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PRESIDENTIAL POWER OF COMMUTATION: FROM
DEATH TO LIFE WITHOUT PAROLE

Schick v. Reed, 483 F.2d 1266 (D.C. Cir. 1973)

In 1954 petitioner was convicted by court-martial of premeditated murder¹ and sentenced to death. In 1960 President Eisenhower commuted his sentence to dishonorable discharge and life imprisonment without possibility of parole.² Petitioner sought an order directing the United States Board of Parole³ to consider him for parole, claiming

1. Schick, an Army master sergeant, was tried and sentenced under the provisions of the Uniform Code of Military Justice [hereinafter cited as UCMJ], the governing body of substantive and procedural law for the United States Armed Forces. The UCMJ was enacted in 1950, Ch. 169, 64 Stat. 108, pursuant to congressional authority to "make Rules for the Government and Regulation of the land and naval Forces." U.S. CONST. art. I, § 8. For general analysis of the UCMJ, see W. AYCOCK & S. WURFEL, *MILITARY LAW UNDER THE UNIFORM CODE OF MILITARY JUSTICE* (1955); A. SCHILLER, *MILITARY LAW* (4th ed. 1968); Snedeker, *The Uniform Code of Military Justice*, 38 GEO. L.J. 521 (1950).

Schick was convicted under article 118 of the UCMJ, 10 U.S.C. § 918 (1970), which provides, in pertinent part:

Any person subject to this chapter who, without justification or excuse, unlawfully kills a human being, when he— (1) has a premeditated design to kill . . . shall suffer death or imprisonment for life as a court-martial may direct.

The UCMJ provides an elaborate system of appellate review of court-martial convictions. Cases in which a death sentence is imposed must be reviewed by a Board of Review. UCMJ art. 66(b), 10 U.S.C. § 866(b) (1970). Cases in which the Board of Review has affirmed a death sentence must be reviewed by the Court of Military Appeals, *id.* art. 67(b)(1), 10 U.S.C. § 867(b)(1) (1970), and if again affirmed, by the President. *Id.* art. 71(a), 10 U.S.C. § 871(a) (1970). The President's review is limited to the sentence; he may approve the death sentence, or commute it and then approve the commuted sentence. *Id.* In Schick's case, the death sentence was affirmed by both the Board of Review and the Court of Military Appeals. *United States v. Schick*, 6 U.S.C.M.A. 493, 20 C.M.R. 209 (1955), *aff'd on rehearing*, 21 C.M.R. 343 (1956).

2. The President's commutation order included the following language: "This commutation of the sentence is expressly made on the condition that [he] shall never have any rights . . . arising under the parole . . . laws of the United States . . ." Brief for Appellees at 15, *Schick v. Reed*, 483 F.2d 1266 (D.C. Cir. 1973).

3. The United States Board of Parole, which consists of eight members appointed by the President, has sole authority to grant, modify, or revoke paroles of all federal prisoners. Office of the Federal Register, General Services Administration, *United States Government Organization Manual 1972/73*, at 293 (1972). See 18 U.S.C. § 4201 (1970) (creating the Parole Board).

that since the federal parole statute⁴ provided for parole eligibility after fifteen years of a life sentence, the "no parole" condition imposed by the President was illegal. The federal district court granted the Parole Board's motion for summary judgment⁵ on the ground that the commutation was a valid exercise of presidential power under article II of the Constitution.⁶ The United States Court of Appeals for the District of Columbia Circuit affirmed and *held*: The constitutional grant of pardon power to the President includes the power to commute a death sentence to life imprisonment without possibility of parole, notwithstanding the parole statute.⁷

4. 18 U.S.C. § 4202 (1970) provides:

A Federal prisoner, other than a juvenile delinquent or a committed youth offender, wherever confined and serving a definite term or terms of over one hundred and eighty days, whose record shows that he has observed the rules of the institution in which he is confined, may be released on parole after serving one-third of such term or terms or after serving fifteen years of a life sentence or of a sentence of over forty-five years.

Military prisoners confined in federal institutions (as in *Schick*) are generally subject to the parole provisions for federal prisoners. *Koyce v. United States Bd. of Parole*, 306 F.2d 759 (D.C. Cir. 1962); *Jones v. Looney*, 107 F. Supp. 624 (E.D. Mich. 1952); *Jackson v. Humphrey*, 92 F. Supp. 635 (M.D. Pa.), *aff'd per curiam*, 185 F.2d 407 (3d Cir. 1950), *cert. denied*, 340 U.S. 937 (1951). Military prisoners confined in military institutions have their own parole provisions. *See, e.g.*, 10 U.S.C. § 3663 (1970) (Army).

5. *Schick v. Reed*, Civil No. 779-71 (D.D.C., Mar. 29, 1972).

