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THE WHITE HOUSE

WASHINGTON

July 19, 1976

ADMINISTRATIVELY CONFIDENTIAL

MEMORANDUM FOR: PHILIP W. BUCHEN

FROM: JAMES E. CONNOR *JEC*

SUBJECT: Capital Punishment

The President has reviewed your memorandum of July 8th on the above subject and has approved Option 1:

- Direct the Attorney General to forward a bill to Congress incorporating the features of S. 1401 as passed by the Senate during the 93rd Congress and to work with the key committees of Congress on a priority basis toward enactment.

Please follow-up with the appropriate action.

cc: Dick Cheney

THE WHITE HOUSE  
WASHINGTON

July 14, 1976

MR PRESIDENT:

Capital Punishment

Staffing of the attached memorandum from Phil Buchen resulted in the following recommendations:

- Option 1 - Direct the Attorney General to forward a bill to Congress incorporating the features of S. 1401 as passed by the Senate during the 93rd Congress and to work with the key committees of Congress on a priority basis toward enactment. (Supported by the Attorney General, Counsel's Office, Jim Cannon, Max Friedersdorf, and Jim Lynn.)
- Option 2 - Schedule a meeting with the Attorney General and Counsel's Office to review specific legislative proposals and to explore further your role in enacting an appropriate measure. (Supported by Jack Marsh.)

Bob Hartmann commented as follows: "I don't see need for President to get into this any deeper at this time - his position is good in light of latest Supreme Court decision but why press this Congress for anything? "

Jim Connor

THE WHITE HOUSE

WASHINGTON

July 8, 1976

MEMORANDUM FOR THE PRESIDENT

FROM: PHILIP W. BUCHEN *P.*

SUBJECT: Capital Punishment

As you know, the Supreme Court on July 2 decided five cases involving the imposition of the death penalty. This is to present a brief background and analysis of these cases in the context of current Federal statutory law and to offer two options relative to the issue of capital punishment which are available to you at this time.

Present Federal Statutes

The death penalty is presently specified as an authorized sentence upon conviction under at least ten sections of Federal law, including offenses proscribing murder, treason, rape, air piracy, and delivery of defense information to aid a foreign government: 18 U.S.C. 34 (destruction of motor vehicles or motor vehicle facilities where death results); 18 U.S.C. 351 (assassination or kidnapping of a Member of Congress); 18 U.S.C. 794 (gathering or delivering defense information to aid a foreign government); 18 U.S.C. 1111 (murder in the first degree within the special maritime and territorial jurisdiction of the United States); 18 U.S.C. 1716 (causing the death of another by mailing injurious articles); 18 U.S.C. 1751 (Presidential and Vice Presidential murder and kidnapping); 18 U.S.C. 2031 (rape within the special maritime or territorial jurisdiction of the United States); 18 U.S.C. 2381 (treason); and 49 U.S.C. 1472(i) (aircraft piracy).

As drafted, however, the death penalty provisions in these sections, except for the recently revised provision relating to aircraft piracy which is discussed below, are unconstitutional under the U. S. Supreme Court's decision in the case of Furman v. Georgia [408 U.S. 238 (1972)].

The Furman Case

In Furman, a five-justice majority of the Supreme Court held that the imposition and carrying out of the death penalty in the cases in question would constitute "cruel and unusual punishment" in violation of the

Eighth and Fourteenth Amendments. The Court did not hold that capital punishment per se is unconstitutional. Rather, they concluded that the application of statutes leaving the imposition of the death penalty to the unfettered discretion of a judge or jury was constitutionally infirm.

Referring to the "wanton and freakish imposition" of the death penalty, which was noted with disfavor in the pivotal concurring opinions of Justices Stewart and White, the Chief Justice in his dissent noted:

\* \* \*

"Since the Court's decision turns 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. If such standards can be devised or the crimes more meticulously defined, the result cannot be detrimental." (Emphasis added.) (at 396-401)

\* \* \*

As articulated in the Furman decision then, it appeared clear that the objection of the Supreme Court to the death penalty as a punishment for certain crimes went not to its nature but to the manner of its imposition.

