Mr. WARNER. Mr. President, I thank the distinguished minority leader and the majority leader. In essence, it is their interpretation of the bill that the purport of this amendment is covered and that it could easily have been added had I been present a little earlier and asked for its inclusion.

So, Mr. President, that satisfies my purpose and I do not think it is necessary for me to withdraw the amendment because I did not ask for its consideration in view of the unanimous-consent request. We have established the legislative history that I felt was necessary.

Mr. BYRD. I thank the Senator.

Mr. WARNER. I thank the Chair.

The PRESIDING OFFICER. The question is on agreeing to the amendment of the majority leader.

The amendment (No. 3466) was agreed to.

Mr. LEAHY. Mr. President, the House amendments to the Freedom of Information Act provisions in the Senate-passed drug bill were generally technical in nature and I would have accepted them without change. However, I am happy to join my friend, the distinguished chairman of the Constitution Subcommittee, Senator HATCH, in making minor changes in two of the House amendments and restoring original Senate language in place of a third House modification to our provisions.

The first minor change involves a House amendment clarifying our provision authorizing the assessment of review costs. As explained by Representative ENGLISH, in his statement in the CONGRESSIONAL RECORD of October 8, 1986, the House amendment was intended to establish a limitation on review costs similar to the one that was included in S. 774, the FOIA reform legislation which was passed by the Senate in the 98th Congress, and in H.R. 6414, a bill which was introduced by Representative ENGLISH, along with Representative KINDNESS, in the same year. Our addition to the language of the House amendment is merely intended to conform it more closely to the language of the earlier legislation; it is not, in any way, intended to indicate any disagreement with Representative ENGLISH's statement regarding the purpose and meaning of the House amendment.

The second minor change which Senator HATCH and I have agreed to would simply establish an effective date of 180 days after enactment for the fee and fee waiver provisions in section 1803 of the drug bill, in place of the House provisions which would have established an effective date of 90 days after enactment.

Our final change to the House amendment of the FOIA provisions in the Senate-passed drug bill would simply restore the original language of section 1802(a) in the Senate version amending section (b)(7)(C) of the FOIA exemption for law enforcement records. The Senate-passed version of this amendment, as I explained in my earlier statement in the CONGRESSIONAL RECORD of September 30, 1986, was based upon an identical amendment in S. 774 designed to clarify the degree of risk of harm from disclosure which must be shown to justify withholding records under that subparagraph of the law enforcement records exemption. Again, let me emphasize that this change in the statutory language substantially reflects current judicial interpretations and would not appreciably alter the meaning of the affected provision in its practical application.

Although the sponsors of the House amendments were concerned that such a change from the current statutory language could create problems with regard to interpretations of a related personal privacy exemption in paragraph (b)(6) of the FOIA, I am confident that the courts will recognize this change as simply codifying their present objective approach to assessing the degree of risk, rather than calling for a departure to a less rigorous standard.

Let me just say that I was pleased to find that both Representative ENGLISH and Representative KINDNESS share my understanding of the purpose and meaning of the FOIA amendments contained in the omnibus drug bill. I concur with their views, as stated in the CONGRESSIONAL RECORD of October 8, 1986, finding them consistent with my own earlier comments on these provisions.

Mr. KERRY. Will the Senator yield for a question?

Mr. LEAHY. I am happy to yield for a question.

Mr. KERRY. As a member of the Foreign Relations Committee, and Senator from a State proud to be home to some of the Nation's pre-eminent research institutions and libraries, I am concerned about the proposed changes in the Freedom of Information Act regarding the fees which can be charged under the act. A week ago the Senate passed by voice vote an amendment to the drug bill (amendment 3066) which I understood to have the effect of correcting the current narrow interpretation of the act's intent by Federal agencies, and making waivers and reductions of fees available to all requesters when the information released contributes to public understanding of the Government. I understood the amendment's chief sponsor, the distinguished Senator from Vermont, to explain in his explanation of the amendment, that any requester engaged in the dissemination of information to the public could also qualify for waiver or reduction of fees.

