

103^D CONGRESS
1ST SESSION

S. 527

To provide for, and to provide constitutional procedures for the imposition of, the death penalty for causing death through the use of a bomb or other destructive device.

IN THE SENATE OF THE UNITED STATES

MARCH 5 (legislative day, MARCH 3), 1993

Mr. D'AMATO (for himself, Mr. DOLE, Mr. DECONCINI, Mr. DOMENICI, Mr. SMITH, Mr. MCCONNELL, and Mr. MURKOWSKI) introduced the following bill; which was read twice and referred to the Committee on the Judiciary

A BILL

To provide for, and to provide constitutional procedures for the imposition of, the death penalty for causing death through the use of a bomb or other destructive device.

1 *Be it enacted by the Senate and House of Representa-*
2 *tives of the United States of America in Congress assembled,*

3 **SECTION 1. SHORT TITLE.**

4 This Act may be cited as the “Bombing Homicide
5 Death Penalty Act”.

1 **SEC. 2. DEATH PENALTY AUTHORIZATIONS AND PROCE-**
2 **DURES.**

3 Section 924 of title 18, United States Code, is
4 amended by adding at the end the following new sub-
5 section:

6 “(i) CAUSING DEATH THROUGH THE USE OF A
7 BOMB OR OTHER DESTRUCTIVE DEVICE.—

8 “(1) PENALTY.—

9 “(A) IN GENERAL.—Subject to subpara-
10 graph (B), a person who intentionally or with
11 reckless disregard for human life causes the
12 death of a person through the use of a bomb or
13 other destructive device shall be sentenced to
14 life imprisonment without release or to death if,
15 after consideration of the factors listed in para-
16 graph (2) in the course of a hearing held pursu-
17 ant to paragraph (3), it is determined that im-
18 position of a sentence of death is justified.

19 “(B) ____.—No person may be sentenced
20 to the death penalty who was less than 18 years
21 of age at the time of the offense.

22 “(2) FACTORS TO BE CONSIDERED IN DETER-
23 MINING WHETHER A SENTENCE OF DEATH IS JUSTI-
24 FIED.—

25 “(A) MITIGATING FACTORS.—In determin-
26 ing whether a sentence of death is justified for

1 an offense described in paragraph (1), the jury,
2 or if there is no jury, the court, shall consider
3 each of the following mitigating factors and de-
4 termine which, if any exists:

5 “(i) MENTAL CAPACITY.—The defend-
6 ant’s mental capacity to appreciate the
7 wrongfulness of his or her conduct or to
8 conform his or her conduct to the require-
9 ments of law was significantly impaired,
10 regardless of whether the capacity was so
11 impaired as to constitute a defense to the
12 charge.

13 “(ii) DURESS.—The defendant was
14 under unusual and substantial duress, re-
15 gardless of whether the duress was of such
16 a degree as to constitute a defense to the
17 charge.

18 “(iii) PARTICIPATION IN OFFENSE
19 MINOR.—The defendant’s participation in
20 the offense, which was committed by an-
21 other, was relatively minor, although not
22 so minor as to constitute a defense to the
23 charge.

24 The jury, or if there is no jury, the court, shall
25 consider whether any other aspect of the de-

1 defendant’s character or record or any other cir-
2 cumstance of the offense that the defendant
3 may proffer as a mitigating factor exists.

4 “(B) AGGRAVATING FACTORS.—In deter-
5 mining whether a sentence of death is justified
6 for an offense described in paragraph (1), the
7 jury, or if there is no jury, the court, shall con-
8 sider each of the following aggravating factors
9 and determine which, if any, exist—

10 “(i) PREVIOUS CONVICTION OF OF-
11 FENSE FOR WHICH A SENTENCE OF DEATH
12 OR LIFE IMPRISONMENT WAS AUTHOR-
13 IZED.—The defendant has previously been
14 convicted of another Federal or State of-
15 fense resulting in the death of a person,
16 for which a sentence of life imprisonment
17 or death was authorized by statute.

18 “(ii) PREVIOUS CONVICTIONS OF VIO-
19 LENT OFFENSES.—The defendant has pre-
20 viously been convicted of 2 or more Fed-
21 eral or State offenses, each punishable by
22 a term of imprisonment of more than 1
23 year, committed on different occasions, in-
24 volving the infliction or attempted inflic-

1 tion of serious bodily injury or death upon
2 another person.

