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Calendar No. 186

97TH CONGRESS
1ST SESSION**S. 114**

[Report No. 97-143]

To establish rational criteria for the imposition of the sentence of death, and for other purposes.

IN THE SENATE OF THE UNITED STATES

JANUARY 15 (legislative day, JANUARY 5), 1981

Mr. DECONCINI (for himself, Mr. THURMOND, Mr. HATCH, Mr. DENTON, and Mr. ZORINSKY) introduced the following bill; which was read twice and referred to the Committee on the Judiciary

JULY 1, 1981

Reported, under authority of the order of the Senate of June 25 (legislative day, June 1), 1981, by Mr. THURMOND, with amendments to the text and an amendment to the title

[Omit the part struck through and insert the part printed in italic]

A BILL

To establish rational criteria for the imposition of the sentence of death, and for other purposes.

1 *Be it enacted by the Senate and House of Representa-*
2 *tives of the United States of America in Congress assembled,*
3 That chapter 227 of title 18 of the United States Code is

1 amended by adding after section 3562 a new section 3562A,
2 to read as follows:

3 **“§ 3562A. Sentencing for capital offenses**

4 “(a) HEARING REQUIRED.—A person shall be subject-
5 ed to the penalty of death for any offense against the United
6 States only if a hearing is held in accordance with this
7 section.

8 “(b) HEARING BEFORE COURT OR JURY.—When a de-
9 fendant is found guilty of or pleads guilty to an offense for
10 which one of the sentences provided is death, the judge who
11 presided at the trial or before whom the guilty plea was en-
12 tered, or any other judge if the judge who presided at the
13 trial or before whom the guilty plea was entered is unavail-
14 able, shall conduct a separate sentencing hearing to deter-
15 mine the punishment to be imposed. The hearing shall be
16 conducted—

17 “(b) NOTICE BY THE GOVERNMENT.—Whenever the
18 Government intends to seek the death penalty for an offense
19 for which one of the sentences provided is death, the attorney
20 for the Government, a reasonable time before trial or accept-
21 ance by the court of a plea of guilty, shall sign and file with
22 the court, and serve upon the defendant, a notice (1) that the
23 Government in the event of conviction will seek the sentence
24 of death, and (2) setting forth the aggravating factor or fac-
25 tors which the Government will seek to prove as the basis for

1 *the death penalty. The court may permit the attorney for the*
2 *Government to amend this notice for good cause shown.*

3 “(c) *HEARING BEFORE COURT OR JURY.*—*When the*
4 *attorney for the Government has filed a notice as required*
5 *under subsection (b) and the defendant is found guilty of or*
6 *pleads guilty to an offense for which one of the sentences*
7 *provided is death, the judge who presided at the trial or before*
8 *whom the guilty plea was entered, or any other judge if the*
9 *judge who presided at the trial or before whom the guilty plea*
10 *was entered is unavailable, shall conduct a separate sentenc-*
11 *ing hearing to determine the punishment to be imposed. The*
12 *hearing shall be conducted—*

13 “(1) before the jury which determined the defend-
14 ant’s guilt;

15 “(2) before a jury impaneled for the purpose of
16 the hearing if—

17 “(A) the defendant was convicted upon a
18 plea of guilty;

19 “(B) the defendant was convicted after a
20 trial before the court sitting without a jury;

21 “(C) the jury which determined the defend-
22 ant’s guilt has been discharged for good cause; or

23 “(D) after initial imposition of a sentence
24 under this section, redetermination of the sentence
25 under this section is necessary; or

1 “(3) before the court alone, upon the motion of
2 the defendant and with the approval of the Govern-
3 ment.

4 A jury impaneled pursuant to paragraph (2) of this subsection
5 shall consist of twelve members, ~~but~~, *unless*, at any time
6 before the conclusion of the hearing, the parties ~~may~~ stipulate
7 with the approval of the court that it shall consist of any
8 number less than twelve.

