to at-risk youth and to veterans' treatment programs.

The bill also will direct more funds to State and local governments and agencies to augment and strengthen their enforcement efforts directed at the illegal drug industry.

These provisions, and others I have not mentioned here, Mr. President, are worthy, and deserve the support of this body.

I would like to focus for a moment on the specific portion of this bill which I believe to be especially critical.

The bipartisan bill contains all the tough, new law enforcement provisions that were contained in the Democratic package which was introduced on September 9. These provisions are contained in the title which I sponsored, and they appear in the bipartisan package which is before us as part of Title I.

I am pleased that my colleagues on the other side of the aisle agreed with me so