viewer whose reception of specified satellite transmissions is not for commercial gain.

The Simon amendment, which the sponsors have accepted, sets up the same penalty structure for the interception of radio communications transmitted on frequencies allocated under subpart D of part 74 of the FCC rules.

The penalty structure under the Grassley and Simon amendments is:

A first offender will be subject to a suit by the federal government for injunctive relief. If injunctive relief is granted, the court may use whatever means in its authority, including civil and criminal contempt, to enforce that injunction. It must impose a $500 civil fine. In addition, the penalty for second and subsequent offenses is a $500 fine in a suit brought by the government.

Under the private civil damages provisions of the Electronic Communications Privacy Act the first offender may be sued for the greater of actual damages or statutory damages of $50 to $500. The second offender is subject to suit for the greater of actual damages or statutory damages of $100 to $1000. Third and subsequent offenders are subject to full civil damages under the Electronic Communications Privacy Act.

The legislation creates a statutory framework for the authorization and issuance of an order for a pen register or a trap and trace device based on a finding that such installation and use is relevant to an on-going criminal investigation.

Mr. THURMOND. Mr. President, today, I rise in support of the amendment to H.R. 5484, the Electronic Communications Privacy Act of 1986. This amendment is similar to S. 2575, the Senate companion, which is currently pending in the Judiciary Committee.

As a cosponsor of S. 2575, the Senate bill, I commend Senator PATRICK J. LEAHY and Senator CHARLES MCC. MATHIAS, JR., for introducing this much-needed legislation. The bill is the product of over a year's worth of negotiations and is now strongly supported by business groups as well as the Justice Department.

This legislation updates present wiretap law which currently provides privacy protection only for voice communications that are transmitted in whole or part by wire by adding new protection for certain voice communications, regardless of how they are transmitted, as well as data communications and electronic mail.

This legislation is necessary due to the changes that have occurred in communications technology since the current law was enacted in 1968. Along with providing privacy protection for new forms of technology, this bill also clarifies the procedures that law enforcement officers must follow when they seek permission for a wiretap.

When S. 2575, which is currently pending in the Judiciary, was first introduced and referred to the committe, it contained a provision that would make it a criminal offense to intercept satellite communications—known as "backhauls"—which are transmissions between a television affiliate and the network, as well as video conferences transmitted by satellite. Concern has been expressed in the committee that such a provision may unfairly subject unknowing satellite dish owners to criminal liability. This amendment responds to this concern by providing that a person must intentionally intercept such communications to be subject to penalties, and those penalties will be civil only. This amendment also contains other changes which serve to strengthen this bill.

I believe that this amendment strikes a reasonable balance between legitimate privacy concerns and the importance of Federal officials using electronic surveillance as an effective and valuable law enforcement tool. Because this needed legislation is supported by all members of the Judiciary Committee, and because I have been informed that the essence of this Senate amendment will be maintained through conference, I am willing to support this expedited process. My colleagues in the Senate should also be aware that the sponsors of this legislation will continue to seek Judiciary Committee approval of the companion bill. I urge each one of my colleagues to vote for this amendment, and support the amended bill.

Mr. President, the House has passed this amendment. The Senate Judiciary Committee considered it carefully. We approved it, and the report is here now in the Senate. We accept the amendment.

Mr. DANFORTH. This legislation covers some conduct that also is prohibited under section 705 of the Communications Act of 1934. Do I understand correctly that the sanctions contained in this legislation would be imposed in addition to, and not instead of, those contained in section 705 of the Communications Act?

Mr. MATHIAS. That is correct. This legislation is not intended to substitute for any liabilities for conduct that also is covered by section 705 of the Communications Act. Similarly, it is not intended to authorize any conduct which otherwise would be prohibited by section 705. The penalties provided for in the Electronic Communications Privacy Act are in addition to those which are provided by section 705 of the Communications Act.

As a general rule, conduct which is illegal under section 705 of the Communications Act would also be illegal under this bill. These supplemental sanctions are particularly important where an unauthorized interception is made for direct or indirect financial gain. This bill is designed to help put an end to such conduct.

