issue, the 24 prisoners now held in maximum security should be returned to the general prison population as soon as possible providing the same is safe and practical. I direct you to provide copies of this opinion within a reasonable time to the 24 prisoners who are presently under the sentence of death and to report to me at your earliest possible convenience the action that you take in each case.

All opinions or directives of any previous Attorney General are hereby rescinded insofar as they are not consistent with this opinion and directive.

Sincerely,

J. SHANE CREAMER,
Attorney General.

Opinion of Former Attorney General Fred Speaker

Harrisburg, Pa.,
January 19, 1971

Mr. Joseph Mazurkiewicz, Superintendent
Rockview State Correctional Institution
R. D. #3
Bellefonte, Pennsylvania

Dear Warden Mazurkiewicz:

You are directed to remove the Electric Chair from the Execution Room at Rockview State Correctional Institution and begin conversion of the room into an office.

This is another step toward a more rational and humane correctional policy and is intended to build upon the verbal instructions previously given you not to hire a new Public Executioner.

These steps can be justified purely on the basis of economy. There have been no executions during the past two Administrations, and public pronouncements by Governor Shapp indicate that no electrocutions will be permitted in the foreseeable future. Because of the critical need for additional office space and because of the continued irrational expense of paying an inactive Executioner, sound management principles would indicate the wisdom of this decision.

But I am not content to base this directive on economics alone. I am convinced that the imposition of the death penalty constitutes "cruel and unusual punishment" prohibited by the Eighth and Fourteenth amendments to the United States Constitution and perhaps is one of the

"cruel punishments" proscribed by Section 13 of the Pennsylvania Declaration of Rights.

The question of constitutionality of capital punishment has seldom been considered by the Supreme Court of the United States. Indeed, the scope of the "cruel and unusual punishment" clause has been substantially reviewed by the Court less than a dozen times.

> "The Court, however, has never held directly that the death penalty is or is not cruel and unusual punishment. It has heard argument on the issue only once, and then decided the case on other grounds. Three opinions contain short statements, made in the course of decision on related issues, which suggest that capital punishment is constitutionally permissible. Yet more recent doctrinal developments have not only undermined these statements, but also indicated growing concern among the Justices with the operation of the death penalty. The basic eighth amendment question now hangs in an uncomfortable limbo." (Goldberg & Dershowitz, *Declaring the Dealth Penalty Unconstitutional,* 83 Harv. L. Rev. 1773, 1775 (1970).)

The failure of the Supreme Court to act does not preclude state executive action. On the contrary, the Attorney General's oath "to support, obey and defend the Constitution" obliges him to determine and act upon a constitutional mandate when the Court remains silent. (See, e.g., Ex Parte *La Prade,* 289 U. S. 444, 458 (1932) where the Court said that the state Attorney General might hold ". . . that the statute is unconstitutional and that, having regard to his official oath, he rightly may refrain from effort to enforce it.")

Upon examination of the applicable constitutional proscriptions and after logical reflection, I am of the opinion that imposition of the death penalty in the Electric Chair is both "cruel" and "unusual" punishment. Accordingly, the portions of the Act of June 19, 1913, P. L. 528, providing for a sentence of death by electrocution are unconstitutional and unenforceable.

Execution by electrocution is cruel. An early opinion of the United States Supreme Court stated that:

> ". . . Punishments are cruel when they involve torture or a lingering death; but the punishment of death is not cruel, within the meaning of that word as used in the Constitution. It implies there something inhuman and barbarous, something more than the mere extinguishment of life." (*In re: Kemmler,* 136 U. S. 436, 447 (1890).)

Can any one read the description of an electrocution by former Pennsylvania Supreme Court Justice Curtis Bok and believe that savagely-inflicted lingering death not to be "inhuman and barbarous"?