9 ~~“(e)~~ *“(d)* PROOF OF AGGRAVATING AND MITIGATING
10 FACTORS.—Notwithstanding Rule 32(c) of the Federal
11 Rules of Criminal Procedure, when a defendant is found
12 guilty of or pleads guilty to an offense for which one of the
13 sentences provided is death, no presentence report shall be
14 prepared. In the sentencing hearing, information may be pre-
15 sented as to any matter relevant to the sentence and shall
16 include matters relating to any of the aggravating or mitigat-
17 ing factors set forth in subsections ~~(f)~~, *(g)*, ~~(g)~~, *(h)* and ~~(h)~~, *(i)*,
18 or any other mitigating factor. Information presented may
19 include the trial transcript and exhibits if the hearing is held
20 before a jury or judge not present during the trial. Any other
21 information relevant to such mitigating or aggravating fac-
22 tors may be presented by either the Government or the de-
23 fendant, regardless of its admissibility under the rules gov-
24 erning admission of evidence at criminal ~~trials~~. *trials*, *except*
25 *that information may be excluded if its probative value is*

1 *substantially outweighed by the danger of unfair prejudice,*
2 *confusion of the issues, or misleading the jury.* The Govern-
3 ment and the defendant shall be permitted to rebut any infor-
4 mation received at the hearing and shall be given fair oppor-
5 tunity to present argument as to the adequacy of the informa-
6 tion to establish the existence of any of the aggravating or
7 mitigating factors, and as to the appropriateness in that case
8 of imposing a sentence of death. The Government shall open
9 the argument. The defendant shall be permitted to reply. The
10 Government shall then be permitted to reply in rebuttal. The
11 burden of establishing the existence of any aggravating factor
12 is on the Government, and is not satisfied unless established
13 beyond a reasonable doubt. The burden of establishing the
14 existence of any mitigating factor is on the defendant, and is
15 not satisfied unless established by a preponderance of the in-
16 formation.

17 ~~“(d)~~ *“(e) RETURN OF FINDINGS.—*The jury, or if there
18 is no jury, the court, shall consider all the information re-
19 ceived during the hearing ~~and the evidence received during~~
20 ~~the trial.~~ *hearing.* It shall return special findings identifying
21 ~~any mitigating factors and any aggravating factors set forth~~
22 ~~in subsections (g) and (h) found to exist.~~ *whether or not any*
23 *mitigating factors or any aggravating factors set forth in sub-*
24 *section (g), (h), or (i) have been found to exist.* A finding of
25 such a factor by a jury shall be made by ~~majority~~ *unanimous*

1 vote. If no such aggravating factors set forth in subsection (g)
2 or (h) are found to exist the court shall impose a sentence,
3 other than death, authorized by law. If one or more of such
4 aggravating factors are found to exist, the jury, or if there is
5 no jury, the court, shall then consider whether the aggravat-
6 ing factor or factors found to exist sufficiently outweigh any
7 mitigating factor or factors found to exist, or in the absence
8 of mitigating factors, whether the aggravating factors are
9 themselves sufficient, to justify a sentence of death. Based
10 upon this consideration, the jury by unanimous vote, or if
11 there is no jury, the court, shall return a finding as to wheth-
12 er a sentence of death is justified. *If, in the case of an offense*
13 *of treason or espionage, no aggravating factor set forth in*
14 *subsection (h) is found to exist, or, in the case of any other*
15 *offense, the aggravating factor set forth in subparagraph*
16 *(i)(1) is not found to exist or the aggravating factor set forth*
17 *in subparagraph (i)(1) is found to exist but no other aggra-*
18 *vating factor set forth in subsection (i) is found to exist, the*
19 *court shall impose a sentence, other than death, authorized by*
20 *law, If, in the case of an offense of espionage or treason, one*
21 *or more of the aggravating factors set forth in subsection (h)*
22 *is found to exist, or, in the case of any other offense, the*
23 *aggravating factor set forth in subparagraph (i)(1) and one or*
24 *more of the other aggravating factors set forth in subsection*
25 *(i) are found to exist, the jury, or if there is no jury, the*

1 court, shall then consider whether the aggravating factor or
 2 factors found to exist sufficiently outweigh any mitigating
 3 factor or factors found to exist, or in the absence of mitigating
 4 factors, whether the aggravating factors are themselves suffi-
 5 cient to justify a sentence of death. Based upon this consider-
 6 ation, the jury by unanimous vote, or if there is no jury, the
 7 court, shall return a finding as to whether a sentence of death
 8 is justified.

