

OFFICIAL TRANSCRIPT
PROCEEDINGS BEFORE
THE SUPREME COURT
OF THE
UNITED STATES

CAPTION: DWIGHT J. LOVING, Petitioner v.
UNITED STATES
CASE NO: No. 94-1966
PLACE: Washington, D.C.
DATE: Tuesday, January 9, 1996
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IN THE SUPREME COURT OF THE UNITED STATES

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DWIGHT J. LOVING, :
Petitioner :
v. : No. 94-1966
UNITED STATES :
- - - - -X

Washington, D.C.
Tuesday, January 9, 1996

The above-entitled matter came on for oral
argument before the Supreme Court of the United States at
11:05 a.m.

APPEARANCES:

JOHN H. BLUME, ESQ., Columbia, South Carolina; on behalf
of the Petitioner.
EDWIN S. KNEEDLER, ESQ., Deputy Solicitor General,
Department of Justice, Washington, D.C.; on behalf of
the Respondent.

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1 P R O C E E D I N G S

2 (11:05 a.m.)

3 CHIEF JUSTICE REHNQUIST: We'll hear argument
4 now in No. 94-1966, Dwight Loving v. United States.

5 Mr. Blume.

6 ORAL ARGUMENT OF JOHN H. BLUME

7 ON BEHALF OF THE PETITIONER

8 MR. BLUME: Mr. Chief Justice, may it please the
9 Court:

10 This case presents several questions regarding
11 whether and under what circumstances the President is
12 permitted to create aggravating factors for military
13 capital cases.

14 In this Court we have presented several
15 challenges to the creation of these factors, ranging from
16 the most broad to this is a nondelegatable power to the
17 most narrow, that Congress failed to provide the President
18 with an intelligible principle. In considering all of
19 these issues, however, some historical perspective is
20 necessary.

21 In Article I, section 8, clause 14, the Framers
22 gave to Congress and not the President the plenary power
23 to make rules for the Government regulation of the land
24 and naval forces. They did so for a reason and from a
25 very historical vantage point. Not only were they

1 distrustful of executive control of the military in
2 general, but they were wary of broad court-martial
3 jurisdiction. The Framers and those who influenced their
4 political thought had lived under martial law and had
5 witnessed and suffered through the abuses of military
6 power.

7 QUESTION: Mr. Lowenfield, before you go too
8 much further -- I'm sorry. Mr. Blume. I'm thinking of
9 the case I'm going to ask you about.

10 There -- most of your argument is based on
11 separation of powers. There is another separation of
12 powers issue it seems to me and that is the standing
13 problem.

14 Even if we assume that the President has no
15 power to specify what crimes shall be subject to the death
16 penalty, Congress itself in 10 U.S.C., section 918 has
17 specified two. It has specifically said that anyone who
18 unlawfully kills a human being when he, number one, has a
19 premeditated design to kill, and number four, is engaged
20 in the perpetration or attempted perpetration of burglary,
21 sodomy, rape, robbery or aggravated arson. In those two
22 instances, Congress has said he shall suffer death or
23 imprisonment for life.

24 Now, it seems to me that if that specification
25 is sufficient, it doesn't matter whether or not the

1 President has authority to add additional aggravating
2 circumstances so long as those two suffice. Is it clear
3 that those two alone don't suffice? Premeditated design
4 to kill or killing in the perpetration of those particular
5 crimes? MR. BLUME: That's true. There was -- there
6 were a number of. MR. BLUME: Yes, Justice Scalia, I think it's of
7 clear that does not suffice. All article 118 is -- iting.
8 sets forth four theories under which you can be found
9 guilty of murder. One is premeditated and number four is
10 a felony murder theory. This is much like every murder
11 statute -- 118(4).

12 QUESTION: No, it doesn't. No, it's quite sign
13 different because the way 918 -- this is on page 145 of
14 the joint appendix, by the way. The way 918 ends is, in
15 all four of those situations specified he's guilty of of
16 murder and shall suffer such punishment as a court-martial
17 may direct. And if it ended there, then you would Furman
18 possibly be into the argument that you want to make to us
19 whether the President has the authority to specify what is
20 shall obtain the death penalty.

