

CENTRAL INTELLIGENCE AGENCY
WASHINGTON, D.C. 20505

Office of General Counsel

11 April 1986

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Dear Tom:

Enclosed are two memoranda which you may wish to provide the Working Group for our next meeting. The first is a brief summary of why the death penalty is a problem in general under federal criminal statutes, and specifically under 18 U.S.C. § 794. The second memo contains a brief summary of various bills which have been introduced to provide the death penalty for various espionage offenses.

Sincerely,



Associate General Counsel

STAT

Enclosures

10 April 1986

MEMORANDUM

SUBJECT: Death Penalty Under the Espionage Statutes:
18 U.S.C. § 794

QUESTION

1. Whether the death penalty imposed under 18 U.S.C. § 794 which prohibits the gathering or delivering of defense information to aid a foreign government is unconstitutional.

CONCLUSION

2. The Espionage Statutes provide for the death penalty in 18 U.S.C. § 794 and the Ninth Circuit has determined that this penalty is unconstitutional. In Furman v. Georgia, 408 U.S. 238 (1972), the Supreme Court held that the death penalty is unconstitutional if it can be imposed in an arbitrary and discriminatory manner. In order to have a constitutional death penalty, a state legislature or Congress must indicate in the pertinent statute the factors concerning the defendant and the crime committed for the judge or jury to consider in imposing the death penalty.^{1/} Gregg v. Georgia, 428 U.S. 153 (1975). The function of these factors is to limit the discretion of the judge or jury when he (they) are determining whether to impose the death penalty. Because § 794 of Title 18 contains no relevant factors for a judge or jury to consider in imposing the death penalty, the death penalty can be imposed in an arbitrary and discriminatory manner and is, therefore, unconstitutional. U.S. v. Harper, 729 F.2d 1216 (1984).

ANALYSIS

3. In Furman v. Georgia, 408 U.S. 238 (1972) the United States Supreme Court considered the constitutionality of the death penalty.^{2/} Justices Douglas, Brennan, Stewart and White all wrote separate concurring opinions which stated that the death penalty imposed in the three cases was unconstitutional due to the ban imposed by the 8th Amendment against cruel and unusual punishments. The factor linking all of these concurring opinions was that the death penalties in these cases were imposed randomly

and arbitrarily because the states had not set forth any guidelines to be used by judges or juries in determining when to impose the death penalty. According to Justice Douglas, "[t]he death penalty inflicted on one person is 'unusual' if it discriminates against him by reason of his race, religion, wealth, social position, or class, or if it is imposed under a procedure that gives room for the play of such prejudices." Id. at 242. Douglas based this statement on two facts. First, the language of the 8th Amendment was derived from a particular provision in the English Bill of Rights and the purpose of that provision was to forbid arbitrary and discriminatory penalties of a severe nature. Id. Douglas also stated that the requirements of the Equal Protection Clause of the Fourteenth Amendment are inherent in the proscription against cruel and unusual punishments imposed by the 8th Amendment. In order to comply with the Equal Protection Clause of the 14th Amendment, it is clear that punishments cannot constitutionally be imposed in an arbitrary or discriminatory manner. Justices Brennan, Stewart and White also focused on the arbitrary and discriminatory manner in which the death penalty had been imposed in these three instances to find it unconstitutional.

4. One example of a death penalty which is constitutional according to the Furman decision is the Georgia provision discussed by the Supreme Court in Gregg v. Georgia, 428 U.S. 153 (1975).^{3/} The Court determined that the Georgia statute complied with the guidelines set forth in Furman for the following reasons. First, the law narrows the class of persons subject to the death penalty by specifying ten aggravating circumstances and requiring that at least one must be present before the death penalty can be imposed. Id. at 196-97.^{4/} Second, the jury is authorized to consider any other appropriate or mitigating circumstances. Id. at 197. These procedures require the jury to consider the circumstances of the crime and the criminal before it recommends the sentence. Third, although some jury discretion exists, it is controlled by clear and objective standards so as to produce a nondiscriminatory application. Id. at 198, citing Coley v. State, 231 Ga. 829, 834, 204 S.E.2d. 612, 615 (1974). An additional safeguard is the statutory provision for an automatic appeal of all death sentences to the State's Supreme Court. The Court must insure that the death penalty was imposed in a nondiscriminatory manner which was free from the influence of passion. The Court must also examine similar cases to determine whether the sentence is disproportionate compared to the sentences imposed in those similar cases. Id. at 198.