Therefore, I am perplexed to find additional remarks in the record raising doubts about the status of a certain category or requester—"organizations seeking to establish private repositories of public records" or "this type of private library of public documents." In my lengthy experience in public life, these kinds of organizations are precisely the kinds of groups that should receive every benefit of the Freedom of Information Act. By seeking out documentation on important public policy issues from inside the Government, these organizations have not only saved the taxpayers billions of dollars by helping to expose waste and fraud, bad decisions and misdeeds, but they also have proven essential to public education and the proper functioning of our democracy. The use of the adjective "private" also puzzles me, since the gathering of government documents into a library or repository open to the public can only assist further research and public education. I am sure that the research librarians at "private" institutions in Massachusetts, like Harvard University or Boston College, and at other less-renowned repositories of public records, see their mission as fulfilling the intent of the Freedom of Information Act.

If I may ask my distinguished colleague from Vermont, was it not the intention of this amendment to make more generous the FOIA's fee waiver provisions for the news media and public interest users, not to restrict them? And was it not the intention of this amendment to qualify for fee waivers and reductions all requesters engaged in the dissemination of information to the public, where the information contributes to public understanding of the Government and its policies, and where disclosure is not primarily in the commercial interest of the requester?

Mr. LEAHY. My distinguished colleague from Massachusetts understands the amendment perfectly. Any statements in the record which give a more restrictive meaning to the amendment with regards to the waiver and reduction of fees conflict with the clear language of the amendment itself. With this amendment, we have sought to remove the roadblocks and technicalities which have been used by various Federal agencies to deny waivers or reductions of fees under the FOIA to the news media and public interest users of the FOIA. Information released under the FOIA which contributes to public understanding of the Government clearly qualifies for waiver or reduction of fees, as long as it is not primarily in the commercial interest of the requester. Where disclosure is primarily in the commercial interest of the requester, and the records are requested for a commercial use, the requester will pay search, duplication and review charges under this amendment. FOIA requesters engaged in the dissemination of information to the public—and that of course is the primary function of libraries and repositories of public documents—would qualify for waiver or reduction of fees under the FOIA.

Mr. KERRY. I thank my distinguished colleague, the Senator from Vermont, for his clarification, and for his efforts to assure the free flow of information that is so vital to an informed citizenry and the continued success of our democracy.

Mr. LEVIN. In terms of procedure, the new section providing for a life sentence without parole follows the basic format of the earlier section providing for the death penalty, but with a few significant modifications. For the most part, these modifications are designed to make the provision before us today more consistent with the procedural format of S. 239, the death penalty bill reported out by the Senate Judiciary Committee earlier in this Congress, that was the death penalty provision which was passed as part of the bill by the other body.

I would ask the majority leader, who, along with Senator BYRD, is the principal sponsor of this amendment whether it is his understanding that the moving of the intent requirement from being one of the required aggravating factors which would have had to have been found for imposing the death penalty under the original bill to being an element of the offense punishable by life imprisonment without parole under this modification means that in order to satisfy the elements of the offense, the defendant must reasonably have foreseen that the defendant's conduct in the course of the commission of the offense resulting in death for which the defendant was convicted, would cause, or would create a grave risk of causing, death to any person? By implication, therefore, the defendant's showing that he could not have foreseen these consequences is a defense to the charge that his actions included the requisite intent. Is that also the majority leader's understanding of the effect of these changes?

Mr. DOLE. I agree with the interpretation of the Senator from Michigan. In meeting the requirement of intent as an element of the offense in this amendment, the defendant must reasonably have foreseen that the defendant's conduct in the course of the commission of the offense resulting in death for which the defendant was convicted, would cause, or would create a grave risk of causing, death to any person. Without such reasonable foreseeability, the elements of the offense would not be satisfied. On another matter, Senator LEVIN, I would like to clarify that mandatory life imprisonment without parole means that an individual who is sentenced pursuant to these strict procedures will serve the duration of his life in prison. I understand that the law which created the Sentencing Commission last Congress also provided for the abolishment of parole. Is your understanding that the abolishment of people will not affect in any way the intent of the language "life imprisonment without parole? In other words, will an individual convicted and sentenced under this procedure serve the duration of his life in prison without chance of release under any circumstances?

