

which some agencies have abused this process. For example, some agencies, when they are about to miss the 20-day deadline, allegedly have contacted a requester to simply inquire whether the requester still wants the request, or with other frivolous inquiries, all for the purpose of obtaining tolling of the deadline. Such practices should not be permitted. On the other hand, agencies do have a legitimate need for some tolling of the deadline. The language of subclauses (I) and (II) is the result of hard-fought negotiations between the FOIA requester community and representatives of the agencies, negotiations to which Senator LEAHY and I, frankly, served more as mere conduits rather than full participants. This language allows tolling whenever and as often as necessary to clarify fee issues, and also allows one additional catch-all request with the stipulation that this additional request must be reasonable.

With regard to the tolling for requests for information relating to fee assessments that is authorized by subclause (II), neither agencies nor requesters would benefit if agencies could not contact requesters and toll the deadline while waiting to hear whether a requester still wanted the request in light of, for example, a substantial upward revision in the search fees that would be assessed in relation to a FOIA request. And because such upward revisions might occur multiple times as a request is processed, it is not practical to impose a numerical limit on such fee-related requests. Such requests need only be necessary in order to be entitled to tolling under this subclause. Presumably, a request as to whether a requester still wanted his request in light of a trivial upward revision in the search-fees estimate would not be "necessary," and therefore would not be entitled to tolling. Moreover, tolling only occurs while the agency is awaiting the requester's response. If an agency were to call or e-mail a requester and inquire whether he still wanted the request in light of a \$100 increase in estimated review or search fees, and the requester immediately responded yes, no tolling would occur. At least at this time, it is not apparent how this tolling exception could be abused.

With regard to the catch-all requests authorized by subclause (I), representatives of the agencies identified for the committee a wide array of additional reasons for which agencies reasonably need to request additional information from the requester and should be entitled to tolling. The agencies' representatives, however, also thought that an agency would not need to make more than one such non-fee-related information request. Since the agencies are the masters of their own interests, we have incorporated that limit into this bill, allowing the agencies to make a tolling-initiating request for any purpose and in addition to previous fee-related requests, with the additional stipula-

tion that these one-time requests also be reasonable.

Additional changes were made to this bill from S. 849. This bill omits section 8 of the August-passed bill. The former section 8 maintained the requirement that previously enacted statutes only be construed to create exemptions to FOIA if the statute at least established criteria for withholding information, but required that future statutes instead include a clear statement that information is not subject to release under FOIA. I only grudgingly accepted former section 8 since I do not favor the use of clear statement rules in this circumstance. The rule likely would serve as a trap for unwary future legislative drafters. Under such a rule, even a statement in a statute that particular information shall not be released under any circumstances whatsoever would be construed not to preclude release of the information under FOIA. On the other hand, some FOIA requesters came to have second thoughts about section 8's elimination of the requirement for future legislation that FOIA exemptions at least set criteria for what information may be withheld. In my view, it would not be practical to require a clear statement in addition to requiring that exemptions only be implied when release criteria are identified. At the very least, it would pose a difficult question of statutory construction were a court asked to construe a statute to allow information to be "FOIAble", despite a clear statement in the statute that the information was not subject to release under FOIA, because the statute did not also set criteria for withholding the information. I have never seen such a "clear-statement-plus rule." I think that simple clear-statement rules themselves reach the zenith of one legislature's power to bind future legislatures, and that a "clear-statement-plus rule" would cross that line. Given the preference of some advocates for this bill for keeping the requirement that FOIA exemptions identify withholding standards or criteria, and my objection to combining a clear-statement rule with additional requirements for identifying a FOIA exemption, the compromise reached in this bill was simply to strike the previous section 8.

This draft also includes a provision that is now subsection (b) of section 4 that requires that attorneys' fees assessed against agencies be extracted from the agencies' own appropriated budgets rather than from the U.S. Treasury. This change was necessary in order to avoid an unwaivable point of order against the bill in the House of Representatives under that body's pay-go rules. I do not like this provision. As I explained in my August 3 remarks, I believe that section 4 already awards attorneys' fees too liberally in the circumstances of a settlement. Effectively, it protects an agency from fee assessments not when the agency's legal position would prevail on the merits, but rather only when the re-

quester's claims would not survive a motion to dismiss or for summary judgment. I believe that this standard will discourage agencies from settling—even a case that the agency believes that it will win at trial it likely will be disinclined to settle if the agency believes that the claims would not be dismissed on summary judgment. Subsection (b), by extracting the fees out of the agency's own budget, substantially aggravates section 4's de facto no-good-deed-goes-unpunished rule, and will further aggravate section 4's tendency to discourage agencies from settling FOIA lawsuits. Unfortunately, we have been unable to identify any way of solving the bill's pay-go problems other than by partly repealing or delaying the implementation of parts of the OPEN Government Act, solutions to which advocates for the bill balked. The effects of subsection (b) should be monitored and, if the provision is as discouraging of settlements and disruptive to agency budgets as I fear that it might be, perhaps the provision should be repealed or a separate fund established to pay the fees assessed pursuant to FOIA's fee-shifting rules.