The exception to the general rule is that we do not provide liability for the noncommercial private viewing of unscrambled network feeds to affiliated stations by the owners of home satellite dishes. Accountability for that conduct will be determined solely under section 705 of the Communications Act. The private viewing of any other video transmission not otherwise excepted by section 705(b) could be subject to action under both the Communications Act and this legislation.

Mr. DANFORTH. So although the proposed legislation which amends title 18 of the United States Code replaces, for specified conduct, the penalty structure of the Electronic Communications Privacy Act as introduced, and substitutes a scheme of public and private remedies under title 18, am I correct that conduct prohibited by the Communications Act will continue to be governed by that act?

Mr. MATHIAS. That is correct. Conduct which is not prohibited by the Electronic Communications Privacy Act, but which is prohibited by the Communications Act, still will be subject to the full range of remedies and penalties under the Communications Act.

Mr. DANFORTH. I thank the distinguished Senator for this clarification.

Mr. HATCH. Mr. President, I am pleased to join this amendment. Senator LEAHY and I have worked together to fashion a balanced protection for law enforcement records.

We have added protections for foreign counterintelligence and terrorism records. On this portion, we owe gratitude to Senator DENTON whose work on the Terrorism Subcommittee aided this amendment.

The limited fee waivers of this change also facilitate the beneficial goal of media access to some records.

These and many other provisions will greatly strengthen the enforcement ability against this national drug crisis. Another important provision involves the Freedom of Information Act. This section will protect a few narrow law enforcement files from mandatory disclosure. This section was nearly the same as part of S. 774 which unanimously passed the Senate last Congress.

Most important, this section will directly improve drug enforcement. In 1982 the DEA did a study on the impact of FOIA on drug investigations. That study found, among other things, that:

85 percent of the DEA's Agents considered the FOIA to be inhibiting their operations.

78 percent of DEA's investigations (303 cases) involved the recruitment and use of confidential sources. Of this total:

(a) 47 percent of the enforcement investigations involved difficulty obtaining information from witnesses or defendants. Sixteen percent of these problems were directly attributed to the FOIA; and

(b) 26 percent of the enforcement investigations involved a reluctance or an unwillingness on the part of informants to cooperate with DEA. One-third of the instances were directly attributed to the FOIA.

More than 60 percent of the FOIA and Privacy Act requests received by DEA originate from within the criminal element.

This study focused on only investigations that were actually initiated. No insight was gained as to the opportunities lost on investigations that were not developed because persons failed to come forward with information for fear of FOIA exposures. In the final analysis, the loss of such investigative opportunities may far outweigh the adverse effects revealed in the study. That 1982 study concluded that many investigations are aborted, compromised, or reduced in scope because of FOIA exposure.

This is not the only study establishing the problem. In 1978 the Senate Judiciary Subcommittee on Criminal Law concluded that:

It can safely be said that none of the sponsors of FOIA] foresaw the host of difficulties the legislation would create for the law enforcement community, nor did they foresee the utilization that would be made of the act by organized crime and other criminal elements or the damage it would do to the personal security of individual citizens, * * * Informants are rapidly becoming an extinct species because of fear that their identities will be revealed in response to a FOIA request.

In that same year the General Accounting Office released a study detailing 49 instances of potential informants refusing to cooperate with law informants refusing to cooperate with FOIA. In 1979, FBI Director Webster supplied documentation of over 100 instances of FOIA interference with law enforcement investigations or informants. In 1981, his list was expanded to 204 examples. In 1983, even more examples were brought out by his testimony. In fact, no fewer than five different reports studying the impact of FOIA have concluded that the act has harmed the ability of law enforcement officers to enlist informants and carry out confidential investigations. Among these, the Attorney General's 1981 Task Force on Violent Crime found the FOIA should be amended because it is used by lawbreakers "to evade criminal investigation or retaliate against informants."

