

103^D CONGRESS
2^D SESSION

H. R. 4035

To establish constitutional procedures for the imposition of the death penalty.

IN THE HOUSE OF REPRESENTATIVES

MARCH 15, 1994

Mr. EDWARDS of California (for himself and Mr. SCHUMER) introduced the following bill; which was referred to the Committee on the Judiciary

A BILL

To establish constitutional procedures for the imposition of the death penalty.

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. CONSTITUTIONAL PROCEDURES FOR THE IM-**
4 **POSITION OF THE SENTENCE OF DEATH.**

5 Part II of title 18 of the United States Code is
6 amended by adding the following new chapter after chap-
7 ter 227:

8 **“CHAPTER 228—DEATH SENTENCE**

“Sec.

“3591. Sentence of death.

“3592. Mitigating and aggravating factors to be considered in determining whether a sentence of death is justified.

“3593. Special hearing to determine whether a sentence of death is justified.

“3594. Imposition of a sentence of death.

“3595. Review of a sentence of death.

“3596. Implementation of a sentence of death.

“3597. Use of State facilities.

“3598. Special provisions for Indian country.

1 **“§ 3591. Sentence of death**

2 “A defendant who has been found guilty of—

3 “(1) an offense described in section 794 or sec-
4 tion 2381 of this title; or

5 “(2) any other offense for which a sentence of
6 death is provided, if the defendant, as determined
7 beyond a reasonable doubt at the hearing under sec-
8 tion 3593—

9 “(A) intentionally killed the victim;

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

12 “(C) intentionally participated in an act,
13 contemplating that the life of a person would be
14 taken or intending that lethal force would be
15 used in connection with a person, other than
16 one of the participants in the offense, and the
17 victim died as a direct result of the act; or

18 “(D) intentionally and specifically engaged
19 in an act of violence, knowing that the act cre-
20 ated a grave risk of death to a person, other
21 than one of the participants in the offense, such
22 that participation in the act constituted a reck-

1 less disregard for human life and the victim
2 died as a direct result of the act,
3 shall be sentenced to death if, after consideration of the
4 factors set forth in section 3592 in the course of a hearing
5 held pursuant to section 3593, it is determined that im-
6 position of a sentence of death is justified, except that no
7 person may be sentenced to death who was less than 18
8 years of age at the time of the offense.

9 **“§ 3592. Mitigating and aggravating factors to be con-**
10 **sidered in determining whether a sen-**
11 **tence of death is justified**

12 “(a) MITIGATING FACTORS.—In determining wheth-
13 er a sentence of death is to be imposed on a defendant,
14 the finder of fact shall consider any mitigating factor, in-
15 cluding the following:

16 “(1) IMPAIRED CAPACITY.—The defendant’s ca-
17 pacity to appreciate the wrongfulness of the defend-
18 ant’s conduct or to conform conduct to the require-
19 ments of law was significantly impaired, regardless
20 of whether the capacity was so impaired as to con-
21 stitute a defense to the charge.

22 “(2) DURESS.—The defendant was under un-
23 usual and substantial duress, regardless of whether
24 the duress was of such a degree as to constitute a
25 defense to the charge.

1 “(3) MINOR PARTICIPATION.—The defendant is
2 punishable as a principal (as defined in section 2 of
3 title 18 of the United States Code) in the offense,
4 which was committed by another, but the defend-
5 ant’s participation was relatively minor, regardless
6 of whether the participation was so minor as to con-
7 stitute a defense to the charge.

8 “(4) EQUALLY CULPABLE DEFENDANTS.—An-
9 other defendant or defendants, equally culpable in
10 the crime, will not be punished by death.

11 “(5) NO PRIOR CRIMINAL RECORD.—The de-
12 fendant did not have a significant prior history of
13 other criminal conduct.

14 “(6) DISTURBANCE.—The defendant committed
15 the offense under severe mental or emotional dis-
16 turbance.

17 “(7) VICTIM’S CONSENT.—The victim consented
18 to the criminal conduct that resulted in the victim’s
19 death.