9 “(e) “(f) IMPOSITION OF SENTENCE.—Upon a finding
 10 that a sentence of death is justified, the court shall sentence
 11 the defendant to death. ~~Upon a contrary finding,~~ Otherwise
 12 the court shall impose a sentence, other than death, author-
 13 ized by law.

14 “(f) “(g) MITIGATING FACTORS.—In determining
 15 whether a sentence of death is to be imposed on a defendant,
 16 the following mitigating factors shall be considered but are
 17 not exclusive:

18 “(1) the defendant was ~~youthful~~ *less than eighteen*
 19 *years of age* at the time of the crime;

20 “(2) the defendant’s capacity to appreciate the
 21 wrongfulness of his conduct or to conform his conduct
 22 to the requirements of law was significantly impaired,
 23 but not so impaired as to constitute a defense to the
 24 charge;

1 “(3) the defendant was under unusual and sub-
2 stantial duress, although not such duress as constitutes
3 a defense to the charge;

4 “(4) the defendant is punishable as a principal ~~or~~
5 ~~otherwise but his participation was relatively minor;~~
6 *(as defined in section 2(a) of this title) in the offense,*
7 *which was committed by another, but his participation*
8 *was relatively minor, although not so minor as to con-*
9 *stitute a defense to the charge;*

10 “(5) the defendant could not reasonably have fore-
11 seen that his conduct in the course of the commission
12 of murder, or other offense resulting in death for which
13 he was convicted, would cause, or would create a
14 grave risk of causing, death to any person.

15 ~~“(g)~~ *“(h)* AGGRAVATING FACTORS FOR TREASON AND
16 ESPIONAGE.—If the defendant is found guilty of or pleads
17 guilty to an offense under section 794 or section 2381 of this
18 title, the following aggravating factors shall be considered:

19 “(1) the defendant has been convicted of another
20 offense involving espionage or treason for which either
21 a sentence of life imprisonment or death was author-
22 ized by statute;

23 “(2) in the commission of the offense the defend-
24 ant knowingly created a grave risk of substantial
25 danger to the national security;

1 “(3) in the commission of the offense the defend-
2 ant knowingly created a grave risk of death to another
3 person.

4 ~~“(h)~~ “(i) AGGRAVATING FACTORS FOR HOMICIDE.—If
5 the defendant is found guilty of or pleads guilty to any other
6 offense for which one of the sentences provided is death, the
7 following aggravating factors shall be considered:

8 “(1) *the defendant—*

9 “(A) *intentionally killed the victim;*

10 “(B) *intentionally inflicted serious bodily*
11 *injury which resulted in the death of the victim;*

12 “(C) *intentionally participated in an act*
13 *which he knew or reasonably should have known*
14 *would create a grave risk of death to a person,*
15 *other than one of the participants in the offense,*
16 *and the victim did die as a direct result of the act;*
17 *or*

18 “(D) *attempted to kill the President of the*
19 *United States under the circumstances provided*
20 *in section 1751(c) of this title;*

21 ~~“(1)~~ “(2) the death or injury resulting in death
22 occurred during the commission or attempted commis-
23 sion of, or during the immediate flight from the com-
24 mission or attempted commission of, an offense under
25 section 751 (prisoners in custody of institution or offi-

1 cer), section 794 (gathering or delivering defense infor-
2 mation to aid foreign government), section 844(d)
3 (transportation of explosives in interstate commerce for
4 certain purposes), section 844(f) (destruction of Gov-
5 ernment property by explosives), section 844(i) (de-
6 struction of property in interstate commerce by explo-
7 sives), section 1201 (kidnaping), or section 2381 (trea-
8 son) of this title, or section 902 (i) or (n) of the Federal
9 Aviation Act of 1958, as amended (49 U.S.C. 1472 (i),
10 (n)) (aircraft piracy);

11 ~~“(2)~~ “(3) the defendant has been convicted of an-
12 other Federal offense, or a State offense resulting in
13 the death of a person, for which a sentence of life im-
14 prisonment or a sentence of death was authorized
15 by statute;

16 ~~“(3)~~ “(4) the defendant has previously been con-
17 victed of two or more State or Federal offenses punish-
18 able by a term of imprisonment of more than one year,
19 committed on different occasions, involving the inflic-
20 tion ~~of~~ *of, or attempted infliction of*, serious bodily
21 injury upon another person;

