S. HRG. 109–729

PRESERVING SACRED GROUND: SHOULD CAPITAL OFFENDERS BE BURIED IN AMERICA'S NATIONAL CEMETERIES?

HEARING

BEFORE THE

COMMITTEE ON VETERANS' AFFAIRS UNITED STATES SENATE

ONE HUNDRED NINTH CONGRESS

FIRST SESSION

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PRESERVING SACRED GROUND: SHOULD CAPITAL OFFENDERS BE BURIED IN AMERICA'S NATIONAL CEMETERIES?

THURSDAY, SEPTEMBER 22, 2005

U.S. SENATE,
COMMITTEE ON VETERANS' AFFAIRS,
Washington, DC.

The Committee met, pursuant to notice, at 10:19 a.m., in room SR–418, Russell Senate Office Building, Hon. Larry E. Craig, Chairman of the Committee, presiding.

Present: Senators Craig, Thune, Salazar, and Mikulski.

OPENING STATEMENT OF HON. LARRY E. CRAIG, CHAIRMAN, U.S. SENATOR FROM IDAHO

Chairman CRAIG. Good morning, everyone. The U.S. Senate Committee on Veterans' Affairs will come to order. We appreciate all of your presence this morning. We oftentimes do not give hearings titles, but I think this one deserves a title. We call it "Preserving Sacred Ground: Should Capital Offenders Be Buried in America's National Cemeteries?"

I have called this hearing to examine a very sensitive topic, one that the Congress first addressed in 1997. We were then confronted with the fact that the perpetrator of the Oklahoma City bombings, Timothy McVeigh, was legally entitled to burial and memorialization at America's national cemeteries. Largely in response to McVeigh's eligibility, the Congress passed a law to deny interment in Arlington National Cemetery and VA national cemeteries to any person convicted of a Federal capital crime or a State capital crime for which a sentence of death or life imprisonment without parole is given.

The intent of the 1997 law was clear: We should not bury brutal murderers alongside America's honored dead. The circumstances surrounding the placement of a convicted double murderer's cremated remains at Arlington National Cemetery in late July caused me and many of my colleagues to wonder what impact the 1997 law actually had. The media coverage of the former Chief Justice William Rehnquist's Arlington Cemetery funeral only served to confirm my bewilderment. How could an individual who committed such heinous acts be placed in the same hallowed ground as Chief Justice Rehnquist, Justice Thurgood Marshall, President Kennedy, and hundreds upon hundreds of servicemen and women to whom this country owes eternal respect?

Russell Wagner's two life sentence carried with them the possibility of parole. The 1997 law only bars national cemetery interment to State capital offenders sentenced to death or life in prison without parole. Thus, we have our first example of what I think we call "the parole loophole."

We will hear in a moment from Mr. Vernon Davis, son of Daniel and Wilda Davis, the victim of Wagner's crimes. Mr. Davis, who himself is a veteran, will give us his thoughts about all this, a story, I am sure, that causes him profound anguish.

To further explore how wide the parole loophole is for State capital offenders, I asked my staff to have the Congressional Research Service analyze the sentence of Dennis Rader, better known as the infamous BTK serial killer. BTK, being short for Rader's method in disposing of his ten victims, that is, bind, torture, and kill. Rader was given ten consecutive life sentences of which he must serve a minimum of 175 years. However, because the Kansas law under which Rader was tried did not allow for a sentence of death, nor did it allow for a sentence of life without parole, the Congressional Research Service concluded that as an honorably discharged veteran of the Air Force, it would appear that he is not statutorily precluded from interment in a national cemetery.

If the 1997 law cannot prevent the interment of a notorious serial killer, then what good is it? Answering that question is what I hope we can accomplish today. However, one thing is certain already: The parole loophole, in my opinion, must be closed. I will soon introduce legislation to, at a minimum, take that necessary reform in the 1997 law.

Let me make a point that decisions to take away benefits earned by virtue of honorable military service should never be made without careful and reasonable deliberation. And I want to thank the Veterans of Foreign Wars, the American Legion, the Disabled American Veterans, the Vietnam Veterans of America, and the Paralyzed Veterans of America for agreeing to submit a unified testimony which drives this point home.

The unified testimony illustrates the complexity involved in this sensitive, highly charged issue. It takes courage to recommend a path of caution and prudence when emotions are riding high, so I appreciate very much their testimony today. And, of course, as I think many of you have noted, joining Mr. Davis on our first panel is his able Senator and a friend of mine from the State of Maryland, Senator Barbara Mikulski. The Senator sent a forceful letter to me just days after the Wagner story broke, urging the Committee to act. We are fortunate to have her here with us this morning.

On our second panel, we will have Richard Wannemacher, VA Acting Under Secretary for Memorial Affairs, and Turman Higginbotham, Deputy Superintendent of Arlington National Cemetery. Mr. Wannemacher is accompanied by Patrick Hallinan, Acting Director of VA National Cemetery Administration, Office of Field Programs, and Mr. Richard Hipolit, Assistant General Counsel at the Department of Veterans Affairs. Mr. Higginbotham is accompanied by Craig Schmauder, Army Deputy General Counsel for Civil Works and Environment. Mr. Wannemacher and Mr. Higginbotham will testify about existing law, its adequacies, and

the process in place to determine whether individuals are barred as capital offenders.

Finally, we have the unified testimony of the Veterans organizations. The spokesman for them today will be Dennis Cullinan, Director of the VA National Legislative Service. He is accompanied by Brian Lawrence, Assistant National Legislative Director with the Disabled American Veterans.

Let me welcome all of you. Senator Akaka may be able to join us today, but we will now proceed and I will ask the Senator from the great State of Maryland to start.

Barbara?

STATEMENT OF HON. BARBARA MIKULSKI, U.S. SENATOR FROM MARYLAND

Senator MIKULSKI. Thank you very much, Senator Craig. I want to thank you, Mr. Chairman and Senator Akaka, for convening this hearing and responding to my request when I found out that a convicted Maryland murderer, who had died in prison from a heroin overdose, was about to be buried in Arlington Cemetery.

I was so concerned about this that I asked you to re-examine the restrictions on the burial of capital offenders at Arlington Cemetery or VA cemeteries. I thank you for holding this hearing because we would agree that Arlington National Cemetery and all of our national cemeteries are hallowed ground. They should not be tainted by the remains of a convicted murderer.

Today, I am introducing legislation to close the loophole that allows convicted murderers, those convicted in State courts, to be honored at national cemeteries. I look forward to your legislation as well because it is not about my legislation or your legislation, it is about the right legislation. I come to you today not as a member of a party, but because I know how strongly you feel about these issues. I do, too. When it comes to standing up for our veterans and who should be buried at Arlington or other national cemeteries, we have to be the red, white, and blue party. I think this is what our focus is today.

Mr. Chairman and the distinguished Senator from Colorado, let me tell you what brought me to this. I am joined at the table by one of my constituents, Mr. Vernon Davis. Mr. Davis is from Hagerstown. His wife and daughter and several members of the Davis family are here. Why are they here? Well, I found out—quite frankly, they brought to my attention that the remains of a convicted cold-blooded murderer, sentenced for two life sentences for his crimes, was buried at Arlington National Cemetery in July. This man, Russell Wagner, was convicted of stabbing two elderly citizens of Hagerstown: Daniel Davis, age 84, and his wife, Wilda, age 80. They were the parents of Vernon, who is at this table.

He was sentenced in State court for two life sentences for these despicable crimes. While serving his prison term, he died from a heroin overdose. Early in his life, he did serve honorably in Vietnam. His remains were allowed to be placed in Arlington with full military honors even though he had done this dastardly deed and died in prison unrepentant, shooting up heroin that he had smuggled in.

This is not what our sacred ground is for. This episode has been so terribly painful for the Davis family. You can understand. They have had to relive the horror of what happened in their own family while seeing the man who took away the lives of these wonderful citizens being honored as a hero.

There has been community outrage in Maryland, which I share, and which I shared with you in my letter. The current law does not apply to his case, so he's eligible to be buried in Arlington. But Arlington is for heroes.

So many Marylanders—as I know in Utah and Colorado—so many Marylanders who have served with honor are laid at rest in Arlington. They are heroes from every war. There is one I recall very distinctly, Navy diver Michael Steadam, who was brutally murdered on a hijacked plane, simply because he wore a Navy uniform. There are countless constituents of mine from all wars who lie at rest in Arlington. In Iraq, 37 Marylanders have died, including two from the same high school just a few years apart. These are the heroes who deserve burial at our national cemeteries.

Now, you are going to hear from the Veterans Service Organizations—and I salute them for standing up for the fact that our veterans should have benefits, health care that they need, honorable burying, and so on. I respect and I admire them. I know that their position is to be very careful when we limit rights, and I understand that as well. Know that I feel promises made to veterans should be promises kept, particularly in VA medical care. But you know what? This is murder. This is murder, and we are talking about something very different.

