In the

Supreme Court of the United States

LIBRARY C'
SUPREME COURT, U. S.

MAURICE SCHICK,

Petitioner,

--vs--

GEORGE J. REED, et al.,

Respondents.

No. 73-5677

Washington, D. C.
October 23, 1974

Pages 1 thru 36

Duplication or copying of this transcript by photographic, electrostatic or other facsimile means is prohibited under the order form agreement.

HOOVER REPORTING COMPANY, INC.
Official Reporters
Washington, D. C.
546-6666

OCT 31 11 16 AM '74
RECEIVED
SUPREME COURT, U.S.
MARSHAL'S OFFICE

IN THE SUPREME COURT OF THE UNITED STATES

MAURICE SCHICK, Petitioner,	:	
v.	:	No. 73-5677
GEORGE J. REED, et al., Respondents.	:	

Washington, D. C.,

Wednesday, October 23, 1974.

The above-entitled matter came on for argument at 2:00 o'clock, p.m.

BEFORE:

WARREN E. BURGER, Chief Justice of the United States
WILLIAM O. DOUGLAS, Associate Justice
WILLIAM J. BRENNAN, JR., Associate Justice
POTTER STEWART, Associate Justice
BYRON R. WHITE, Associate Justice
THURGOOD MARSHALL, Associate Justice
HARRY A. BLACKMUN, Associate Justice
LEWIS F. POWELL, JR., Associate Justice
WILLIAM H. REHNQUIST, Associate Justice

APPEARANCES:

HOMER E. MOYER, JR., ESQ., Covington & Burling, 888 Sixteenth Street, N. W., Washington, D. C. 20006; on behalf of the Petitioner.

LOUIS F. CLAIBORNE, ESQ., Assistant to the Solicitor General, Department of Justice, Washington, D. C. 20530; on behalf of the Respondents.

C O N T E N T S

- - -

P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments next in 73-5677, Schick against Reed.

Mr. Moyer, I think you can proceed now.

ORAL ARGUMENT OF HOMER E. MOYER, JR., ESQ.,

ON BEHALF OF THE PETITIONER

MR. MOYER: Mr. Chief Justice, and may it please the Court:

The ultimate question in this case is a very narrow one. It is whether the petitioner can ever be considered for parole.

The relief we seek is not his release from prison, only that he be given the opportunity to come before the Parole Board.

The facts in this case are simple and undisputed.

Maurice Schick, a man of some 52 years of age, has been incarcerated just under 21 years. The terms of his present sentence require that he remain in prison for the rest of his life, with no possibility of parole release.

In March 1954, he was tried by an Army general court-martial, convened just outside Tokyo, Japan, for the murder of a daughter of an Army colonel assigned to that post.

Following a six-day trial, at which the sole disputed issue was the legal sanity of the accused at the time of the offense, petitioner was convicted and sentenced to death.

Although, at various times during the course of the trial on appellate proceedings, eight prominent civilian psychiatrists concluded that he lacked the requisite mental responsibility at the time of the offense, his conviction and sentence were nonetheless approved by all military appellate reviewing authorities, and in 1957 his case was forwarded, as is required by statute, to the President for his review.

QUESTION: And there was conflict in the testimony on his capacity, was there not?

MR. MOYER: That's correct, Mr. Chief Justice. Four Army psychiatrists testified that he did not lack the requisite mental responsibility at the time of the offense.

QUESTION: And there were four defendant psychiatrists?

MR. MOYER: At the time of trial there were two civilian Japanese psychiatrists. He did not have the opportunity to return to the United States. During the course of appellate proceedings, opinions were submitted by Dr. Carl Menninger, three other psychiatrists from the Menninger Clinic, the psychiatrist at St. Elizabeth's, the psychiatrist for the Baltimore court system. All of the civilian psychiatrists replying that he lacked the requisite mental responsibility.

In 1960, the President commuted petitioner's sentence to life imprisonment, on condition that he never be

considered for parole.

At issue here is the validity of that no-parole provision.

We maintain that it is constitutionally invalid, on two separate and independently dispositive grounds.

First, it is invalid under the retrospective application of Furman v. Georgia; and

Second, it is invalid because, in imposing the commuted punishment of life imprisonment with no possibility of parole, the President exceeded his constitutional grant of authority under Article II, Section 2.

I should like first to discuss the Furman point, which is the narrower ground for decision here.