20 “(8) OTHER FACTORS.—Other factors in the
21 defendant’s background, record, or character or any
22 other circumstance of the offense that mitigate
23 against imposition of the death sentence.

24 “(b) AGGRAVATING FACTORS FOR ESPIONAGE AND
25 TREASON.—In determining whether a sentence of death

1 is justified for an offense described in section 3591(1), the
2 jury, or if there is no jury, the court, shall consider each
3 of the following aggravating factors for which notice has
4 been given and determine which, if any, exist:

5 “(1) PRIOR ESPIONAGE OR TREASON OF-
6 FENSE.—The defendant has previously been con-
7 victed of another offense involving espionage or trea-
8 son for which a sentence of either life imprisonment
9 or death was authorized by law.

10 “(2) GRAVE RISK TO NATIONAL SECURITY.—In
11 the commission of the offense the defendant know-
12 ingly created a grave risk of substantial danger to
13 the national security.

14 “(3) GRAVE RISK OF DEATH.—In the commis-
15 sion of the offense the defendant knowingly created
16 a grave risk of death to another person.

17 The jury, or if there is no jury, the court, may consider
18 whether any other aggravating factor for which notice has
19 been given exists.

20 “(c) AGGRAVATING FACTORS FOR HOMICIDE.—In
21 determining whether a sentence of death is justified for
22 an offense described in section 3591(2), the jury, or if
23 there is no jury, the court, shall consider each of the fol-
24 lowing aggravating factors for which notice has been given
25 and determine which, if any, exist:

1 “(1) DEATH DURING COMMISSION OF ANOTHER
2 CRIME.—The death, or injury resulting in death, oc-
3 curred during the commission or attempted commis-
4 sion of, or during the immediate flight from the
5 commission of, an offense under section 32 (destruc-
6 tion of aircraft or aircraft facilities), section 33 (de-
7 struction of motor vehicles or motor vehicle facili-
8 ties), section 36 (violence at international airports),
9 section 351 (violence against Members of Congress,
10 Cabinet officers, or Supreme Court Justices), an of-
11 fense under section 751 (prisoners in custody of in-
12 stitution or officer), section 794 (gathering or deliv-
13 ering defense information to aid foreign govern-
14 ment), section 844(d) (transportation of explosives
15 in interstate commerce for certain purposes), section
16 844(f) (destruction of Government property by ex-
17 plosives), section 1118 (prisoners serving life term),
18 section 1201 (kidnapping), section 844(i) (destruc-
19 tion of property affecting interstate commerce by ex-
20 plosives), section 1116 (killing or attempted killing
21 of diplomats), section 1203 (hostage taking), section
22 1992 (wrecking trains), section 2280 (maritime vio-
23 lence), section 2281 (maritime platform violence),
24 section 2332 (terrorist acts abroad against United
25 States nationals), section 2339 (use of weapons of

1 mass destruction), or section 2381 (treason) of this
2 title, or section 902 (i) or (n) of the Federal Avia-
3 tion Act of 1958 (49 U.S.C. 1472 (i) or (n)) (air-
4 craft piracy).

5 “(2) PREVIOUS CONVICTION OF VIOLENT FEL-
6 ONY INVOLVING FIREARM.—For any offense, other
7 than an offense for which a sentence of death is
8 sought on the basis of section 924(c) of this title, as
9 amended by this Act, the defendant has previously
10 been convicted of a Federal or State offense punish-
11 able by a term of imprisonment of more than one
12 year, involving the use or attempted or threatened
13 use of a firearm, as defined in section 921 of this
14 title, against another person.

15 “(3) PREVIOUS CONVICTION OF OFFENSE FOR
16 WHICH A SENTENCE OF DEATH OR LIFE IMPRISON-
17 MENT WAS AUTHORIZED.—The defendant has pre-
18 viously been convicted of another Federal or State
19 offense resulting in the death of a person, for which
20 a sentence of life imprisonment or a sentence of
21 death was authorized by statute.

22 “(4) PREVIOUS CONVICTION OF OTHER SERI-
23 OUS OFFENSES.—The defendant has previously been
24 convicted of two or more Federal or State offenses,
25 punishable by a term of imprisonment of more than

1 one year, committed on different occasions, involving
2 the infliction of, or attempted infliction of, serious
3 bodily injury or death upon another person.