You will review the Federal law, which you have already done in your opening statement, but there is this big loophole. We made sure Tim McVeigh and anyone convicted of a Federal crime, a Federal murder, is not buried at Arlington. Yet if someone is tried for the same crime in a State court, like Wagner was in Maryland, he can be buried at Arlington.

This loophole enabled the man who murdered them to be placed alongside of our heroes. Well, we need to look at this. When we passed the law in 1997, it does not apply to Wagner or anyone else in State court, and particularly those eligible for parole. We need to examine the law, and we need to understand the position of the veterans organizations for these families. And we think about Arlington. You know, to all of America, Arlington is one of our national icons. It is like the Statue of Liberty. The flag over Arlington, the Eternal Flame of President Kennedy, the distinguished people who died there, the Tomb of the Unknown Soldier that honors the sacrifice. Even if we do not know your name, we want to salute you and honor you, even at death. Therefore, I believe that the people who are buried there should truly be those who not only served the Nation but also are honorable citizens of our Nation.

Mr. Chairman, I want to thank you for looking at the legislation and holding the hearing. I do believe we need to close the loophole. I presented the story, but I do believe that the story is best told by the family who is most affected. It is indeed a story that is grim, and because of the loophole, it has become melancholy.

I look forward to working with you on a bipartisan basis.

[The prepared statement of Senator Mikulski follows:]

PREPARED STATEMENT OF HON. BARBARA MIKULSKI, U.S. SENATOR FROM MARYLAND

Thank you, Mr. Chairman and Senator Akaka, for convening today's hearing: to help us preserve our national cemeteries as places of honor for our veterans. Arlington National Cemetery and all our national cemeteries are hallowed ground, they should not be polluted by the remains of convicted murderers.

Today, I am introducing legislation to close the loophole that allows convicted murders to be honored at national cemeteries.

Mr. Chairman, in August, I brought to your attention a tragic and troubling circumstance regarding national cemeteries. The remains of a convicted cold-blooded murderer sentenced to two life sentences for his crimes were placed at Arlington National Cemetery on July 27, 2005.

This man, Russell Wagner, was convicted of stabbing to death two elderly residents of Hagerstown, MD, Daniel Davis, 84 and his wife, Wilda Davis, 80.

He was sentenced in State court to two life sentences for these unspeakable crimes. While serving his sentence in prison, Wagner died from a heroin overdose and because he served honorably in Vietnam, his remains were allowed to be placed in Arlington National Cemetery with full military honors even though he committed this terrible crime.

This episode has been terribly painful for the Davis family understandably. They have had to relive the horror of their parents' brutal murder, while seeing the man who took away their loved ones being honored as a hero in our Nation's most sacred burial ground. There has been community outrage—which I share.

The law that allows this disgrace must be changed.

Arlington is for heroes. So many Marylanders who served with honor were laid to rest in Arlington. The heroes from every war, men like Navy Diver Michael Steadam, who was brutally murdered by terrorists simply because he was a member of our military.

In the Iraqi conflict, 37 Marylanders have died including two from the same high school who died within weeks of each other. These are the heroes who deserve burial at our national cemeteries.

The Committee will hear from the Veterans Service Organizations. In my 18 years as the head of the VA–HUD Subcommittee, I was proud to work closely with the veterans organizations. They are tireless advocates for America's veterans. I do respect and admire them.

I know many in these groups are uncomfortable with the idea of Congress tinkering with the benefits our veterans have earned.

I can understand their yellow flashing lights.

Promises made to our veterans must be promises kept. For 18 years, I fought every day to safeguard these benefits—and continue to do so. Because they represent America's payment of a debt, we owe our brave veterans for their service a debt that can never be fully repaid. But this is murder.

Federal law already prohibits murderers from being honored at Arlington and our national cemeteries. In 1997, Congress passed a law to restrict burial eligibility to prevent convicted Oklahoma City bomber Timothy McVeigh from being buried in a national cemetery following his execution.

If someone is convicted of a capital crime in a Federal court—their remains cannot be placed at Arlington. Yet, if someone is tried for the same kind of crime in a State court, they can be buried in Arlington if they are eligible for parole.

This loophole enabled the man who murdered Mr. and Mrs. Davis to be placed alongside the heroes at Arlington.

Why did Congress pass this law?

Not to further punish the guilty, but to preserve our national cemeteries as places of honor for our veterans.

So I was shocked to learn that the law we passed in 1997 doesn't apply in the case of the man who murdered Daniel and Wilda Davis. He was convicted of two life sentences. But because he was convicted in State court, he remained eligible for interment with honors at Arlington National Cemetery.

This doesn't make any sense.

The purpose of the 1997 law was to protect the standards our military men and women live by to protect the values they fight and die for. The cold-blooded murder of an elderly couple is certainly contrary to those values.

I am here today on behalf of the Davis family. But I am also here on behalf of a Nation at war. Every day across this country, brave young soldiers are being honored and laid to rest in our national and veterans cemeteries.

We have precious little to offer in comfort for their grieving loved ones who have made the ultimate sacrifice a nation can ask of a Mother or Father. But we can insist that these sacred resting places and the honors our Nation rightfully bestowed

on those who have died in its service are preserved as sanctuaries and monuments to the values they died protecting. Placing the remains of a cold-blooded murderer in this hallowed ground makes a mockery of that service. And it is wrong.

Mr. Chairman, I appreciate you taking on this difficult issue. I thank you and the Committee for rethinking the circumstances under which convicted murderers are allowed to be buried in our national cemeteries. I look forward to your recommendations.

Chairman CRAIG. Senator, thank you very much for that very important and stirring testimony. I think you have said it clearly and said it very well.

Before I introduce Vernon Davis, let me recognize my colleague, Ken Salazar from Colorado, who is here. Ken, thanks for joining me this morning.

Senator SALAZAR. Thank you, Senator.

Chairman CRAIG. Mr. Davis, thank you very much for being with us this morning. The microphone is yours.

STATEMENT OF VERNON G. DAVIS, SON OF VICTIMS DANIEL AND WILDA DAVIS

Mr. DAVIS. By the way, I am Santa Claus. I do Santa Claus in December.

Chairman CRAIG. Do you really?

Mr. DAVIS. Yes, I do.

Chairman CRAIG. Good for you.

Mr. DAVIS. Everything gets shaved December 25th.

Chairman CRAIG. Well, you are getting awfully close to Santa Claus right now. You will be ready. Thank you.

Mr. DAVIS. On February 14, 1994, my mother and Daddy were getting ready for bed at 7 o'clock. My mother was talking to my sister. There was a knock come on the door. And my mother told my sister, "Somebody is at the door. I will talk to you later."

Mom and Dad would invite anybody in their house. They didn't have enemies. They didn't have nobody. If you remember, February 14 is Valentine's Day. A fellow by the name of Russell Wagner was at the door. They opened the door for him. Before they opened the door, he knew exactly what he was going to do, how he was going to do it, and what he was going to do. He had a knife and a pair of gloves with him.

He took Mom and Dad and sat them on the kitchen chair and tied their hands behind their back, put a pillowcase over their head, and stabbed them 14, 15 times. And then he robbed them and then left.

It took a while to catch the guy. Then the case went to trial, while in the meantime—I am ahead of my story. So that was on the 14th. On the 15th, Mom and Dad's great-granddaughter was delivering their newspaper. As she walked in the door, she happened to look over and saw Mom and Dad. That little girl was sleeping beside her Mother and Daddy on the floor for at least 9 years.

We had one trial, and that was held in Oakland, Maryland. It was a hung jury because they could not prove that—for some technicality. I don't know what it was anymore. The first trial was in 1996. The second trial was in 2002. They found him guilty because of DNA evidence. Mom and Dad's blood was found on Russell Wagner's gloves that was used in their murder.

He went to jail, and I tried to keep track of him. From what I understand, he was down in Jessup, Maryland. And then we heard later that he died on the the third day of the second month of this year. When he died, we thought it was over, and we didn't have to worry about him anymore.

Then on July 27, I heard that they placed his remains in Arlington Cemetery. I thought that was totally wrong. That's an honorable place for honorable people to go, not a murderer. And I realized what you all have done. The law that was passed was only looking at one person. But you got more than one person out there that is like that. And what I am asking is the law to be changed for this reason.

You just had a Chief Justice of the Supreme Court buried there, and I thought there was something wrong with that, too, because he is buried alongside with a murderer. And Arlington Cemetery is very honorable place to go.

I have got a factory in Hagerstown, Mack truck and Volvo plants, drawing up petitions. I did not even know about it, and they presented it to me, and I got over 400 names on this petition. There was a guy who called me 2 days ago telling me that his brother in Arizona—I did not even know him—has a petition going, and the same thing with a guy from California. I was hoping to get them before that time, but I couldn't get them. He said he is going to send the petitions to me sometime. But there are people out there who are doing it on their own, and I don't even know who they are. But I wish you would change the law.