Petitioner and respondents agree on a number of factors that bear on the Furman point. There is, first of all, no disagreement that the sentence of life imprisonment with no possibility of parole could not have been adjudged a trial. The only sentencing options for the court-martial were death or life imprisonment without -- with the usual parole possibilities.

Second, there is no disagreement about the inextricable relationship between the death penalty and petitioner's no-parole life sentence. Petitioner could never have become subject to his present sentence had he not first been sentenced to death.

Third, there is no disagreement that Furman v. Georgia in validated the imposition as well as the carrying out of the death penalty. Lower courts, implementing Furman, have vacated death sentences and substituted alternative punishments provided by statute.

And, finally, there is no disagreement here that Furman v. Georgia has been applied retrospectively.

Given these undisputed facts, the non-parole provision of petitioner's sentence is necessarily invalid, for it could not now exist but for the prior imposition of the death penalty. Had the death penalty never been imposed, petitioner would now be eligible for parole.

Moreover, if the Court were to uphold petitioner's present sentence, it would sanction the following situation:

All prisoners sentenced to death but not executed at the time of Furman now are serving sentences of life imprisonment with eligibility of parole. All except the petitioner and one other prisoner, whose situation is identical.

Schick, who was singled out for executive clemency, is now serving a more severe sentence than prisoners who had been sentenced to death but not executed, and not singled out for executive clemency.

QUESTION: I suppose he's still eligible for further executive clemency, is he not, Mr. Moyer?

MR. MOYER: Presumably he could petition regularly

for additional executive clemency. A petition was submitted, Mr. Justice Blackmun, in 1968, and denied in early 1969.

QUESTION: But he's presumably better off than that class of people who didn't get -- were sentenced to death and didn't get executive clemency, and were executed.

MR. MOYER: He certainly was not executed. We don't believe that the government's argument draws much strength from the fact that the government was here, precluded from carrying out what we now know to be a constitutionally cruel and unusual punishment.

QUESTION: Do you know that in the case of the military?

MR. MOYER: I'm sorry, sir?

QUESTION: Do you know that the death penalty is cruel and unusual in the military situation?

MR. MOYER: Well, the government has raised that point here. The answer to that is, we submit, clearly that it is constitutionally cruel and unusual. I shall address that in some detail momentarily.

QUESTION: Now that I've interrupted you, as I look at your brief and your reply brief, I think you didn't cite Warden v. Marrero of last term, --

MR. MOYER: That's correct, sir.

QUESTION: -- that the government has relied upon. Somewhere in your argument would you touch upon that, and let

us have the benefit of your comments? Whenever you get to it.

MR. MOYER: Warden v. Marrero involved primarily, Mr. Justice Blackmun, a statutory question about parole applicability for the petitioner there, and the effect of a 1970 statute dealing exclusively with drug traffickers, and whether someone who was ineligible for parole under the prior statute was -- should be considered eligible for parole subsequent to the 1970 statute.

The question we present here, or that is involved here, is not,under our Furman point, a statutory question. Our point here is that the retrospective application of the constitutional rule of Furman must necessarily invalidate the no-parole provision.

There was, in this case, no statutory basis for the no-parole provision, and that point I shall elaborate on.

The result in this case that the petitioner is serving the most severe sentence of anyone in the federal prison system, because he was the subject of executive clemency, is simply a perverse result. The result -- this result is clearly contrary to the purpose and the spirit of executive clemency, and we submit, under Furman v. Georgia, cannot be permitted to stand.

And in asking the Court to invalidate this provision, we are asking simply that it rule exactly the same way as the Supreme Court of California en banc ruled, when it was

faced with precisely this same issue. That case is In re Walker, and it's discussed in our brief.

In responding to the Furman point, the government has abandoned some arguments that it earlier advanced, including, I might note, the argument that the majority of the Court of Appeals below adopted as its rationale of decision; namely, that the death sentence was never imposed in petitioner's case, because it had never been ordered executed.

Now the government's primary defense to the Furman point appears to rest on the contention raised for the first time in its brief on the merits that Furman v. Georgia does not apply to the military at all.

This contention and the factual assertions that it rests upon are wholly unsupportable.

In our reply brief we have cited extensive authority, which contradicts this new argument; and I shall not repeat that case law here.

Let me say only in summary that that proposition is directly contradicted by opinions of members of this Court in Furman v. Georgia itself, which expressly contemplate applicability to the military.