Finally, the bill includes two changes that were sought by the House. One is to expand section 6's denial of search fees to agencies that miss the response deadline to also include duplication fees in the case of media requesters and other subclause (II) requesters who already are exempted from search fees. Since these requesters already do not pay search fees, in their cases the threat of denying agencies such fees if the 20-day response deadline is not met is not much of a sanction. Although duplication fees for idiosyncratic requests sometimes are massive and denying such fees in all cases would be excessive—paper and toner do cost money—it is my understanding that media and other subclause (II) requesters typically make narrow and tailored requests that do not result in massive duplication costs.

The last change made in this bill is the addition of the new section 12, which requires that when an agency deletes information in a document pursuant to a FOIA exemption, that it identify at the place where the deletion is made the particular exemption on which the agency relies.

Overall, I believe that the bill that will pass the Senate today strikes the right balance and that it will improve the operation of the Freedom of Information Act, and I encourage my colleagues to support this legislation.

ADDITIONAL STATEMENTS

REMEMBERING JOHN MOSES

• Mr. FEINGOLD. Madam President, today I honor the memory of a man who served the State of Wisconsin, and its veterans, with great skill and dedication for more than two decades. John

Moses served as secretary of the Wisconsin Department of Veterans Affairs from 1962 to 1984. I had the great pleasure of knowing John personally, and having him serve as a member of my Veterans' Advisory Committee. I saw firsthand how committed he was to ensuring that Wisconsin's veterans, who have given so much to our country, get the care and services they deserve in return.

In fact, John was a veteran himself, who bravely served in World War II. He came under attack twice as part of an anti-aircraft unit in the Aleutian Islands, and later, in the European theater, led the point platoon in General Patton's drive across the Moselle River to Siegfried line. He also survived a severe wound he received in combat on the German border, which put him in the hospital for more than a year. John's heroic military service said volumes about the kind of man he was and how devoted he was to serving our country.

Service of every kind defined John's life, from his time in the U.S. military to his tenure at the Wisconsin Department of Veterans Affairs, and through other efforts, such as his 10 years as president of the Gays Mills School Board. John came from a tradition of public service; his father was Governor of North Dakota, and he was then elected to the Senate. He briefly served in this body before he passed away in 1945.

John Moses was a man of outstanding character and uncommon commitment to both his State and his country. I feel fortunate to have known him, and I know that the State of Wisconsin is a better place for his dedicated efforts. That is a lasting legacy and one to which I am proud to pay tribute today.●

REMEMBERING MICHAEL DOHENY

● Mr. HAGEL. Madam President, I rise to express my sympathy over the loss of Michael Doheny of Nebraska. Michael, a civilian contractor, died in Iraq on December 9 when an improvised explosive device struck his convoy vehicle. He was 35 years old.

Michael was raised in Broken Bow, NE, and graduated from Broken Bow High School in 1996. He joined the Marine Corps after high school, where he served 8 years and achieved the rank of sergeant. In 2005, Michael left the military and began work as a civilian contractor for SOC-SMG, providing security at military bases and other installations. He was serving his third tour of duty as a civilian contractor in Iraq when he was killed.

All of Nebraska is proud of Michael's service to our country, as well as the thousands of brave men and women serving in Iraq and Afghanistan.

Michael is remembered as a devoted husband, son, and brother. In addition to his wife Melissa, he is survived by his mother, Kathy Kugler; two brothers, Marine Sgt. Robert Kugler and John Doheny; and sister Amy Ritchie.

I ask my colleagues to join me and all Americans in honoring Michael Doheny.●

MESSAGES FROM THE PRESIDENT

Messages from the President of the United States were communicated to the Senate by Mr. Thomas, one of his secretaries.

EXECUTIVE MESSAGES REFERRED

As in executive session the Presiding Officer laid before the Senate messages from the President of the United States submitting sundry nominations and two withdrawals which were referred to the appropriate committees.

(The nominations received today are printed at the end of the Senate proceedings.)

MEASURES PLACED ON THE CALENDAR

The following bill was read the second time, and placed on the calendar:

S. 2483. A bill to authorize certain programs and activities in the Forest Service, the Department of the Interior, and the Department of Energy, and for other purposes.