Chairman CRAIG. Well, Mr. Davis, thank you very much for that testimony. I know it is tough in any circumstance to relive the tragedy that struck your family at the hands of this fellow.

We will accept the petitions you have with you, and the others as they come to you, if you want to submit them to the Senator or to us, we will be happy to receive them and make them a part of the record of this hearing. So we thank you very, very much for your testimony.

Barbara, thank you for being with him. We appreciate it, and we appreciate your due diligence, Barbara, on this issue.

Senator MIKULSKI. You are quite welcome.

Do you want to introduce your wife?

Chairman CRAIG. Please do.

Mr. DAVIS. Yes, my wife is back there. Her name is Vivian. Stand up, Vivian. And my daughter here, her name is Julie; my nephew, Lee; and my older sister, Virginia.

Chairman CRAIG. Thank you all very much for being here today.

Mr. DAVIS. And Mr. Phil Stotlemeyer, a Marine veteran. He wanted to come along.

Chairman CRAIG. Very good. All right. Good luck at Christmas.

Senator MIKULSKI. Mr. Chairman, just by way of background, Hagerstown is in western Maryland.

Chairman CRAIG. Right.

Senator MIKULSKI. It is one of our larger communities on the way to Appalachia and mountain counties, but it is rural. It has those rural values that you also share—hard work, patriotism, community. It also has a very low crime rate. This crime was

shocking when it occurred, and also, the people of Hagerstown are so duty-driven that they are really behind us on this examination.

Thank you.

Chairman CRAIG. Thank you both very much.

Mr. DAVIS. Thank you for your time.

Chairman CRAIG. Yes, Senator Salazar?

Senator SALAZAR. I know I was late coming into the meeting because I was voting, but could I make a statement regarding this issue?

Chairman CRAIG. Please do.

STATEMENT OF HON. KEN SALAZAR, U.S. SENATOR FROM COLORADO

Senator SALAZAR. First, Senator Mikulski, I want to thank you for bringing this issue before the Veterans' Affairs Committee, and to you, Mr. Davis, for the pain that your family has suffered. Our thoughts and our prayers are with you.

It is hard to believe that because of legal loopholes people who have committed truly atrocious crimes would be allowed burial next to real American heroes. It is shocking that the Wagner you described—and the crime that you described—is a real monster who bound and killed your parents in their home on Valentine's Day in 1994, was laid to rest at Arlington National Cemetery alongside Medal of Honor recipients and veterans going back to the American Revolution. It is abhorrent that a killer who died of a heroin overdose in prison was given the same honor as our most prominent Americans, including John Kennedy, William Taft, Earl Warren, Thurgood Marshall, Chief Justice Rehnquist, and others.

In Colorado, we have two national cemeteries, Fort Logan and Fort Lyon. I have often walked through the beautiful tracts of land at Fort Logan and been humbled to see the seven Buffalo Soldiers, the Medal of Honor recipients, and the 82,000 more heroes who were buried in those cemeteries. Heroes like Private John Davis who won the Medal of Honor for capturing the Confederate Flag in Georgia in April of 1865. Heroes like Major William Adams, an Army helicopter pilot in Vietnam who died after volunteering to rescue three fellow soldiers from a small fire base under heavy attack. And heroes like First Sergeant Maximo Chavez, who died during a ferocious firefight in Vietnam during which he used his body as a shield to protect his fellow soldiers against a grenade attack, moved two wounded men to safety, and killed an enemy machine gun crew before falling mortally himself.

These soldiers and millions of others who served our Nation honorably deserve all the honors of a military funeral. They also deserve the dignity of not being buried next to murderers and monsters like Russell Wagner and the BTK killer. I think that it is important for us to close this loophole. As we close this loophole, I think it is also important for us to make sure that we do not open the door to further erosion of any veterans' benefits. At a time when the VA is turning away hundreds of thousands of veterans and making it harder and harder for Priority 7 and 8 veterans to get care, we have to remember one important fact: a veteran is a veteran, no matter what. By serving honorably and by sacrificing

to preserve our freedom, soldiers, sailors, airmen, and marines have all earned the eternal support of a grateful Nation.

I am glad to participate in this hearing and to work with Senator Mikulski and Members of this Committee to close the loophole, preserve the sanctity of our national cemeteries, and protect the rights and benefits of honorably discharged veterans.

Thank you very much. Thank you, Mr. Chairman.

Chairman CRAIG. Ken, thank you for that excellent statement.

Now we will call our second panel forward: Richard Wannemacher, Acting Under Secretary for Memorial Affairs, Department of Veterans Affairs; and Thurman M. Higginbotham, Deputy Superintendent, Arlington National Cemetery.

Richard, good morning. We will let you start and—well, let's see. We also have Patrick—oh, Patrick Hallinan is not on the panel. All right. We have Craig Schmauder. Thank you for being here, and also Richard Hipolit, thank you. Please proceed.

STATEMENT OF RICHARD A. WANNEMACHER, JR., ACTING, UNDER SECRETARY FOR MEMORIAL AFFAIRS, NATIONAL CEMETERY ADMINISTRATION, DEPARTMENT OF VETERANS AFFAIRS; ACCOMPANIED BY RICHARD J. HIPOLIT, ASSISTANT GENERAL COUNSEL, DEPARTMENT OF VETERANS AFFAIRS

Mr. WANNEMACHER. Mr. Chairman, Members of the Committee, good morning. Before I start my formal statement, I would also like to express our condolences to Mr. Davis and the tragedy that he and his family have experienced and the impact that it has had on their lives.

In my testimony, I will discuss the Department of Veterans Affairs implementation of the capital crime prohibition statute and some of the issues that have been encountered administering the statute within the national cemetery system. I am accompanied by Richard Hipolit, Assistant General Counsel, and I would like to submit my written testimony for the record.

Chairman CRAIG. Without objection, your full testimony will be a part of the record.

Mr. WANNEMACHER. My office oversees the daily operations of VA's 121 national cemeteries and the burial eligibility determination process. Last year, the National Cemetery Administration (NCA) interred more than 93,000 veterans and members of their families. We issued more than 351,000 headstones and markers and prepared more than 435,000 Presidential Memorial Certificates commemorating the honorable service of those who had served in defense of a free and democratic Nation.

The provisions of Public Law 105–116 prohibit burial or memorialization in a national cemetery of an otherwise eligible veteran who was convicted of a Federal capital crime and sentenced to death or life imprisonment or convicted of a State capital crime and sentenced to death or life imprisonment without parole, or was found to have committed a Federal or State capital crime but was not convicted because they were not available for trial due to their death or flight.

Due to the specific requirements of the statute, this prohibition is used in a limited number of cases. We have issued regulations

and procedures designed to provide consistent application of the capital crimes prohibition statute. National cemetery directors throughout the Nation receive training on how to identify such cases, with the NCA central office officials providing oversight and guidance.

When a burial request raises suspicion that the capital crime prohibition may impact eligibility determination, the cemetery director questions the funeral director or the decedent's personal representative regarding the facts surrounding the individual's death and informs them that there may be a delay while eligibility is determined. If the decedent died while incarcerated, the cemetery director requests a Notice of Conviction from the Federal or State prison to assist in determining the individual's eligibility. When it is suspected that the decedent may have committed a capital crime but was not convicted due to death or flight to avoid prosecution, the cemetery director will work with the local VA Regional Counsel to obtain information from law enforcement officials on the facts of the case and interpretation of State law.

Cemetery directors approve burial eligibility if there does not appear to be clear and convincing evidence that the decedent would have been convicted of a Federal or a State capital crime. If there does appear to be clear and convincing evidence, then the family or personal representative has the opportunity to provide additional information for VA to consider before the National Cemetery Administration makes a final determination on burial eligibility.

When the family or personal representative elects to pursue the matter further, these cases are handled in accordance with the procedural protections associated with processing claims within the Department of Veterans Affairs. Under these guidelines, the National Cemetery Administration has been able to effectively process formal eligibility determination on capital crimes cases. While VA believes that it has a workable process in place, we have identified some areas in the statute that have been difficult for us to implement.

First, when there is no Notice of Conviction, VA employees are put in the position of having to decide whether there is clear and convincing evidence that a capital crime took place and then what kind of conviction or sentence that individual would have faced. In such a case, we rely on the assistance of local and State officials who do not always have the time to address VA requests for information on a case that they were not going to prosecute since the person was no longer living.

Second, there are significant differences between how individual States define and prosecute capital crimes. Due to this disparate treatment, it is conceivable that a veteran could be determined eligible or not eligible for VA benefits depending solely on the jurisdiction in which the crime was committed.

Finally, requests for burials are time sensitive, especially when dealing with casketed remains. Our goal is to process burial eligibility determinations within 48 hours. In cases where there are questions about eligibility due to the capital crimes prohibition statute, families may opt for a private burial rather than interment in a VA cemetery. Therefore, we may have indirectly prevented an otherwise eligible veteran from receiving the burial benefit that he

or she earned. We believe that aspects of the capital crimes prohibition statute could be strengthened, and we would be happy to work with VSOs, the Committee, and the community towards that end.