#### Post-Furman Legislative Initiatives

In the wake of the Furman decision, there developed three different approaches to the reinstatement of the death penalty: (1) mandatory imposition of the death penalty upon conviction of certain offenses; (2) establishment of exclusive and determinative criteria to be applied by the sentencing authority to determine whether the penalty is to be imposed; and (3) establishment of designated criteria to serve as a guideline for the discretionary imposition of the penalty.

By a literal reading of Furman, some argued that mandatory death would be able to withstand the test of constitutionality by precluding

the exercise of any discretion on the part of the sentencing authority and thereby eliminating the danger of "wanton and freakish" application. Such penalties would attach to the conviction of specified offenses, e. g., murder, and would preclude the consideration of any mitigating circumstances that might justify a lesser punishment in a particular case. This concept was embraced in legislation enacted in a number of states.

The second approach would allow for the imposition of the death penalty upon conviction of certain classes of heinous offenses, but only when one or more of certain designated aggravating circumstances is found to exist (e. g., if the defendant were shown to be a hired killer) and none of certain specified mitigating circumstances is found to exist (e. g., immaturity, duress, etc.). This concept was advanced by the Department of Justice and incorporated into Pub. L. 93-366, enacted on August 5, 1974, which relates, however, only to murder incident to aircraft piracy [49 U.S.C. 1472(i)(n)(Supp. IV)]. Additionally, the Department supported the same concept in the context of a general capital punishment measure which passed the Senate in 1974 (S. 1401, 93d Cong.) by a margin of over 3 to 2, but received no attention in the House. The same approach is included in the bill to recodify the totality of Federal criminal law (S. 1, 94th Cong.), but has not been introduced as a separate measure in the current Congress.

The third approach to reinstatement of the death penalty involved the establishment of criteria to serve as a guide in the discretionary imposition of the penalty. This was the course originally adopted before the Furman opinion by the American Law Institute (ALI) in its Model Penal Code. Under this scheme even if several aggravating and no mitigating circumstances are found to exist, the death penalty need not be imposed. This discretionary element distinguishes the ALI approach from the Justice Department concept.

In your speech before the Federal Bar Association in Miami, Florida, on February 14, 1976, you stated:

\* \* \*

"I favor the use of the death penalty in the Federal criminal system in accordance with proper Constitutional standards. The death penalty should be imposed upon the conviction of sabotage, murder, espionage and treason. Of course, the maximum penalty should not be applied if there is duress or impaired mental capacity or similar

extenuating circumstances. But in murders involving substantial danger to the national security, or when the defendant is a coldblooded hired killer, the use of capital punishment is fully justified."

\* \* \*

Thus, you are on record in support of a limited reinstatement of the death penalty in accordance with the Supreme Court's teachings in Furman. More specifically, your statement is supportive of both the ALI and Justice approaches.

#### The Gregg Case

In the lead case decided last week [Gregg v. Georgia, 44 LW 5230], the Supreme Court held that a statutory scheme similar to that advanced by the ALI and applied to the offense of first-degree murder was consistent with the constitutional requirements announced in Furman. \* The Court expressly reserved judgment with respect to possible application of the sanction to other crimes, e. g., rape and kidnapping.

The Gregg case established the jury as the sentencing authority, but in a companion case the Court also sustained a statute allowing for imposition by a judge under the same standards [Profitt v. Florida, 44 LW 5256].

A third case involved a state statutory scheme which made reference to a series of aggravating circumstances but did not explicitly speak of mitigating circumstances. However, since the statute had been judicially construed to embrace the jury's consideration of such circumstances, its validity was also sustained [Jurek v. Texas, 44 LW 5262].

Two state capital punishment statutes were struck down by the Court. These required a mandatory death penalty upon conviction of first-degree murder and a range of other homicidal offenses without reference to any aggravating or mitigating circumstances. The Court concluded that both were inconsistent with the requirements established by Furman. [Woodson v. North Carolina, 44 LW 5267 and Roberts v. Louisiana, 44 LW 5281]

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\* The Georgia statute contained provision for the automatic appellate review of death penalty cases. Although this does not appear to be a constitutional necessity, it should be noted that the Justice Department model contains a similar provision. Additionally, both the Georgia statute and the Justice Department bill required a bifurcated trial and a criminal evidentiary standard, i. e., "beyond a reasonable doubt", at the sentencing proceeding.