A mainstay of drug enforcement today is the volunteered statements and background information provided to Federal agencies by confidential sources, particularly for key criminal enterprises relating to narcotics, organized crime, and extremist violence. However, because of the large volume of FOIA requests from known or suspected criminals, many sources—citizens and "street" informants alike—have become reluctant to assist the FBI or DEA because of fears that the Government cannot protect their identities. This is not merely a perception problem. Indeed, confidential law enforcement information is disclosed to organized crime and drug dealers through FOIA.

Perhaps I could explain these provisions more carefully. FOIA contains an exemption that is supposed to protect informants, but even a quick look at that language reveals that the current protection is not sufficient. Exemption 7 protects "investigatory records compiled for law enforcement purposes but only to the extent such records * * * would disclose the identity of a confidential source * * * and then only when that information was furnished only by the confidential source." Let's examine the massive loopholes in that language. If a record would disclose an informant's identity but is not an investigatory record, it must be disclosed. If a record would disclose an informant's identity but was not compiled for law enforcement purposes, it must be disclosed. Thus, if a record contains informant identities and is not an investigatory record, but a summary of recent successes in drug cases submitted to the Drug Policy Board, it must be disclosed. Is this the kind of protection that our informants deserve. After all, they have put their lives on the line to help us control the drug crisis.

Let us look further at the requirement that a record could only be disclosed if it "would disclose" the identity of an informant. This is a dangerous standard. If a record says that the informant, Joe Jones, drove away in a green sedan, the language of the statute allows the deletion of the informant's name, but that is not the only identifier. The requester who may be the felon, and remember over 80 percent of those requesting information from the DEA in 1985 were from the criminal element, knows that he only has one friend with a green sedan. Yet the DEA has no way of knowing if that information "would identify" the informant. The language of the statute does not clearly protect that information.

Let's look at another example. The DEA record would mention only that the informant is a "she." The statute does not necessarily permit deletion of that pronoun because it referes to half of humanity. It does not clearly identify informant, but what the DEA does not know is that the criminal requester knows that he only told one female, his girlfriend, about his crime. He has found the informant. Without going into more details, I assure my colleagues that this last example is not hypothetical.

The problem with the narrow "would disclose" language is that there is no way for the DEA to know what the criminal requester knows. The criminal may know that one of his friends always calls a party a "bash" or a soft drink a "pop." If one of those words appear in a requested record, he has identified the informant.

I could go on with other examples. For example, the statute says a record may be withheld only if disclosed "only by" that informant. This means that if the DEA also received the information from another informant, it cannot protect either of the two informants because neither are independent sources. Yet the criminal element is not going to worry about such technicalities, it is going to take action when it identifies an informant.

In 1978, our colleague, Senator NUNN held a hearing on this subject. He interviewed an admitted murderer and convicted felon, Gary Bowdach. This is a verbatim rendering of that discussion:

Mr. NUNN. Turning to the Freedom of Information Act, what was your motivation in filing FOIA requests on you own behalf.

Mr. BOWDACH. To try to identify the informants that revealed information to the agencies. * * *

Mr. NUNN. Why did you want to get their names?

Mr. BOWDACH. To know who they were, to take care of business later on.

Mr. NUNN. To take care of business later on? You mean by that to murder them?

Mr. BOWDACH. Yes sir.

What more needs to be said? This murderer states forthrightly that FOIA is used to take revenge on informants. To address this problem, this amendment recommeds very modest changes. It does not gut the information act, but simply states that records may be withheld if it is reasonable to expect that the record could lead to disclosure of the informant's identity. This is reasonableness test that can be tested in the courts. With this background it is easy to see why this language unanimously passed the Senate last Congress.

The current seventh exemption exempts investigatory records compiled for law enforcement purposes if those records also meet one of six further requirements (A to F). The six further criteria are intended to protect enforcement proceedings and against disclosures to suspects, fair trials, personal privacy, identities of informants, investigative techniques, and the life and safety of law enforcement personnel.

The current threshold language of the exemption means that records may be eligible for protection if they are investigatory records complied for law enforcement purposes. This could mean that a record which jeopardizes one of the six requirements, such as "endanger the life * * * of law enforcement personnel," could be disclosed simply because it does not satisfy the formalistic rest of being an investigatory record. This exalts form over substance.