3 “(iii) PREVIOUS CONVICTIONS OF
4 DRUG OFFENSES.—The defendant has pre-
5 viously been convicted of 2 or more Fed-
6 eral or State offenses, each punishable by
7 a term of imprisonment of more than 1
8 year, committed on different occasions, in-
9 volving the importation, manufacture, or
10 distribution of a controlled substance (as
11 defined in section 102 of the Controlled
12 Substances Act (21 U.S.C. 802)).

13 “(iv) PREVIOUS CONVICTIONS OF VIO-
14 LENT DRUG OFFENSES.—The defendant
15 has previously been convicted of a Federal
16 or State offense, punishable by a term of
17 imprisonment of more than 1 year, involv-
18 ing the infliction of, or attempted infliction
19 of, serious bodily injury or death upon an-
20 other person, and has previously been con-
21 victed of a Federal or State offense,
22 committed on a different occasion and
23 punishable by a term of imprisonment of
24 more than 1 year, involving the importa-
25 tion, manufacture, or distribution of a con-

1 trolled substance (as defined in section 102
2 of the Controlled Substances Act (21
3 U.S.C. 802)).

4 “(v) SERIOUS DRUG FELONY CONVICT-
5 TION.—The defendant has previously been
6 convicted of another Federal or State of-
7 fense involving the manufacture, distribu-
8 tion, importation, or possession of a con-
9 trolled substance (as defined in section 102
10 of the Controlled Substances Act (21
11 U.S.C. 802)) for which a sentence of 5 or
12 more years of imprisonment was author-
13 ized by statute.

14 “(vi) PREVIOUS CONVICTION OF A
15 VIOLENT FELONY INVOLVING A FIRE-
16 ARM.—The defendant has previously been
17 convicted of a Federal or State offense
18 punishable by a term of imprisonment of
19 more than 1 year involving the use or at-
20 tempted use of a firearm to threaten, in-
21 timidate, assault or injure a person.

22 “(3) SPECIAL HEARING TO DETERMINE
23 WHETHER A SENTENCE OF DEATH IS JUSTIFIED.—

24 “(A) NOTICE BY THE GOVERNMENT.—

25 When the Government intends to seek the death

1 penalty for an offense described in paragraph
2 (1), the attorney for the Government, a reason-
3 able time before the trial, or before acceptance
4 by the court of a plea of guilty, or at such time
5 thereafter as the court may permit upon a
6 showing of good cause, shall sign and file with
7 the court, and serve on the defendant, a no-
8 tice—

9 “(i) stating that the Government in
10 the event of conviction will seek the sen-
11 tence of death; and

12 “(ii) setting forth the aggravating fac-
13 tor or factors listed in paragraph (2)(B)
14 and any other aggravating factor not listed
15 in paragraph (2)(B) that the Government,
16 if the defendant is convicted, will seek to
17 prove as the basis for the death penalty.

18 The court may permit the attorney for the Gov-
19 ernment to amend the notice upon a showing of
20 good cause.

21 “(B) HEARING BEFORE A COURT OR
22 JURY.—When the attorney for the Government
23 has filed a notice as required under subpara-
24 graph (A) and the defendant is found guilty of
25 an offense described in paragraph (1), the

1 judge who presided at the trial or before whom
2 the guilty plea was entered, or another judge if
3 that judge is unavailable, shall conduct a sepa-
4 rate sentencing hearing to determine the pun-
5 ishment to be imposed. Prior to such a hearing,
6 no presentence report shall be prepared by the
7 United States Probation Service, notwithstand-
8 ing the provisions of the Federal Rules of
9 Criminal Procedure. The hearing shall be con-
10 ducted—

11 “(i) before the jury that determined
12 the defendant’s guilt;

13 “(ii) before a jury impaneled for the
14 purpose of the hearing if—

15 “(I) the defendant was convicted
16 upon a plea of guilty;

17 “(II) the defendant was convicted
18 after a trial before the court sitting
19 without a jury;

20 “(III) the jury that determined
21 the defendant’s guilt was discharged
22 for good cause; or

23 “(IV) after initial imposition of a
24 sentence under this section, reconsid-

1 eration of the sentence under the sec-
2 tion is necessary; or

3 “(iii) before the court alone, upon mo-
4 tion of the defendant and with the ap-
5 proval of the attorney for the Government.