21 It doesn't end there, though. And it says, order,
22 except that if found guilty under clause 1 or 4, he shall
23 suffer death or imprisonment for life as a court-martial
24 may direct. existed in the United States was valid?

25 Now, why isn't that an adequate specification

1 whether or not the President adds additional ones?

2 MR. BLUME: Because the teaching of Furman is
3 that there has to be something beyond murder.

4 QUESTION: There was no Court opinion in Furman.

5 MR. BLUME: That's true. There was -- there
6 were a number of different opinions, but the consensus of
7 it seems to be that there has to be murder plus something.
8 It is not enough if you are just merely found guilty of
9 murder. All 118 does is sets forth a set of four
10 theories. It does say and you can only get death for
11 118(1) or 118(4).

12 QUESTION: Right. And 1 is premeditated design
13 to kill. That's something more than just murder.

14 MR. BLUME: But, Justice Scalia, there were
15 numerous statutes which existed like this at the time of
16 Furman, all of which were found to be unconstitutional.
17 Pennsylvania made the argument on rehearing after Furman
18 that premeditation is enough, that we have narrowed
19 because of premeditation, and rehearing was denied. This
20 is the way all statutes looked.

21 All 118 is is four different theories of murder.
22 It does --

23 QUESTION: We held in Furman that no statute
24 that then existed in the United States was valid?

25 MR. BLUME: No, but a number of them were

1 reversed and vacated in light of Furman and sent back
2 for --

3 QUESTION: For reconsideration.

4 MR. BLUME: -- further work.

5 QUESTION: Well, for reconsideration in the
6 light of Furman. And there was no -- there were -- to get
7 the majority in Furman, there were something like five
8 different opinions which didn't agree with one another.

9 MR. BLUME: They did not, but I do not see how
10 it is consistent with Furman to say that premeditation
11 alone is enough. There were numerous premeditation
12 statutes. Murder, that was all they had. And you could
13 get mandatory death or discretionary death for
14 premeditated murder, and those were not sufficient.

15 QUESTION: Where is the holding? That is, is
16 there a case? Can you cite a case, which I would then
17 like to read, which says that a statute which says the
18 death penalty is reserved for those who murder with
19 premeditation? Is there a case that says that that is
20 insufficiently -- is too broad, is not sufficiently narrow
21 under Furman?

22 MR. BLUME: No. I know of no case which says
23 premeditation alone is enough, but if you look at --

24 QUESTION: So, that issue then is open. Is that
25 right?

1 MR. BLUME: I think if you look at all the
2 statutes which were before the Court in Furman, the way
3 they looked, this looks like numerous statutes which were
4 in existence at the time. It looks a lot like 20 U.S.C.
5 111 which is the Federal murder statute.

6 QUESTION: It might but, I mean, that's why I'm
7 looking for a precedent. What is the strongest precedent
8 in your opinion that would suggest or show or hold that a
9 murder statute that says the death penalty is reserved for
10 murder with premeditation is too broad?

11 MR. BLUME: There is no case that says exactly
12 that. If you look at Gregg and Furman --

13 QUESTION: That's why I asked you for the
14 strongest precedent.

15 MR. BLUME: And then if you look even at
16 Lowenfield, which is the case which brought us to this, as
17 I understand Lowenfield, it says that, well, this narrows
18 because you have --

19 QUESTION: Either Lowenfield or Blume. I don't
20 remember which.

21 (Laughter.)

22 MR. BLUME: I've been confused with many people.

23 But Lowenfield indicates that the reason that is
24 sufficient, the reason the guilt phase narrowing in
25 Lowenfield is sufficient because they're very -- it's very

1 narrowly tailored. You have a specific mens rea
2 requirement of premeditation plus some additional felony,
3 and that is one of the things that distinguished that.
4 States it You don't have that here. You have either
5 premeditation, premeditation alone as a basis under which
6 you can be found guilty of murder, or felony murder,
7 garden variety felony murder under 118(4), which there's
8 absolutely no mens rea requirement at all. If that was
9 sufficient, there would be no narrowing in any event.
10 being the QUESTION: It's not any felony murder. It's
11 five specific crimes: burglary, sodomy, rape, robbery, or
12 aggravated arson. So, if -- I suppose that if all that
13 were at stake were that provision, I guess maybe that
14 would comply with Furman, wouldn't it? If all -- if that
15 were the only thing because that's pretty specific, but
16 there's this other thing. That's why I'm asking to be
17 sure I get the --