> "He started, painfully and uncertainly, to lower himself into the chair, but now the guards were swift. They lifted him deep into the seat and adjusted the electrodes at calves and wrists.
>
> "Then they fastened a thick belt across his chest and lowered over his head the heavy wired leather mask.
>
> "It hid all but the tip of his nose and his lips. He was making efforts to quiet them by biting his tongue, the best that he could do, against his racing mind and heart, to keep control and to sit erect . . .
>
> "The guards stepped back. The Warden, who had stood by with arm raised, lowered his hand. It had taken a minute and thirty-seven seconds.
>
> "There was a low whine and a short loud snap, as of huge teeth closing.
>
> "Roger's head flew back and his body leaped forward against the confining straps. Almost at once smoke arose from his head and left wrist and was sucked up into the ventilator overhead. The body churned against the bonds, the lips ceased trembling and turned red, then slowly changed to blue. Moisture appeared on the skin and a sizzling noise was audible. The smell of burning flesh grew heavy in the air.
>
> "Roger was being broiled.
>
> "The current went off with a distinct clap after about two minutes and Roger slumped back into his seat, his head hanging. No one moved. Then came the second jolt and again the body surged against the restraining straps and smoke rose from it. The visible flesh was turkey red.
>
> "Again the current slammed off and this time the doctor stepped forward to listen, but he moved back again and shook his head. Apparently Roger still clung faintly to life.
>
> "The third charge struck him, and again the smoking and sizzling and broiling. His flesh was swelling around the straps.
>
> "The doctor listened carefully and raised his head.
>
> " 'I pronounce this man dead,' he said, folding up his stethoscope. It was seven minutes after Roger had been seated in the chair." (Bok, *Star Wormwood,* 114-15 (1959).)

The method of execution by electrocution was adopted as a humane device, intended to kill instantly. But Justice Bok tells us that intention fails. And the very language of the Pennsylvania statute implicitly acknowledges that the death may be lingering:

> ". . . Such punishment, in every case, must be inflicted by causing to pass through the body of the convict a current of electricity of intensity sufficient to cause death, *and the application of such current must be continued until such convict is dead.*" (Emphasis added.) (Act of June 19, 1913, P. L. 528, § 1.)

Even if some new form of immediate electrocution or other device of instantaneous death could be developed by inventive modern technology, I am convinced it would be constitutionally defective under evolving and enlightened humanitarian standards. The United States Supreme Court has recognized that Eighth Amendment standards change. What once was permissible no longer is. (See, e.g., *Trop v. Dulles,* 356 U. S. 86, 101 (1958): "The Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society"; *Weems v. United States,* 217 U. S. 349, 378 (1910): "The clause of the Constitution in the opinion of the learned commentators may be therefore progressive, and is not fastened to the obsolete but may acquire meaning as public opinion becomes enlightened by a humane justice.")

Death by electrocution is constitutionally prohibited also because it is unusual. Under our evolving standards of decency and humane justice, the imposition of the death penalty has become unusual in the extreme. In the first five years of the last decade, 181 men were executed in the United States. That total dropped to ten in the next two years; and no one was executed in the last three. In Pennsylvania there have been no executions since 1962. To kill a convict now, in the face of this progressive evolution would be so unusual as to merit constitutional condemnation.

I have found no Pennsylvania Supreme Court case expressly upholding the constitutionality of the death penalty under the Pennsylvania Constitution, although it is implied by dictum in *Commonwealth v. Howard,* 426 Pa. 305 (1967). But even if I had, Pennsylvania is obliged to follow the proscriptions of the Eighth Amendment to the federal constitution as imposed by the Fourteenth Amendment. (See *Robinson v. California,* 370 U. S. 660 (1962).)

The Fourteenth Amendment suggests one other ground for invalidating the death penalty. That portion which mandates "equal protection" has been grossly offended by the imposition of the death penalty. In the words of the former United States Attorney General Ramsey Clark:

> ". . . It is the poor, the sick, the ignorant, the powerless and the hated who are executed.
>
> "Racial discrimination is manifest from the bare statistics of capital punishment. Since we began keeping records in 1930, there have been 2,066 Negroes and only 1,751 white persons put to death. Negroes have been only one-eighth of our population. Hundreds of thousands of rapes have occurred in America since 1930, yet only 455 men have been executed for rape—and 405 of them were Negroes. There can be no rationalization or justification of such clear discrimination. It is outrageous public murder, illuminating our darkest racism." (Clark, *Crime in America,* 335 (1970).)

This directive is intended to constitute both an administrative order to you as an employee of the Justice Department and a formal opinion of the Attorney General. It is intentionally issued during that brief period after the termination of Governor Shafer's incumbency but before I leave office as Attorney General. The Administrative Code of April 9, 1929, P. L. 177, gives the Attorney General the power to furnish legal advice, imposes the duty to comply upon Commonwealth departments and officers, and provides that he remains in office until a successor is "appointed and qualified." It is, openly and candidly, an attempt on my part to reach into the future.

I believe deeply that our practice of killing criminals is both a disgusting indecency and demeaning to the society that tolerates it. In conscience I am compelled to speak out and to do what I can to stop it.

The Death Room is an obscenity. Hopefully legislation to abolish the death penalty will be enacted this year. In the meantime I am unwilling to leave intact, as I depart my office, a cruel instrument of public vengeance.

Sincerely,

FRED SPEAKER,
Attorney General.