6. U.S. CONST. art. II, § 2 provides: "The President shall be Commander in Chief of the Army and Navy of the United States . . . and he shall have Power to grant Reprieves and Pardons for Offenses against the United States, except in Cases of Impeachment."

In an unpublished order the district court stated that "the conditional commutation of plaintiff's sentence was the result of the exercise by the President of his powers under Article II of the Constitution to grant reprieves and pardons for offenses against the United States, and of his authority as Commander-in-Chief of the Armed Forces and under the provisions of the Uniform Code of Military Justice . . ." It appears that the court was unsure from which presidential power the commutation derived. Brief for Appellant at 3 n.1, *Schick v. Reed*, 483 F.2d 1266 (D.C. Cir. 1973).

7. *Schick v. Reed*, 483 F.2d 1266 (D.C. Cir. 1973). The court also rejected petitioner's arguments that his confinement without the possibility of parole was cruel and unusual punishment and a denial of equal protection. In discussing the issue of cruel and unusual punishment, the court noted that a federal narcotics statute precluding parole had been upheld against eighth amendment attack. *Id.* at 1269. *See, e.g.*, *Stewart v. United States*, 325 F.2d 745 (8th Cir.), *cert. denied*, 377 U.S. 937 (1964), *construing* Narcotic Control Act of 1956, ch. 629, tit. I, § 103, 70 Stat. 568. The analogy is weak because that statute made parole unavailable for a maximum of forty years, not during life imprisonment; furthermore, the statute was repealed by the Comprehensive Drug Abuse Prevention and Control Act of 1970, 21 U.S.C. §§ 801-966 (1970), which restored availability of parole for narcotics offenders. More persuasive is the court's recognition that confinement for a lifetime is a

In contrast to the English theory that the power to grant pardons was inherent in the King,⁸ the early American theory was that the pardon power rested in the people as the ultimate sovereign, who chose to provide for its exercise by the executive branch of their Government.⁹ Thus, the Federal Constitution confers the pardon power upon the President,¹⁰ and state constitutions generally delegate this power to the governor.¹¹

A full pardon releases an offender from all consequences of his conviction.¹² The President is not limited to giving full pardons, however, and may grant conditional pardons and commutations as

less severe punishment than execution, which has not yet been held prohibited by the eighth amendment in all circumstances. See *Furman v. Georgia*, 408 U.S. 238 (1972); note 33 *infra* and accompanying text.

The court dismissed the equal protection claim summarily. Having defined Schick's class as all those sentenced to death by court-martial, the court stated that he "is in no worse position than others of his class . . . sentenced to death during a period when the death penalty was being enforced"—in other words, he is alive and they are not. 483 F.2d at 1270.

8. Generally speaking, the English theory of government was that all powers of government emanated from the King. Laws were enacted, adjudicated, and administered by his authority. Prosecutions were conducted in his name. It was the King's peace or the peace and good order of the King's realm which was offended by crime; hence the King could bestow his mercy by pardon.

Jamison v. Flanner, 116 Kan. 624, 634, 228 P. 82, 87 (1924). See also 4 H. STEPHEN, COMMENTARIES ON THE LAWS OF ENGLAND 561 (6th ed. 1868).

9. See *Laird v. Sims*, 16 Ariz. 521, 523, 147 P. 738, 739 (1915); *Jamison v. Flanner*, 116 Kan. 624, 634, 228 P. 82, 87 (1924); U.S. DEP'T OF JUSTICE, THE ATTORNEY GENERAL'S SURVEY OF RELEASE PROCEDURES pt. III, at 88-89 (1939) [hereinafter cited as RELEASE PROCEDURES]. But see Lieber, *A Paper on the Abuse of the Pardoning Power*, in CIVIL LIBERTY AND SELF-GOVERNMENT 431 (3d ed. T. Woolsey 1875) (suggesting that the people chose the chief executive merely because he stands in the place of the monarch in this country).

10. For the specific language of the constitutional grant of pardon power, see note 6 *supra*. Crimes prohibited by military laws are offenses against the United States, and only the President has power to pardon those crimes. 19 OP. ATT'Y GEN. 106 (1888); cf. *Vanderslice v. United States*, 19 Ct. Cl. 480 (1884) (President may remit penalties inflicted by court-martial sentence but cannot reinstate officer after sentence of dismissal has been carried into effect).

11. In a majority of states, however, the governor is assisted in the pardoning process by a state official or agency. In some states the agency is an advisory board which holds hearings and makes recommendations to the governor. See, e.g., IND. CONST. art. V, § 17 ("a council to be composed of officers of State"). In others the governor is a member of a pardon board which constitutes the ultimate pardoning authority. See, e.g., FLA. CONST. art. IV, § 8 (governor may pardon "with the approval of three members of the cabinet").