The current language of (7)(A) requires an agency to show that disclo-

sure of a record "interferes" with an enforcement proceeding. At the outset of an investigation, however, the agency often does not know which aspects of a record, if disclosed to the suspect, would interfere with the investigation. Thus the existing language could disclose to a suspect vital information about an ongoing investigation.

The current language of (7)(D) requries that a record conclusively "disclose the identity of an informant" before it qualifies for exemption. This ignores the commonsense principle that some information that does not in itself identify the informant can, in some circumstances known only to the suspect, result in such identification. This is particularly true in organized crime investigations because of the institutional memory of these organizations.

The threshold language about "investigatory" has meant that law enforcement manuals were not covered by the exemption for law enforcement techniques and procedures. The courts have also reached conflicting results about the protection to be afforded prosecutorial guidelines and other law enforcement techniques and procedures.

Finally, the language in (7)(F) has an obvious and absurd limitation. Under this language, records are only exempt if they endanger the life of a police officer, without giving similar protection to the life of any natural person.

Some kinds of investigations are particularly difficult to protect from abuse under FOIA. These are characteristically the kinds of investigations that involve organized crime, terrorism, and foreign counterintelligence. In these instances, the suspects often have the time, resources, and inclination to use FOIA to learn the identities of informants, the progress achieved by various investigations, and methods to avoid detection and prosecution. In short, these entities have in common a detached coordinating agent with the ability and motivation to circumvent the intent of the exemptions.

In hearings before the Constitution Subcommittee, FBI Director Webster documented 204 recent examples of FOIA substantially jeopardizing law enforcement.

This amendment would exempt from disclosure any information that could reasonably be expected to disclose a confidential source, including a State or local government agency or foreign government. This change would afford greater protection to information which should clearly be exempt from disclosure due to its serious implications for law enforcement investigations and the safety of confidential informants.

The present exemption that would disclose a confidential source—the rationale is to broaden the definition of confidential source to include State, local, and foreign governments. Some of the formalistic requirements of exemption 7, such as the threshold requirement that the record must be investigatory, are deleted to focus on preventing harm to law enforcement functions.

With regard to organized crime, there is much evidence of the existence of sophisticated networks of FOIA requesters. Under the current FOIA there is a real danger which accompanies FOIA requests by organized criminal groups who have both the incentive and the resources to use the act systematically—to gather, analyze, and piece together segregated bits of information obtained from agency files. These sophisticated criminals can use the FOIA to determine whether an investigation is being conducted on him or his organization, whether there is an informant in his organization, and even who that informant might be. The release of records containing dates of documents, locations reporting investigations, the amount of material, and even the absense of information are all meaningful when compiled in the systematic manner employed by organized crime.

This amendment would broaden b(7) and provide some additional provisions to protect records compiled in a lawful investigation of organized crime or drug offenses.

Finally, the bill acknowledges that drugs and organized crime constitutes a special problem under FOIA. There is much evidence of the existence of sophisticated networks of organized crime FOIA requesters. For example, organized members in the Detroit area have been instructed to submit FOIA requests to the FBI in an effort to identify FBI informants. Through this concerted effort, the members and associated of this family have obtained over 12,000 pages of FBI documents.

The withholding of information on the basis of one of the enumerated exemptions can often be ineffective in avoiding the anticipated harms that would accompany disclosure because invoking the exemption itself becomes a piece of the mosaic. To invoke (b)(7)(D), for example, is to tell the requester, potentially a criminal seeking information in his illicit organization, exactly what he may want to know—that his organization has an internal informant. Thus, we are adding the new provisions of this bill.

In such a case, the Freedom of Information Act presents the potential for damage to sensitive FBI investigations, even though no release of substantive information is made. A requester with an awareness of the law's provisions, a familiarity with an agency's records systems, and whatever personal knowledge he brings to the situation, can gain insight into FBI operations regardless of his ability to procure a release of Bureau documents. For example, knowledge that a suspected informant's file has grown over a period of time is often enough to tip off the sophisticated criminal that the suspected informant has been talking to law enforcement official too often.