22 ~~“(4)~~ “(5) in the commission of the offense the de-
23 fendant knowingly created a grave risk of death to one
24 or more persons *in addition to the victim of the of-*
25 *fense*;

1 ~~“(5)~~ “(6) the defendant committed the offense in
2 an especially heinous, cruel, or depraved manner;

3 ~~“(6)~~ “(7) the defendant procured the commission
4 of the offense by payment, or promise of payment, of
5 anything of pecuniary value;

6 ~~“(7)~~ “(8) the defendant committed the offense as
7 consideration for the receipt, or in the expectation of
8 the receipt, of anything of pecuniary value;

9 ~~“(8)~~ “(9) the defendant committed the offense
10 after substantial planning and premeditation to cause
11 the death of a person or commit an act of terrorism;

12 ~~“(9)~~ “(10) the defendant committed the offense
13 against—

14 “(A) the President of the United States, the
15 President-elect, the Vice President, the Vice-
16 President-elect, the Vice-President-designate, or,
17 if there is no Vice President, the officer next in
18 order of succession to the office of the President
19 of the United States, or any person who is acting
20 as President under the Constitution and laws of
21 the United States;

22 “(B) a chief of state, head of government, or
23 the political equivalent, of a foreign nation;

1 “(C) a foreign official listed in section
2 1116(b)(3)(A) of this title, if he is in the United
3 States because of his official duties; or

4 “(D) a Federal judge, a Federal law-enforce-
5 ment officer, or an employee of a United States
6 penal or correctional institution, while performing
7 his official duties or because of his status as a
8 public servant. For purposes of this subsection, a
9 ‘law-enforcement officer’ is a public servant au-
10 thorized by law or by a Government agency or
11 Congress to conduct or engage in the prevention,
12 investigation, or prosecution of an offense.”.

13 “(j) *INSTRUCTION TO JURY ON RIGHT OF THE DE-*
14 *FENDANT TO JUSTICE WITHOUT DISCRIMINATION.—In*
15 *any hearing held before a jury under this section, the court*
16 *shall instruct the jury that in its consideration of whether the*
17 *sentence of death is justified it shall not consider the race,*
18 *color, national origin, creed, or sex of the defendant. The jury*
19 *shall return to the court a certificate signed by each juror*
20 *that consideration of race, color, national origin, creed, or sex*
21 *of the defendant was not involved in reaching his or her indi-*
22 *vidual decision.*

23 SEC. 2. Section 34 of title 18 of the United States Code
24 is amended by changing the comma after the words “impris-

1 onment for life” to a period and deleting the remainder of the
2 section.

3 SEC. 3. Section 794(a) of title 18 of the United States
4 Code is amended by changing the period at the end of the
5 section to a comma and by adding immediately thereafter the
6 words “except that the sentence of death shall not be im-
7 posed unless the jury or, if there is no jury, the court, further
8 finds that the offense directly concerned nuclear weaponry,
9 military spacecraft or satellites, early warning systems, or
10 other means of defense or retaliation against large-scale
11 attack; war plans; communications intelligence or crypto-
12 graphic information; or any other major weapons system or
13 major element of defense strategy.”

14 SEC. 4. Section 844(d) of title 18 of the United States
15 Code is amended by striking the words “as provided in sec-
16 tion 34 of this title”.

17 SEC. 5. Section 844(f) of title 18 of the United States
18 Code is amended by striking the words “as provided in sec-
19 tion 34 of this title”.

20 SEC. 6. Section 844(i) of title 18 of the United States
21 Code is amended by striking the words “as provided in sec-
22 tion 34 of this title”.

23 SEC. 7. The second paragraph of section 1111(b) of title
24 18 of the United States Code is amended to read as follows:

1 “Whoever is guilty of murder in the first degree shall be
2 punished by death or by imprisonment for life;”.

3 SEC. 8. Section 1116(a) of title 18 of the United States
4 Code is amended by striking the words “any such person
5 who is found guilty of murder in the first degree shall be
6 sentenced to imprisonment for life, and”.

7 SEC. 9. Section 1201 of title 18 of the United States
8 Code is amended by inserting after the words “or for life” in
9 subsection (a) the words “and, if the death of any person
10 results, shall be punished by death or life imprisonment”.

