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Department of Justice

STATEMENT

OF

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BEFORE

THE

SUBCOMMITTEE ON CRIMINAL JUSTICE
COMMITTEE ON THE JUDICIARY
U.S. HOUSE OF REPRESENTATIVES

CONCERNING

DEATH PENALTY LEGISLATION

ON

NOVEMBER 7, 1985

Mr. Chairman and Members of the Subcommittee, I am pleased to be here today to present the views of the Department of Justice and of the Administration on reestablishing constitutional procedures for the imposition of capital punishment for certain especially heinous federal crimes. Our position is simply stated: We strongly support the death penalty for a narrowly limited class of federal crimes for which there is no other appropriate punishment. Consequently we strongly support the enactment of legislation that will allow the consideration and imposition of the sentence of death under constitutionally permissible procedures and criteria. In fact, the Administration regards the passage of such legislation as one of its highest priorities in the criminal justice area.

The reinstitution of the death penalty is long overdue as a possible punishment for certain especially serious federal offenses. From the earliest days of our country, the death penalty was part of our criminal justice system. It allowed society to exact a just punishment from the most dangerous and vicious criminals, and it no doubt deterred countless crimes. Not so long ago, a person who kidnapped and murdered a young child, or a spy who sold our country's most important secrets to a hostile government knew pretty well the price he or she would pay if caught: because of the seriousness of the offense, and in accordance with the views of the overwhelming majority of our citizens, the punishment would be death.

Then in 1972, the Supreme Court decided the well known case of Furman v. Georgia. 1/ That decision, in effect, made many of the death penalty provisions in state and federal law inoperative by holding that the unlimited discretion as to whether or not to impose this punishment given judges and juries under many statutes then in effect caused the death penalty to be imposed so arbitrarily and capriciously as to constitute cruel and unusual punishment under the Eighth Amendment.

However, following Furman, the Supreme Court considered a number of state death penalty statutes and provided guidance as to what procedures are constitutionally mandated for the imposition of this punishment. 2/ In these cases the Court has clearly held that the death penalty is a constitutionally permitted sanction if imposed under certain procedures and criteria which guard against the unfettered discretion condemned in Furman. Therefore, it cannot be said that the death penalty is cruel and unusual punishment. Those who try to argue that it is simply do not know the law on this subject as set down by the highest judicial authority in this country.

Mr. Chairman, after the Furman case, 38 states revised their laws to provide for the death penalty under the requirements of

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1/ 408 U.S. 238.

2/ Particularly notable in this series of cases was a group of landmark decisions all handed down on the same day in 1976 -- Gregg v. Georgia, 428 U.S. 153; Proffitt v. Florida, 428 U.S. 242; Jurek v. Texas, 428 U.S. 262; Woodson v. North Carolina, 428 U.S. 280; and Roberts v. Louisiana, 428 U.S. 325.

that decision and of the others of the Supreme Court which followed it. In other words, just over 75% of the states have concluded that the death penalty should be available as a punishment for certain offenses. But the federal government lags behind. Incredibly, the maximum punishment that can be imposed by a federal court for the murder of the President, of a Member of Congress, or of an ordinary citizen committed on some federal property is less than could be imposed by most state courts if they had jurisdiction or were free to exercise it. 3/

Until very recently, most persons thought of the types of murder that I have just described as the primary offense for which the death penalty should be available as a possible punishment. Indeed, the death penalty should be available for first degree murder whenever there is federal jurisdiction over the offense. During the last year, however, we have seen appalling incidents of espionage in which it has been alleged -- and in a number of cases already proven -- that military officers and others who enjoyed positions of special trust and responsibility have sold our country's secrets to foreign powers. The incalculable harm caused by these offenses -- crimes that may have impaired our country's ability to defend itself against a

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3/ While in theory, a state could prosecute a person for assassinating the President or a Member of Congress, the assertion of federal jurisdiction over these uniquely federal crimes ousts the state of jurisdiction. See 18 U.S.C. 351(f) and 1751(h). Certain federal properties, like a number of military bases and prisons, are areas of exclusive federal jurisdiction on which the laws of the states do not apply.

nuclear attack -- should underscore the necessity of having an enforceable death penalty available for espionage cases resulting in particularly serious breaches of national security as well as for first degree murder.

Mr. Chairman, we realize that the death penalty is controversial in some quarters. We know that some persons believe that society is not justified in taking a person's life, no matter how despicable his crime, no matter how much suffering he or she has caused, and no matter how much of a danger he poses to the community. Let me state emphatically that this Administration does not share that point of view.

First, common sense tells us that the death penalty operates as an effective deterrent for crimes involving planning and calculation. Espionage is a good example of such a crime. Presidential assassination is another. Second, and just as important, society has a right, as the Supreme Court has repeatedly reaffirmed, to exact a just punishment on those individuals who deliberately flout its laws in a particularly harmful and dangerous way. For some offenses, death is the only just punishment. We firmly believe that civilized society has a right if not a duty to rid itself permanently of those individuals who have been found to have committed certain carefully described but especially harmful offenses in an especially aggravated manner.