Because of the mosaic problem with FOIA and the particular threat posed by organizations with historical continuity and an institutional memory and further because use of the exemptions themselves can become a "piece of the mosaic," simply broadening existing exemptions will not cure the problem of organized crime abuse of FOIA. Accordingly, the proposed bill's changes to b(7) and the new additions to FOIA relative to law enforcement would exclude from disclosure all documents compiled in a lawful investigation of organized crime which would harm investigations or informants. The new provisions apply with equal force to records concerning foreign counterintelligence and terrorism which have been classified.

FEES AND WAIVERS

The fee waiver provision incorporated into this amendment is taken from H.R. 6414, a bill introduced in the 98th Congress. This provision was changed from the version found in H.R. 6414 to indicate our intent to resolve a few important FOIA issues.

In the first place, this change from H.R. 6414 removes the language "by or on behalf of" to limit the breadth of the categorical waiver provision to those requesters who seek Government records for their own scholarly work or media work. Next, we are removing the language "nonprofit group that intends to make the information available" to clarify that organizations seeking to establish private repositories of public records shall not qualify for a waiver. These groups purport to act as an intermediary between the Government and requesters in seeking records that requesters could seek directly from the Government. This type of private library of public documents, whether operated for profit or not, should not qualify for a waiver under the standards of this bill. Congress never intended such a result and does not change its intention with language.

This amendment also adds the words "in the public interest because it" to bring the new language more into conformance with the standards and language of current law.

The change also strikes from the provisions of the bill allowing reduction of fees the words "a requester is indigent and can demonstrate a compelling need." By striking this language, we intend to eliminate prison-

ers and other indigents from eligibility for reduced fees.

Finally this provision limits significantly the denovo review standard found in H.R. 6414. It strikes the words "reduction or" to specify that denovo review is to apply only to the waiver provisions of this section. Thus, denovo review applies to review of eligibility of scholar, bonafide news representatives, and commercial requesters for waivers. It does not apply to reductions of fees requested under the standards of (iii). These reduction issues will continue to be reviewed under the arbitrary and capricious standard.

The scope of denovo review is also limited to the administrative record. This denovo standard should not be construed to apply to any matters not raised or any evidence not presented in the administrative record.

It's also important to note that this provision makes commercial requesters subject to processing costs in addition to search and duplication fees. This could generate as much as $60 million in additional fees to offset the costs of FOIA processing.

I ask unanimous consent to have a letter from Director Webster printed in the RECORD.

There being no objection, the letter was ordered to be printed in the RECORD, as follows:

U.S. DEPARTMENT OF JUSTICE,
FEDERAL BUREAU OF INVESTIGATION,
Washington, DC., September 27, 1986.

Senator ROBERT DOLE,
Majority Leader, U.S. Senate, Washington, DC.,

DEAR SENATOR DOLE: The Omnibus Drug Enforcement, Education, and Control Act contains a provision vitally important to FBI efforts to strengthen drug and organized crime law enforcement programs. This provision would amend the Freedom of Information Act to offer needed protections for confidential undercover informants and investigations.

The cooperation of confidential sources is a mainstay of nearly every successful drug enforcement effort. However, because of the increasingly large volume of FOIA requests from known or suspected criminals, many such sources have become reluctant to assist the FBI or the DEA. Moreover, FOIA disclosures have on numerous occasions compromised investigations and jeopardized the safety of informants.

No fewer than five separate reports on the impact of FOIA, including one done by the GAO, have concluded that the Act has had a harmful effect on undercover and confidential investigations. A recent report by the Drug Enforcement Administration documented that "14% of DEA's investigations were adversely affected by FOIA-related problems to the extent that investigations were aborted, significantly compromised, reduced in scope; or required significant amounts of additional work."

As I have testified before the Senate on a number of occasions, the provisions contained in the pending drug bill are long overdue and likely to make a substaintial contribution to the success of our national battle against harmful drugs and the organized crime elements which distribute them. The Senate has unanimously approved these exact provisions in the previous Congress and I strongly encourage it to do so again.