12. *Knote v. United States*, 95 U.S. 149 (1887); *United States v. Wilson*, 32 U.S. (7 Pet.) 150 (1883).

well.¹³ While a commutation normally affects only the length of a prison sentence, the commutation of a death sentence changes the nature of the punishment.¹⁴

Parole, though often confused with conditional pardon¹⁵ and the concept of leniency,¹⁶ does not alter the court-imposed sentence, but rather merely permits a prisoner to serve a portion of his sentence outside prison.¹⁷ The federal parole system at its creation in 1910¹⁸

13. *Ex parte Wells*, 59 U.S. (18 How.) 307 (1855). The President had pardoned Wells' death sentence on condition that he remain in prison for life. The Supreme Court reasoned that the Constitution extended the power to all kinds of pardons then known to the law; since the pardon power as exercised by the English Crown included conditional pardons, the same meaning must be given to the language in the Constitution. *Id.* at 311. Wells' conditional pardon, however, was actually a commutation, or substitution of a less severe sentence. Thus, later cases interpreted *Wells* to mean that the President has power to commute sentences. *See, e.g.*, *Biddle v. Perovich*, 274 U.S. 480 (1927); *Bishop v. United States*, 223 F.2d 582 (D.C. Cir. 1955), *vacated on other grounds*, 350 U.S. 961 (1956); *Ex parte Harlan*, 180 F. 119 (C.C.N.D. Fla. 1909), *aff'd sub nom.* *Harlan v. McGourin*, 218 U.S. 442 (1910). Note that the pardon in *Wells* had the same effect as the conditional commutation in the instant case; because there was no federal parole system in 1855, Wells would remain in prison until his death.

In thirty-seven states the power to grant commutations is specifically included in the pardon power conferred by the state constitution. A typical provision is found in ILL. CONST. art. V, § 12: "The Governor may grant reprieves, commutations and pardons, after conviction, for all offenses on such terms as he thinks proper. The manner of applying therefore [*sic*] may be regulated by law." *See also* Mo. CONST. art. IV, § 7:

The governor shall have power to grant reprieves, commutations and pardons, after conviction, for all offenses except treason and cases of impeachment, upon such conditions and with such restrictions and limitations as he may deem proper, subject to provisions of law as to the manner of applying for pardons. The power to pardon shall not include the power to parole.

14. In *Biddle v. Perovich*, 274 U.S. 480 (1927), presidential power to commute a death sentence to life imprisonment was upheld on the theory that life imprisonment was generally understood to be a lesser penalty than death.

The unique nature of the death penalty was considered at length in the concurring and dissenting opinions in *Furman v. Georgia*, 408 U.S. 238 (1972). *See note 33 infra* and accompanying text.

15. *See, e.g.*, *Ex parte Peterson*, 14 Cal. 2d 82, 92 P.2d 890 (1939); *Lovelace v. Commonwealth*, 285 Ky. 326, 147 S.W.2d 1029 (1941); *State v. Murphy*, 345 Mo. 358, 133 S.W.2d 398 (1939); *Fehl v. Martin*, 155 Ore. 455, 64 P.2d 631 (1937).

16. *See, e.g.*, *Zink v. Lear*, 28 N.J. Super. 515, 522, 101 A.2d 72, 75 (1953) ("an act of leniency"); *Commonwealth ex rel. Carmelo v. Burke*, 168 Pa. Super. 109, 118, 78 A.2d 20, 24 (1951) ("a matter of grace").

17. *See, e.g.*, *Anderson v. Corall*, 263 U.S. 193, 196 (1923); *People ex rel. Abner v. Kinney*, 30 Ill. 2d 201, 205, 195 N.E.2d 651, 653 (1964); *Doyle v. Hampton*, 207 Tenn. 399, 404, 340 S.W.2d 891, 893 (1960).

One author suggests that parole originated in America as an outgrowth of the re-

did not provide parole eligibility for prisoners serving life sentences.¹⁹ The parole statute was soon amended,²⁰ and now confers upon all federal prisoners the right to be considered for parole.²¹ Since parole is only a privilege and not a right,²² however, courts have unanimously upheld the Parole Board's discretion to deny parole.²³

Generally, when a sentence has been commuted by the President the date of parole eligibility is determined according to the length of the commuted sentence.²⁴ Thus, a federal prisoner whose death

formatory movement and in response to indeterminate sentences and crowded prisons. R. CLEGG, *PROBATION AND PAROLE* 22-23 (1964). The most important functions of parole are rehabilitation of the offender, protection of society (by keeping the offender under supervision), and prevention of crime (the desired result of rehabilitation). See generally *RELEASE PROCEDURES* pt. IV.