Thank you very much for the opportunity to appear, and I will be glad to answer any questions.

[The prepared statement of Mr. Wannemacher follows:]

PREPARED STATEMENT OF RICHARD A. WANNEMACHER, JR., ACTING UNDER SECRETARY FOR MEMORIAL AFFAIRS, NATIONAL CEMETERY ADMINISTRATION, DEPARTMENT OF VETERANS AFFAIRS

Mr. Chairman and Members of the Committee, good morning. I appreciate the opportunity to be here today to discuss with you the Department of Veterans Affairs (VA) implementation of the capital crime prohibition statute. I am accompanied by Richard Hipolit, Assistant General Counsel.

My office oversees the daily operations of the National Cemetery Administration (NCA) 121 national cemeteries and the burial eligibility determination process. As you know, the provisions of Public Law 105–116 were enacted into law on November 21, 1997, and subsequently codified at 38, U.S.C. § 2411 and 38, U.S.C. § 2408(d). The provisions apply to requests for burials that occur on or after November 21, 1997. Under this law, an otherwise eligible person who was convicted of a Federal capital crime and sentenced to death or life imprisonment, or was convicted of a State capital crime, and sentenced to death or life imprisonment without parole, or was found to have committed a Federal or State capital crime but was not convicted by reason of not being available for trial due to death or flight to avoid prosecution, is not eligible for burial or memorialization in a VA national cemetery. Memorialization refers to the provision of a headstone, marker, memorial marker, burial flag, or Presidential Memorial Certificate.

Due to the rather specific requirements of 38 U.S.C. § 2411, this prohibition is used in a limited number of cases. The practical effect of this provision on NCA is that in most cases where the prohibition would apply the individual's family opts for a private burial. Nevertheless, as a means of implementing the capital crime prohibition, VA has issued regulations as well as program policy guidance outlining specific steps for NCA employees to follow when they believe the capital crime prohibition may impact a request for benefits from NCA. These regulations, which are codified at 38 CFR 38.617 and 38.618, serve as a framework for NCA actions in such matters. In addition, NCA has prepared standard letters based on these regulations for use by NCA personnel in communicating with a decedent's personal representative on such cases. Such standard letters are designed, to the extent possible, to provide for a consistent application of policy throughout NCA concerning the application of the capital crime prohibition. On all requests involving the capital crime statute, NCA Central Office officials provide oversight and guidance to the cemetery directors as eligibility is determined.

NCA most often becomes aware of potential capital crime prohibition cases through the funeral director, a member of the public, or media reports. NCA staff also can be made aware of such cases through a flagged name in NCA's burial operations database, or through a review of eligibility information in Veterans Benefits Administration (VBA) databases. NCA cemetery directors receive periodic training, which has included a review of the ways to identify such cases.

When a request for burial or memorialization raises a suspicion that the capital crime prohibition may impact an eligibility determination, the cemetery director makes an inquiry to the funeral home or with the decedent's personal representative about the facts surrounding the individual's death. If necessary, the cemetery director informs the funeral director or the decedent's personal representative about the prohibitions contained in this law and that there may be a delay while eligibility is being considered.

If the decedent died while incarcerated, the cemetery director requests a Notice of Conviction from the Federal or State prison; he or she may contact the local VA Regional Counsel to assist in obtaining the Notice. If the Notice indicates the decedent is not eligible, then the request for burial is denied; otherwise, the request is approved.

When it is suspected that a decedent may have committed a capital crime, but was not convicted due to death or flight to avoid prosecution, the cemetery director will take steps to obtain information from law enforcement officials in the jurisdiction where the crime was committed. Again, the VA Regional Counsel may assist

the cemetery director in obtaining information from Federal or State Attorney General's offices as to how the case would have been potentially prosecuted.

After collecting the available evidence, the VA Regional Counsel provides a written summary of events and a description on how the case would have been prosecuted allowing the cemetery director to make an initial decision on whether or not there "appears to be clear and convincing evidence that a capital crime took place." If there does not appear to be clear and convincing evidence, the cemetery director approves burial. If the family decides on private burial during the period the cemetery director is collecting information, NCA interprets this as a withdrawal of the request for a VA burial benefit and no further action is taken.

If no decision to bury elsewhere has occurred and there appears to be clear and convincing evidence that the decedent was convicted of a Federal or State capital crime, or was not convicted due to flight or death, the cemetery director sends the personal representative a certified letter outlining the steps that can be taken to provide additional information for consideration. The option to end the process at this point is also available. Cases where the personal representative elects to pursue the matter further are handled consistent with procedures contained in 38 CFR 38.617 and 38.618. Because these regulations are designed to provide the procedural protections associated with processing of claims for veterans benefits, they are somewhat complex. Nevertheless, our experience has been that NCA staff has been able to effectively and efficiently process capital crimes burial cases where a formal eligibility determination is required.

While VA feels that it has a workable process in place, allowing us to implement the current statute, we have identified several areas of the statute which have been difficult to implement.

In particular, we have found the requirement contained in 38 U.S.C. § 2411(b)(3), which prohibits an individual from receiving burial benefits if the individual "has not been convicted of such a crime by reason of the person not being available for trial due to death or flight to avoid prosecution" somewhat difficult to administer. In these cases, because there is no Notice of Conviction, VA employees are put in the position of making decisions that typically would go through the judicial process. The employee has to decide not only if there appears to be clear and convincing evidence that a capital crime took place, but what kind of conviction and sentence would have resulted. Also, these cases put employees in the position of having to rely on local and/or state officials to assist in providing information necessary to make a decision. Some local and state officials have not responded to VA requests for information; in several cases we have been told that the local or state law officials did not have the time to spend on a case that they were not going to prosecute since the person was no longer living.

Another area that has created problems is that each state defines "capital crimes" differently, and there are significant differences between individual states regarding the imposition of the death sentence. For example, two individuals could commit similar crimes but in two different states; however, one State may prosecute as a capital crime and the other may not. One person would then be eligible for VA burial benefits and the other would not. While we strive to apply the requirement of this law as consistently as possible, the disparity in State law leads to an inequity that is built into the current system.

Finally, requests for burials are time sensitive, particularly if you are dealing with casketed remains. We strive to process all capital crime burial eligibility determinations as quickly as possible. Nevertheless, some delay is inherent in this process. If the cemetery director has to tell a funeral director that an eligibility determination must be delayed since the case has to be reviewed, a family may decide to go elsewhere for burial. In such a case, we may be indirectly preventing an otherwise eligible veteran from receiving the burial benefit that he or she has earned.

While there are aspects of the capital crimes prohibition statute we believe could be clarified and possibly strengthened, we do not currently have any specific suggestions. We would, however, be happy to work with the Committee on this matter. Such a discussion should not just look at the capital crime statute language, but also consider VA's statutory provisions governing the forfeiture of benefits. We note that, as part of the Veterans Benefits Act of 2003, Congress recently amended 38 U.S.C. § 6105 (Forfeiture for subversive activities), to add prohibitions against payment of VA benefits in cases where a veteran has been convicted of six additional offenses. The offenses included within the section 6105 forfeiture provision now include crimes involving the misuse of biological and chemical weapons and the use weapons of mass destruction, acts of terrorism, and genocide.

Thank you, again, for the opportunity to share with you an overview of NCA's current processes as related to the capital crime prohibition. I look forward to working with the Committee on this issue.

RESPONSE TO WRITTEN QUESTIONS SUBMITTED BY HON. JOHN THUNE TO RICHARD A. WANNEMACHER, JR.

. *Question.* It seems to me the situation that has arisen in the case of Russell Wagner could be prevented by simply changing the law to say that those convicted of murder but eligible for parole shall not be allowed to be buried in a national cemetery. Wouldn't this close the loophole and prevent this situation from arising again. It seems like an obvious remedy.

Answer. Failed to respond within allotted time.

Chairman CRAIG. Thank you very much, Richard.

Now let us turn to Superintendent Higginbotham. Welcome before the Committee.

STATEMENT OF THURMAN HIGGINBOTHAM, DEPUTY SUPERINTENDENT, ARLINGTON NATIONAL CEMETERY; ACCOMPANIED BY CRAIG R. SCHMAUDER, DEPUTY GENERAL COUNSEL, U.S. ARMY

Mr. HIGGINBOTHAM. Good morning, sir. Thank you very much, sir. I, too, would also like to applaud Mr. Davis's courage here this morning. Mr. Davis and I had a conversation in my office a few months ago concerning this matter, and I share his grief deeply.