18 MR. BLUME: But there is no mens rea requirement
19 in 118(4). It's just a felony murder theory. It's a
20 theory under which you can be found guilty of murder,
21 and --

22 QUESTION: And is there a precedent on that?

23 you can be MR. BLUME: It's substantive criminal law. All
24 these are -- if you look at them and you look at all the
25 statutes, they are -- they're like every statute which

1 existed at the time. There were ways in which you could
2 be found guilty of murder. You could be found guilty of
3 murder in some States as premeditated murder; in some
4 States it's felony murder. This just lays out the various
5 four theories under which you can be found guilty.

6 QUESTION: Yes, but it does -- it doesn't
7 dispense with a mens rea requirement, doesn't it? Because
8 you still have the mens rea requirement necessary for
9 murder. You simply have the overlay of these felonies as
10 being the basis for the requirement that death be imposed.
11 That's not a dispensation with mens rea.

12 MR. BLUME: It is under 118(4). There is no --

13 QUESTION: Does 118(4) say killing in connection
14 with or murder in connection with? I don't have it in
15 front of me.

16 QUESTION: Kills a human being.

17 MR. BLUME: Kills.

18 QUESTION: It says -- oh, it says -- merely says
19 kills.

20 MR. BLUME: Yes.

21 QUESTION: Okay.

22 MR. BLUME: Yes. It's just a theory under which
23 you can be found guilty of felony murder.

24 QUESTION: I see.

25 MR. BLUME: That's the way virtually all the

1 statutes look. I mean, in this regard it's just a little
2 different grammatically of the Federal murder statute, 20
3 U.S.C. 1 -- 1011.

4 QUESTION: Enmund I think supports your position
5 there, that you can't automatically transpose the mens rea
6 for a felony to a killing and still have capital
7 punishment for it.

8 MR. BLUME: That's correct.

9 And what's also -- I mean, it's also Furman and
10 Gregg and the other cases when they indicate that there
11 has to be murder plus something, and it has to be done at
12 some phase of the proceeding. It's not merely enough.
13 There has to be a principled way to distinguish people
14 within the class of those guilty of murder as who's
15 deserving of death and who's not. And 118 does not do
16 that. It just sets forth various theories under which you
17 can be found guilty of murder.

18 QUESTION: Under --

19 QUESTION: But, of course --

20 QUESTION: Excuse me.

21 Under subsection 4, at least one of those is
22 arguably out under Coker v. Georgia. Rape is the basis.

23 MR. BLUME: Well, if that -- well, if it were
24 murder in the commission of a rape, I guess it would
25 depend on what the intent was.

1 But, I mean, I don't think in any event no one
2 has ever argued -- the Government has never even argued --
3 that 118 standing alone is constitutionally sufficient.

4 QUESTION: May I just go back to where your
5 answer takes us? Assuming that there are aggravating
6 factors added to these definitions, we're still left
7 without mens rea, aren't we? The aggravating factors
8 don't apply -- don't supply mens rea.

9 MR. BLUME: Well, that's true.

10 QUESTION: So, why isn't your argument that
11 there's no mens rea requirement and therefore there's
12 something more fundamentally defective than simply the
13 problem of delegation with respect to aggravating factors?

14 MR. BLUME: Well, it's -- there are a number of
15 States in which you can be found guilty of murder, and
16 then there has -- under some type of felony murder basis,
17 and then at sentencing there has to be some other
18 additional finding, some other aggravating finding.

19 QUESTION: No, but I thought your argument -- I
20 just want to understand your argument, and I thought your
21 argument was, in response to Justice Scalia, that in fact
22 that still leaves us with an incomplete murder statute
23 because there's no mens rea requirement. Now, if we add,
24 let's assume, with proper delegation or with congressional
25 action a series of aggravating factors on top of it, we're

1 still left with the problem which was the basis for your
2 answer to him. Or do -- what am I missing?

