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cc: Miss Lawton
Mr. Kelley
Mrs. Gauff
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The Deputy Attorney General

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Mary C. Lawton
Deputy Assistant Attorney General
Office of Legal Counsel

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Effect of the Supreme Court's Decision in Furman v. Georgia on Future Imposition of the Death Penalty.

In June 1972, a 5-4 majority of the Supreme Court held that imposition of the death penalty in three State cases involving two rapists and one murderer constituted cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments. Furman v. Georgia, Nos. 69-5003, 5030, 5031, O.T. 1971. The death penalties in Furman had been imposed by juries as discretionary judgments, without standards to guide the exercise of discretion. This is the usual procedure under State and federal law, and it was held constitutional by the Supreme Court last year in McGautha v. California, 402 U.S. 153, over due process and equal protection objections. This memorandum will attempt to analyze the alternatives available for future use of capital punishment, consistent with the Furman decision.

The import of the Furman decision is far from clear. There was no opinion for the Court. The per curiam order of reversal rested on the votes of five Justices--Douglas, Brennan, Stewart, White and Marshall--each of whom wrote a concurring opinion in which none of their brethren joined. Two Justices, Brennan and Marshall, concluded, on the basis of somewhat differing theories, that capital punishment is unconstitutional per se. Justice Douglas took the position that current capital punishment systems discriminated, in practice, against minorities, and that this violated an equal protection concept he found implicit in the Eighth Amendment. Justices White and Stewart emphasized the rarity of the imposition of death in relation to the substantial numbers of similar cases where it is a potential penalty,

resting their conclusions of invalidity essentially on alleged arbitrariness in the operation of existing systems. The four dissenting Justices--Burger, Blackman, Powell and Rehnquist--found no constitutional infirmity in the death penalty per se, or in the manner of its imposition in the cases before the Court. The two major dissenting opinions, by the Chief Justice and Justice Powell, were joined by all four of the dissenting Justices.

There is no room left for the death penalty under the Brennan and Marshall opinions, and no likelihood that these Justices will change their positions. Although Justice Douglas stopped short of the Brennan-Marshall per se position, it seems very likely that he would move to essentially that position in a future case, if necessary to avoid upholding a death penalty. The key opinions, then, are those of Justices Stewart and White.

The nub of Justice Stewart's rather cryptic opinion is expressed in the following sentences:

These death sentences are cruel and unusual in the same way that being struck by lightning is cruel and unusual. For, of all the people convicted of rapes and murders in 1967 and 1968, many just as reprehensible as these, the petitioners are among a capriciously selected random handful upon whom the sentence of death has in fact been imposed I simply conclude that the Eighth and Fourteenth Amendments cannot tolerate the infliction of a sentence of death under legal systems that permit this unique penalty to be so wantonly and so freakishly imposed.

This seems to suggest that if the death sentence were imposed somewhat more frequently, and its imposition reflected a more rational pattern in terms of the seriousness of the offense, it might be constitutional. However, there is nothing in Justice Stewart's opinion indicating his view

that ~~the~~ result might be achieved under any discretionary sentencing system. Particularly in view of the Chief Justice's suggestions for legislative action, Justice Stewart's failure to make any such suggestion was certainly deliberate. Other portions of the Stewart opinion reflect an extreme distaste for the death penalty. It seems probable, therefore, that Justice Stewart, too, would move to a per se position in a future case.

Justice White's opinion indicates that he might sustain the death penalty with respect to a narrowly-defined range of offenses, provided some rational pattern in its imposition could be shown or anticipated. He stated at the outset that--

. . . I do not at all intimate that the death penalty is unconstitutional per se or that there is no system of capital punishment that would comport with the Eighth Amendment.

His theory of decision was that "the death penalty could so seldom be imposed that it would cease to be a credible deterrent or measurably to contribute to any other end of punishment" and that "this point has been reached . . . under the statutes involved in these cases." Expressing a view similar to Justice Stewart's, he stated that "there is no meaningful basis for distinguishing the few cases in which [the death penalty] is imposed from the many cases in which it is not." He further observed that the seeming capriciousness in the imposition of death arose largely from conferring that discretionary power on juries.

Like Justice Stewart, Justice White refrains from suggesting any ways in which present discretionary death sentencing systems might be modified to satisfy constitutional standards. However, in view of the tone and thrust of Justice White's opinion, and his history of relative conservatism on criminal law questions, we believe that he might well vote to uphold legislation along the lines sketched in Alternative 1, below.