Mr. Chairman and distinguished Members of the Committee, thank you for inviting the Department of the Army to discuss the 1997 law intended to prohibit capital offenders from interment or memorialization in Arlington National Cemetery. Thank you for the opportunity to testify before this Committee in support of the Department of the Army's Arlington National Cemetery and Soldiers' and Airmen's Home National Cemetery program. I am testifying on behalf of the Secretary of the Army, who is responsible for operating and maintaining Arlington and Soldiers' and Airmen's Home National cemeteries, as well as establishing the Army's eligibility policy for interment, inurnment, and memorialization.

Arlington National Cemetery is the Nation's preeminent military cemetery. It is an honor to represent this cemetery and the Soldiers' and Airmen's Home National Cemetery, which are both national cemeteries under the jurisdiction of the Department of the Army and are civil works activities. On behalf of these two cemeteries and the Department of the Army, I would like to express our appreciation for the exceptional support that Congress has provided over the years.

In fiscal year 2004, there were 3,858 interments and 2,517 inurnments in Arlington National Cemetery. To date in fiscal year 2005, we have performed a total of 6,300 interment and inurnments services. We anticipate at a minimum an equal number of services in fiscal year 2006.

Additionally, millions of visitors, both foreign and American, come to Arlington National Cemetery each year to view the cemetery and participate in and observe ceremonial events. During 2004 and 2005, over 3,000 ceremonies were conducted in those years to include the President of the United States at ceremonies on Veterans Day and Memorial Day.

During fiscal year 2004, Arlington National Cemetery also accommodated approximately 4 million guests, making it one of the most visited historic sites in the National Capital Region.

One of the Army's paramount objectives is to steadfastly maintain the integrity of Arlington National Cemetery by ensuring only

those eligible under applicable law and Army policy are buried, inurned, or memorialized. There are two sections of the United States Code that address the burial of certain convicted criminals in Arlington National Cemetery.

Enacted in 1997, 10 U.S.C. § 985, disqualifies persons convicted of a Federal capital offense, an offense for which the death penalty may be imposed, from burial or inurnment in Arlington National Cemetery.

Also enacted in 1997, 38 U.S.C. § 2411, prohibits the interment, to include inurnment, or memorialization of a person who has been convicted of a Federal capital crime and sentenced to death or life imprisonment, or a person convicted of a State crime and sentenced to death or life imprisonment without parole. However, this statute does not address those who commit other heinous crimes and limits State capital crimes to the willful, deliberate, or premeditated killing of another human being.

Under 38 U.S.C. § 2411, the prohibition shall not apply unless written notice of a conviction is received by the Arlington National Cemetery before approval of an application for interment or memorialization of such person. Pursuant to the statute, such written notice shall be furnished to such official by the Attorney General in the case of a Federal capital crime, or by an appropriate State official, in the case of a State capital crime.

Since these laws were enacted in 1997, Arlington National Cemetery has interred, inurned, or memorialized over 50,000 veterans and/or eligible family members. In not one of these cases were we timely notified in writing of a Federal or State conviction in accordance with the statute's requirements. National media extensively reported on the recent inurnment in Arlington National Cemetery of Russell W. Wagner, an eligible veteran who was also a convicted murderer. Arlington National Cemetery was neither notified nor aware until after his inurnment service that he had been convicted in a Maryland State court of two murders. However, under 38 U.S.C. § 2411, he was not barred from inurnment in Arlington National Cemetery, as his life sentences included the possibility of parole. The disqualification contained in 10 U.S.C. § 985 did not apply because Mr. Wagner was not convicted of a Federal capital offense.

Arlington National Cemetery's process relies on receiving proper notification from the appropriate State or Federal official that an individual was convicted of a State or Federal capital offense and is prohibited from interment, inurnment, or memorialization in Arlington National Cemetery, as specified in 38 U.S.C. § 2411. Again, to date, no such timely notification has been received by the Cemetery from any State or Federal officials.

I note the prohibitions of 38 U.S.C. § 2411 do not apply in cases where notification was not made prior to approval of the interment, inurnment, or memorialization, which contemplates that eligible veterans who have been convicted of a State or Federal capital offense may be interred, inurned, or memorialized in Arlington if notice is not timely received.

The Army and Arlington National Cemetery recognize the significance of the issues involved in this matter, will continue to follow the current law, and look forward to working with this Committee

and the Congress in maintaining the integrity of the cemetery. The Army thanks the Committee and the Congress again for its long-standing commitment to and support for Arlington National Cemetery.

[The prepared statement of Mr. Higginbotham follows:]

PREPARED STATEMENT OF THURMAN HIGGINBOTHAM, DEPUTY SUPERINTENDENT, ARLINGTON NATIONAL CEMETERY

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One of the Army's paramount objectives is to steadfastly maintain the integrity of Arlington National Cemetery by ensuring only those eligible under applicable law and Army policy are buried, inurned, or memorialized. There are two sections of the United States Code (U.S.C.) that address the burial of certain convicted criminals in Arlington National Cemetery. 10 U.S.C. § 985, enacted in 1997, disqualifies persons convicted of a Federal capital offense, an offense for which the death penalty may be imposed, from burial or inurnment in Arlington National Cemetery.

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The Army and Arlington National Cemetery recognize the significance of the issues involved in this matter, will continue to follow current law, and look forward to working with this Committee and the Congress in maintaining the integrity of the Cemetery. The Army thanks the Committee and the Congress for its long-standing commitment to, and support for, Arlington National Cemetery.

Chairman CRAIG. Superintendent, thank you very much.

We have been joined by Senator Thune. John, do you have any opening statement you want to make prior to questions?

STATEMENT OF HON. JOHN THUNE, U.S. SENATOR FROM SOUTH DAKOTA

Senator THUNE. Mr. Chairman, I do have an opening statement I would like to have included in the record, and I appreciate you very much for holding this important hearing. This is a complicated and sensitive issue, but clearly one that needs a remedy. I support your efforts, and I understand you are intending to introduce legislation that would correct this loophole.

So I have got a statement I would like to have included in the record in its entirety.

Chairman CRAIG. Without objection, it will become a part of the Committee record.

Senator THUNE. Thank you. And I thank the panel for your testimony this morning as well.

Chairman CRAIG. John, thank you for being here.

[The prepared statement of Senator Thune follows:]

PREPARED STATEMENT OF JOHN THUNE, U.S. SENATOR FROM SOUTH DAKOTA

I would like to thank the Chairman for holding this important hearing on the complicated and sensitive issue of whether an honorably discharged veteran convicted of murder can be buried in a national cemetery. On the one hand, this seems like an easy issue to resolve. It seems almost intuitive that people convicted of murder should not be allowed to be buried with full military honors in a place like Arlington. On the other hand, we're talking about veterans who were honorably discharged, and faithfully served this country, usually long before they committed a heinous crime. If a person has been honorably discharged from the military, that person deserves the respect and the gratitude of the United States Government and the American people. But, I think it is an unwritten creed among veterans in this country that throughout their life they follow a path of honor, integrity, service to their community and, above all preserve the dignity of their status as American military veterans. When a few commit unspeakable crimes against their fellow citizens and the country that they had once sworn to protect, they break that creed of honor.

Therefore, I believe that that those veterans convicted of murder should not be buried at a national cemetery. Because the law we passed in 1997 to prevent those convicted of murder from being buried at Arlington has been circumvented in the case of Russell Wagner, I believe we must work to close the loophole.

I was a Member of the House in 1997 when the Congress passed this law. One of the reasons Congress passed this law was to prevent the possibility of Timothy McVeigh, the Oklahoma City bomber who was a decorated and honorably dis-

charged veteran, from being buried at Arlington. I understand from the prepared testimony offered today that under the current law, the BTK killer in Wichita, KS, is entitled to be buried in Arlington because his conviction does not explicitly rule out the possibility of parole. Clearly, we need to change the law to prevent situations like this from happening.

Again, I understand the complexity of this issue, and I appreciate the Chairman holding this hearing to examine this issue. I think it is obvious we need to fix the law we currently have on the books, and I look forward to the testimony to be offered today.

Chairman CRAIG. Let me ask the question of both of you. It would seem that what we have with the parole loophole is a situation where the same crime committed in one State is treated differently for purposes of national cemetery burial eligibility than if it were committed in other States. Is that a circumstance of the situation based on State law or procedure? Please proceed.

Mr. HIPOLIT. Mr. Chairman, I think part of the problem there is that the law now focuses on what sentence the person actually received rather than what sentence they could have received. The way it is written, the person actually has to have been convicted and sentenced to life without parole or death. That puts us at the will of the sentencing authorities, if one person might get a different sentence than another, the sentence received would be controlling. That would, I think, lead to variance from State to State depending on where they were prosecuted. I think that is the main issue. The law focuses on what sentence was actually received rather than what sentence could have been received.

Chairman CRAIG. Any additional reaction to that?

Mr. SCHMAUDER. No, sir. I might add, though, in the Title 10 provision, the sentence requirement is not found, and it is simply a conviction of a Federal capital offense for which the death penalty or life imprisonment may have been imposed. So there is a distinction between the Title 10 and the Title 38 provision.