18. Act of June 25, 1910, ch. 387, 36 Stat. 819.

By 1910, thirty-two states had enacted parole statutes. *RELEASE PROCEDURES* pt. IV, at 20. Today, every state has parole laws. O'Leary & Nuffield, *A National Survey of Parole Decision Making*, 19 *CRIME & DELINQUENCY* 378, 379 (1973); Comment, *Curbing Abuse in the Decision to Grant or Deny Parole*, 8 *HARV. CIV. RIGHTS-CIV. LIB. L. REV.* 419, 421 (1973). State statutes delegating the power of parole to administrative bodies have been held not to infringe upon governors' pardoning powers. See Annot., 143 *A.L.R.* 1486 (1943).

19. "During the first two years of operation, the law was construed to mean that no life term prisoner was eligible for consideration for parole. As there were nearly two hundred such prisoners then in confinement, the Attorney General, in his annual report to Congress, recommended that the law be amended so as to include such prisoners . . ." White, *The Federal Parole Law*, 12 *A.B.A.J.* 51 (1926).

20. Act of Jan. 23, 1913, ch. 9, 37 Stat. 650.

21. 18 U.S.C. § 4202 (1970); note 4 *supra*. See *Cook v. Willingham*, 389 F.2d 769, 770 (10th Cir. 1968); cf. *Jones v. United States*, 419 F.2d 593 (8th Cir. 1969); *United States v. Howell*, 103 F. Supp. 714, 718 (S.D.W. Va.), *aff'd*, 199 F.2d 366 (4th Cir. 1952). The issue in *Schick* was whether the President can withhold this right.

22. *United States v. Frederick*, 405 F.2d 129 (3d Cir. 1968); *Richardson v. Rivers*, 335 F.2d 996 (D.C. Cir. 1964); *O'Neill v. United States*, 315 F. Supp. 1352 (D. Minn. 1970), *aff'd*, 438 F.2d 1236 (8th Cir. 1971).

23. See, e.g., *Buchanan v. Clark*, 446 F.2d 1379, 1380 (5th Cir.), *cert. denied*, 404 U.S. 979 (1971) (failure of Parole Board to grant parole was not due process violation); *Hyser v. Reed*, 318 F.2d 225, 240 (D.C. Cir.), *cert. denied*, 375 U.S. 957 (1963) (Parole Board's discretion to grant, deny, or revoke parole is broad).

24. *Duehay v. Thompson*, 223 F. 305 (9th Cir. 1915), *aff'g* 217 F. 484 (W.D. Wash. 1914). In *Duehay* the court held that the prisoner was eligible for parole under the federal parole statute after serving one-third of the commuted four-year sentence rather than after serving one-third of the original eight-year sentence imposed at trial. "To decree otherwise is to impair the power of the President to grant a commutation of sentence." 217 F. at 486. Some state courts, however, have held *contra*. *Alford v. Hines*, 189 Ky. 203, 224 S.W. 752 (1920) (state parole statute requires service of minimum term provided for offense, despite governor's commutation); *People v. Jenkins*, 325 Ill. 372, 156 N.E. 290 (1927).

sentence was commuted to life imprisonment would become eligible for parole after serving fifteen years.²⁵ When the commuted sentence expressly prohibits parole, however, the legality of that sentence may be questioned.

Schick v. Reed is a case of first impression²⁶ in considering presidential power to commute a death sentence to life imprisonment without parole.²⁷ The *Schick* court relied on the President's acknowledged

25. The dissent in *Duehay* suggested that the federal parole statute should only apply to an original court-imposed sentence, with the result that it would be ineffective to release a prisoner whose death sentence was commuted to life imprisonment. 223 F. 305, 308 (9th Cir. 1915) (dissenting opinion). The rule is otherwise, however. Cf. *Bishop v. United States*, 223 F.2d 582 (D.C. Cir. 1955), *vacated on other grounds*, 350 U.S. 961 (1956) (President commuted death sentence to life imprisonment; issue was whether parole eligibility was determined from date of sentence or date of commutation).

26. The power to withhold parole eligibility as a condition of a commutation had been recognized by only two courts before *Schick*. The only federal case is *Hurt v. Mosely*, No. 71-1307 (10th Cir., Sept. 13, 1971). The President had commuted a death sentence imposed by court-martial to a forty-five year term without parole. On appeal the court summarily affirmed the lower court's denial of habeas corpus relief. In an unpublished opinion the court dealt only with presidential power to grant conditional commutations and did not discuss any possible conflict with the federal parole statute. See also *Hegelberger v. United States*, 445 F.2d 279 (5th Cir. 1971), *cert. denied*, 405 U.S. 925 (1972) (death sentence commuted to fifty-five years without parole, to begin on commutation date; only challenge was to when the years began to run).