REPORTS OF COMMITTEES

The following reports of committees were submitted:

By Mr. BAUCUS, from the Committee on Finance:

Report to accompany S. 1607, a bill to provide for identification of misaligned currency, require action to correct the misalignment, and for other purposes (Rept. No. 110-248).

Report to accompany S. 2113, a bill to implement the United States-Peru Trade Promotion Agreement (Rept. No. 110-249).

INTRODUCTION OF BILLS AND JOINT RESOLUTIONS

The following bills and joint resolutions were introduced, read the first and second times by unanimous consent, and referred as indicated:

By Mr. TESTER (for himself, Mr. JOHNSON, Mr. BROWN, and Mr. CARDIN):

S. 2485. A bill to amend the Public Health Service Act to provide for the participation of physical therapists in the National Health Service Corps Loan Repayment Program, and for other purposes; to the Committee on Health, Education, Labor, and Pensions.

By Mr. KERRY (for himself, Mr. SMITH, and Mr. DURBIN):

S. 2486. A bill to remove a provision from the Immigration and Nationality Act that prohibits individuals with HIV from being admissible to the United States, and for other purposes; to the Committee on the Judiciary.

By Mr. CRAPO (for himself and Mr. JOHNSON):

S. 2487. A bill to increase community development investments by depository institutions, and for other purposes; to the Committee on Banking, Housing, and Urban Affairs.

By Mr. LEAHY (for himself, Mr. CORNYN, Mr. KYL, Mr. SPECTER, Mr. KERRY, Mrs. BOXER, Mr. FEINGOLD,

Mr. DURBIN, Ms. LANDRIEU, Mr. SMITH, Mr. ALEXANDER, Mr. COBURN, Mr. ISAKSON, Mr. OBAMA, Mr. CARDIN, Mr. SANDERS, Mr. BROWN, and Mrs. MCCASKILL):

S. 2488. A bill to promote accessibility, accountability, and openness in Government by strengthening section 552 of title 5, United States Code (commonly referred to as the Freedom of Information Act), and for other purposes; considered and passed.

By Mr. JOHNSON (for himself and Mr. THUNE):

S. 2489. A bill to enhance and provide to the Oglala Sioux Tribe and Angostura Irrigation Project certain benefits of the Pick-Sloan Missouri River basin program; to the Committee on Indian Affairs.

By Mrs. MCCASKILL (for herself, Mr. KOHL, and Mr. CARPER):

S. 2490. A bill to prohibit authorized lenders of home equity conversion mortgages from requiring seniors to purchase an annuity with the proceeds of a reverse mortgage, and to provide other consumer protections to reverse mortgage borrowers; to the Committee on Banking, Housing, and Urban Affairs.

By Mr. NELSON of Florida:

S. 2491. A bill to amend title 10, United States Code, to authorize adjustments for inflation in payments of forfeited pay and allowances to members of the Armed Forces whose courtmartial sentences of confinement and forfeiture are later set aside; to the Committee on Armed Services.

SUBMISSION OF CONCURRENT AND SENATE RESOLUTIONS

The following concurrent resolutions and Senate resolutions were read, and referred (or acted upon), as indicated:

By Ms. COLLINS (for herself, Mr. BIDEN, Mrs. DOLE, Mr. COLEMAN, Mr. LIEBERMAN, Mr. LEVIN, Ms. SNOWE, Mr. JOHNSON, Mr. SMITH, Mrs. FEINSTEIN, Mrs. CLINTON, Ms. LANDRIEU, and Mr. SPECTER):

S. Res. 406. A resolution urging the Government of the Kingdom of Saudi Arabia to overturn the sentence of the "Girl of Qatif"; to the Committee on Foreign Relations.

ADDITIONAL COSPONSORS

S. 661

At the request of Ms. SNOWE, the names of the Senator from Texas (Mrs. HUTCHISON) and the Senator from Michigan (Mr. LEVIN) were added as cosponsors of S. 661, a bill to establish kinship navigator programs, to establish guardianship assistance payments for children, and for other purposes.

S. 988

At the request of Ms. MIKULSKI, the name of the Senator from New Jersey (Mr. LAUTENBERG) was added as a cosponsor of S. 988, a bill to extend the termination date for the exemption of returning workers from the numerical limitations for temporary workers.

S. 1382

At the request of Mr. REID, the name of the Senator from Virginia (Mr. WEBB) was added as a cosponsor of S. 1382, a bill to amend the Public Health Service Act to provide for the establishment of an Amyotrophic Lateral Sclerosis Registry.

S. 1394

At the request of Ms. STABENOW, the name of the Senator from Colorado