4 “(5) GRAVE RISK OF DEATH TO ADDITIONAL
5 PERSONS.—The defendant, in the commission of the
6 offense, or in escaping apprehension for the violation
7 of the offense, knowingly created a grave risk of
8 death to one or more persons in addition to the vic-
9 tim of the offense.

10 “(6) HEINOUS, CRUEL, OR DEPRAVED MANNER
11 OF COMMITTING OFFENSE.—The defendant commit-
12 ted the offense in an especially heinous, cruel, or de-
13 praved manner in that it involved torture or serious
14 physical abuse to the victim.

15 “(7) PROCUREMENT OF OFFENSE BY PAY-
16 MENT.—The defendant procured the commission of
17 the offense by payment, or promise of payment, of
18 anything of pecuniary value.

19 “(8) PECUNIARY GAIN.—The defendant com-
20 mitted the offense as consideration for the receipt,
21 or in the expectation of the receipt, of anything of
22 pecuniary value.

23 “(9) SUBSTANTIAL PLANNING AND
24 PREMEDITATION.—The defendant committed the of-
25 fense after substantial planning and premeditation

1 to cause the death of a person or commit an act of
2 terrorism.

3 “(10) CONVICTION FOR TWO FELONY DRUG OF-
4 FENSES.—The defendant has previously been con-
5 victed of two or more State or Federal offenses pun-
6 ishable by a term of imprisonment of more than one
7 year, committed on different occasions, involving the
8 distribution of a controlled substance.

9 “(11) VULNERABILITY OF VICTIM.—The victim
10 was particularly vulnerable due to old age, youth, or
11 infirmity.

12 “(12) CONVICTION FOR SERIOUS FEDERAL
13 DRUG OFFENSES.—The defendant had previously
14 been convicted of violating title II or title III of the
15 Controlled Substances Act for which a sentence of 5
16 or more years may be imposed or had previously
17 been convicted of engaging in a continuing criminal
18 enterprise.

19 “(13) CONTINUING CRIMINAL ENTERPRISE IN-
20 VOLVING DRUG SALES TO MINORS.—The defendant
21 committed the offense in the course of engaging in
22 a continuing criminal enterprise in violation of sec-
23 tion 408(c) of the Controlled Substances Act and
24 that violation involved the distribution of drugs to

1 persons under the age of 21 in violation of section
2 418 of such Act.

3 “(14) HIGH PUBLIC OFFICIALS.—The defend-
4 ant committed the offense against—

5 “(A) the President of the United States,
6 the President-elect, the Vice President, the
7 Vice-President-elect, the Vice-President-des-
8 ignate, or, if there is no Vice President, the of-
9 ficer next in order of succession to the office of
10 the President of the United States, or any per-
11 son who is acting as President under the Con-
12 stitution and laws of the United States;

13 “(B) a Chief of State, head of government,
14 or the political equivalent, of a foreign nation;

15 “(C) a foreign official listed in section
16 1116(b)(3)(A) of this title, if the official is in
17 the United States on official business; or

18 “(D) a Federal public servant who is a
19 judge, a law enforcement officer, or an em-
20 ployee of a United States penal or correctional
21 institution—

22 “(i) while he or she is engaged in the
23 performance of his or her official duties;

24 “(ii) because of the performance of his
25 or her official duties; or

1 “(iii) because of his or her status as
2 a public servant.

3 For purposes of this subparagraph, a ‘law en-
4 forcement officer’ is a public servant authorized
5 by law or by a Government agency or Congress
6 to conduct or engage in the prevention, inves-
7 tigation, or prosecution or adjudication of an
8 offense, and includes those engaged in correc-
9 tions, parole, or probation functions.

10 “(15) PRIOR CONVICTION OF SEXUAL ASSAULT
11 OR CHILD MOLESTATION.—In the case of an offense
12 under chapter 109A (sexual abuse) or chapter 110
13 (sexual abuse of children), the defendant has pre-
14 viously been convicted of a crime of sexual assault
15 or crime of child molestation.