In two California Supreme Court cases, the governor had commuted death sentences to life imprisonment without parole. CAL. CONST. art. VII, § 1 (1879) (now CAL. CONST. art. V, § 8) gave the governor power to commute "upon such conditions, and with such restrictions and limitations, as he may think proper . . ." In *In re Collie*, 38 Cal. 2d 396, 240 P.2d 275 (1952), *cert. denied*, 345 U.S. 1000 (1953), the court reasoned that enactment of the state parole statute, CAL. PEN. CODE § 3046 (Deering 1970), providing parole eligibility after serving seven years of a life sentence, did not indicate an intent to deprive the governor of power to withhold parole. The court, therefore, avoided the issue of whether the legislature could constitutionally do so. In *Green v. Gordon*, 39 Cal. 2d 230, 246 P.2d 38, *cert. denied*, 344 U.S. 886 (1952), however, the court held that a commutation precluding parole could not be imposed without the prisoner's consent. It should be noted that the California legislature had provided life imprisonment without possibility of parole as an alternative to the death penalty for certain crimes. CAL. PEN. CODE § 209 (Deering 1970) (kidnapping with bodily injury); *id.* § 219 (trainwrecking without bodily injury). Prior legislative approval of the "life without parole" punishment may have been an underlying factor in the above judicial decisions.

27. In 1915, President Wilson exercised the power here in question, apparently without judicial challenge. 41 OP. ATT'Y GEN. 251, 254 (1955). Apparently President Eisenhower also exercised this power in four cases, including the case for which he sought the Attorney General's opinion cited above. See 1955 ATT'Y GEN. ANN. REP. 330 (disposition of cases considered for executive clemency in 1955). The Attorney General concluded that: (1) the pardon power authorized the President, in com-

power to grant conditional commutations,²⁸ and although tacitly recognizing that there may be some limitations on this power,²⁹ decided that the parole statute was not intended to deprive the President of power to withhold parole.³⁰ The court concluded that statutes providing finality

muting a death sentence to life imprisonment, to attach a condition of "no parole;" (2) the President could do so without obtaining the prisoner's consent; and (3) the President's action could not bind his successors. 41 OP. ATT'Y GEN. 251 (1955). The Attorney General's opinion is quoted and approved by the majority opinion in the instant case. 483 F.2d at 1269.

28. See, e.g., *Bishop v. United States*, 223 F.2d 582 (D.C. Cir. 1955), *vacated on other grounds*, 350 U.S. 961 (1956); cases cited note 29 *infra*. The rule was apparently derived from *Ex parte Wells*, 59 U.S. (18 How.) 307 (1855), which upheld the President's power to grant conditional pardons. See note 13 *supra*. Later cases upheld conditional commutations, but referred to them as conditional pardons, relying on *Wells*. See, e.g., *Ex parte Grossman*, 267 U.S. 87, 120 (1924); *Semmes v. United States*, 91 U.S. (2 Otto.) 21, 27 (1875); *United States v. Klein*, 80 U.S. (13 Wall.) 128, 142 (1871).

29. Some cases suggest that the President cannot impose illegal, immoral, or impossible conditions. See, e.g., *Vitale v. Hunter*, 206 F.2d 826, 828 (10th Cir. 1953); *Lupo v. Zerbst*, 92 F.2d 362, 364 (5th Cir.), *cert. denied*, 303 U.S. 646 (1937); *Kavalin v. White*, 44 F.2d 49, 51 (10th Cir. 1930). None of the cases defines what is meant by "illegal" and all uphold conditions imposed by the President. The commentators indicate, however, that "illegal" refers to the manner in which the condition is to be performed by the prisoner to prevent revocation of the commutation. See, e.g., W. HUMBERT, *THE PARDONING POWER OF THE PRESIDENT* 74 (1941). In *Schick*, the "no parole" condition did not require performance by the prisoner, but rather nonperformance by the Parole Board, so the question was whether the President can legally bind the Parole Board not to consider a prisoner for parole.

30. The court avoided the conflict that might arise if Congress tried to impose a limitation on presidential exercise of the pardoning power. "[The pardoning] power of the President is not subject to legislative control." *Ex parte Garland*, 71 U.S. (4 Wall.) 333, 380 (1866). In that case, President Johnson had granted attorney Garland a full pardon for offenses committed during his participation in the Civil War. The Court held that a statute requiring attorneys to swear they had never voluntarily borne arms against the United States interfered with the presidential pardoning power by seeking to punish Garland for the pardoned offenses. See also *Ex parte Grossman*, 267 U.S. 87 (1924); *The Laura*, 114 U.S. 411 (1885).

As originally enacted, the federal parole statute contained a provision that "nothing herein shall be construed to impair the power of the President of the United States to grant a pardon or commutation in any case . . ." Act of June 25, 1910, ch. 387, § 10, 36 Stat. 821. The court considered this provision an unambiguous expression of legislative intent to allow the President to withhold parole. Arguably, however, it could be interpreted as a concession to the President's power to grant a pardon or commutation that would release a prisoner before he otherwise would be eligible for parole. Furthermore, the provision does not appear in any subsequent revisions of the statute.

