

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WILLIAM O. DOUGLAS

June seventh
1971

MEMORANDUM TO: William H. Alsup)
Richard L. Jacobson) Law Clerks - 1971 Term
Kenneth R. Reed)

There is a third assignment that I would like to have one of you undertake. Since I do not know any of you, I leave the matter of the assignment to the three of you. One of you may have a special interest in it that the others do not share -- or one of you may have the background that will start you on your way.

It relates to the death cases that the Court is handing down shortly and the designation of some of those cases for oral argument the first week of argument in October. When we took the Maxwell case a few terms back and the McGautha case and the Crampton case, we limited the grant of certiorari so that the constitutionality of the death sentence would not be reached. There has been a drive on inside the Court to reach that issue so that, to use the words of Justice Black "it may be disposed of once and for all," as if that were possible.

The death penalty has been with us from the very beginning and would require considerable effort to read cruel and unusual punishment in the Eighth Amendment as outlawing it. I suppose that if a State passed a law making it a capital offense for anyone to steal a loaf of bread or a set of food stamps, a court would hold that to be cruel and unusual. But the cases that we have involve either rape with or without injury in the physical sense; rape cases with or without beating; robbery without physical violence to the person, and then the run of the mill murder cases.

The Court decided on June seventh to name a committee composed of Brennan and White to go through the some 185 capital cases then before the Court and to pick cases from each of the three groups with the view of recommending that they be argued October 1971. Some of us opposed this procedure arguing that

the decision of appropriate penalty rested in the very broad discretion of the legislature and that therefore the choice of penalty lay in the legislative rather than in the judicial realm absent a clear cut and extreme case which I have already mentioned -- where the death penalty is exacted for stealing a food stamp.

Burger, Blackmun, Stewart, Brennan, Marshall and I were disposing of all the capital cases presently before us merely by denying. A Fourth Circuit case has been brought here recently by Maryland through the appeal route so that would have to be disposed of by some kind of per curiam. But there was a majority of the Court willing to follow that course rather than to have these cases festering here for at least another Term.

The drive on the other side was very strong, Black demanding that we hear the cases next week and decide them the week after next. In other words, he wanted to make it clear to the nation that the death penalty and all of its aspects pass constitutional muster. But there were finally enough votes to let Brennan and White select cases from each of the three groups and put those cases down for argument in October.

Hence this memo and hence this summer research project. The question of the death penalty has been a hobby of mine for some years. I have always thought it was extremely unwise as a public policy to enforce it. That of course is a far cry from saying that it is cruel and unusual punishment under the meaning of the Eighth Amendment. We as a people have always had the death penalty. Why it should become suddenly unconstitutional is a puzzle because none of the rape cases, none of the murder cases, none of the burglary cases are anywhere near the loaf of bread case that I mentioned above.

We need a solid piece of work this summer on the sociological, penological, psychiatric, and legislative aspects of this whole problem. I do not think this Court is wise enough to make a decision on all these various facets of this problem. I think it is a decision that turns not on the meaning of a constitutional phrase but on the degree of maturity of the people. The question is not political in the sense of Reynolds v. Sims, but in the

framework of our Constitution it is non-legal as compared to legal. In other words it goes into the realm of what our public policy should be. I have long felt that where there is a mandate in the Constitution such as in the Fifth Amendment or in the First Amendment we should enforce that very freely and, if you please, expansively. But the words "cruel and unusual" allow no such manipulation if the historic frame of reference from which they are drawn is kept in mind. If that norm is departed from then the words become entirely subjective. Great, great value judgments are involved. That is why sociological, penological, and other phases of the question which I have mentioned become germane.

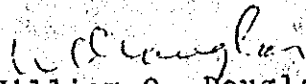
The summer research project should go into all these materials. The Court decisions are largely irrelevant. Sociological, psychiatric and political documents are very relevant. England has had several royal commissions dealing with the problem. Would it be lack of equal protection to execute a woman who killed a policeman but not to execute her if she killed her husband? These value judgments are beyond the expertise of courts. We have difficulty enough in determining what is "reasonable" within the meaning of the Fourth Amendment. We are utterly lost when it comes to making a law for the entire country that determines what is "civilized" or necessary for law and order.

I have been interested in the past in getting the felony statistics from those States that have abolished capital punishment. Minnesota is one; Michigan is another. They have been without capital punishment for some time. There are other States that are more recent converts. I would think that the impact of capital punishment on felonies is a very important aspect of this whole problem. I would look at these very closely. If there is no difference between Minnesota and Michigan on the one hand and New York on the other, it is arguably unwise for the people in New York to perpetuate capital punishment on the ground that it is a deterrent to crime or at least to felonies. My conclusion years ago was that capital punishment was not such a deterrent any more than war is a deterrent. The stockpiling of arms and threats or reprisals usually generate war rather than prevent it. At least that has been our history up to now.

These are very large questions and underline this problem. I am not interested in a collection of cases to show what judges have decided on the matter because judges by and large are pretty ignorant people. But I am interested in case workers, penologists,

and others who are close to the phenomena with which capital punishment deals and their conclusions and observations.

I have not checked this, but I am quite sure that each of the colonies or States had the death penalty at the time they approved the Bill of Rights. I would like in a memo the crimes that were covered by those laws state-by-state and I would like some reference to the debates on the Bill of Rights that specifically refer to the death penalty.


William O. Douglas