11 SEC. 10. The last paragraph of section 1716 of title 18
12 of the United States Code is amended by changing the
13 comma after the words “imprisonment for life” to a period
14 and deleting the remainder of the paragraph.

15 *SEC. 11. Subsection (c) of section 1751 of title 18 of*
16 *the United States Code is amended to read as follows: “Who-*
17 *ever attempts to kill or kidnap any individual designated in*
18 *subsection (a) of this section shall be punished (1) by impris-*
19 *onment for any term of years or for life, or (2) by death or*
20 *imprisonment for any term of years or for life, if the conduct*
21 *constitutes an attempt to kill the President of the United*
22 *States and results in bodily injury to the President or other-*
23 *wise comes dangerously close to causing the death of the*
24 *President.”.*

1 ~~SEC. 11.~~ 12. The second to the last paragraph of section
2 1992 of title 18 of the United States Code is amended by
3 changing the comma after the words “imprisonment for life”
4 to a period and deleting the remainder of the section.

5 ~~SEC. 12.~~ 13. Section 2031 of title 18 of the United
6 States Code is amended by deleting the words “death, or”.

7 ~~SEC. 13.~~ 14. Section 2113(e) of title 18 of the United
8 States Code is amended by striking the words “or punished
9 by death if the verdict of the jury shall so direct” and insert-
10 ing in lieu thereof the words “or if death results shall be
11 punished by death or life imprisonment”.

12 ~~SEC. 14.~~ 15. Section 903 of the Federal Aviation Act of
13 1958, as amended (49 U.S.C. 1473), is amended by striking
14 subsection (c).

15 ~~SEC. 15.~~ 16. The analysis of chapter 227 of title 18 of
16 the United States Code is amended by inserting after item
17 3562 the following new item:

“3562A. Sentencing for capital offenses.”.

18 ~~SEC. 16.~~ 17. Section 3566 of title 18 of the United
19 States Code is amended by adding a second paragraph as
20 follows:

21 “In no event shall a sentence of death be carried out
22 upon a pregnant woman.”.

1 SEC. ~~17.~~ 18. Chapter 235 of title 18 of the United
2 States Code is amended by inserting immediately after sec-
3 tion 3741 the following new section:

4 **“§ 3742. Appeal from sentence of death**

5 “In any case in which the sentence of death is imposed
6 under section 3562A of this title, the sentence of death shall
7 be subject to review by the court of appeals upon appeal by
8 the defendant. Notice of appeal must be filed within the time
9 prescribed for appeal of judgment in section 2107 of title 28
10 of the United States Code. An appeal under this section may
11 be consolidated with an appeal of the judgment of conviction.
12 Such review shall have priority over all other cases.

13 “On review of the sentence, the court of appeals shall
14 consider the record, the evidence submitted during the trial,
15 the information submitted during the sentencing hearing, the
16 procedures employed in the sentencing hearing, and the spe-
17 cial findings returned under section 3562A(~~d~~) (*e*) of this title.

18 “~~The court shall affirm the sentence if it determines~~
19 ~~that: (1) the sentence of death was not imposed under the~~
20 ~~influence of passion, prejudice, or any other arbitrary factor;~~
21 ~~and (2) the information supports the special finding of the~~
22 ~~existence of any aggravating factor, or the failure to find any~~
23 ~~mitigating factors as set forth or allowed in section 3562A;~~
24 ~~and (3) the sentence of death is not excessive, considering~~
25 ~~both the crime and the defendant 3562A.~~ In all other cases

1 the court shall remand the case for reconsideration under sec-
2 tion 3562A of this title. The court of appeals shall state in
3 writing the reasons for its disposition of the review of the
4 sentence.”.

5 SEC. ~~18~~. 19. The analysis of chapter 235 of title 18 of
6 the United States Code is amended by adding at the end
7 thereof the following new item:

“3742. Appeal from sentence of death.”.

8 SEC. ~~19~~. 20. The provisions of sections 3562A and
9 3742 of title 18 of the United States Code, as added by this
10 Act, shall not apply to prosecutions under the Uniform Code
11 of Military Justice (10 U.S.C. 801).

Amend the title so as to read: “A bill to establish constitutional procedures for the imposition of the sentence of death, and for other purposes”.