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Statement of
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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's (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 C.F.R. §§ 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 C.F.R. §§ 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.