Chief Justice Burger's dissenting opinion essays to interpret the Stewart-White opinions and the net effect of

the Court's holding. The following passages are particularly significant--

Today the Court has not ruled that capital punishment is per se violative of the Eighth Amendment; nor has it ruled that the punishment is barred for any particular class or classes of crimes. The substantially similar concurring opinions of MR. JUSTICE STEWART and MR. JUSTICE WHITE, which are necessary to support the judgment setting aside petitioners' sentences, stop short of reaching the ultimate question. The actual scope of the Court's ruling, which I take to be embodied in these concurring opinions, is not entirely clear. This much, however, seems apparent: if the legislatures are to continue to authorize capital punishment for some crimes, juries and judges can no longer be permitted to make the sentencing determination in the same manner they have in the past.

* * * *

The critical factor in the concurring opinions of both MR. JUSTICE STEWART and MR. JUSTICE WHITE is the infrequency with which the penalty is imposed. This factor is taken not as evidence of society's abhorrence of capital punishment--the inference that petitioners would have the Court draw--but as the earmark of a deteriorated system of sentencing. It is concluded that petitioners' sentences must be set aside, not because the punishment is impermissibly cruel, but because juries and judges have failed to exercise their sentencing discretion in acceptable fashion.

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While I would not undertake to make a definitive statement as to the parameters of the Court's

ruling, it is clear that if state legislatures and the Congress wish to maintain the availability of capital punishment, significant statutory changes will have to be made. Since the two pivotal concurring opinions turn on the assumption that the punishment of death is now meted out in a random and unpredictable manner, legislative bodies may seek to bring their laws into compliance with the Court's ruling by providing standards for juries and judges to follow in determining the sentence in capital cases or by more narrowly defining the crimes for which the penalty is to be imposed. (Emphasis added.)

The Chief Justice's reading of the Stewart-White position is, of course, not binding on Justices Stewart and White. Nevertheless, it affords an intellectually respectable basis upon which the Executive branch could propose legislation.

Under the Furman decision, alternative approaches to imposition of capital punishment in the future are quite limited. They may be outlined generally, as follows:

1. Legislation limiting capital punishment for federal offenses to a narrow range, and channeling the discretionary judgment for its imposition. Federal law currently authorizes capital punishment for a relatively wide range of offenses. This range could be narrowed to the most serious, premeditated crimes--e.g., treason, assassination of the President or Vice President, kidnaping or skyjacking where death results. In addition, statutory guidelines could be enacted listing circumstances of aggravation and mitigation to be considered by the jury or judge in deciding whether to impose the death penalty. Such guidelines were developed in the American Law Institute Model Penal Code (§ 210.6), and were included in the Report of the National Commission on Reform of Federal Criminal Laws (§ 3604). Finally, the legislation could provide for imposition of the death penalty by the court, instead of the jury.

The principal advantages of such legislation are that it would be responsive to the Chief Justice's express suggestions and, at least arguably, to the objections of Justices Stewart and White. By narrowing the range of offenses for which capital punishment is prescribed to the most serious offenses, it would be reasonable to expect that the number of death sentences would increase in relation to the total number of prosecutions for such offenses. This, coupled with sentencing guidelines, might ultimately produce some rational pattern in death sentencing. Vesting sentencing power in the judge should also promote greater uniformity and rationality.

There are disadvantages in this approach. For one thing, sentencing "guidelines" like the Model Penal Code's are probably more cosmetic than substantive. Because of the inherent difficulty of predicting in advance the myriad of factors relevant to a discretionary judgment of death, any statutory guidelines might prove to be "meaningless 'boiler-plate' or a statement of the obvious that no jury would need." McGautha v. California, 402 U.S. 183 (1971). Therefore, such guidelines would probably not contribute markedly to more rational patterns of sentencing. Moreover, there are policy and practical objections to vesting death sentence power in judges. As a policy matter, imposition of death has been judged appropriate as an expression of the "conscience of the community." Juries are uniquely qualified to make that expression, judges are not. On the practical level, the federal judges would probably not want this responsibility, and might well oppose efforts to give it to them. Finally, we have no solid assurance that a majority of the present Court would sustain such legislation. Justices Stewart and White may really be saying that, owing largely to the widespread distaste for capital punishment by Americans generally, no discretionary capital punishment scheme can be devised which will operate other than capriciously.

2. Mandatory death penalties. There are a few federal and State statutes (e.g. 10 U.S.C. 906) which provide a mandatory death penalty upon conviction of certain narrow offenses. Such statutes were not before the Court in Furman, and only the opinions of Justices Brennan and Marshall require the conclusion that they are invalid. Justices Douglas, Stewart and White explicitly stated that they were expressing no view on mandatory death penalties. Therefore, the option of providing for mandatory death penalty for very serious federal offenses is theoretically open.