6 A jury impaneled pursuant to clause (ii) shall
7 consist of 12 members unless, at any time be-
8 fore the conclusion of the hearing, the parties
9 stipulate, with the approval of the court, that it
10 shall consist of a lesser number.

11 “(C) PROOF OF MITIGATING AND AGGRA-
12 VATING FACTORS.—At the hearing, information
13 may be presented concerning—

14 “(i) any matter relating to any miti-
15 gating factor listed in paragraph (2)(A)
16 and any other mitigating factor; and

17 “(ii) any matter relating to any ag-
18 gravating factor listed in paragraph (2)(B)
19 for which notice has been provided under
20 paragraph (3)(A) and (if information is
21 presented relating to such a listed factor)
22 any other aggravating factor for which no-
23 tice has been so provided.

24 Information presented may include the trial
25 transcript and exhibits. Any other information

1 relevant to such mitigating or aggravating fac-
2 tors may be presented by the Government or
3 the defendant, regardless of its admissibility
4 under the rules governing admission of evidence
5 at criminal trials, except that information may
6 be excluded if its probative value is outweighed
7 by the danger of creating unfair prejudice, con-
8 fusing the issues, or misleading the jury. The
9 attorney for the Government and the attorney
10 for the defendant shall be permitted to rebut
11 any information received at the hearing, and
12 shall be given fair opportunity to present argu-
13 ment as to the adequacy of the information to
14 establish the existence of any aggravating or
15 mitigating factor and as to the appropriateness
16 in that case of imposing a sentence of death.
17 The attorney for the Government shall open the
18 argument. The defendant shall be permitted to
19 reply. The Government shall then be permitted
20 to reply in rebuttal. The burden of establishing
21 the existence of an aggravating factor is on the
22 Government, and is not satisfied unless the ex-
23 istence of such a factor is established beyond a
24 reasonable doubt. The burden of establishing
25 the existence of any mitigating factor is on the

1 defendant, and is not satisfied unless the exist-
2 ence of such a factor is established by a prepon-
3 derance of the evidence.

4 “(D) RETURN OF SPECIAL FINDINGS.—
5 The jury, or if there is no jury, the court, shall
6 consider all the information received during the
7 hearing. It shall return special findings identify-
8 ing any aggravating factor or factors set forth
9 in paragraph (2)(B) found to exist and any
10 other aggravating factor for which notice has
11 been provided under paragraph (3)(A) found to
12 exist. A finding with respect to a mitigating
13 factor may be made by 1 or more members of
14 the jury, and any member of the jury who finds
15 the existence of a mitigating factor may con-
16 sider such factor established for purposes of
17 this section regardless of the number of jurors
18 who concur that the factor has been estab-
19 lished. A finding with respect to any aggravat-
20 ing factor must be unanimous. If no aggravat-
21 ing factor listed in paragraph (2)(B) is found to
22 exist, the court shall impose a sentence other
23 than death authorized by law.

24 “(E) RETURN OF A FINDING CONCERNING
25 A SENTENCE OF DEATH.—If an aggravating

1 factor required to be considered under para-
2 graph (2)(B) is found to exist, the jury, or if
3 there is no jury, the court, shall consider wheth-
4 er the aggravating factor or factors found to
5 exist outweigh any mitigating factor or factors.
6 The jury, or if there is no jury, the court, shall
7 recommend a sentence of death if it unani-
8 mously finds at least 1 aggravating factor and
9 no mitigating factor or if it finds 1 or more ag-
10 gravating factors that outweigh any mitigating
11 factors. In any other case, it shall not rec-
12 ommend a sentence of death. The jury shall be
13 instructed that it must avoid any influence of
14 sympathy, sentiment, passion, prejudice, or
15 other arbitrary factors in its decision, and
16 should make such a recommendation as the in-
17 formation warrants.