16 The jury, or if there is no jury, the court, may consider
17 whether any other aggravating factor for which notice has
18 been given exists.

19 **“§ 3593. Special hearing to determine whether a sen-
20 tence of death is justified**

21 “(a) NOTICE BY THE GOVERNMENT.—If, in a case
22 involving an offense described in section 3591, the attor-
23 ney for the government believes that the circumstances of
24 the offense are such that a sentence of death is justified
25 under this chapter, the attorney shall, a reasonable time

1 before the trial or before acceptance by the court of a plea
2 of guilty, sign and file with the court, and serve on the
3 defendant, a notice—

4 “(1) stating that the government believes that
5 the circumstances of the offense are such that, if the
6 defendant is convicted, a sentence of death is justi-
7 fied under this chapter and that the government will
8 seek the sentence of death; and

9 “(2) setting forth the aggravating factor or fac-
10 tors that the government, if the defendant is con-
11 victed, proposes to prove as justifying a sentence of
12 death.

13 The factors for which notice is provided under this sub-
14 section may include factors concerning the effect of the
15 offense on the victim and the victim’s family, and may
16 include oral testimony, a victim impact statement that
17 identifies the victim of the offense and the extent and
18 scope of the injury and loss suffered by the victim and
19 the victim’s family, and any other relevant information.

20 The court may permit the notice to include any aggravat-
21 ing factor that is not an element of the underlying offense.
22 The court may also permit the attorney for the govern-
23 ment to amend the notice upon a showing of good cause.

24 “(b) HEARING BEFORE A COURT OR JURY.—If the
25 attorney for the government has filed a notice as required

1 under subsection (a) and the defendant is found guilty of
2 or pleads guilty to an offense described in section 3591,
3 the judge who presided at the trial or before whom the
4 guilty plea was entered, or another judge if that judge is
5 unavailable, shall conduct a separate sentencing hearing
6 to determine the punishment to be imposed. The hearing
7 shall be conducted—

8 “(1) before the jury that determined the de-
9 fendant’s guilt;

10 “(2) before a jury impaneled for the purpose of
11 the hearing if—

12 “(A) the defendant was convicted upon a
13 plea of guilty;

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

16 “(C) the jury that determined the defend-
17 ant’s guilt was discharged for good cause; or

18 “(D) after initial imposition of a sentence
19 under this section, reconsideration of the sen-
20 tence under this section is necessary; or

21 “(3) before the court alone, upon the motion of
22 the defendant and with the approval of the attorney
23 for the government.

24 A jury impaneled pursuant to paragraph (2) shall consist
25 of 12 members, unless, at any time before the conclusion

1 of the hearing, the parties stipulate, with the approval of
2 the court, that it shall consist of a lesser number.

3 “(c) PROOF OF MITIGATING AND AGGRAVATING FAC-
4 TORS.—Notwithstanding rule 32(c) of the Federal Rules
5 of Criminal Procedure, when a defendant is found guilty
6 or pleads guilty to an offense under section 3591, no
7 presentence report shall be prepared. At the sentencing
8 hearing, information may be presented as to any matter
9 relevant to the sentence, including any mitigating or ag-
10 gravating factor permitted or required to be considered
11 under section 3592. Information presented may include
12 the trial transcript and exhibits if the hearing is held be-
13 fore a jury or judge not present during the trial. The de-
14 fendant may present any information relevant to a miti-
15 gating factor. The government may present any informa-
16 tion relevant to an aggravating factor for which notice has
17 been provided under subsection (a). The government and
18 the defendant shall be permitted to rebut any information
19 received at the hearing, and shall be given fair opportunity
20 to present argument as to the adequacy of the information
21 to establish the existence of any aggravating or mitigating
22 factor, and as to the appropriateness in the case of impos-
23 ing a sentence of death. The government shall open the
24 argument. The defendant shall be permitted to reply. The
25 government shall then be permitted to reply in rebuttal.

1 The burden of establishing the existence of any aggravat-
2 ing factor is on the government, and is not satisfied unless
3 the existence of such a factor is established beyond a rea-
4 sonable doubt. The burden of establishing the existence
5 of any mitigating factor is on the defendant, and is not
6 satisfied unless the existence of such a factor is established
7 by a preponderance of the information.