We see one advantage in this approach--it would eliminate capriciousness in the imposition of the death penalty on those convicted of certain offenses, simply because all such persons would be executed. At least superficially, this would meet the principal objection voiced by Justices Stewart and White.

The disadvantages of mandatory death penalties, however, far outweigh the advantages. The common law rule imposed a mandatory death penalty on all convicted murderers. Since Colonial times, there has been a continual movement away from the common-law rule. This history is outlined sympathetically in Justice Harlan's opinion in the McGautha case (pp. 197-203), and it reflects a near-universal rejection of mandatory death penalties, both for humanitarian and practical reasons.

The practical objection to the mandatory death penalty approach is compellingly demonstrated by history. Where the only possible penalty is death and juries know it, they simply refuse to convict in many cases, regardless of the strength of the evidence, and the defendant goes scot free. This phenomenon of "jury nullification" would pose a serious threat to the administration of criminal justice.

Moreover, we believe that a substantial majority of the present Supreme Court, and perhaps all of its members, would invalidate mandatory death penalties, except

possibly with respect to very narrow categories of offenses--e.g. treason in wartime, assassination of the President. In his dissenting opinion, joined by Justices Blackmun, Powell and Rehnquist, Chief Justice Burger stated--

Real change could clearly be brought about if legislatures provided mandatory death sentences in such a way as to deny juries the opportunity to bring in a verdict on a lesser charge; under such a system, the death sentence could only be avoided by a verdict of acquittal. If this is the only alternative that the legislatures can safely pursue under today's ruling, I would have preferred that the Court opt for total abolition. (Emphasis added.)

Similarly, Justice Blackmun's opinion refers to mandatory death penalty legislation as "regressive and of an antique mold."

As the Solicitor General recently told the Supreme Court in the McGautha case, "flexibility is the hallmark of modern sentencing philosophy." Should the Department now espouse mandatory death sentences as a general policy position, it would repudiate the basic premises of our position in McGautha, a position supported by weighty authority and, in our view, entirely sound. In short, we do not believe that the mandatory death sentence approach is intellectually respectable.

3. A constitutional amendment nullifying the Furman decision. The purpose of such an amendment would be to validate systems of discretionary "standardless" death sentencing, by judge or jury, which were upheld in the McGautha case. It would reinstate existing sentencing systems, substantially immunizing them from Eighth Amendment objections. While preparation of such an amendment

would pose some policy and drafting problems--e.g., presumably, we would not want to authorize the death penalty for car theft--these problems should not be too substantial.

The obvious advantage of an amendment is certainty. As a provision of the Constitution, it is, ipso facto constitutional. The principal disadvantage of this approach is delay and uncertainty of ratification. Ratification requires concurrence of three fourths of the States. As one index of national sentiment, 9 States have abolished the death penalty entirely, and several others have limited it narrowly. Therefore, prospects for ratification of an amendment broadly reinstating the death penalty are quite doubtful.

4. Possibility of death penalty under existing law. There is a remote possibility that we are still in a position to seek the death penalty in a few narrow classes of federal cases. The offenses involved in Furman, murder and rape, are very wide categories of crimes with respect to which deterrence arguments are not, generally speaking, very strong. We might argue that the White-Stewart-Douglas rationales are inapplicable to narrow categories of offenses where the prospect of death is a realistic deterrent, or other considerations make the death penalty appropriate. This might be true of a Presidential assassination or a murder in the course of a skyjacking.

We would anticipate difficulty, however, in persuading the lower federal courts to accept such an argument, particularly in view of statements by the Chief Justice and Justice Powell that new legislation or a constitutional amendment is necessary. Unless the lower courts accepted such an argument and the death penalty were imposed, there would probably be no way to present the issue to the Supreme Court. We conclude, therefore, that the possibility of proceeding under existing law should not be abandoned if a compelling case arises, but that it is not a viable alternative should the Executive branch decide that capital punishment is a desirable general policy objective.

We conclude with a note on scope of the alternatives. Alternatives 1 and 2 would involve federal legislation for federal offenses only. The States, except for California, would be free to adopt similar legislation for State offenses. Alternative 3, the constitutional amendment, would have much broader scope, reinstating the constitutional permissibility of the death penalty for both State and federal offenses, again, except for California. As a result of the decision of the California Supreme Court that that State's Constitution bars the death penalty (People v. Anderson, 493 P. 2d 880 (1972)), a constitutional amendment is necessary in that State.