Chairman CRAIG. So how could the Congress amend the burial prohibition law so that it reflects State sentencing for those who commit the same or similar atrocities? How do we create the uniformity that I think all of us want to seek here?

Mr. HIPOLIT. I think there are a couple of ways as a technical matter that could be done. It would be possible to amend 38 U.S.C. § 2411(b) to keep the existing language but add a reference to "without regard to parole." That would be one way of addressing this issue.

Another way, which would be, I think, probably a clean way, would be to just remove the reference in 2411(b) to the sentence that was received. That would throw us back on the definition of capital crime in 2411(d), which just refers to the sentence that could have been received rather than what was actually received. I think as a technical matter it could be done that way.

Chairman CRAIG. But in that last response you provided, without clarity—clarity sometimes also confuses in the instance of trying to apply it to a variety of laws. Are we now creating a general environment from which interpretation then rests on the part of those who have to make the decision of the right of interment?

Mr. HIPOLIT. I think in the second example I gave, it would be pretty clear. It would be a fairly bright-line rule because we would be able to look at the State law to see the crime with which the

person was charged and what sentence was available for that crime; that would be something we could find in the statute books. I think it would be pretty clear to apply that.

Mr. SCHMAUDER. I would agree with my counsel that it does create an issue, if, in fact, we are relying simply on what could have been the conviction. That certainly will bring into issue plea bargain situations where someone may have been—could have been charged with a death offense and then pleads down in and is convicted of a subsequent——

Chairman CRAIG. Well, you have anticipated my next question, and that is the question of plea bargaining. How do we deal with those cases where the sentence can be reduced for capital crimes even though the underlying act merits burial disqualification? You would have to look at the total package, the total picture of the situation, I guess.

Mr. SCHMAUDER. I agree, Senator.

Chairman CRAIG. I am also concerned about obviously the number of interment or inurnment services on an annual basis and the process of a clear, thorough, but hopefully relatively uncomplicated review. You spoke, certainly, Superintendent Higginbotham, to the timeliness of it and the importance of being able to do it in a timely way, and, of course, the absence of notification, and assure the thoroughness of the process to disallow the kind of thing that just happened.

Mr. HIGGINBOTHAM. I would think that probably what we need to do, we need to just look at that further to see how we can explore a way to find an avenue if we are not getting it from the Attorney General or the State Attorneys General. There must be another process we have to pursue. What that is right now, I don't know.

Mr. WANNEMACHER. At the National Cemetery Administration, we have published regulations and guidelines for our directors to follow and the clarity makes it more efficient. But we have specific se not.guidelines to follow.

Chairman CRAIG. Under what conditions could remains of capital offenders be disinterred from Arlington National Cemetery or VA national cemeteries?

Mr. HIPOLIT. Speaking for the VA cemeteries, the way the law is currently written, if we don't receive notification of a conviction in advance of burial, then the capital crimes prohibition does not apply, so the person would have been eligible for burial. In that case, if we later found out that there had been a conviction, we wouldn't go back and disinter because the person——

Chairman CRAIG. There is no requirement to do that.

Mr. HIPOLIT. That is correct.

Mr. HIGGINBOTHAM. That is the same at Arlington, Senator.

Chairman CRAIG. So, in other words—well, you have answered the question, then.

If the action were directed by an act of Congress to preserve the dignity of those places and not as an act of punishment, might that avoid questions of constitutionality under an ex post facto or bill of attainder considerations?

Mr. HIPOLIT. Mr. Chairman, I think you are correct about that. The ex post facto clause would apply in a case where Congress

would add an additional punishment for a crime that was already committed or would criminalize conduct that was legal when it was committed. I think the controlling factor is whether the intention of Congress is to punish past conduct or whether it is to regulate current activities. I think Congress was very careful in enacting the original capital crimes law to make clear that what it was doing was preserving the sanctity of the cemeteries. The purpose was to address a current need rather than go back and punish people that had committed crimes. I think if it is done to that end, you would avoid a problem with ex post facto.

Chairman CRAIG. Any reaction?

Mr. SCHMAUDER. Other than I am not a constitutional lawyer, I think that is a correct approach, and I think that is the intent.

Chairman CRAIG. I am trying to get an idea about how pervasive the parole loophole is. How many Federal and State capital offenders have been denied burial because of the existing prohibition? Do you have that figure?

Mr. WANNEMACHER. At the National Cemetery Administration in cases of denial, we do not collect explicit data on what eligibility criteria triggered the burial denial and we do not know if the request for burial has been withdrawn simply because we have been asking questions as to eligibility under the capital crimes prohibition statute. The National Cemetery Administration is averaging about 2 cases a month across the system nationwide, which we know are being reviewed under the capital crimes prohibition statute and regulation.

Mr. HIGGINBOTHAM. In my more than near 40 years at Arlington, I know of several that I can recall.

Chairman CRAIG. How many cases did you have no authority to deny burial to because of sentences like the Russell Wagner situation or even the BTK killer situation? Do you know that?

Mr. HIGGINBOTHAM. No, sir.

Chairman CRAIG. You don't have that figure either?

Mr. WANNEMACHER. I don't have that figure either, sir.

Chairman CRAIG. The law requires that you obtain a written Notice of Conviction from either Federal or State officials before burial eligibility can be barred. How workable is that requirement?

Mr. WANNEMACHER. Because of the time limitations, it is workable, but we have to get local jurisdictions to cooperate, and we rely on our regional general counsel to assist in these cases. Sometimes it depends on the jurisdiction, really.

Mr. HIPOLIT. If we have reason to believe that there may have been a conviction, we will go out and seek information from the appropriate authorities.

Chairman CRAIG. Well, the question is: How would you even know? How do you develop a reason to believe?

Mr. HIPOLIT. I think in many cases we have acquired information from the news media or reports from individuals. We have found out about cases on our own. I can't say that system is infallible by any means. There may be cases that we do not find out about.

Mr. WANNEMACHER. Word of mouth is usually the way that we are notified of such cases. When we are notified, we put a flag in our computer burial operations system database which serves the national cemetery system and the State veterans cemeteries as

well. This flag indicates an individual may be involved in a possible capital crimes case, and alerts staff to initiate procedures, such as asking specific questions, in accordance with the statute and regulation.

Chairman CRAIG. So the question is not asked up front.

Mr. WANNEMACHER. Right. That is correct.

Chairman CRAIG. "Has this person ever been convicted of a capital crime?" That question is not asked of either——

Mr. WANNEMACHER. No, sir.

Mr. HIGGINBOTHAM. No, sir.

Chairman CRAIG. At Arlington or any of the rest of them.

Mr. HIGGINBOTHAM. We may become aware—there are some triggers while our representatives are taking the application from funeral directors. If the person died in a penitentiary, OK, then the flag goes up. Maybe we better look at this and see if the law might apply.

Chairman CRAIG. I would think it should.

Mr. HIGGINBOTHAM. If that does not happen, then they just say the State of Maryland, like in the case of Mr. Wagner, if I am not mistaken, his death was in March, and the application was not made with us until months later. We received a cremation certificate, which only indicated the death occurred in Maryland. There was no place of death so there was nothing for us to put our arms around to even take a step further.

Chairman CRAIG. Richard, your testimony suggests there has been a lack of cooperation from Federal and State officials with respect to those cases requiring a finding by VA that an individual would have been convicted of a State or Federal capital crime. Has the result of that lack of cooperation been that individuals who have committed murders but who died before being convicted are now buried at VA national cemeteries? Has that been the result?

Mr. WANNEMACHER. As I said in my statement, the National Cemetery Administration always errs on the veteran's side. So if there is a situation where NCA does not have absolute proof that a capital crime as defined by the statute has been committed, then we err in favor of the veteran.

Chairman CRAIG. Mr. Higginbotham, military funeral honors are denied to capital offenders even when a burial occurs at a private cemetery. What process is used by the military services to ensure that no funeral honors are provided to capital offenders at private cemeteries, do you know?

Mr. HIGGINBOTHAM. Private cemeteries?

Chairman CRAIG. Yes.

Mr. HIGGINBOTHAM. No, I don't know what that process is.

Chairman CRAIG. Mr. Higginbotham, it would appear from your testimony that Arlington has a passive process by which it identifies capital offenders. Unless Arlington officials receive a notice of conviction from a Federal or State official, no action is taken. That is what we have heard today.

Why doesn't Arlington have a more formal active process in place?

Mr. HIGGINBOTHAM. Well, we relied on the law and the State and the Federal officials.

Chairman CRAIG. But you don't ask the question up front.

Mr. HIGGINBOTHAM. No, we do not.

Chairman CRAIG. Well, gentlemen, thank you all for being here today as we gather information and understand the process here and attempt to clarify this law. I think it is going to be the wishes of Congress that we do that, and we are certainly going to proceed in that direction.