8 “(d) RETURN OF SPECIAL FINDINGS.—The jury, or
9 if there is no jury, the court, shall consider all the informa-
10 tion received during the hearing. It shall return special
11 findings identifying any aggravating factor or factors set
12 forth in section 3592 found to exist and any other aggra-
13 vating factor for which notice has been provided under
14 subsection (a) found to exist. A finding with respect to
15 a mitigating factor may be made by 1 or more members
16 of the jury, and any member of the jury who finds the
17 existence of a mitigating factor may consider such factor
18 established for purposes of this section regardless of the
19 number of jurors who concur that the factor has been es-
20 tablished. A finding with respect to any aggravating factor
21 must be unanimous. If no aggravating factor set forth in
22 section 3592 is found to exist, the court shall impose a
23 sentence other than death authorized by law.

24 “(e) RETURN OF A FINDING CONCERNING A SEN-
25 TENCE OF DEATH.—If, in the case of—

1 “(1) an offense described in section 3591(1), an
2 aggravating factor required to be considered under
3 section 3592(b) is found to exist; or

4 “(2) an offense described in section 3591(2), an
5 aggravating factor required to be considered under
6 section 3592(c) is found to exist,

7 the jury, or if there is no jury, the court, shall consider
8 whether all the aggravating factor or factors found to exist
9 sufficiently outweigh all the mitigating factor or factors
10 found to exist to justify a sentence of death, or, in the
11 absence of a mitigating factor, whether the aggravating
12 factor or factors alone are sufficient to justify a sentence
13 of death. Based upon this consideration, the jury by unan-
14 imous vote, or if there is no jury, the court, shall rec-
15 ommend whether the defendant should be sentenced to
16 death, to life imprisonment without possibility of release,
17 or to some other lesser sentence. The jury or the court,
18 if there is no jury, regardless of its findings with respect
19 to aggravating and mitigating factors, is never required
20 to impose a death sentence and the jury shall be so in-
21 structed.

22 “(f) SPECIAL PRECAUTION TO ENSURE AGAINST
23 DISCRIMINATION.—In a hearing held before a jury, the
24 court, prior to the return of a finding under subsection
25 (e), shall instruct the jury that, in considering whether

1 a sentence of death is justified, it shall not consider the
2 race, color, religious beliefs, national origin, or sex of the
3 defendant or of any victim and that the jury is not to rec-
4 ommend a sentence of death unless it has concluded that
5 it would recommend a sentence of death for the crime in
6 question no matter what the race, color, religious beliefs,
7 national origin, or sex of the defendant or of any victim
8 may be. The jury, upon return of a finding under sub-
9 section (e), shall also return to the court a certificate,
10 signed by each juror, that consideration of the race, color,
11 religious beliefs, national origin, or sex of the defendant
12 or any victim was not involved in reaching his or her indi-
13 vidual decision and that the individual juror would have
14 made the same recommendation regarding a sentence for
15 the crime in question no matter what the race, color, reli-
16 gious beliefs, national origin, or sex of the defendant or
17 any victim may be.

18 **“§ 3594. Imposition of a sentence of death**

19 “Upon a recommendation under section 3593(e) that
20 the defendant should be sentenced to death or life impris-
21 onment without possibility of release, the court shall sen-
22 tence the defendant accordingly. Otherwise, the court shall
23 impose any lesser sentence that is authorized by law. Not-
24 withstanding any other provision of law, if the maximum
25 term of imprisonment for the offense is life imprisonment,

1 the court may impose a sentence of life imprisonment
2 without possibility of release.

3 **“§ 3595. Review of a sentence of death**

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

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

13 “(1) the evidence submitted during the trial;

14 “(2) the information submitted during the sentencing
15 hearing;

16 “(3) the procedures employed in the sentencing
17 hearing; and

18 “(4) the special findings returned under section
19 3593(d).