18 “(F) SPECIAL PRECAUTION TO ENSURE
19 AGAINST DISCRIMINATION.—In a hearing held
20 before a jury, the court, prior to the return of
21 a finding under subparagraph (E), shall in-
22 struct the jury that, in considering whether a
23 sentence of death is justified, it shall not con-
24 sider the race, color, religious beliefs, national
25 origin, or sex of the defendant or of any victim

1 and that the jury is not to recommend a sen-
2 tence of death unless it has concluded that it
3 would recommend a sentence of death for the
4 crime in question no matter what the race,
5 color, religious beliefs, national origin, or sex of
6 the defendant or of any victim may be. The
7 jury, upon return of a finding under subpara-
8 graph (E), shall also return to the court a cer-
9 tificate, signed by each juror, that consideration
10 of the race, color, religious beliefs, national ori-
11 gin, or sex of the defendant or any victim was
12 not involved in reaching his or her individual
13 decision and that the individual juror would
14 have made the same recommendation regarding
15 a sentence for the crime in question no matter
16 what the race, color, religious beliefs, national
17 origin, or sex of the defendant or any victim
18 may be.

19 “(4) IMPOSITION OF A SENTENCE OF DEATH.—
20 Upon the recommendation under paragraph (3)(E)
21 that a sentence of death be imposed, the court shall
22 sentence the defendant to death. Otherwise the court
23 shall impose a sentence, other than death, author-
24 ized by law.

25 “(5) REVIEW OF A SENTENCE OF DEATH.—

1 “(A) APPEAL.—In a case in which a sen-
2 tence of death is imposed, the sentence shall be
3 subject to review by the court of appeals upon
4 appeal by the defendant. Notice of appeal of the
5 sentence shall be filed within the time specified
6 for the filing of a notice of appeal of the judg-
7 ment of conviction. An appeal of the sentence
8 under this subsection may be consolidated with
9 an appeal of the judgment of conviction and
10 shall have priority over all other cases.

11 “(B) REVIEW.—The court of appeals shall
12 review the entire record in the case, including—

13 “(i) the evidence submitted during the
14 trial;

15 “(ii) the information submitted during
16 the sentencing hearing;

17 “(iii) the procedures employed in the
18 sentencing hearing; and

19 “(iv) the special findings returned
20 under paragraph (3)(D).

21 “(C) DECISION AND DISPOSITION.—

22 “(i) If the court of appeals determines
23 that—

24 “(I) the sentence of death was
25 not imposed under the influence of

1 passion, prejudice, or any other arbitrary factor;
2

3 “(II) the evidence and information support the special findings of
4 the existence of an aggravating factor
5 or factors; and
6

7 “(III) the proceedings did not involve any other prejudicial error requiring reversal of the sentence that
8 was properly preserved for and raised
9 on appeal,
10

11 the court it shall affirm the sentence.
12

13 “(ii) In any other case, the court of appeals shall remand the case for reconsideration or for imposition of another authorized sentence as appropriate.
14
15

16 “(iii) The court of appeals shall state in writing the reasons for its disposition of
17 an appeal of sentence of death under this subsection.
18
19

20 “(6) IMPLEMENTATION OF SENTENCE OF
21 DEATH.—
22

23 “(A) PROCEDURE.— A person who has
24 been sentenced to death pursuant to this subsection shall be committed to the custody of the
25

1 Attorney General until exhaustion of the proce-
2 dures for appeal of the judgment of conviction
3 and for review of the sentence. When the sen-
4 tence is to be implemented, the Attorney Gen-
5 eral shall release the person sentenced to death
6 to the custody of a United States marshal, who
7 shall supervise implementation of the sentence
8 in the manner prescribed by the law of the
9 State in which the sentence is imposed. If the
10 law of that State does not provide for imple-
11 mentation of a sentence of death, the court
12 shall designate another State, the law of which
13 does so provide, and the sentence shall be im-
14 plemented in the manner prescribed by such
15 law.

16 “(B) LIMITATION.—A sentence of death
17 shall not be carried out upon a person who
18 lacks the mental capacity to understand the
19 death penalty and why it was imposed on that
20 person, or upon a woman while she is pregnant.