5. In U.S. v. Harper, 729 F.2d 1216 (1984), the Ninth Circuit considered the constitutionality of the death penalty imposed under the Espionage Statutes in 18 U.S.C. § 794.^{5/} According to the statute, whoever is found guilty of gathering or delivering defense information to aid a foreign government may be punished by

death or by imprisonment for any term of years or for life. The Ninth Circuit determined that the death penalty imposed under this statute is unconstitutional because the statute contains no guidelines for a jury or judge to consider when imposing the death penalty. Id. at 1225. The court concluded that the legislature, representing organized society, must articulate clear guidelines concerning the factors about the crime and the defendant that the judge or jury must consider in determining whether to impose the death penalty. Id. at 1225. The court determined that such a statute would be the only way to comply with the Furman and Gregg decisions.

FOOTNOTES

1/ A sentence is the pronouncement by a court of the penalty imposed upon the defendant after the defendant has been found guilty. In the federal courts the sentence is usually imposed by the judge who presided at the trial. 4 Wharton's Criminal Procedure §609 (12th ed. 1976).

2/ The Court considered the death penalty as it had been imposed in three separate situations. Three black men were sentenced to death, two for crimes of murder and one for the crime of rape. Furman at 252-53. In each case, the determination of whether the penalty should be for death or a lighter punishment was left by the State to the discretion of the judge or the jury. All three of these cases involved jury trials. Id. at 240.

3/ Georgia's statutory scheme for the imposition of the death penalty is the following:

1. The death penalty may be imposed for only six categories of crime: murder, kidnapping for ransom or where the victim is harmed, armed robbery, rape, treason and aircraft hijacking. Gregg at 162-63.

2. If the trial is by jury, the judge is required to charge the lesser included offense if it is supported by the evidence. Id. at 163.

3. If guilt is determined, a presentence hearing is conducted before whoever made the determination of guilt.

At the hearing the judge [or jury] shall hear additional evidence in extenuation, mitigation, and aggravation of punishment, including the record of any prior criminal convictions and pleas of guilty or pleas of nolo contendere of the defendant, or the absence of any prior conviction and pleas: Provided, however, that only such evidence in aggravation as the State has made known to the defendant prior to his trial shall be admissible. The judge [or jury] shall also hear argument by the defendant or his counsel and the prosecuting attorney...regarding the punishment to be imposed. § 27-2503 (Supp. 1975)

Id. at 163-64.

4. In determining the appropriate sentence, the judge or jury must also consider any mitigating or aggravating circumstances otherwise authorized by law and any of ten aggravating statutory circumstances which the evidence supports. The judge or trial jury may impose the death penalty if he (they) find beyond a reasonable doubt the presence of at least one of the ten specified aggravating circumstances. Id. at 164-65. (See Footnote 4 for a list of these circumstances.)

5. If the verdict is death, the judge or jury must specify the aggravating circumstance(s) found. Id. at 166.

6. The statute provides for a special expedited direct review by the Supreme Court of Georgia for the purpose of determining the appropriateness of the death sentence in the particular case. Id. at 166.

7. The Supreme Court must determine whether the death sentence was imposed under the influence of passion or prejudice, whether the evidence supports the jury's or judge's finding of a statutory aggravating circumstance, and whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases. Id. at 166-67.

8. If the court affirms the death sentence, it must include in its decision reference to similar cases that it considered. Id. at 167.

9. A transcript and complete record of the trial, as well as a separate report by the trial judge, are transmitted to the court for its use in reviewing the sentence. The report is designed to elicit information about the defendant, the crime, and the circumstances of the trial. It requires the trial judge to characterize the trial in several ways designed to test for arbitrariness and disproportionality of the sentence. Id. at 167.

10. Under its special review authority, the court may either affirm the death sentence or remand the case for resentencing. In cases in which the death sentence is affirmed, there remains the possibility of executive clemency. Id. at 168.

4/ The statute provides in part:

"(a) The death penalty may be imposed for the offenses of aircraft hijacking or treason, in any case.

"(b) In all cases of other offenses for which the death penalty may be authorized, the judge shall consider, or he shall include in his instructions to the jury for it to consider, any mitigating circumstances or aggravating circumstances otherwise authorized by law and any of the following statutory aggravating circumstances which may be supported by the evidence:

"(1) The offense of murder, rape, armed robbery, or kidnapping was committed by a person with a prior record of conviction for a capital felony, or the offense of murder was committed by a person who has a substantial history of serious assaultive criminal convictions.

"(2) The offense of murder, rape, armed robbery, or kidnapping was committed while the offender was engaged in the commission or another capital felony, or aggravated battery, or the offense of murder was committed while the offender was engaged in the commission of burglary or arson in the first degree.