It is also inconsistent with precedents of military courts and civilian courts, including this Court, applying the Eighth Amendment ban on cruel and unusual punishments to the military. But it must be emphasized that the proposition that

the government puts forward here is fundamentally inconsistent with the entire pattern of development of military law, since the enactment of the Uniform Code of Military Justice in 1950. Because that pattern of growth, which has been shaped by civilian court opinions, military court opinions, and by congressional enactments, has consistently minimized the differences between military and civilian criminal procedures.

Now, the government offers two factual justifications why Furman should not apply to the military. It should first be observed that whether or not these are true, these assertions would not serve to override contrary bank of precedents cited in our brief.

Moreover, by seeking a factual evaluation, the government asks this Court to open the door to jurisdiction-by-jurisdiction review of the applicability of the Furman rationale to the particular experience of a given jurisdiction.

But, most important, the factual assertions that the government seeks to rest its argument on are demonstrably false.

The government argues, first, that military discipline and special military circumstances require the use of the death penalty. Restated, this argument is that military discipline is dependent upon capital punishment, or, more precisely, dependent upon constitutionally cruel and unusual

punishments.

This is simply baseless. A short answer is provided by the military itself, for the death penalty in the military has fallen into destitute. It is simply not used. When it has been used by the military, it has been used not to further disciplinary purposes but to punish servicemen for committing civilian type offenses.

The fact that the United States Marine Corps has gone for more than a century and a quarter without so much as adjudging the death penalty at trial is, itself, conclusive evidence that the government's claim is simply unsupportable.

The government also argues that the military appellate structure assures that the use of the death penalty in the military will not be random or discriminatory.

This is, first of all, precisely the type of argument that this Court refused to hear in the petitioners for rehearing submitted by the States of Pennsylvania and Georgia.

Secondly, this is demonstrably untrue.

We address this point at some length in our brief, and I shall not repeat that.

Let me say only that we know that the use of the death penalty in the military is random in the extreme. We know that it is used so infrequently that it cannot possibly serve any legislative or social purpose. We know that it's discriminatory among the Services, for it's confined almost

exclusively to the Army.

We know that its impact is racially discriminatory. Of the eight servicemen executed since 1950, whose race we know, all were black. And, furthermore, we know, rather dramatically, that in the military the use of the death penalty does not necessarily correlate with the severity of the crime.

By no stretch of the imagination can it be asserted that the use of the death penalty in the military is less discriminatory or less random or less irrational.

There is, in short, no basis whatever for the factual assertions the government puts forward, and on the basis of which the government would have this Court override a substantial bank of contrary precedents.

Our second point, and the broader constitutional point, is that imposing a sentence of life imprisonment with no possibility of parole, the President exceeded his constitutional grant of authority, under Article II, Section 2.

I would like, in this connection, to begin by noting what is not in dispute on this point.

It is undisputed, first, that the President possesses the constitutional power to commute sentences.

It is secondly undisputed that he possesses absolute discretion in deciding when to exercise that constitutional power.

But it is also undisputed that there are some limits

to that constitutional power. There are, admittedly, some lesser punishments that the President cannot substitute in the act of commutation.

QUESTION: Was any objection made at the time of the commutation?

MR. MOYER: No, Mr. Justice Blackmun. The consent or the acceptance of the petitioner was not requested, and he, of course, was a man who was facing execution and was offered some form of executive clemency, and was not in a very strong bargaining position.

The narrow issue here is what types of lesser punishments may be substituted by the President, what are the limits to the constitutional power to commute sentences.

QUESTION: But here, Mr. Moyer, if a military -- if a man in the military were sentenced to, let us say, thirty years and that was commuted down to twenty or ten, on condition of no-parole, that would be equally unconstitutional, I take it?

MR. MOYER: Well, the first point to note is that a thirty-year sentence would never come before the President in the course of ordinary military appellate review.

QUESTION: Only death sentences?

MR. MOYER: That's correct. Death sentences and cases involving flag officers, go before the President as the ordinary course.

But if the particular prisoner, military or civilian, petitioned directly from the penitentiary for executive clemency in his case, the President certainly would have the constitutional authority to hear that case.

Whether or not the President could commute to a punishment of twenty years without possibility of parole would depend on whether there is any legislative authority for that punishment. The basic point is that the President may not make up any punishment that he chooses to substitute as a lesser punishment.

QUESTION: Suppose, Mr. Moyer, the statute imposed a flat thirty-year penalty, could the President commute that to ten years?

MR. MOYER: We certainly would say that he could, Mr. Justice Blackmun.

QUESTION: Why? The statute doesn't authorize him so to do.