21 “(C) PARTICIPATION BY EMPLOYEES.—No
22 employee of any State department of correc-
23 tions or the Federal Bureau of Prisons, or the
24 United States Marshals Service, and no em-
25 ployee providing services to that department,

1 bureau, or service under contract shall be re-
2 quired, as a condition of that employment or
3 contractual obligation, to be in attendance at or
4 to participate in any execution carried out
5 under this subsection if such participation is
6 contrary to the moral or religious convictions of
7 the employee. For purposes of this subsection,
8 the term ‘participate in any execution’ includes
9 personal preparation of the condemned person
10 and the apparatus used for the execution, and
11 supervision of the activities of other personnel
12 in carrying out such activities.

13 “(7) USE OF STATE FACILITIES.—A United
14 States marshal charged with supervising the imple-
15 mentation of a sentence of death may use appro-
16 priate State or local facilities for the purpose, may
17 use the services of an appropriate State or local offi-
18 cial or of a person such as an official employed for
19 the purpose, and shall pay the costs thereof in a
20 amount approved by the Attorney General.

21 “(8) APPOINTMENT OF COUNSEL.—

22 “(A) REPRESENTATION OF INDIGENT DE-
23 FENDANTS.—Notwithstanding any other law,
24 this paragraph shall govern the appointment of
25 counsel for any defendant against whom a sen-

1 tence of death is sought or on whom a sentence
2 of death has been imposed for an offense de-
3 scribed in paragraph (1) when the defendant is
4 or becomes financially unable to obtain ade-
5 quate representation. Such a defendant shall be
6 entitled to appointment of counsel from the
7 commencement of trial proceedings until 1 of
8 the conditions specified in paragraph (9)(B)
9 has occurred.

10 “(B) REPRESENTATION BEFORE FINALITY
11 OF JUDGMENT.—A defendant within the scope
12 of this paragraph shall have counsel appointed
13 for trial representation as provided in section
14 3005. At least 1 counsel so appointed shall con-
15 tinue to represent the defendant until the con-
16 clusion of direct review of the judgment, un-
17 less replaced by the court with other qualified
18 counsel.

19 “(C) REPRESENTATION AFTER FINALITY
20 OF JUDGMENT.—When a judgment imposing a
21 sentence of death has become final through af-
22 firmance by the Supreme Court on direct re-
23 view, denial of certiorari by the Supreme Court
24 on direct review, or expiration of the time for
25 seeking direct review in the court of appeals or

1 the Supreme Court, the Government shall
2 promptly notify the district court that imposed
3 the sentence. Within 10 days after receipt of
4 such a notice, the district court shall proceed to
5 make a determination whether the defendant is
6 eligible under this paragraph for appointment
7 of counsel for subsequent proceedings. On the
8 basis of the determination, the court shall issue
9 an order—

10 “(i) appointing 1 or more counsel to
11 represent the defendant upon a finding
12 that the defendant is financially unable to
13 obtain adequate representation and wishes
14 to have counsel appointed or is unable
15 competently to decide whether to accept or
16 reject appointment of counsel;

17 “(ii) finding, after a hearing if nec-
18 essary, that the defendant rejected ap-
19 pointment of counsel and made the deci-
20 sion with an understanding of its legal con-
21 sequences; or

22 “(iii) denying the appointment of
23 counsel upon a finding that the defendant
24 is financially able to obtain adequate rep-
25 resentation. Counsel appointed pursuant to

1 this paragraph shall be different from the
2 counsel who represented the defendant at
3 trial and on direct review unless the de-
4 fendant and counsel request a continuation
5 or renewal of the earlier representation.

6 “(D) STANDARDS FOR COMPETENCE OF
7 COUNSEL.—In relation to a defendant who is
8 entitled to appointment of counsel under this
9 subsection, at least 1 counsel appointed for trial
10 representation shall have been admitted to the
11 bar for at least 5 years and have at least 3
12 years of experience in the trial of felony cases
13 in the Federal district courts. If new counsel is
14 appointed after judgment, at least 1 counsel so
15 appointed shall have been admitted to the bar
16 for at least 5 years and have at least 3 years
17 of experience in the litigation of felony cases in
18 the Federal courts of appeals or the Supreme
19 Court. The court, for good cause, may appoint
20 counsel who does not meet these standards, but
21 whose background, knowledge, or experience
22 would otherwise enable him or her to properly
23 represent the defendant, with due consideration
24 of the seriousness of the penalty and the nature
25 of the litigation.