The technique employed by the *Schick* court to avoid a constitutional clash of executive and legislative powers was also used by the California Supreme Court in *Washington University Open Scholarship*

and unlimited discretion to presidential review of court-martial death sentences³¹ indicate a congressional intent to preserve the President's commutation power in all cases³² to which that power extends.

The majority of the *Schick* court rejected petitioner's argument that the Supreme Court ruling in *Furman v. Georgia*,³³ which held the

In re Collie, 38 Cal. 2d 396, 240 P.2d 275 (1952), cert. denied, 345 U.S. 1000 (1953). See note 26 *supra*.

31. UCMJ art. 71(a) provides that the President "shall approve the sentence or such part, amount, or commuted form of the sentence as he sees fit . . ." 10 U.S.C. § 871(a) (1970). Article 76 provides that the action taken by the President under article 71(a) is "final and conclusive" and "binding upon all departments, courts, agencies, and officers of the United States . . ." 10 U.S.C. § 876 (1970).

32. The provisions of the UCMJ cited by the court apply only to military cases, and perhaps are better viewed as a concession to the President in his role as Commander in Chief; the court, however, did not appear to recognize this possible distinction. 483 F.2d at 1269.

33. 408 U.S. 238 (1972). This landmark 5-4 decision was accompanied by nine separate opinions. The per curiam opinion stated:

[T]he imposition and carrying out of the death penalty in these cases constitutes cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments. The judgment in each case is therefore reversed insofar as it leaves undisturbed the death sentence imposed, and the cases are remanded for further proceedings.

Id. at 239-40. Of the concurring Justices, only Justices Brennan and Marshall would hold capital punishment a per se violation of the eighth amendment. Justices Douglas, Stewart, and White relied on the infrequent and discretionary use of the death penalty to conclude that it was cruel and unusual punishment. The dissenting Justices felt the question involved was one for the legislatures, not the courts, to resolve. For a full discussion of the nine opinions, see *The Supreme Court, 1971 Term*, 86 HARV. L. REV. 50, 76 (1972). The history of the movement to abolish capital punishment is explained in Meltsner, *Litigating Against the Death Penalty: The Strategy Behind Furman*, 82 YALE L.J. 1111 (1973).

Since *Furman* the Supreme Court has vacated death sentences *en masse* and remanded cases to appropriate state supreme courts. See, e.g., 408 U.S. 933, 933-40 (1972) (113 memorandum orders). The state courts generally follow two patterns. First, where the statute for the crime provides punishment of death or life imprisonment, the court either itself modifies the sentence to life imprisonment, see, e.g., *State v. Johnson*, 31 Ohio St. 2d 106, 285 N.E.2d 751 (1972), or remands to the trial court for pronouncement of the life sentence. See, e.g., *Capler v. State*, 268 So. 2d 338 (Miss. 1972); *Commonwealth v. Bradley*, 449 Pa. 19, 295 A.2d 842 (1972). Secondly, where the statute provides for death, life, or any term of years, the court generally remands to the trial court for resentencing, see, e.g., *Anderson v. State*, 267 So. 2d 8 (Fla. 1972), or for a new trial on the issue of punishment. See, e.g., *People v. Speck*, 52 Ill. 2d 284, 287 N.E.2d 699 (1972); *Huggins v. Commonwealth*, 213 Va. 327, 191 S.E.2d 734 (1972). At least two state courts, however, have decreed that *Furman* affects only the discretionary provisions of punishment, i.e. that the jury has discretion to recommend mercy, so that a mandatory death penalty for certain crimes remains intact. *Delaware v. Dickerson*, — Del. —, 298 A.2d 761 (1972); *State v. Waddell*, 282 N.C. 431, 194 S.E.2d 19 (1973).

death penalty unconstitutional in certain circumstances, required that his original death sentence be replaced by one of life imprisonment with the possibility of parole.³⁴ The majority reasoned that *Furman's* retroactive application is limited to those persons who were under a death sentence when *Furman* was decided.³⁵

Judge Wright's dissent, however, adopted petitioner's argument and

Due to the relative scarcity of federal crimes for which death is a possible punishment, the federal courts have generally dealt with *Furman* in the context of state habeas corpus cases. See, e.g., *Newman v. Wainwright*, 464 F.2d 615 (5th Cir. 1972) (Florida rape case). Federal courts, however, are clearly bound by *Furman*, when considering federal statutes that provide for capital punishment, to forbid discretionary use of the death penalty. See *United States v. Quinones*, 353 F. Supp. 1325 (D.P.R. 1973), in which defendant was indicted under 18 U.S.C. § 2031 (1970) (rape within special maritime and territorial jurisdiction of United States); the district court stated that if the defendant were convicted, he could not be sentenced to death because the statute, providing for death or life imprisonment, was discretionary.