MR. MOYER: Well, the question, the rule in the Wells case and Biddle v. Perovich, which require -- the rule requires that there be some legislative basis, is, as stated in those cases, a broad rule. The requisite legislative basis has never been spelled out precisely by this Court. Presumably, it could be present in one of three forms.

If the commuted punishment were an alternative punishment for the particular offense, there clearly would be

no question that the requisite legislative basis was present.

QUESTION: I'm assuming there is no alternative.

MR. MOYER: There is none in this case.

And in the hypothetical you posit, a second reading of the legislative basis rule in Wells might well be that legislative basis exists where the commuted punishment is one of common usage found throughout the Code.

And, in that case, confinement certainly is the most common punishment; and under the hypothetical you posit the President certainly would be able to commute in that situation.

And we do not contend otherwise in this case.

This rule obviously flows from the basic separation of powers that the defining of criminal punishments is a uniquely legislative function, that a ruling by this Court that the President need not look to legislatively sanctioned punishments would confer upon the President the authority to devise punishments as he sees fit.

Now, the government appears not to take serious issue with the general proposition that there must be some legislative basis for commuted punishment. Indeed, the Solicitor General, in Biddle v. Perovich, argued that very point.

Rather, the area of primary dispute here is whether there exists the requisite legislative basis. We maintain that no such basis here exists, for the following reasons:

First, the commuted punishment of life imprisonment with no possibility of parole is a punishment completely foreign to military law, and foreign to the Uniform Code of Military Justice.

Not only is it not a punishment for the offense of which petitioner was convicted, but it is provided nowhere in the UCMJ. If that sentence were imposed at a military trial, it would simply be an illegal sentence.

Moreover, that punishment was nowhere to be found among the civilian Federal Criminal Statutes. When the President, in Schick's case, commuted his punishment, he could point to no statute that authorized the punishment of life imprisonment with no possibility of parole.

Thus, in Schick's case, the President not only substituted the commuted punishment, but he devised it. In so doing, we maintain that he exercised a uniquely legislative function, a function reserved by the Constitution to the Legislature.

So, in final response to your question, Mr. Justice Blackmun, under any reading of the rule suggested in the earlier cases, Wells and Perovich, by this case, the President's action here would not be sustainable.

Indeed, when one looks at the legislative scheme, not only is there no authorization for the lesser punishment to which petitioner's sentence was commuted, but the legis-

lative scheme reflects a direct -- directly contrary policy, for the parole statute, which has been a part of the federal law since 1910, reflects a congressional commitment to offender rehabilitation as a matter of federal correctional policy.

I would like to conclude, reserving the remainder of my time for rebuttal, --

QUESTION: First, the statute in Marrero isn't quite in line with what you've just said. Now, there were some of us who didn't agree with the Court's holding in Marrero, and I guess I'm struggling with it still.

MR. MOYER: Well, the statute at issue there, Mr. Justice Blackmun, I think the --

QUESTION: But it was a statute?

MR. MOYER: That's correct, Mr. Justice Blackmun.

QUESTION: Evincing congressional policy at least.

MR. MOYER: That's right. That statute, however, did not exist at the time, or a statute authorizing life imprisonment with no possibility of parole did not exist at the time that the President acted in Schick's case.

The statutory authority that the government has cited in their brief as justification for the President's action here was not enacted until 1970. There was in 1960, at the time of the commutation, no legislative authorization for that punishment.

And it's our position that the action taken by the

President was without any legislative basis in imposing a lesser punishment could not later be ratified by the adoption of that punishment.

QUESTION: Well, then, are you suggesting that it possibly could be done today, constitutionally?

MR. MOYER: The question of whether the President -- of what punishments the President could commute today would depend upon what punishments today are authorized by the Legislature.

To hold otherwise is to allow the President to devise, himself, punishments for the punishment of crimes.

QUESTION: But at least today we have the example of the Marrero statute.

MR. MOYER: We do today have a statute which imposes life imprisonment without possibility of parole. Now, that statute, it should be noted, is narrowly confined. It is confined to drug traffickers. And the legislative history of statutes dealing with trafficking in drugs indicates that the congressional intention was to confine those no-parole imprisonment situations to that narrow category of crimes.

QUESTION: Is that because it's a more offensive crime than murder, do you think?

MR. MOYER: No. The congressional reports there stated that the purposes of rehabilitation in the context of drug traffickers could be carried out only by keeping such

offenders within prisons, that the parole policy was uniquely inapplicable to that situation.