20 “(c) DECISION AND DISPOSITION.—

21 “(1) The court of appeals shall address all substantive
22 and procedural issues raised on the appeal of a sentence of
23 death, and shall consider whether the sentence of death was
24 imposed under the influence of passion, prejudice, or any other
25 arbitrary

1 factor and whether the evidence supports the special
2 finding of the existence of an aggravating factor re-
3 quired to be considered under section 3592.

4 “(2) Whenever the court of appeals finds
5 that—

6 “(A) the sentence of death was imposed
7 under the influence of passion, prejudice, or any
8 other arbitrary factor;

9 “(B) the admissible evidence and informa-
10 tion adduced does not support the special find-
11 ing of the existence of the required aggravating
12 factor; or

13 “(C) the proceedings involved any other
14 legal error requiring reversal of the sentence
15 that was properly preserved for appeal under
16 the rules of criminal procedure,

17 the court shall remand the case for reconsideration
18 under section 3593 or imposition of a sentence other
19 than death.

20 “(3) The court of appeals shall state in writing
21 the reasons for its disposition of an appeal of a sen-
22 tence of death under this section.

23 **“§ 3596. Implementation of a sentence of death**

24 “(a) IN GENERAL.—A person who has been sen-
25 tenced to death pursuant to the provisions of this chapter

1 shall be committed to the custody of the Attorney General
2 until exhaustion of the procedures for appeal of the judg-
3 ment of conviction and for review of the sentence. When
4 the sentence is to be implemented, the Attorney General
5 shall release the person sentenced to death to the custody
6 of a United States marshal, who shall supervise implemen-
7 tation of the sentence in the manner prescribed by the law
8 of the State in which the sentence is imposed. If the law
9 of such State does not provide for implementation of a
10 sentence of death, the court shall designate another State,
11 the law of which does provide for the implementation of
12 a sentence of death, and the sentence shall be implemented
13 in the latter State in the manner prescribed by such law.

14 “(b) PREGNANT WOMAN.—A sentence of death shall
15 not be carried out upon a woman while she is pregnant.

16 “(c) MENTAL CAPACITY.—A sentence of death shall
17 not be carried out upon a person who is mentally retarded.

18 A sentence of death shall not be carried out upon a person
19 who, as a result of mental disability, lacks the mental ca-
20 pacity to understand the death penalty and why it was
21 imposed on that person.

22 **“§ 3597. Use of State facilities**

23 “(a) IN GENERAL.—A United States marshal
24 charged with supervising the implementation of a sentence
25 of death may use appropriate State or local facilities for

1 the purpose, may use the services of an appropriate State
2 or local official or of a person such an official employs
3 for the purpose, and shall pay the costs thereof in an
4 amount approved by the Attorney General.

5 “(b) EXCUSE OF AN EMPLOYEE ON MORAL OR RELI-
6 GIOUS GROUNDS.—No employee of any State department
7 of corrections, the United States Department of Justice,
8 the Federal Bureau of Prisons, or the United States Mar-
9 shals Service, and no employee providing services to that
10 department, bureau, or service under contract shall be re-
11 quired, as a condition of that employment or contractual
12 obligation, to be in attendance at or to participate in any
13 prosecution or execution under this section if such partici-
14 pation is contrary to the moral or religious convictions of
15 the employee. For purposes of this subsection, the term
16 ‘participation’ includes personal preparation of the con-
17 demned individual and the apparatus used for execution
18 and supervision of the activities of other personnel in car-
19 rying out such activities.

20 **“§ 3598. Special provisions for Indian country**

21 “Notwithstanding sections 1152 and 1153, no person
22 subject to the criminal jurisdiction of an Indian tribal gov-
23 ernment shall be subject to a capital sentence under this
24 chapter for any offense the Federal jurisdiction for which
25 is predicated solely on Indian country as defined in section

1 1151 of this title, and which has occurred within the
2 boundaries of such Indian country, unless the governing
3 body of the tribe has elected that this chapter have effect
4 over land and persons subject to its criminal jurisdiction.”.

5 (b) AMENDMENT OF CHAPTER ANALYSIS.—The
6 chapter analysis of part II of title 18, United States Code,
7 is amended by adding the following new item after the
8 item relating to chapter 227:

“228. Death sentence 3591.”.



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