3 MR. BLUME: Well, my answer to Justice Scalia
4 is, is that 118 is only a substantive murder statute.
5 There has --

6 QUESTION: No, but your answer was that it isn't
7 even that. It's not a complete murder statute, and you
8 said it was incomplete because there was no mens rea
9 requirement. Right?

10 MR. BLUME: No. What I was trying to say is, is
11 that all 118 does is provide four different theories under
12 which you can be found guilty of murder.

13 QUESTION: Yes, and I thought you said one of
14 the things that it doesn't provide is mens rea.

15 MR. BLUME: Under 118(4). 118(1) is if you kill
16 somebody with a premeditated design to kill. That's
17 118(1).

18 QUESTION: Right.

19 QUESTION: But he's asking you if 4 is bad for
20 that reason, why don't you make that direct attack on 4
21 and say that there's no requirement that he have had an
22 intent to kill which our case law requires? Isn't that
23 intent to kill read into this statute?

24 MR. BLUME: No. I don't think there's any
25 intent to kill read into 118(4).

1 QUESTION: Is that right? Well, then I guess
2 the conviction is invalid no matter what.

3 QUESTION: We have a -- yes. We have a much
4 more fundamental problem.

5 QUESTION: Is there a conviction here for
6 premeditated murder under 1 as well as under 4?

7 MR. BLUME: There are two convictions.

8 QUESTION: I thought so.

9 MR. BLUME: One for 118(1) and one for 118(4).

10 QUESTION: Yes. So, we have both before us
11 here.

12 MR. BLUME: That's true.

13 QUESTION: And then why don't you proceed with
14 the remaining parts of your argument?

15 MR. BLUME: The -- on the separation of powers
16 issue, our most broad submission that this is a power
17 which cannot be delegated. The core constitutional value,
18 as Justice Scalia stated in *Mistretta* and as Chief Justice
19 Rehnquist stated in *Industrial Union*, is that basic and
20 critical policy choices governing society are to be made
21 by the Congress, or, put differently, it's the hard
22 choices and not the filling in of blanks which the
23 Congress --

24 QUESTION: So, you want us to hold that Congress
25 could not delegate to the President this authority.

1 MR. BLUME: I think this particular power is
2 nondelegatable. We have several challenges to it, but I
3 think it is nondelegatable.

4 QUESTION: And what is your best case for that
5 proposition?

6 MR. BLUME: The best -- I think the fundamental
7 problem with delegating this to the President, if you want
8 to get down to the root of it -- there are several
9 problems with it, in addition to the history and wanting
10 to keep the executive out of this power, but it creates
11 the impermissible blending of functions.

12 QUESTION: I asked what your best case was for
13 that proposition.

14 MR. BLUME: The best case I think would be Ex
15 parte Milligan and Reid v. Covert where they say that if
16 the President has the power to create substantive rules of
17 law in court-martial context, then you have the
18 impermissible blending of functions.

19 QUESTION: Ex parte Milligan didn't deal with
20 any sort of delegation.

21 MR. BLUME: It dealt -- it makes the statement
22 that if you -- if the President has substantive rule-
23 making power, substantive -- the power to define crimes in
24 the court-martial context. Milligan was about whether the
25 declaration of war suspended civil jurisdiction.

1 QUESTION: Well, you don't take the position
2 that the aggravating factors are an element of the crime,
3 do you?

4 MR. BLUME: This Court has referred to
5 aggravating circumstances --

6 QUESTION: I thought that was clear.

7 MR. BLUME: I think you have to look at -- this
8 Court has called aggravating circumstances substantive
9 criteria at the level of legislative definition. That's
10 why --

11 QUESTION: Do you take the position that the
12 aggravating circumstances are elements of the crime?

13 MR. BLUME: No. I take the position that they
14 are substantive factors.

15 QUESTION: No? The answer is no?

16 MR. BLUME: This Court has said they are not
17 elements of the crime.

18 QUESTION: Right. That's correct.

19 MR. BLUME: But substantive procedure, Justice
20 O'Connor, is a spectrum and things fall along a spectrum.
21 And it's true that aggravating circumstances, this Court
22 has repeatedly held, delimit the pool of persons eligible
23 for the death penalty.