1 “(E) APPLICABILITY OF CRIMINAL JUS-
2 TICE ACT.—Except as otherwise provided in
3 this paragraph, section 3006A shall apply to
4 appointments under this paragraph.

5 “(F) CLAIMS OF INEFFECTIVENESS OF
6 COUNSEL.—The ineffectiveness or incompetence
7 of counsel during proceedings on a motion
8 under section 2255 of title 28 in a capital case
9 shall not be a ground for relief from the judg-
10 ment or sentence in any proceeding. The limita-
11 tion stated in the preceding sentence shall not
12 preclude the appointment of different counsel at
13 any stage of the proceedings.

14 “(9) COLLATERAL ATTACK ON JUDGMENT IM-
15 POSING SENTENCE OF DEATH.—

16 “(A) TIME FOR MAKING SECTION 2255 MO-
17 TION.—In any case in which a sentence of
18 death has been imposed for an offense against
19 the United States and the judgment has become
20 final under section 3598(a)(3), a motion in the
21 case under section 2255 of title 28 shall be filed
22 within 90 days after the issuance of the order
23 relating to appointment of counsel under sec-
24 tion 3598(a)(3). The court in which the motion
25 is filed for good cause may extend the time for

1 filing for a period not exceeding 60 days. A mo-
2 tion under this subparagraph shall have priority
3 over all noncapital matters in the district court,
4 and in the court of appeals on review of the dis-
5 trict court's decision.

6 “(B) STAY OF EXECUTION.—The execution
7 of a sentence of death shall be stayed in the
8 course of direct review of the judgment and
9 during the litigation of an initial motion in the
10 case under section 2255 of title 28. The stay
11 shall run continuously following imposition of
12 the sentence, and shall expire if—

13 “(i) the defendant fails to file a mo-
14 tion under section 2255 of title 28 within
15 the time specified in subparagraph (A) or
16 fails to make a timely application for court
17 of appeals review following the denial of
18 such a motion by a district court;

19 “(ii) upon completion of district court
20 and court of appeals review under section
21 2255 of title 28, the motion under that
22 section is denied and—

23 “(I) the time for filing a petition
24 for certiorari has expired and no peti-
25 tion has been filed;

1 “(II) a timely petition of certio-
2 rari was filed and the Supreme Court
3 denied the petition; or

4 “(III) a timely petition for certio-
5 rari was filed and upon consideration
6 of the case,

7 the Supreme Court disposed of it in a
8 manner that left the capital sentence un-
9 disturbed; or

10 “(iii) before a district court, in the
11 presence of counsel and after having been
12 advised of the consequences of his decision,
13 the defendant waives the right to file a mo-
14 tion under section 2255 of title 28 .

15 “(C) FINALITY OF THE DECISION ON RE-
16 VIEW.—If 1 of the conditions specified in sub-
17 paragraph (B) has occurred, no court there-
18 after shall have the authority to enter a stay of
19 execution or grant relief in the case unless—

20 “(i) the basis for the stay and request
21 for relief is a claim not presented in earlier
22 proceedings;

23 “(ii) the failure to raise the claim is—

1 “(I) the result of governmental
2 action in violation of the Constitution
3 or laws of the United States;

4 “(II) the result of the Supreme
5 Court recognition of a new Federal
6 right that is retroactively applicable;
7 or

8 “(III) based on a factual predi-
9 cate that could not have been discov-
10 ered through the exercise of reason-
11 able diligence in time to present the
12 claim in earlier proceedings; and

13 “(iii) the facts underlying the claim
14 would be sufficient, if proven, to under-
15 mine the court’s confidence in the deter-
16 mination of guilt on the offense or offenses
17 for which the death penalty was imposed.

18 “(10) JURISDICTION.—There is Federal juris-
19 diction over an offense under this subsection if—

20 “(A) the conduct of the offender occurred
21 in the course of an offense against the United
22 States; or

23 “(B) a destructive device or part thereof
24 involved in the offense has moved at any time
25 in interstate or foreign commerce.”.



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