I should like to conclude with just a word about the balance of interests in this case.

On the one side, there are important considerations favoring invalidation of the no-parole provision. In addition to the constitutional rules at stake, the no-parole provision in this case is directly contrary to national penal and correctional policy.

The no-parole provision is anti-rehabilitative in the extreme.

And, finally, the no-parole provision in this case discriminates against the petitioner by placing him in a special uniquely disadvantaged category, where he is serving a more severe sentence than anyone else in the federal prison system.

On the other hand, there are no counterveiling government interests here at stake, for all we ask in this case is that petitioner be given the opportunity to be considered for parole. This balance or imbalance of interests here argues strongly, we suggest, for invalidation of the no-parole provision.

I'd like to reserve the remainder of my time.

MR. CHIEF JUSTICE BURGER: Very well.

Mr. Claiborne.

ORAL ARGUMENT OF LOUIS F. CLAIBORNE, ESQ.,

ON BEHALF OF THE RESPONDENTS

MR. CLAIBORNE: Mr. Chief Justice, may it please the Court:

I should like to begin with the last point touched upon by my opponent, which is to say the propriety of the no-parole condition which was attached by the President when he commuted Sergeant Schick's death sentence.

As Mr. Justice Blackmun, I think, has narrowed the point, my opponent is not clear whether he is saying that one must look to the penalties of punishments provided by the murder statute, here Article 118 of the Code, or whether one simply looks to the federal criminal law or the criminal law as a whole, to determine the issue which he puts; which is: can the President invent a new novel penalty punishment alien to American law?

For the purpose of this case, we may assume -- though the Court has never so held, and it's arguable that only other constitutional limitations apply, such as cruel and unusual punishment -- we may assume that the President enjoys no power to create a totally novel or bizarre penalty, which is elsewhere unknown in the criminal laws of the United States.

But that is simply not this case.

To be sure, Article 118, the murder statute in the military case, provides only two alternatives: death or life

imprisonment with, normally, eligibility for parole.

But other laws in the United States, including a specific federal statute, do envisage life imprisonment without parole.

So we're not in the area of a novel invention, the creation of a new penalty, which, arguably, might present a difficult constitutional question.

We're dealing with a condition which is only recently affirmed by Congress as a proper punishment in the federal system, as Mr. Justice Blackmun has pointed out.

We're also dealing with a provision which is common in the laws of twenty States, and many times, often for all life sentences, the eligibility for parole which is otherwise available is denied in the case of lifers.

Nothing, therefore, extraordinary in this provision, and therefore nothing beyond the power of the President, unless he's confined to the same alternatives the judge would be. And of course he is not. One need take only the example of a judge who sentences to the statutory minimum, the result would be that the President cannot exercise his power of --

QUESTION: Do you know how many times this has been done?

MR. CLAIBORNE: Mr. Justice Marshall, so far as our research indicates, President Eisenhower, on five occasions in addition to this one, commuted death sentences with a condition

of no parole. One other case, it was life, the other cases it was periods of 55 or 45 years, with no parole eligibility.

The Attorney General -- Attorney General Brownell, who wrote an opinion for President Eisenhower with respect to these cases, indicates that President Wilson had, on two occasions, done the same thing.

Of course, there was no occasion to do so before 1913, because parole in the case of a life sentence was not the rule; in fact, was unavailable generally before 1910; in the case of life sentences, before 1913.

So we don't expect to find a long backward history of this.

QUESTION: Is that all?

MR. CLAIBORNE: Except, as I say, Mr. Justice, for the experience of twenty States, in which life sentences are --

QUESTION: I'm interested in the federal government.

MR. CLAIBORNE: Well, we do have, of course, as Mr. Justice Blackmun pointed out, the narcotics statute, which does expressly, as a matter of congressional decision, deny parole.

QUESTION: Well, are there any narcotics convictions received any clemency?

The answer is no.

MR. CLAIBORNE: Not that I'm --

QUESTION: Right.

MR. CLAIBORNE: Undoubtedly --

QUESTION: So that has nothing to do with my point, which is: how many times have you had clemency without parole by the President of the United States?

MR. CLAIBORNE: Well, so far as I'm aware, Mr. Justice Marshall, six instances by President Eisenhower, two by President Wilson.

The decisions of the President in commutation matters are not published, and whether research more thorough would produce other instances, I don't know. So far as I'm able to say, those are the only instances.

QUESTION: Do you have any idea how many sentences in toto President Eisenhower commuted?