Senator LEVIN. That is indeed my understanding. There will be no procedure for release of an individual sentenced to life imprisonment without parole under this law.

Mr. HARKIN. I would like to ask Senator BIDEN a question with regard to the bill which is before us. As you know, I am a strong supporter of the efforts to curtail the interdiction of illegal drugs into this country and I have supported measures to halt the resultant widespread trafficking and use of such drugs. I supported the original Senate bill on this subject and intend to vote in favor of the measure which is now before us.

However, it has come to my attention that we may be including in the bill a section which could have a detrimental effect on the legitimate import operations of countless American companies. Specifically, I am looking at one section of the bill which causes me concern.

If I might ask a question with regard to section 3111(5)(m) which defines "controlled substances" as "merchandise" which cannot be imported without a license or permit. As I read this bill, legitimate goods which are controlled by quotas or other legal restrictions could be included in this definition. Is it the intent to include such items in this bill?

Mr. BIDEN. No. The focus of this bill is to attack the importers of illegal substances not legitimate importers. The intent was not to include legal merchandise under the definition of controlled substances, rather the intent of the bill was to control the importation and trafficking of illegal drugs in this country. Further, we did not intend to put more hurdles before or cause more problems for those Americans who are in a legitimate import business.

DEATH PENALTY

Mr. DOLE. Mr. President, since the 1972 Supreme Court decision, numerous attempts have been made in the Senate to repair the constitutional defects found by the Court in existing Federal death penalty legislation. Unfortunately, the House refused to move on the issue.

Now, at long last, the other body has included a death penalty provision—limited to certain drug offenses—in its version of the drug bill. While I applaud this initiative, the House provision did not go far enough.

Federal legislation restoring the death penalty is needed for the most heinous of Federal crimes—crimes that endanger innocent life or compromise our national security. It was my feeling that the Senate should substitute broader death penalty provisions for the House language and insist on its inclusion in the final version of the legislation. However, it does not look like that's in the cards.

The Senate was considering the narrower version. Even with this very limited proposal it was necessary for a cloture petition to be filed. Again it is the same small group Senators who have objected to the death provision in the drug bill who have consistently opposed proposals such as S. 239. While I have no quarrel at all with those who oppose the death penalty on philosophical grounds, it is most regrettable that cloture had to be invoked in the closing days of this session of the Congress.

The arguments in support of this measure closely parallel the rationale for the broader proposal. First, is the deterrent effect of capital punishment. Although there is no conclusive evidence one way or the other, it is highly likely that penal sanctions beyond those now on the books are necessary to deal with the ever growing problem or drug trafficking.

Our prisons and jails are bulging with drug offenders. Almost a quarter of the Federal inmate population is incarcerated on drug-related offenses. Many face stiff mininum mandatory terms, yet the flow into the prison system not only continues unabated, but is steadily increasing. Under these circumstances, the ultimate sanction seems appropriate. If minimum mandatories don't work to deter drug criminals, then let's apply the ultimate deterrent.

Second, the death penalty is an instrument of incapacitation. Its effect is obvious. It is clear that those who have been executed are unable to commit similar crimes in the future. Too many drug offenders return to this highly profitable illicit enterprise upon release. They are incorrigible, antisocial and have proven to be dangerous to society for the rest of their lives. In the institutional setting they are chronic threats to fellow inmates and correctional officials.

Third, there is the matter of retribution. These individuals are directly responsible for the degredation or destruction of hundreds of our young people.

Mr. President, this Senator strongly supports the death penalty, and believes a broad death penalty should have been included. Under the bill as modified those who would have been subject to this penalty will now receive a mandatory life sentence with no chance of probation or parole.

Mr. BYRD. Mr. President, the Senate should feel a fine sense of accomplishment for our work on this bill.

There is no question that drug abuse in the United States is a problem of vast and growing proportions. Millions of Americans use illegal drugs or diverted legal drugs. Over 4 million Americans use cocaine at least once per month. Twenty million Americans use marijuana at least once per month. These statistics are alarming.