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Introduction

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INTRODUCTION

*Arthur J. Goldberg**

In the summer of 1963, during my tenure on the Supreme Court, in reviewing the lists of cases to be discussed when the Court reconvened for the 1963 Term in October, I found six capital cases seeking review by certiorari. In studying these cases, I came to the conclusion that they presented the Court with an opportunity to explicitly address the constitutionality of capital punishment for the first time. I thereupon prepared a memorandum on this subject which I circulated to the members of the Court for their consideration.

In this memorandum, I stated:

The Court has never explicitly considered whether, and under what circumstances, the Eighth and Fourteenth Amendments to the United States Constitution proscribes the imposition of the death penalty. The Court has, of course, implicitly decided (in every case affirming a capital conviction) that the death penalty is constitutional. But in light of the worldwide trend toward abolition, I think this Court should now request argument and explicitly consider this constantly recurring issue.

In my memorandum, I marshalled the arguments and precedents against the death penalty. My conclusion was two-fold. First, the death penalty constitutes cruel and unusual punishment proscribed by the eighth and fourteenth amendments to the United States Constitution. Second, if a majority of the Court was unwilling to so hold, it should, in my view, rule that the death penalty could not constitutionally be imposed for an offense which did not involve the taking of human life.

When the Court reconvened on the first Monday of October 1963, at its initial conference, a majority voted to reject the contentions and conclusions of my memorandum. The vote was six to three. Only Justices Douglas and Brennan joined in support of my views.

The Court then proceeded to deny certiorari in the six capital cases before it. In one of them, *Rudolph v. Alabama*, the petitioner was sentenced to death for rape, a horrendous offense, which, however, did not involve the taking of human life. The Court denied the grant of certio-

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rari. I dissented on the ground that the death penalty was cruel and unusual punishment within the meaning of the eighth amendment since there was no taking of human life. Only Justices Douglas and Brennan joined in this dissent.

Although my efforts to declare the death penalty unconstitutional were unsuccessful, an important consequence was to alert the Bar to raise the issue of the constitutionality of the death penalty, which previously had not been done, even in the six cases upon which we ruled.

Thereafter, beginning in 1965, the constitutionality of the death penalty was raised by counsel in a wide variety of cases. Confronted squarely with the issues, the Court was forced to deal with both procedural and substantive challenges to the death penalty. This being the case, the Court, to consider these challenges, imposed a moratorium on executions which lasted from 1965 to 1980.

In 1972, the Supreme Court decided in *Furman v. Georgia* that the sentencing authority, judge or jury, cannot exercise untrammelled discretion to pronounce life or death in capital cases, but that rational standards must be used to make this determination. The sentencing authority was required to weigh various mitigating and aggravating factors in deciding whether an individual should be put to death. In other words, as the Court made clear in *Woodson v. North Carolina*, mandatory sentencing laws were unconstitutional.

Since most states had mandatory sentencing laws, and these were unconstitutional, the convictions of more than 600 inmates of death cells were reversed. They were not set free, however, but resentenced. Virtually all of them were then given life imprisonment.

Litigation, however, continued involving other aspects of the imposition of the death penalty, thus keeping the moratorium in effect while the states proceeded to amend their laws to conform to the Court's decision in *Furman*.

In 1976 in *Gregg v. Georgia*, the Court, for the first time, squarely held that "the punishment of death does not invariably violate the Constitution." It did so by a divided vote. This was a deplorable step backward. It legitimated the imposition of this ultimate sanction. Opponents of the death penalty continued to litigate, raising other issues.

In 1977, in *Coker v. Georgia*, the Court held that the imposition of the death penalty against an individual who had committed rape but did not take the life of the victim was unconstitutional under the eighth amendment. In *Coker*, the Court adopted my dissenting opinion in *Rudolph v. Alabama*, which it had rejected in 1963. This led to the resen-

tencing of defendants convicted of such crimes. My only comment is that in the Supreme Court, as in life in general, time works changes.

The moratorium imposed by the Court on the death penalty, however, was not lifted until 1980. This was because the Court, in a number of cases, had to pass on statutes which were redrafted by the states to meet the *Gregg* test. The Court sustained these statutes and made it clear by decisions and denial of certiorari that the states were free to proceed with executions in capital cases, as they regrettably now are doing. Since 1980, almost two hundred persons convicted of a capital offense, under statutes conforming to *Gregg*, have been executed.

Opponents of the death penalty, notwithstanding, have continued their challenge on other grounds. In *McCleskey v. Kemp*, the death penalty was attacked on the ground, supported by substantial evidence, that it was disproportionately imposed on blacks and other minority groups. The Court rejected this contention.

In view of the present majority on the Court, which supports imposition of the death penalty, there is no likelihood that the Court will overrule its ruling in *Gregg* in the foreseeable future.

Watchman, what of the night? Or, to put it in other terms, where other than the Court can opponents of the death penalty turn for relief?

The answer is Congress, state legislatures, state courts and governors.

Public opinion polls show that a majority of the public now favors imposition of the death penalty. Nevertheless, public opinion on this grave matter has changed in the past and, hopefully, it may change in the not too distant future.

Further, there is a widespread and mistaken notion, not only in public minds, but among these agencies, that the Supreme Court having spoken is the final word.

Not so! There is nothing in the Constitution which precludes Congress, state legislatures, state courts and governors from abolishing or not imposing the death penalty, despite the Supreme Court's holdings. These bodies may go beyond the Court in protecting individual freedoms, including the safeguard against cruel and unusual punishment. What they may not do is restrict Supreme Court decisions. In other words, they may not invoke the discredited doctrines of interposition and nullification which were designed to limit constitutional safeguards mandated by the Supreme Court.

In addition, Congress, under section 5 of the fourteenth amendment, may declare that capital punishment is in violation of due process. Thus,

at one blow, Congress has the right to abolish capital punishment throughout the United States.

Also, state legislatures and state courts may interpret the language of their own constitutions as outlawing the death penalty, notwithstanding that the language of their constitutions is the same or similar to the eighth amendment and, notwithstanding the holdings of the Supreme Court applying the Federal Constitution. Their right to do so is an established principle of federalism and not subject to review by the Supreme Court. And state governors may commute persons sentenced to the death penalty, both on constitutional and moral grounds.

So, the ball is in the court of Congress, legislatures of the several states, their courts and their governors. These bodies cannot escape the reality that in excess of 2000 persons are now incarcerated in death cells and more will follow. They cannot escape the reality that the executions of such persons will be nothing more than governmental mass murder.

And they cannot ignore the fact that all reliable studies fail to show any probative evidence that imposition of the death penalty effectively deters capital offenses. Deterrence, after all, is the ultimate rationale for criminal punishment.

Camus once said, "the great civilizing step" is to abolish the death penalty. Most Western countries have done so and many neutral and non-aligned countries as well.

The ultimate question is: Shall our nation continue to live under the archaic doctrine of *lex talionis*—an eye for an eye and a tooth for a tooth?