But we also want something that is workable. We do not want to have to be dealing with these kinds of things after the fact. We need to work together to make sure there is a process in place that is not cumbersome, but is responsible in ensuring the sanctity of our cemeteries for those who are buried there. So we thank you very much, and we will stay in contact with you as we refine this legislation.

Mr. HIGGINBOTHAM. Thank you, sir.

Mr. WANNEMACHER. Thank you, Senator.

Chairman CRAIG. Thank you.

Chairman CRAIG. Now we will ask our last panelist to come forward: Dennis Cullinan, Director, National Legislative Service, Veterans of Foreign Wars, accompanied by Brian Lawrence, Assistant National Legislative Director, Disabled American Veterans.

Dennis, welcome. Please proceed.

STATEMENT OF DENNIS M. CULLINAN, DIRECTOR, NATIONAL LEGISLATIVE SERVICE, VETERANS OF FOREIGN WARS OF THE UNITED STATES; ACCOMPANIED BY BRIAN LAWRENCE, ASSISTANT NATIONAL LEGISLATIVE DIRECTOR, DISABLED AMERICAN VETERANS

Mr. CULLINAN. Thank you very much, Mr. Chairman.

On behalf of the American Legion, the Disabled American Veterans, the Paralyzed Veterans of America, the Vietnam Veterans of America, and the Veterans of Foreign Wars of the United States, it is my privilege to address this forum today regarding an issue fraught with considerable legal, philosophical, and emotional implications and complexity. It is an issue that goes to the heart of the rules and rationale for the granting and, in some most unfortunate circumstances, taking away the benefits and entitlements conferred on this Nation's defenders by a grateful Nation.

The situation that has again brought the rules governing burial or inurnment in Arlington or within the National Cemetery Administration are, as discussed today, the circumstances surrounding the placement of Russell Wayne Wagner's remains in Arlington Cemetery earlier this year.

The propriety or correctness of the statutory language allowing Russell Wagner's Arlington service is now being called into question. It is this, along with certain other inequities under this law, that we will address here today.

When Public Law 105–116 was under consideration in 1997, the Veterans Service Organizations represented here today, among others, testified before the House Veterans' Affairs Committee that, "No group of citizens has invested more in the preservation of our national interests than veterans." And to that extent today, we continue to uphold most strongly the rule of law and the preservation of civilized conduct.

It is our concern, however, that just as veterans must face the same justice as other citizens, that they are not subject to more severe or stringent penalties as a consequence of having served the Nation in uniform.

Prior to the enactment of this law, the burial prohibition applied only to individuals who had perpetrated acts of mutiny, treason, sabotage, or subversive activities. Inasmuch as such actions effectively undid or negated their contributions while serving in uniform, the continuation of veteran's benefits, in our view, was clearly unwarranted and, indeed, improper.

With respect to denying such benefits as a consequence of having committed certain other capital crimes, as was directed under this Public Law, we were then compelled to look at the implications or effect that allowing this honor to be conferred upon such nefarious individuals would have on burial in national cemeteries as a whole. It was our collective conclusion that permitting individuals so undeserving of such honor to be buried in veterans' cemeteries would diminish the dignity and service of other veterans and their survivors who are fully deserving of the honor. It is for this reason that we assented to the Act.

However, in addressing burial eligibility, to now further extend the criteria or legal basis for revoking veterans' earned benefits and entitlements could well promote a cascading march of personal opinion regarding the severity or turpitude of various crimes leading to statutory renderings that would unjustly deny veterans that which this Nation has conferred upon them. As we testified in 1997, "equal treatment [under law for veterans] demands a firm general rule that penalties should correlate to the crime and should not go beyond to revoke unrelated rights earned through service to the Nation."

As abhorrent the crimes committed by Russell Wayne Wagner subsequent to his honorable discharge from the military, he was and remains qualified for inurnment in Arlington National Cemetery. As unpalatable as this is for all of us here today, to allow this situation to result in an injudicious legislative assault on the costly bought prerogatives of all those who have, with honor and dignity, guarded our democratic liberties while serving in uniform would be a profoundly unfortunate outcome.

One recommendation we would offer with respect to Public Law 105–116 pertains to a matter of fairness and equity. While its application with respect to Federal capital crimes is equitable, there is an anomaly in its language on State capital crimes. Applicable Federal capital crime is defined as "an offense . . . for which the death penalty or life imprisonment may be imposed." State capital crime is defined as that for which " . . . the death penalty or life imprisonment without parole may be imposed."

Due to the fact that some States explicitly stipulate sentences without parole in their sentencing language on capital crimes and others do not, with the inference that parole is then possible if improbable, a capital crime in one State will result in the prohibition on burial in a national cemetery, whereas conviction in another State of the very same crime will not. And the potential for burial of the BTK killer is a startling example of this. This is clearly something that this Congress should address and rectify.

The last observation we will share here today is that on December 21, 2004, VA's Under Secretary for Memorial Affairs reissued guidelines and procedures for determining eligibility for burial benefits in potential capital crime cases. While we do not comment on the particulars of these guidelines today, it is our contention that the application of a uniform policy does provide an additional measure of certainty and equity in determining the outcome of these difficult and oftentimes unclear cases. It is our understanding that Arlington National Cemetery does not have a similar policy. We strongly recommend that the Superintendent of our National Veterans Cemetery devise and apply a similar coherent policy directive. This will help ensure a greater measure of fairness in determining burial eligibility and potentially help avoid some of the acrimony and ambiguity that has accompanied the inurnment of Russell Wagner.

Mr. Chairman, that concludes our statement.

[The prepared statement of Mr. Cullinan follows:]

PREPARED STATEMENT OF DENNIS M. CULLINAN, DIRECTOR, NATIONAL LEGISLATIVE SERVICE, VETERANS OF FOREIGN WARS OF THE UNITED STATES

Mr. Chairman and Members of the Committee:

On behalf of the American Legion, Disabled American Veterans, Paralyzed Veterans of America, Vietnam Veterans of America and the Veterans of Foreign Wars of the United States it is my privilege to address this forum today regarding an issue fraught with considerable legal, philosophical and emotional implications and complexity. It is an issue that goes to the heart of the rules and rational for the granting and, in some most unfortunate circumstances, taking away the benefits and entitlements conferred on this Nation's defenders by a grateful Nation.

The situation that has again brought the rules governing burial or inurnment in Arlington or within the National Cemetery Administration are the circumstances surrounding the placement of Russell Wayne Wagner's remains in Arlington Cemetery early this year.

A 52-year-old Vietnam War-era veteran, Russell Wayne Wagner died February 7 of a heroin overdose in prison. In 2002, he was convicted by the State of Maryland of the Valentine's Day 1994 murders of Daniel Davis, 84, and Wilda Davis, 80, and was sentenced to two consecutive life terms. The victims were found bound and stabbed in their home in Hagerstown, Md.

Wagner's cremated remains were placed at the cemetery July 27 of this year. Wagner had been in the Army from 1969 to 1972 and was honorably discharged, service that qualified him for inurnment at Arlington.

Congress passed a law in 1997 prohibiting people convicted of Federal or state capital crimes and sentenced to death or life imprisonment without parole from being interred at Arlington and other military cemeteries. Wagner would have become eligible in 2017 for a review that could have led to parole, according to the Maryland Division of Corrections. Under these guidelines, he was eligible for an Arlington service.

The propriety or correctness of the statutory language allowing Russell Wagner's Arlington service is now being called into question. It is this, along with certain inequities under this law, that we will address today.

When this law was under consideration in 1997, the Veterans Service Organizations represented here today, among others, testified before the House Veterans' Affairs Committee. "No group of citizens has invested more in the preservation of our national interests than veterans." And, to that extent today, we continue to uphold mostly strongly the rule of law and the preservation of civilized conduct.

Generally, as a group, we tend to expect more from veterans, to hold ourselves to a higher standard of behavior. Yet we must also realize that, just as in other segments of society, individuals will violate the rule of law, do unjustified harm to others, at times of the most abhorrent kind. Under these circumstances, justice must be met out, and all appropriate punishment under law applied. It is our concern, however, that just as veterans must face the same justice as other citizens, that they not are subject to more severe or stringent penalties as a consequence of having served the Nation in uniform.

Prior to the enactment of Public Law 105–116, prohibiting the interment or memorialization in national cemeteries of individuals committing Federal or State capital crimes, this prohibition applied only to individuals who had perpetrated acts of mutiny, treason, sabotage or subversive activities. In as much as such actions effectively undid or negated their contributions while serving in the military, the continuation of veteran's benefits, in our view, was clearly unwarranted and, indeed, improper.

With respect to denying such benefits as a consequence of having committed certain other capital crimes, as was directed under PL 105–116, we were then compelled to look at the implications or affect that allowing this honor to be conferred upon such nefarious individuals would have on burial in national cemeteries as a whole. It was our collective conclusion that permitting individuals so undeserving of such honor to be buried in veteran's cemeteries would diminish the dignity and service of other veterans and their survivors who are fully deserving of the honor. It is for this reason that we assented to this Act.