"(3) The offender by his act of murder, armed robbery, or kidnapping knowingly created a great risk of death to more than one person in a public place by means of a weapon or device which would normally be hazardous to the lives of more than one person.

"(4) The offender committed the offense of murder for himself or another, for the purpose of receiving money or any other thing of monetary value.

"(5) The murder of a judicial officer, former judicial officer, district attorney or solicitor or former district attorney or solicitor during or because of the exercise of his official duty.

"(6) The offender caused or directed another to a commit murder or committed murder as an agent or employee of another person.

"(7) The offense of murder, rape, armed robbery, or kidnapping was outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind, or an aggravated battery to the victim.

"(8) The offense of murder was committed against any peace officer, corrections employee or fireman while engaged in the performance of his official duties.

"(9) The offense of murder was committed by a person in, or who has escaped from, the lawful custody of a peace officer or place of lawful confinement.

"(10) The murder was committed for the purpose of avoiding, interfering with, or preventing a lawful arrest or custody in a place of lawful confinement, of himself or another.

"(c) The statutory instructions as determined by the trial judge to be warranted by the evidence shall be given in charge and in writing to the jury for its deliberation. The jury, if its verdict be a recommendation of death, shall designate in writing, signed by the foreman of the jury, the aggravating circumstance or circumstances which it found beyond a reasonable doubt. In non-jury cases the judge shall make such designation. Except in cases of treason or aircraft hijacking, unless at least one of the statutory aggravating circumstances enumerated in section 27-2534.1(b) is so found, the death penalty shall not be imposed." § 27-2534.1 (Supp. 1975).

5/ § 794. Gathering or delivering defense information to aid foreign governments.

(a) Whoever, with intent or reason to believe that it is to be used to the injury of the United States or to the advantage of a foreign nation, communicates, delivers, or transmits, or attempts to communicate, deliver, or transmit, to any foreign government, or to any faction or party or military or naval force within a foreign country, whether recognized or unrecognized by the United States, or to any representative, officer, agent, employee, subject, or citizen thereof, either directly or indirectly, any document, writing, code book, signal book, sketch, photograph, photographic negative, blueprint, plan, map, model, note, instrument, appliance, or information relating to the national defense, shall be punished by death or by imprisonment for any term of years or for life.

(b) Whoever, in time of war, with intent that the same shall be communicated to the enemy, collects, records, publishes, or communicates, or attempts to elicit any information with respect to the movement, numbers, description, condition, or disposition of any of the Armed Forces, ships, aircraft, or war materials of the United States or with respect to the plans or conduct, or supposed plans or conduct of any naval or military operations, or with respect to any works or

measures undertaken for or connected with, or intended for the fortification or defense of any place, or any other information relating to the public defense, which might be useful to the enemy, shall be punished by death or by imprisonment for any term of years or for life.

(c) If two or more persons conspire to violate this section, and one or more of such persons do any act to effect the object of the conspiracy, each of the parties to such conspiracy shall be subject to the punishment provided for the offense which is the object of such conspiracy.

8 April 1986

MEMORANDUM

SUBJECT: Summary of Bills Concerning the Imposition of the Death Penalty and Other Penalties under the Espionage Laws

1. H.R. 704 amends 18 U.S.C. § 2381 which currently provides for the death penalty in cases of treason. The amendment imposes criteria for the imposition of such a sentence of death. The bill requires the Government to notify the court and defendant if it intends to seek the death penalty. The judge is to conduct a separate sentencing hearing to determine whether any aggravating or mitigating factors exist. If no aggravating factors exist, the judge shall impose a sentence other than death. If aggravating and mitigating factors exist, the judge shall balance them to determine whether the death sentence is justified. The defendant has the right to appeal a death sentence to the court of appeals. H.R. 704 amends 18 U.S.C. §794(a) which currently authorizes the death penalty if one transmits or attempts to transmit to a foreign government any information relating to the national defense. The amendment restricts the imposition of the death penalty to cases in which the jury or court finds that the offense directly concerned nuclear weaponry, military spacecraft or satellites, early warning systems, or other means of defense or retaliation against large-scale attack; war plans; communications intelligence or cryptographic information; or any other major weapons system or major element of defense strategy.