MR. CLAIBORNE: Of military death sentences or of sentences of --

QUESTION: No, military sentences.

MR. CLAIBORNE: Military death sentences during President Eisenhower's period in office were, at a guess -- and it's really a guess, because the figures are divided in ways that don't show it too clearly -- something in the order of twenty.

Now, let me say finally, on this point, that there is no statutory bar, even assuming that a statutory bar to this sort of condition attached to a presidential pardon were

constitutionally relevant, the very statute involved here, under the Uniform Military Code, specifically authorizes the President to commute a sentence to such lesser punishment as he sees fit, leaving him full sway, full discretion.

The general parole statute, as we indicate in our brief, initially had a provision which specifically says this is no way meant to control or fetter the discretion of the President when exercising his constitutional power of pardon.

Now, let me say that the relevance of this issue is important if the Court should hold that a mandatory death sentence passes constitutional muster. Because in that event it will indeed be important to recognize in the President a power to commute or, in Governors of States, the power to commute any mandatory death sentence; but in at least the most shocking cases one cannot expect that power of clemency to be exercised if the alternative used here is unavailable.

And yet the result would be, if the alternative were available, to encourage the commutation of death sentences when the Chief Executive, whether of the United States or of a State, is in a position to assure that there will be no automatic eligibility for parole in fifteen years. Which does not deprive him of a later opportunity, or of his successor of an opportunity to reconsider the matter at a later time. Nor, indeed, does it in this case.

Now, leaving that question and turning to Furman vs. Georgia, it is said that Furman vs. Georgia has been held by this Court to be fully retroactive. And it is true that in two cases, in Michigan vs. Payne and in Robinson vs. Neil, this Court so characterized its prior holdings with respect to Furman v. Georgia.

I don't want to quibble about terminology, but it is at least arguable that all the Court has ever held with respect to Furman is that it will prevent the present execution of any death sentence, no matter when imposed.

The Court has not had occasion to hold, and has not held, that Furman vs. Georgia is fully retroactive in the same sense as it's held Gideon vs. Wainwright fully retroactive.

For instance, I don't suppose the Court has had before it, but I'm not sure that the Court has foreclosed itself removing, if a criminal, a person should come before the Court and say: "I pled guilty out of fear of a death penalty. Which this Court has now ruled was unconstitutional, and therefore I want to withdraw my plea and have a trial."

That would be fully retroactive application of Furman, if the Court were to afford such a prisoner a reopening of his conviction on a plea of guilty. And it's not an unreal hypothesis.

There may indeed also be civil consequences that flow from a full retroactive application of Furman. I'm not sure

what they would be, whether they deal with life insurance policies or other matters. But this Court hasn't left that question open.

Now, to say that the Court has not closed the door, of course, is not to indicate how it ought to decide it, now that the question may be presented.

We analyze it this way. We say the basis of the decision in Furman, when one puts together the opinions of the members of the Court who constituted the majority, seem to turn on two findings:

The first is that the public attitudes of today, with strong emphasis on the very recent past, indicate a rejection of the death penalty as unnecessarily cruel.

Also, the experience of the recent past in the civilian context in the United States indicates that the administration of the death penalty has been so random, so freakish, so discriminatory, so haphazard, that it is unusual and cruel to impose it or carry it out today.

To effectuate those policies, it is not necessarily required to go back twenty years to invalidate a death sentence which has already been commuted fourteen years ago, and to look to the collateral consequences of that death sentence.

It seems to us that the approach followed in Michigan vs. Payne is appropriate here. Now, it's true that

in Michigan vs. Payne the Court declined to make any retrospective application, even though all that was at stake was sentence, just as here.

Now, here the Court has gone somewhat further. It has said, We will require resentencing where there is still a realistic alternative. But it needn't necessarily go the further step of undoing the commutation which was premised on a death sentence which was imposed at a time when this Court might not have found imposition freakish or contrary to prevalent attitudes.

Now, finally, we get to the question of whether, at all events, Furman should be applied in the military context. I owe the Court an apology for raising this issue so late in the day. Part of the explanation is that in the District Court Furman had not yet been decided when the case was in the District Court, this Court had not yet decided Furman.

In the briefs in the Court of Appeals, my friend invoked Furman only by analogy, that is to suggest that the no-parole condition, for the reasons given by majority in Furman violated the cruel and unusual punishment clause. An argument no longer pressed here, nor, indeed, put by the Petition for Certiorari.