It is important to note that *Furman* does not forbid mandatory death penalties, or so it has been interpreted. See 22 DE PAUL L. REV. 481 (1972); Note, *Capital Sentencing—Effect of MaGautha and Furman*, 45 TEMP. L.Q. 619 (1972). President Nixon, in a recent State of the Union message, requested that federal statutes containing the death penalty be amended to authorize the automatic imposition of the death sentence, eliminating the requirement of jury recommendation. R. NIXON, OUR FEDERAL SYSTEM OF CRIMINAL JUSTICE, H.R. DOC. NO. 60, 93d Cong., 1st Sess. 1731 (1973).

34. Life imprisonment was the alternative punishment available at the time of Schick's court-martial. See 10 U.S.C. § 918 (1970), excerpted at note 1 *supra*. As the court noted, Schick raised this issue for the first time at oral argument; thus he was probably unaware that the same argument was successful in a California appellate court case decided one month earlier. See *In re Walker*, 104 Cal. Rptr. 668 (Ct. App. 1972). The governor had commuted Walker's death sentence to life imprisonment without parole in 1961. The court held that habeas corpus relief was not justified on the grounds raised by Walker, but proceeded, sua sponte, to hold the "no parole" condition invalid. The state supreme court previously had held the death penalty unconstitutional in *People v. Anderson*, 6 Cal. 3d 628, 493 P.2d 880, 100 Cal. Rptr. 152, cert. denied, 405 U.S. 983 (1972). The court in *Walker* reasoned that the *Anderson* decision applied retroactively to Walker's death sentence, changing it to life imprisonment; thus the severity of Walker's sentence was increased by the condition of "no parole." 104 Cal. Rptr. at 677.

35. This holding accords with the Supreme Court's prior views on the retroactivity of decisions announcing new constitutional rules. The Court has indicated that the most important criterion is the purpose of the new rule: if retroactive application is necessary to effectuate that purpose, then the decision recognizing the new rule will be retroactively applied. See, e.g., *Robinson v. Neil*, 409 U.S. 505 (1973); *Halliday v. United States*, 394 U.S. 831 (1969); *Stovall v. Denno*, 388 U.S. 293 (1967); *Tehan v. United States ex rel. Shott*, 382 U.S. 406 (1966); *Linkletter v. Walker*, 381 U.S. 618 (1965). In *Robinson* the Court, discussing the retroactivity of another rule, said of *Furman*: "[W]e have not hesitated to apply it retrospectively . . ." 409 U.S. at 508. The reference is to Supreme Court memorandum orders vacating the sentences of death row inmates. See note 33 *supra* & text accompanying note 41 *infra*.

urged total retroactivity of *Furman* to reach those "suffering adverse consequences from the prior imposition of an illegal death sentence."³⁶ Citing the Supreme Court's statement in *Furman* that "imposition" of a death penalty constitutes cruel and unusual punishment, Judge Wright reasoned that all previously imposed death sentences should be treated as illegal when imposed. He analogized the instant situation to cases in which the *Gideon v. Wainwright*³⁷ right-to-counsel rule was retroactively applied because parties would otherwise "suffer anew" from pre-*Gideon* violations,³⁸ and to a case allowing a paroled convict to exercise his right to challenge his conviction.³⁹

Judge Wright's analogies, when extended to *Furman*, fall short of reaching his desired result, for if the rationale of the cases on which he relied is the protection of constitutional rights in criminal proceedings,⁴⁰ Schick's right to be spared from execution has been protected by the President's commutation. Furthermore, the Supreme Court's use in *Furman* of the word "imposition," absent further elaboration, has been viewed by some state courts as a prohibition only against discretionary use of the death penalty in the future.⁴¹

36. 483 F.2d at 1272.

37. 372 U.S. 335 (1963). *Gideon* held that in state felony prosecutions counsel must be appointed to represent defendants who are unable to retain their own counsel. The *Gideon* right-to-counsel rule was applied retroactively in *Pickelsimer v. Wainwright*, 375 U.S. 2 (1963). *Accord*, *Doughty v. Maxwell*, 376 U.S. 202 (1964); see Comment, *Retroactivity in Criminal Procedure: The Supreme Court as Monday Morning Quarterback*, 24 U. MIAMI L. REV. 139 (1969).

38. *Loper v. Beto*, 405 U.S. 473 (1972); *Burgett v. Texas*, 389 U.S. 109 (1967). *Burgett* held that an uncounselled pre-*Gideon* conviction could not be counted as a previous offense under a recidivist statute. *Loper* prohibited the use of the same to impeach a defendant's credibility.

39. *Jones v. Cunningham*, 371 U.S. 236 (1963). *Jones* held that a parolee is "in custody" within the meaning of 28 U.S.C. § 2241 (1970) (district court has jurisdiction to grant habeas corpus writ to prisoners in custody in violation of the Constitution).