24 QUESTION: We also held in a case like Curtiss-
25 Wright that where the President has independent authority

1 in the field, then delegation standards are much more lax.
2 And here the President -- the Constitution makes the
3 President commander-in-chief, so that I think that your
4 argument may be weaker in this area than it might be just
5 in an ordinary context where the President doesn't have
6 independent authority.

7 MR. BLUME: Well, the question --

8 QUESTION: Or to put that another way, if there
9 were one worst-of-all case in which to revive Schechter,
10 surely it's a case dealing with the President's power as
11 commander-in-chief. We haven't used Schechter at all in
12 over half a century, and you want us to revive it in a
13 case involving the President's power as commander-in-
14 chief.

15 MR. BLUME: Absolutely, and I think with all due
16 respect it is precisely because the President is
17 commander-in-chief that he can't do this because --

18 QUESTION: Mr. Blume, I understood you to have
19 an anterior argument, and if I'm wrong, please tell me. I
20 thought you were arguing that there had, in fact, been no
21 delegation to the President because this statute was made
22 unconstitutional by your reading of Furman. Let's assume
23 for the moment that you're correct about that. And,
24 therefore, any delegation that might have been given under
25 some other regime was not given under a statute written to

1 conform to the Furman decision.

2 I thought that you were saying there hasn't been
3 any delegation, so the Court doesn't have to reach the
4 question what if Congress rewrote this statute post Furman
5 and had a delegation in it. I thought that was your
6 position.

7 MR. BLUME: That is -- we make a range of
8 arguments from the most broad to the most narrow. This is
9 a nondelegatable power, which is the issue I was
10 addressing, and then even if it is a delegatable power,
11 that there has been no delegation here, that after 118 was
12 invalidated by the military courts in Matthews, was found
13 to be inadequate under Furman, that it was the Congress
14 and not the President which had to come back and do
15 something. And Congress did not authorize the President
16 to create the aggravating factors in R.C.M. 1004. And I
17 think --

18 QUESTION: Does that -- that argument assumes
19 that the statute was invalid, I take it, from the moment
20 of Furman and, therefore, the statute which authorizes the
21 President to narrow the circumstances of imposition could
22 not have applied to it because it didn't exist at that
23 point. Is that your argument?

24 MR. BLUME: That's true. I mean, I think --

25 QUESTION: Why do we make that assumption? Why

1 don't we assume, taking even a very broad reading of
2 Furman, that what Furman required was, among other things,
3 as we now see with the benefit of hindsight, some
4 narrowing function, and that in fact the delegation to
5 provide that narrowing function was on the books?

6 And, therefore, unless the delegation itself is
7 unconstitutional, Furman did not automatically result in
8 the obliteration of the statute, and the statute was saved
9 under the authority of the President to narrow the
10 imposition of the death penalty. Why isn't that just as
11 good as -- an analysis as the one that you assume?

12 MR. BLUME: Because I think you have to look at
13 it pragmatically as it unfolded. What I think that does
14 is try and make sense of events which happened beforehand
15 from a 1996 perspective. Look at this as it unfolded.

16 In 1950, the Congress enacted a murder statute
17 which set forth several theories of murder and said you
18 can be sentenced to death or life in the unfettered
19 discretion of the court-martial under one of these two
20 theories. That's all it said.

21 Furman comes along and says the statute and all
22 the statutes like these are unconstitutional, that
23 something else has to happen. There has to be murder plus
24 something.

25 Now, what remained then was a murder statute

1 with a penalty of life imprisonment under the doctrine of
2 severability. You severe out what's bad --

3 QUESTION: Well, that's a total --

4 MR. BLUME: -- and you keep what's good.

5 QUESTION: That's a totally abstract approach to
6 the thing. This statute was never held unconstitutional.

7 MR. BLUME: It was held unconstitutional by the
8 military courts in the United States v. Matthews. They
9 said this does not satisfy Furman.