Only at the oral argument at the Court of Appeal was it suggested that Furman had any direct application to this case.

QUESTION: Court of Appeals, isn't it?

MR. CLAIBORNE: Court of Appeals.

[Laughter.]

MR. CLAIBORNE: In other places it is the Court of Appeal. I have been too far away, that's all.

Now, even so, we should have raised the point in our brief in our position in this Court. We were slow in seeing it.

It is, however, it seems to us, an important point that ought not be decided backhandedly in this case.

My opponent spends a great deal of time in his reply brief proving that the cruel and unusual punishment concept applies to the military. Without quibbling, this Court has indeed never held that the cruel and unusual punishment clause of the Constitution applies to the military. There were only four votes for that proposition in Trop vs. Dulles, and only one Court of Appeal has directly so held.

But, for the purpose of this case, we may assume that Article 55 of the Code enacts the same standard for the military, and I'm willing to treat it under that same standard. But it does not follow that what is cruel and unusual in the civilian context is, ipso facto, cruel and unusual in the military system.

Cruelty is relative, war is cruel, and the reasons underlying this Court's decision in Furman for finding the

death penalty cruel and unusual may indeed not be applicable in the military context.

There may be a special need for deterrent in military conditions, and there it may be more important to look to the imposition of the death sentence in the area of the battle-field, which may have a very real deterrent, whatever happens on review.

On the other hand, the freakish and haphazard imposition of the death penalty which persuaded this Court to hold such discretionary penalties unconstitutional in civilian context is not so likely in the military, if only because there are so many levels of review of sentence. Something unknown to the civil system.

First of all, the convening authority must make a decision when referring a case whether to refer it as a capital case or not, a first screen. If the court-martial having had the case referred to it as capital, sentences precedent to the death penalty, it must be approved by the convening authority.

After that, the case goes to the Court of Military Review, which has again power to reduce or vary, commute the death sentence.

Then the case goes to the Court ofMilitary Appeals, which has no power to vary the sentence, but reviews the conviction in light of the sentence.

But, finally, in every death sentence case, at a single

level, the level of the President, we have a review of the death sentences imposed.

So it's reasonable to suppose that with a centralized system, and these levels of review, we are going to come out with a patent to these less freakish to use -- Mr. Justice Stewart's terminology -- than we find in so many disparate jurisdictions all over the country and, indeed, in the federal civilian system.

QUESTION: If one can accept the thesis of how it came about that the one corporal or sergeant in World War II was executed for desertion, Sergeant -- what was his name?

MR. CLAIBORNE: Slovik, I believe.

Slovik, I think.

QUESTION: Slovik. The fact of so many different people with responsibility, and each one passing the buck to the other, would lead to almost a more freakish situation, wouldn't it?

MR. CLAIBORNE: Well, I'm not sure that --

QUESTION: That's at least the thesis of what happened in that case, to Corporal Slovik, or Sergeant Slovik.

MR. CLAIBORNE: Mr. Justice Stewart, in the particular case of Sergeant Slovik, I cannot, obviously, --

QUESTION: I don't know the facts really, either.

MR. CLAIBORNE: Of course there were many death sentences imposed and executed in World War II.

QUESTION: But only one for --

MR. CLAIBORNE: Only one for desertion.

Those that were imposed for murder, one doesn't know whether it was the murder of a commanding officer or an officer.

QUESTION: You say only one for desertion?

MR. CLAIBORNE: One for desertion, Mr. Justice Marshall.

QUESTION: That was carried out, but there was more than one imposed.

MR. CLAIBORNE: There was. There were something over a hundred.

QUESTION: Many, many, many imposed --

QUESTION: Well, I represented half a dozen.

MR. CLAIBORNE: Yes.

Well, Mr. Justice Marshall, you speak from closer experience than I do. I do know from what few figures we have, that there were indeed several imposed, and only one carried out, for desertion. There were many for other crimes.

Now, I must say, the other crimes were mostly rape and murder. Murder, one doesn't know whether that was military or not, it could have been.

But I'm not suggesting that this Court has a basis on which to make a decision as to whether Furman ought to apply to the military.

I am suggesting that there are sufficient differences so that the Court ought to hold its hand, and if it reaches that issue, which it reaches only if it first holds that Furman would retroactively apply to this situation; then you have to decide whether it applies to military at all.

In that event, we think the record far too bare, the facts, figures, other indications as to the deterrent value, as to the actual experience, are not explored in this record. And the Court ought have more to go on before reaching that very important step.

