more than 40 years of rule by the Kenya African National Union, KANU. President Kibaki and his administration deserve credit for advancing basic freedoms and permitting the emergence of a vibrant civil society, but his failure to rein in corruption in government ranks has him now just trailing Raila Odinga, his main contender in the presidential race.

The fact that these elections are so close and hotly contested is a good sign for Kenya's democracy. For the first time, a number of parties appear to be taking small but noticeable steps away from ethnic loyalties and towards more legitimate political platforms. Such a development is an essential component as the country moves towards better governance, and I am so pleased by all the work the administration—and in particular the embassy in Nairobi—is undertaking by working closely with the Electoral Commission of Kenya, political parties, civil society organizations and other international partners through a new multidonor-funded, comprehensive electoral assistance program. Such initiatives are vital to help bring about a strong democracy.

As the 2007 national elections approach, however, there are a number of challenges to a peaceful and fair multiparty process. Like other Kenyan polls before it, this campaign period has been fraught with violence and accusations of fraud. The electoral commission is investigating reports of voting cards being bought, and the primary conventions of the mainstream political parties were interrupted by violence and chaos. On balance, there are those who say security has gotten better, but violence continues at unacceptable rates and around 16,000 Kenyans have been displaced in election-related violence.

Last May, the United States Ambassador to Kenya, Mr. Michael Ranneberger, addressed the Kenyan government and political community. He promised that the United States would be neutral in the elections and in building the capacity of political parties and civil society, but he made it clear that, and I quote, ''We are not neutral with respect to . . . the conduct of elections. We want to see an inclusive, fair, and transparent electoral process.''

As voting day draws near, it is essential that the international community speaks with one voice in calling for all parties to refrain from violence and fraud before, during, and after the upcoming polls. Kenya's political elite, military officials, judicial bodies, and 14 million registered voters must understand that the world is watching closely for signs that Kenya is truly committed to good governance and rule of law. Kenya's important leadership role in the region and throughout the continent make it particularly important that the government ensure the open flow of information, freedom of assembly, and nonpartisan conduct of the polls. Further, the government must refrain from any misuse of its resources or authorities in the runup to the election and on Election Day. All parties should renounce efforts to enflame tribal hatred, which means that politicians need to control their rhetoric, eschew violence, and avoid threats.

International support for Kenya's upcoming polls includes a large number of foreign observers who will be dispersed across the country to witness the polling on Election Day. Reports from these monitors and independent media will inform opinions around the globe not only when it comes to assessing the past 5 years of President Kibaki's administration but also in determining the legitimacy of the next government. In 2 weeks, all eyes will be on a country that is an important role model of stability and growth in a region beset by natural and manmade disasters. It is not only Kenya's next president and other political leadership who will be decided on December 27, but it is also the state of its democracy.

OPEN GOVERNMENT ACT

Mr. KYL. Madam President, I rise today to comment on the OPEN Government Act. This bill is only a slightly modified version of S. 849, a bill that passed the Senate on August 3 of this year. At that time, I made a more complete statement regarding the bill—see 153 CONGRESSIONAL RECORD at S10987 to S10989 in the daily edition of the RECORD,, on August 3, 2007—as did Senators LEAHY and CORNYN—see the RECORD at S10986 to S10987 and S10989 to S10990. Thus my remarks today need only describe the changes made to the bill and a few other matters.

One section of the bill that makes important changes to the law and thus deserves comment is section 6. Although this section appeared in S. 849, I did not address the provision in August because final negotiations regarding the language of that section were completed only an hour or so before we began a hotline of the bill. The purpose of section 6 is to force agencies to comply with FOIA's 20-day deadline for responding to a request for information. The original introduced version of S. 849 sought to obtain agency compliance by repealing certain FOIA exemptions in the event that an agency missed the 20-day deadline, an approach that I and others argued would impose penalties that were grossly disproportionate and that would principally punish innocent third parties—see S. Rep. 110–059 at 13–14 and 15–19. The current draft applies what is in my view a much better calibrated sanction, the denial of search fees to agencies that miss the 20-day deadline with no good excuse.

Several features of this new system merit further elaboration. First, the 20-day deadline begins to run only when a FOIA request is received by the appropriate component of the agency, but in any event no later than 10 days after the request is received by a FOIA component of the agency. The reasoning behind this distinction is that requesters should receive the full benefit of the 20-day deadline if they make the effort to precisely address their request to the right FOIA office, and that they should also be protected by the secondary 10-day deadline if they at least ensure that their request goes to some FOIA component of the agency. So long as a misdirected request is sent to some FOIA component of an agency, it is reasonable to expect that such component will be able to promptly identify that missive as a FOIA request and redirect it to its proper destination.

On the other hand, if a FOIA request is sent to a part of an agency that is not even a FOIA component, it is difficult to impose particular deadlines for processing the request. For example, if a request is sent to an obscure regional office of an agency, it will probably simply be sent to regional headquarters. Many agencies have a large number of field offices whose staff handle very basic functions and are not trained to handle FOIA requests. Such staff probably will not recognize some requests as FOIA requests. Implementing a deadline that extended to FOIA requests that are received by such staff would effectively require training a large number of additional agency staff in FOIA, something that Congress has not provided the resources to do.

Also, because this bill imposes significant sanctions on an agency for a failure to comply with the 20-day deadline, it is important that the deadline only begin to run when the agency can reasonably be expected to comply with it, and that the law not create opportunities for gamesmanship. If the deadline began to run whenever an agency component receives the request, for example, sophisticated commercial requesters might purposely send their request to an obscure field office in the hope that by the time the FOIA office receives the request, it will be impossible to meet the deadline, and the requester will thereby be relieved from paying search fees. Given the wide variety of types of FOIA requesters, Congress cannot simply assume that every requester will act in good faith and that no requester will seek to take advantage of the rules. The present bill therefore initiates the 20-day deadline only when the request is received by the proper FOIA component of the agency, or no later than 10 days after the request is received by some FOIA component of the agency.

Section 6 of the bill also allows FOIA's 20-day response deadline to be tolled while an agency is awaiting a response to a request for further information from a FOIA requester, but only in two types of circumstances. Current practice allows tolling of the deadline whenever an agency requests further information from the requester. Some FOIA requesters have described to the Judiciary Committee situations in

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 stipulation 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 requester'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