Sincerely,

WILLIAM H. WEBSTER,
Director.

Mr. GRASSLEY. Mr. President, I am very pleased with the agreements we were able to reach concerning the provisions in this bill which relate to home dish users. First, we have affirmed the right of dish users to listen to all unencrypted audio subcarriers that are redistributed by facilities open to the public. This includes subcarriers meant for redistribution by broadcast stations, cable systems, and like facilities and those subcarriers made available in office buildings and other public places. Further, we have decriminalized the private noncommercial viewing of unscrambled satellite video programming that would have previously resulted in the imposition of criminal sanctions on people who simply view television in the privacy of their own homes.

Anyone who has actually viewed programming from a satellite Earth station will find that many channels are indistinguishable from one another in terms of network, nonnetwork, backhaul, or affiliate feeds. With dozens of sporting events, for example, it is difficult to tell whether one is watching a so-called affiliate feed or a backhaul feed. Similarly, with teleconferences, there is often little difference in screen format from our own hearing or Senate floor coverage.

Finally, by decriminalizing the private viewing of most satellite television signals, we avoid the problem of potentially invading the privacy of these people who watch television in their own homes.

The new sections regarding home dish viewing of private unencrypted satellite video transmissions provide for injunctive relief in the case of intentional viewing of such signals. Intentional viewing means that the Earth station owner must know that he is viewing a prohibited signal and that that type of viewing is not permitted under the act.

So, in this case, the applicable remedy would be injunctive relief and, upon a second occurrence, a $500 civil penalty. This would give networks and other programmers the ability to claim protection under the act without scrambling their signals. These claims would largely be a fiction under any set of circumstances; however, I cannot see imposing criminal sanctions on an innocent viewing public for the benefit of those who could scramble but choose not to.

The new satellite dish provisions would affect 1.5 to 2 million American families nationwide who receive their television programming via satellite. Satellite dish technology is especially important to rural Americans who do not have the same access to a multiplicity of television programming as do their urban counterparts.

I wish to thank my colleagues, Senators LEAHY and MATHIAS, and their competent staffs for their diligent work on resolving the satellite dish issues.

□ 0010

Mr. WEICKER. Might I ask the distinguished Senator from Maryland what the cost is?

Mr. MATHIAS. There are no costs to this amendment.

Mr. WEICKER. There are no costs involved, there is no additional authorization in this amendment?

Mr. MATHIAS. No.

The PRESIDING OFFICER. The question is on the second-degree amendment.

Mr. CHILES. I move adoption.

Mr. HATCH. I move adoption of the amendment as modified.

The PRESIDING OFFICER. The question is on the second-degree amendment.

Mr. HATFIELD. Mr. President, is there an amendment pending at this moment?

The PRESIDING OFFICER. There are two amendments pending.

Mr. MATHIAS. I move adoption.

Mr. LEAHY. I move adoption of the amendment.

The PRESIDING OFFICER. We have not yet adopted the amendment.

The question is on the second-degree amendment.

The amendment (No. 3067) was agreed to.

The PRESIDING OFFICER. The question is on agreeing to the first-degree amendment as amended.

The amendment (No. 3066) as amended was agreed to.

Mr. LEAHY. Mr. President, I move to reconsider the vote by which the amendment was agreed to.

Mr. THURMOND. Mr. President, I move to lay that motion on the table.

The motion to lay on the table was agreed to.

AMENDMENT NO. 3068

(Purpose: To amend the Internal Revenue Code of 1954 to provide for the reimbursement to State and local law enforcement agencies for costs incurred in investigations which substantially contribute to the recovery of Federal taxes)

Mr. CHILES. Mr. President, I send to the desk an amendment and ask for its immediate consideration.

The PRESIDING OFFICER. The amendment will be stated.

The assistant legislative clerk read as follows:

The Senator from Florida [Mr. CHILES] proposes an amendment numbered 3068.

Mr. CHILES. Mr. President, I ask unanimous consent that reading of the amendment be dispensed with.