Accordingly, should the Court go so far in the case, we think the appropriate course would have to be a remand to the District Court, with an opportunity for presentation of evidence and of statistics, which would furnish that Court, the Court of Appeal, and perhaps ultimately this Court, with a concrete record on which to make that important decision.

Now, we recognize that this is a hard case.

We do want to emphasize that it is not our position that the President, once he imposes this sort of condition, does so irrevocably. It is, as Attorney General Brownell made clear in his advice to President Eisenhower, open to that President or to any of his successors to vary the condition, and it may well be that circumstances would justify it in this case.

QUESTION: In other words, in that view, the

President is a continuing de facto parole body, is that your view?

MR. CLAIBORNE: Exactly, Mr. Chief Justice. And it is open to the President, perhaps especially so in the military context, in which the President serves also as commander-in-chief, to appeal to him and perhaps that procedure in the military doesn't require going through the pardon board; I really can't speak too authoritatively about that.

QUESTION: But didn't Mr. Moyer say that there had been an effort in recent years?

MR. CLAIBORNE: Well, I frankly was unaware -- I think he said 1968.

QUESTION: Yes.

MR. CLAIBORNE: It is -- I'm not for a moment suggesting that I have any basis on which to encourage the hope that such an application would be successful.

On the other hand, six years having gone by, there's no reason not to reapply.

MR. CHIEF JUSTICE BURGER: Thank you, Mr. Claiborne.

Mr. Moyer, do you have anything further?

You have about six minutes left.

REBUTTAL ARGUMENT OF HOMER E. MOYER, ESQ.,

ON BEHALF OF THE PETITIONER

MR. MOYER: Mr. Chief Justice, I have only two brief points in rebuttal.

The first is that in asking this Court to hold that the retroactivity of Furman does not reach petitioner's sentence, the government is asking this Court to create a new strand to the doctrine of retroactivity, a strand that would hold that some retroactive constitutional rulings are retroactive for some purposes but not for others.

QUESTION: Well, your proposition is based on the assumption that we decided this issue in about enough scope to embrace the military, isn't it?

MR. MOYER: That's correct, Mr. Chief Justice.

QUESTION: That's your starting point.

MR. MOYER: That's right, and that's the second point that I would like to address.

Respondents suggest the appropriateness of a remand and an evidentiary hearing in this case. We would suggest that that is uniquely inappropriate.

First, whatever facts might be adduced at an evidentiary hearing, they would not suffice to overturn the contrary precedents in military and civilian courts.

But, moreover, we know, from the facts before this Court now, that there are no facts that could be adduced that

would justify the position or the propositions that the government puts forward.

Let me deal quite briefly in the specifics of the use of the death penalty.

First, the idea that the death penalty is a deterrent must necessarily rest upon the reasonable expectation that that penalty will be used. In the military there is no basis for that form of expectation. And certainly not in the case where military discipline is at stake.

There were 102 servicemen executed during World War II, 101 of those 102 were convicted of civilian type offenses: rape and murder. Only one was executed for having committed a military type offense.

All 12 of the servicemen executed since 1950 committed civilian type offenses.

But even if you accept the government's hypothesis that there is some deterrent value to the imposition of the death penalty, without its ever being executed, we know that that doesn't sustain their position here, because the Marine Corps has not even adjudged the death sentence since before 1849. The Navy has adjudged it five times in that century and a quarter.

QUESTION: Well, I suppose it would be arguable that that demonstrates equally, or perhaps no more than, that the discipline in the Marine Corps is much better, and that the

quality and caliber of the people is higher, as they traditionally claim.

MR. MOYER: I suppose, Mr. Chief Justice, in the same way it could be argued that the more random and the more freakish the imposition of the death penalty is, the more that shows that the deterrent effect is created by the death penalty.

QUESTION: How many death penalties did you say were entered?

MR. MOYER: There were 102 that were executed during World War II.

All but one were servicemen who had been convicted of murder or rape.

QUESTION: Well, you mean carried out?

MR. MOYER: That's correct.

QUESTION: Because I know of one incident where 51 were sentenced to death, but they didn't die.

MR. MOYER: That's correct.

QUESTION: There were more that were imposed.

MR. MOYER: Oh, yes, indeed; no question about that.

I have nothing further.

Thank you.

MR. CHIEF JUSTICE BURGER: Thank you, gentlemen.

The case is submitted.

[Whereupon, at 2:50 p.m., the case was submitted.]