

Statement of

The Honorable John Cornyn

United States Senator
Texas
June 9, 2005

U.S. Senate Committee on the Judiciary
U.S. Senator John Cornyn (R-TX)

S. 1181, enacting section 8 of the OPEN Government Act
[Cornyn-Leahy-Alexander-Feingold-Isakson]

Thursday, June 9, 2005, 9:30 a.m., Dirksen Senate Office Building Room 226

Mr. Chairman, thank you for placing on today's markup calendar S. 1181, concerning the federal Freedom of Information Act - or FOIA. The bill is co-sponsored by Senator Leahy - with whom I am pleased to be working on a number of FOIA issues - as well as by Senators Alexander, Feingold, and Isakson, and Representative Lamar Smith plans to introduce the same bill in the House shortly. I'm pleased that this bill enjoys strong bipartisan support - including numerous organizations across the ideological spectrum. I can't imagine a more common sense, good government bill. It should not be controversial. I'm not aware of any opposition to it. I'm informed that the Administration has no concerns about it. And I hope that the committee will approve it today.

On March 15, the Terrorism subcommittee convened a hearing on another Cornyn-Leahy bill - S. 394, known as the OPEN Government Act. That, too, is a good bill to strengthen and enhance FOIA. But I recognize that that bill will take some time to work through, and that is why I have not asked the Chairman to place that bill on the markup calendar.

S. 1181, by contrast, should be very easy for this committee to approve. It simply implements section 8 of the OPEN Government Act. It would simply help to ensure an open and deliberate process in Congress, by providing that any future legislation to establish a new exemption to the federal Freedom of Information Act must be stated explicitly within the text of the bill. Specifically, any future attempt to create a new so-called "(b)(3) exemption" to the federal FOIA law must specifically cite section (b)(3) of FOIA if it is to take effect.

The justification for this provision is simple: Congress should not establish new secrecy provisions through secret means. If Congress is to establish a new exemption to FOIA, it should do so in the open and in the light of day. FOIA establishes a presumption of disclosure. But if documents are to be kept secret pursuant to a future act of Congress, as may sometimes be appropriate and necessary, we should at least make sure that that act of Congress itself not be undertaken in secret.

I want to be clear: This bill does not affect current law in any way, and it does not affect the Executive Branch in any direct way. It only applies to the process through which Congress must enact any FOIA exemption in the future. And for those who are interested in the technical aspects of this bill, I will just point out that this provision is modeled after other federal laws - such as the War Powers Resolution (50 U.S.C. § 1547(a)) and the Federal Vacancies Reform Act (5 U.S.C. § 3347) - which also require Congress to act in an explicit fashion in order to carry out particular objectives. Think of it as a direction to the courts - a canon of interpretation, advising on how to construe future acts of Congress.

A recent news report published by the Cox News Service amply demonstrates the importance of this issue, and specifically emphasizes the need for section 8. I ask unanimous consent that a copy of this news report be entered into the record. And I ask my colleagues to support this bill.