However, in addressing burial eligibility, to extend further the criteria or legal basis for revoking veteran's earned benefits and entitlements could well promote a cascading march of personal opinion regarding the severity or turpitude of various crimes leading to statutory renderings that would unjustly deny veterans that which this Nation has conferred upon them. As we testified in 1997, "equal treatment [under law for veterans] demands a firm general rule that penalties should correlate to the crime and should not go beyond to revoke unrelated rights earned through service to the Nation."

As abhorrent the crimes committed by Russell Wayne Wagner subsequent to his honorable discharge from the military, he was and remains qualified for inurnment in Arlington National Cemetery. As unpalatable as this is for all of us here today, to allow this situation to result in an injudicious legislative assault on the costly bought prerogatives of all of those who have with honor and dignity guarded our democratic liberties while serving in uniform, would be a profoundly unfortunate outcome.

One recommendation we would offer with respect to the language of PL 105–116 pertains to a matter of fairness and equity. While its application with respect to Federal capital crimes is equitable, there is an anomaly in its language on State capital crimes. Applicable Federal capital crime is defined as "an offense" for which the death penalty or life imprisonment may be imposed. State capital crime is defined as that for which "...the death penalty or life imprisonment without parole may be imposed."

Due to the fact that some states explicitly stipulate sentences without parole in their sentencing language on capital crimes and others do not, with the inference that parole is then possible if improbable, a capital crime in one state will result in the prohibition on burial in a national cemetery whereas conviction in another state of the very same crime will not. One striking example of this is in the State of Kansas where without parole is not stipulated in sentencing and, for this reason, the infamous BTK killer, Dennis Rader, an honorably discharged veteran, who has been sentenced to 175 years in prison, will under current law be eligible upon his demise for burial in a National Cemetery or inurnment in Arlington National Cemetery. This is clearly something that this Congress should address and rectify.

The last observation we will share here today is that on December 21, 2004, VA's Under Secretary for Memorial Affairs reissued guidelines and procedures for determining eligibility for burial benefits in potential capital crimes cases. While we will not comment on the particulars of these guidelines today, it is our contention that the application of this uniform policy does provide an additional measure of certainty and equity in determining the outcome of these difficult and often times unclear cases. It is our understanding that Arlington National Cemetery does not have a similar policy. We strongly recommend that the Superintendent of our National Veterans Cemetery devise and apply a similar coherent policy directive. This will help ensure a greater measure of fairness in determining burial eligibility and potentially help avoid the acrimony and ambiguity that has accompanied the inurnment of Russell Wagner.

Mr. Chairman and distinguished Members of the Committee, this concludes my testimony. I will be happy to respond to any questions you may have.

RESPONSE TO WRITTEN QUESTIONS SUBMITTED BY HON. JOHN THUNE TO DENNIS M. CULLINAN

1. *Question.* It seems to me a loophole in the law was exploited in the case of Russell Wagner that violates the spirit of the law prohibiting convicted murderers from

being buried in a national cemetery. Do you believe Russell Wagner should have been buried at Arlington National Cemetery?

Answer. Failed to respond within allotted time.

2. *Question.* Russell Wagner was able to be buried in Arlington for essentially the same reason that BTK killer will be able to be buried there—because their convictions explicitly or implicitly leave open the possibility for parole. Should the BTK killer be allowed to be buried at Arlington?

Answer. Failed to respond within allotted time.

Chairman CRAIG. Dennis, thank you, and as I ask these questions, both of you may choose to respond to them.

Your testimony points out that there are some actions committed after service that essentially negate an individual's honorable military service and that, therefore, the continuation of veterans' benefits is unwarranted in those cases. Many would argue that capital murder and even other post-service crimes might fall in the category of negating honorable military service. Where would you draw the line?

Mr. CULLINAN. Mr. Chairman, when we testified in 1997, we had to pay great attention to protecting the sanctity of our national cemeteries and preserving the benefits of our Nation's veterans. One of the key issues with respect to this is the fact that burial in a national cemetery is a shared honor, and to allow someone of the kind of the BTK killer to be buried in a national cemetery brings shame and dishonor to all of those who are buried there, and their survivors. On the other hand, there are certain other crimes that, as abhorrent as they may be, do not rise to that level of infamy.

In preparing this testimony, we noted that along with the severity, the evil of the crime, there is the issue of how infamous it is, how widely known, how widely understood. And that is the crux of the problem. It is not just the crime itself. It is actually how widely known the crime is, how evil it is.

So having said that, we would be very reluctant, other than perhaps making certain corrections in the application of the current law, to go farther than that.

Chairman CRAIG. Well, you are caught in a very difficult situation, as are we. Obviously, you are and you should be the guardian of our veterans' rights, and certainly burial in a national or State cemetery is viewed as a very important right. And the debate that we are going through right now and, I understand, the debate that you are all going through, as it relates to how heinous a crime, you are talking infamous versus heinous.

Mr. CULLINAN. Right.

Chairman CRAIG. Let me walk you through a couple of thoughts here. Your testimony addressed the concerns that emotionally fired cases like Wagner's could well promote a cascading march of personal opinion regarding the severity or turpitude of various crimes that would have the effect of unjustly revoking veterans' earned benefits. Again, some might argue that there exist some actions that are objectively so grievous so as to remove any debate about their severity or turpitude from the realm of personal opinion. Capital murder is one example.

What about rape? What about child abduction, molestation? Should the complexity of where the line is drawn cause us to draw a very thin line or no line at all?

Mr. CULLINAN. Mr. Chairman, we would have to say that a line would have to be drawn, but in preparing for this testimony, one of the first things that was apparent in the Public Law under discussion today is the fact that it goes to sentencing as opposed to the crime itself. At first, that did not make sense to me. Upon further reflection, it makes perfect sense because, as a Nation, in adjudicating such matters we are not only governed by a code of law, but by the decisions of a judge and a jury. And that is the method by which the heinousness, the evil is adjudicated. It is certainly not a perfect method, but other than that, we would be in a situation where we would try and define evil through regulations. Would the Director of the Cemetery Service at the Department of Veterans Affairs be called upon to somehow ascribe a level of evil to various acts? And that is our concern.

Chairman CRAIG. Well, the reason I am walking you through these questions is not only for us to better understand your thoughts, but I think those who are here or those who are interested in what we are attempting to do have to understand the complexity of our concern and how you draw the line in the clear and definable way.

A primary criterion for eligibility to all veterans' benefits, including burial, is that there be an honorable discharge. I would imagine there are numerous criminal actions that, if committed in the service, would hasten a dishonorable discharge. Why, then, if those same actions were to be committed after service should there not be a similar revocation of benefits? Let me give you an example.

Why should a rape, let's say, the day before discharge or prior to discharge that would create a dishonorable discharge from the service not be reacted to in the same way in civilian life and, therefore, bring about an ineligibility? Because if that person obviously committed that crime while in the service and were convicted, they would receive a dishonorable discharge, and they would not be eligible.

Is that a double standard?

Mr. CULLINAN. Mr. Chairman, I do not believe that it is a double standard. With respect to the revocation of a veteran's burial entitlement, that is one of the very rare instances, other than through acts of treason, sabotage, and certain acts of terrorism, where subsequent behavior is predicative on the bestowment and possible revocation of the benefit. It is only veterans then who are sort of subject—not to double jeopardy, but to the fact that behavior subsequent to their having earned a given benefit under law could be taken away.

Chairman CRAIG. Any additional comments, Brian?

Mr. LAWRENCE. Our purpose here is just to make sure that an injustice does not occur 180 degrees opposite to this, where somebody that should rightfully be buried at Arlington is barred, because it is very hard to draw that threshold of separation. And it is hard to tailor that threshold or law to fit every conceivable situation. I thought you summarized our point more eloquently than I could have in your introduction and that we just would urge the greatest caution in adjusting the law.

Chairman CRAIG. Well, gentlemen, thank you both. We will stay in very close contact with you as we craft the language and work

with you in its crafting. It is obvious, in my opinion, that the sentiment of the Congress is to make an adjustment here. At the same time, I think the Congress would approach it with the same kind of caution that you have. And yet it really has to meet a public test. And obviously what happened has not, in the case of the Wagner situation. This is a hearing that is not intended to lay blame in any respect. It is intended to correct what appears to be as I expressed earlier and as others have, a loophole in the law based on the way the law is applied State by State and nationally.

So we thank you very much for being with us today.

Mr. CULLINAN. Thank you very much, Mr. Chairman.

Chairman CRAIG. Thank you all for attending today. I think you sense the sentiment of those of the Senate's, at least, and those who are here and others. We will move expeditiously but cautiously to make a change in the law to attempt to assure that this kind of action does not happen again.

Thank you all very much. The Committee will stand adjourned.

[Whereupon, at 11:30 a.m., the Committee was adjourned.]

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