2. H.R. 1082 also amends 18 U.S.C. §§ 794 and 2381, which are discussed above. The amendment requires the court to follow certain guidelines in determining whether or not to impose the death penalty. The Government must notify the court and defendant that it intends to seek the death penalty. If the defendant is found guilty, the judge is to conduct a separate sentencing hearing at which the judge or jury will determine the existence of any mitigating or aggravating factors. At the conclusion of this separate sentencing hearing, the finder of fact shall consider whether the aggravating factor(s) found to exist outweigh any mitigating factor(s), or whether the aggravating factor(s) alone

justify a sentence of death. At least one aggravating factor must exist before a death sentence is imposed. If the court finds that the sentence of death is justified, the court shall sentence the defendant to death. In the absence of such a finding, the court shall impose any sentence other than death that is authorized by law or a sentence of life imprisonment without parole. The defendant has the right to appeal a death sentence to the court of appeals. The court of appeals shall affirm the decision if it determines that the death sentence was not imposed arbitrarily and that the information presented at the separate sentencing hearing supports the finding of the existence of an aggravating factor.

3. H.R. 2797 amends 18 U.S.C. § 794 by adding a new subsection which creates a new Federal criminal offense of treasonous espionage, consisting of the unauthorized disclosure of classified information detrimental to the national security for profit. A person shall be subjected to the penalty of death for the offense of treasonous espionage only if the court follows the requisite guidelines. If the defendant is found guilty of the offense, the judge shall conduct a separate sentencing hearing to determine the existence of mitigating factors. The fact finder shall return a special verdict setting forth its findings as to the existence or nonexistence of each of four mitigating factors. If the court finds that one or more of the mitigating factors exists, it shall not sentence the defendant to death, but it shall impose any other sentence provided for by the offense for which the defendant was convicted.

4. H.R. 2662 amends 18 U.S.C. § 794 in order to provide more severe penalties for certain forms of espionage. The amendment leaves intact the sentence of death as one of the penalties for violating either subsection (a) or (b) of section 794.

5. H.R. 3026 amends title 10, United States Code, to establish under the Uniform Code of Military Justice the offense of espionage during peacetime and to provide for a sentence of life imprisonment for any person convicted of the offense. This amendment does not authorize the death penalty if a person commits the offense of espionage during peacetime.

6. H.R. 3188 amends title 10 of the United States Code by creating a new offense, espionage in time of peace. Any person who is subject to the Uniform Code of Military Justice who at any time, with intent or reason to believe that information is to be used to the injury of the United States or to the advantage of a foreign nation, communicates to a foreign government or faction any such information relating to the national defense shall be tried by a general court-martial. On conviction such person shall be punished by death or by imprisonment for any term of years or for life. If the foreign government is the Government of the

Soviet Union or any other Communist country, such person shall upon conviction be punished by death or mandatory life imprisonment. H.R. 3188 amends 18 U.S.C. § 794 by mandating that the death penalty provided for in subsection (a) may only be imposed if the jury or court finds that the foreign government involved is the Soviet Union or any other Communist country and that the information involved is classified. The death penalty authorized in subsection (b) may only be imposed if the jury or court finds that the government involved is the Soviet Union, any other Communist country, or an enemy of the United States and that the information involved is classified.

7. S. 1301 amends title 10 of the United States Code and 18 U.S.C. § 794 in the same manner as does H.R. 3188.

8. S. 1491 amends 18 U.S.C. § 794 in the following manner. The death penalty provided for in subsection (a) may not be imposed for an offense under this subsection occurring during a period other than war or when the United States Armed Forces are engaged in hostilities outside the territories or possessions of the United States unless the jury or judge finds that the offense directly concerned nuclear weaponry, military spacecraft or satellites, early warning systems, or other means of defense or retaliation against large-scale attack; war plans; communications intelligence or cryptographic information; sources or methods of intelligence or counterintelligence operations; or any other major weapons system or major element of defense strategy.

9. The death penalty authorized in subsection (b) of § 794 may not be imposed unless the court follows certain procedures. The Government must notify the court and defendant of its intent to seek the imposition of the death penalty. If the defendant is found guilty, the court shall conduct a separate sentencing hearing to determine the punishment to be imposed. At the hearing, information may be presented as to any matter relevant to the sentence, including mitigating and aggravating factors. The jury or court shall return a special finding as to each mitigating and aggravating factor. If an aggravating factor is found to exist, the jury or court shall then consider whether all the aggravating factors found to exist sufficiently outweigh all the mitigating factors found to exist to justify a sentence of death, or, in the absence of a mitigating factor, whether the aggravating factors alone are sufficient to justify a sentence of death. The jury or court shall then return a finding as to whether the sentence of death is justified.

10. S. 1654 amends 18 U.S.C. § 794 to provide for criminal forfeiture of proceeds derived from espionage activities and rewards for informants providing information leading to arrests in espionage cases. This bill does not amend the death penalty currently authorized by section 794.