Consequently, we support legislation that would do two things: First, it should cover all the offenses in the federal code for which the punishment could extend to death. Second, it should set out the procedures to be followed in those cases in

which the government seeks the death penalty. We believe that federal legislation should carefully reflect all the requirements for the imposition of this punishment as they have been set out by the Supreme Court in the cases to which I referred earlier.

Specifically, in cases in which the government seeks the death penalty, there should, of course, be ample notice to the defendant in advance of trial. Then, if he or she is convicted, there should be a special post-verdict sentencing hearing at which the government may introduce evidence of aggravating factors and the defendant may introduce evidence of mitigating factors. For defendants convicted of first degree murder, for example, the government should be allowed to introduce such matters in aggravation as that the murder was for hire or was committed in an especially heinous, cruel, or depraved manner such as by sustained torture. As matters in mitigation, the defendant should be allowed to introduce such matters as the fact that he was extremely young at the time of the offense, was under unusual duress (although not to such a degree as to constitute a defense to the charge), or that he was a relatively minor participant in the crime, although still punishable as a principal. The defendant also should specifically be allowed to introduce evidence of any other mitigating factors not set out in the statute.

Following the introduction of this evidence, and argument by the government and the defense, the finder of fact at the sentencing hearing should determine first if any aggravating factors have been proven beyond a reasonable doubt. If no aggravating

factors are found, the death penalty should not be imposed. If however, one or more aggravating factors are found, the fact-finder should consider whether any mitigating factors have been established by a preponderance of the evidence. Then, the fact-finder should decide, by unanimous vote, if any aggravating factors found outweigh any mitigating factors, or if no mitigating factors are found whether any aggravating factor or factors alone justify the imposition of death.

In cases where the jury is sitting as the fact-finder at the sentencing hearing, the court should specifically instruct the jurors that in its consideration of whether the punishment of death is justified, it shall not consider the race, color, national origin, creed or sex of the defendant. Each juror should also be required individually to sign a certificate attesting to the fact that he or she did not consider these factors in reaching his or her decision.

Mr. Chairman, I know that a number of bills providing for the reinstitution of capital punishment have been referred to this Subcommittee. Of those, H.R. 343, introduced by Congressman Gekas, and others, represents the type of legislation which the Department supports. It is closely patterned after bills that the Department has drafted and includes the type of post-conviction sentencing hearing I just described. It is also a comprehensive bill in that it provides for capital punishment for

most of the offenses where this punishment is warranted. 4/ We strongly urge that this type of comprehensive approach be adopted. In this regard, we can understand the introduction of bills that provide for capital punishment for only a certain type of offense, such as for espionage or for murder during a hostage taking. Nevertheless, the death penalty is appropriate for such a limited number of federal offenses that we think there should

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4/ These offenses are treason, espionage, aircraft destruction resulting in death, offenses involving the misuse of explosives resulting in death, first degree murder of federal officials or a family member of such an official, first degree murder in the special maritime and territorial jurisdiction, first degree murder of a foreign official, mailing particularly dangerous articles such as poison that results in death, murder during the course of a kidnapping, Presidential assassination, attempted Presidential assassination that comes dangerously close to succeeding, train wrecking resulting in death, and aircraft piracy resulting in death.

With the exception of the kidnapping offense resulting in death and attempted Presidential assassination, these offenses all provide for the death penalty already but, as discussed, the death penalty cannot be imposed because of constitutional procedural problems. The kidnapping statute also provided for the death penalty in cases where death resulted until 1972 when, as part of broader legislation enacted shortly after the Furman decision, the death penalty provision was deleted. See P.L. 92-539. With regard to a Presidential assassination attempt that nearly succeeds, this offense is a unique crime which can cause enormous harm and for which the death penalty should clearly be authorized.

We also recommend that the death penalty be authorized as a possible punishment for murder committed by persons serving a life sentence in a federal correctional institution, which would require the creation of a new offense in title 18, and for the offenses of murder resulting in death under 18 U.S.C. 1952A, murder committed in aid of racketeering activity under 18 U.S.C. 1952B, and for a hostage taking resulting in death under 18 U.S.C. 1203. The recent murder of an elderly United States citizen held hostage by terrorists on the Achille Lauro has vividly demonstrated the need for the death penalty for this particularly despicable offense.

be established uniform procedures for the consideration of whether this punishment should be imposed that would apply to all such cases.

Before concluding, Mr. Chairman, let me urge this Subcommittee to consider and quickly report out a comprehensive death penalty bill. This is not a new or novel question nor is it one on which the American people are closely divided. As I have mentioned, over 75% of the states already provide for capital punishment. In the last Congress, when the Senate passed S. 1765, a bill quite similar to H.R. 343, it was favored by 74% of the Senators present and voting. The vote was 63-22. Polls indicate that a large majority of the American people favor capital punishment, and the entire House should be given an opportunity to vote on an issue of such national concern. Our country deserves nothing less.

Mr. Chairman, that concludes my testimony and I will be happy to answer questions at this time.

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