40. Justice Douglas, speaking for the Court in *Burgett v. Texas*, 389 U.S. 109, 113-14 (1967), stated: "The states are free to provide such procedures as they choose . . . provided that none of them infringes a guarantee in the Federal Constitution." The retroactivity problem arises most often in cases announcing new due process limitations on criminal trial procedures. See Comment, *Retroactivity of Constitutional Decisions*, 41 NOTRE DAME LAW. 206 (1965).

41. See, e.g., *Bowen v. State*, 488 S.W.2d 373 (Tenn. 1972) (death sentence commuted to ninety-nine years); *Stanley v. State*, 490 S.W.2d 828 (Tex. Crim. App. 1972) (death sentence commuted to life imprisonment). The Tennessee and Texas courts have upheld commutations of death sentences following the *Furman* decision on the ground that *Furman* did not automatically invalidate existing death judgments,

Judge Wright's arguments are premised on the belief that a life term without parole is as nonrehabilitative, and perhaps as harsh, as the death penalty.⁴² Though this approach may be appealing, it fails to take into account the fact that the President is not constitutionally obligated to replace a commuted death sentence with a more rehabilitative punishment—it need only be less severe. In addition, only two members of the *Furman* Court agreed that the death penalty is cruel and unusual punishment based solely on its nonrehabilitative nature.⁴³

The decision in *Schick* allowing the President to withhold parole eligibility when he commutes a death sentence reflects the widely accepted idea that no punishment could be worse than death.⁴⁴ Whether the President may attach a "no parole" condition when the commutation merely abbreviates a term of imprisonment is left undecided by the court; an affirmative answer would have to rest on other considerations.⁴⁵ The import of *Schick* will not be clear until the future of the

but merely made them subject to avoidance. See also Wheeler, *Toward A Theory of Limited Punishment II: The Eighth Amendment After Furman v. Georgia*, 25 STAN. L. REV. 62 (1972); Young, *Supreme Court Report*, 58 A.B.A.J. 971 (1972); Note, *Furman v. Georgia—Death Knell for Capital Punishment?*, 47 ST. JOHN'S L. REV. 107 (1972).

42. For a compelling argument that a criminal may be rehabilitated in spite of his pending execution, see Baily, *Rehabilitation on Death Row*, in *THE DEATH PENALTY IN AMERICA* 556 (H. Bedau ed. 1964).

43. Justices Brennan and Marshall suggested that capital punishment is forbidden by the eighth amendment because, due to its nonrehabilitative nature, it serves no valid legislative purpose. But this argument was made to urge total abolition of the death penalty, which clearly is not the holding in *Furman*. See discussion in note 33 *supra*.

44. See *Biddle v. Perovich*, 274 U.S. 480 (1927); A. KOESTLER, *REFLECTIONS ON HANGING* 137 (Amer. ed. 1957). But see C. BECCARIA, *AN ESSAY ON CRIMES AND PUNISHMENTS* 99-100 (2d Amer. ed. 1819). Beccaria denounced all forms of excessive punishments, including the death penalty. To support his belief that capital punishment lacked any deterrent effect, he wrote:

The death of a criminal is a terrible but momentary spectacle, and therefore a less efficacious method of deterring others than the continued example of a man deprived of his liberty *If I commit such a crime*, says the spectator to himself, *I shall be reduced to that miserable condition for the rest of my life*. A much more powerful preventive than the fear of death which men always behold in distant obscurity.

Id. (emphasis original).

45. For example, where the President commutes a forty-five year sentence to twenty years without parole, the prisoner would be eligible for parole under the original sentence after fifteen years, but the commuted sentence precludes parole for twenty years. The Attorney General has acknowledged the problem that might arise "where the condition to be imposed will reduce the prisoner's rights under the original sentence," but left it unresolved. 41 OP. ATT'Y GEN. 251, 256 (1955). The answer might be based on whether or not the prisoner accepted and consented to the com-

death penalty is known. If the death penalty is totally abolished, the decision may be moot; if, however, mandatory death penalties⁴⁶ are instituted for certain federal crimes, presidential clemency will be the only hope for federal prisoners convicted of those crimes, and the "life without parole" commutation may be employed frequently.

mutation. In *Burdick v. United States*, 236 U.S. 79 (1915), the Supreme Court held that acceptance of a pardon is essential to its validity. The Court later refused, however, to extend this rule to the commutation of a death sentence, because it would require the President to "permit an execution which he had decided ought not to take place unless the change is agreed to by one who on no sound principle ought to have any voice in what the law should do for the welfare of the whole." *Biddle v. Perovich*, 274 U.S. 480, 487-88 (1927). If commutation of a lesser sentence than death still requires consent, the prisoner in the above example could refuse to accept the "no parole" condition.

46. See note 33 *supra*.