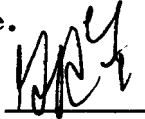
Options

The Supreme Court's ruling is entirely consistent with your expressed views on the matter of capital punishment. It also logically invites enactment of legislation (incorporating either the ALI or Justice Department model, both of which are constitutional under Gregg) to reinstate the death penalty as an available sanction on the Federal level. The question now posed is to what extent do you personally wish to become involved in an attempt to expedite Congressional consideration of an appropriate legislative proposal? Two options arise:

1. Direct the Attorney General to forward a bill to Congress incorporating the features of S. 1401 as passed by the Senate during the 93d Congress and to work with the key committees of Congress on a priority basis toward enactment. [Supported by the Attorney General and Counsel's Office.]
  
2. Schedule a meeting with the Attorney General and Counsel's Office to review specific legislative proposals and to explore further your role in enacting an appropriate measure.

Approve:

Option 1

  
\_\_\_\_\_

Option 2

\_\_\_\_\_



STAFFING

back 7/19/76

July 14, 1976

MR PRESIDENT:

Capital Punishment

Staffing of the attached memorandum from Phil Buchen resulted in the following recommendations:

- Option 1 - Direct the Attorney General to forward a bill to Congress incorporating the features of S. 1401 as passed by the Senate during the 93rd Congress and to work with the key committees of Congress on a priority basis toward enactment. (Supported by the Attorney General, Counsel's Office, Jim Cannon, Max Friedersdorf, and Jim Lynn.)
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Bob Hartmann commented as follows: "I don't see need for President to get into this any deeper at this time - his position is good in light of latest Supreme Court decision but why press this Congress for anything? "

Jim Connor

THE WHITE HOUSE

WASHINGTON

July 8, 1976

MEMORANDUM FOR THE PRESIDENT

FROM: PHILIP W. BUCHEN <sup>P.</sup>

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Options

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2. Schedule a meeting with the Attorney General and Counsel's Office to review specific legislative proposals and to explore further your role in enacting an appropriate measure.

Approve:

Option 1 \_\_\_\_\_

Option 2 \_\_\_\_\_

THE WHITE HOUSE

ACTION MEMORANDUM

WASHINGTON

LOG NO.:

Date: July 9, 1976

Time:

FOR ACTION:

cc (for information):

- ✓ Jim Cannon
- ✓ Max Friedersdorf
- ✓ Jim Lynn
- ✓ Jack Marsh
- ✓ Bob Hartmann

FROM THE STAFF SECRETARY

DUE: Date: Monday, July 12

Time: 10 A.M.

SUBJECT:

Phil Buchen memo 7/8/76 re Capital Punishment

ACTION REQUESTED:

\_\_\_ For Necessary Action

For Your Recommendations

\_\_\_ Prepare Agenda and Brief

\_\_\_ Draft Reply

For Your Comments

\_\_\_ Draft Remarks

REMARKS:

*Marsh - option 2*  
*Hartmann - see comments*  
*Cannon - option 1*  
*Friedersdorf - option 1*  
*Lynn - option 1*  
*Lynn has sent to several people not*  
*Mady yet (7/13)*

PLEASE ATTACH THIS COPY TO MATERIAL SUBMITTED.

If you have any questions or if you anticipate a delay in submitting the required material, please telephone the Staff Secretary immediately.

Jim Connor  
For the President



6:30

THE WHITE HOUSE  
WASHINGTON

Common Commission  
option I on

A to memo on  
capital punishment

8. 7/12

Date: July 9, 1976

Time:

FOR ACTION:

cc (for information):

Jim Cannon  
Max Friedersdorf  
Jim Lynn

Jack Marsh  
Bob Hartmann

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Draft Reply

For Your Comments

Draft Remarks

REMARKS:

*AM RTH*  
*J*

*I don't see need for Pres to get into this any deeper at this time - his position is good in light of latest SCt decision but why press this Congress for anything?*

PLEASE ATTACH THIS COPY TO MATERIAL SUBMITTED.

If you have any questions or if you anticipate delay in submitting the required material, please telephone the Staff Secretary immediately.

Jim Connor  
For the President

*RTH*

THE WHITE HOUSE

WASHINGTON

July 12, 1976

MEMORANDUM FOR: JIM CONNOR  
FROM: MAX FRIEDERSDORF *M.F.*  
SUBJECT: Phil Buchen memo 7/8/76 re Capital  
Punishment

Recommend Option 1.