10 QUESTION: And when did that happen?

11 MR. BLUME: In 1983, and that's what led to
12 this.

13 QUESTION: Let me ask you this question, if I
14 may. What if this case had come directly to us, let's
15 say, post Furman and we had said, well, the statute as it
16 stands may not be applied because there is -- there's no
17 narrowing function provided for it and, therefore, it
18 simply may not be -- the death -- the statute may not be
19 applied, the death penalty may not be imposed unless and
20 until the President engages in this narrowing function or
21 somebody engages in this narrowing function, the President
22 or Congress?

23 Following our decision, the President had
24 promulgated some aggravating factors in discharge of his
25 legal authority to provide a narrowing of the statute's

1 application.

2 Would we have been bound to declare that
3 invalid? In other words, would there have been something
4 wrong with our -- constitutionally wrong with our analysis
5 in saying merely the statute may not be applied unless and
6 until narrowing takes place?

7 MR. BLUME: I think that you would be wrong to
8 the extent that the President can do this. I don't
9 think --

10 QUESTION: No, but that's not my question.
11 That's not my question.

12 MR. BLUME: The question is -- then --

13 QUESTION: The question is, assuming the -- that
14 this authority can be delegated -- just assume that for
15 the sake of argument.

16 MR. BLUME: Okay.

17 QUESTION: Would we have committed a
18 constitutional error, as it were, would we have overlooked
19 something constitutionally if we had said not that the
20 statute is unconstitutional forever and ever, but that it
21 may not be applied until there is some promulgation of
22 narrowing standards? And once there is, if there is, the
23 statute may then be applied. Would we have overlooked
24 something if we had chosen that way to analyze the
25 statute's defect?

1 MR. BLUME: No, and I think that's similar to
2 what happened.

3 QUESTION: Then why may we not look back to the
4 statute now and say that is the effect which we are going
5 to give to Furman, assuming a broad reading of Furman, and
6 therefore since you are not trying to -- the military is
7 not trying to impose the death penalty until after the
8 narrowing promulgation -- the narrowing standards have
9 been promulgated, there's no constitutional defect?
10 What's -- what is -- is there any solecism involved in
11 that?

12 MR. BLUME: Well, the constitutional -- I think,
13 one, it's not -- you're sort of trying to carry forward
14 some underlaying congressional intent for there to be a
15 death penalty in this context, which is difficult to do
16 under these circumstances.

17 And, two, it's the --

18 QUESTION: Well, I would have thought that was
19 very easy to do.

20 MR. BLUME: I don't know that that's --

21 QUESTION: Congress is not demanding narrowing.
22 Our cases have demanded narrowing based on a
23 constitutional analysis.

24 MR. BLUME: But if you're trying to say that --

25 QUESTION: The -- I guess -- let me go back to

1 the basic. The whole question is, do we have to assume
2 that the statute ceased to exist for all purposes and
3 therefore could not have been rendered constitutional by a
4 later promulgation of narrowing standards, or do we have
5 the option to analyze the problem by saying the statute
6 simply could not be imposed until there had been a
7 promulgation of narrowing standards?

8 If the latter analysis is open to us, then the
9 assumption of your argument in fact is false and you'll
10 have to go to a different argument.

11 MR. BLUME: I don't understand -- it seems to me
12 that all roads lead to Rome if you use your analysis. The
13 bottom line is that 118 was invalid as a basis for
14 imposing the death penalty.

15 QUESTION: Well, it depends on when you can get
16 to Rome, and on my second analysis you can get to Rome
17 later. On your analysis, you can't get to Rome until
18 somebody builds a new road.

19 MR. BLUME: And, well, there's no question, I
20 don't think, that something else had to happen to bring
21 this into compliance. The military court said this
22 statute violates Furman. Somebody has to go out and
23 create some aggravating circumstances.

24 QUESTION: Didn't the military court say
25 precisely what Justice Souter said? That the statute as

1 -- is -- has an infirmity, and the court said, and there
2 are two people who can cure it, two bodies who can cure
3 it: the executive, the President, or the legislature.
4 So, that was exactly the theory that the Matthews case put
5 forward.

6 And I thought earlier you were saying that
7 Matthews misread Furman in thinking that the President
8 could provide the cure, that the only person who could --
9 the only body that could provide the cure was the
10 legislature. I thought that was your argument.

11 MR. BLUME: I think that's correct. They did
12 misread. They said the statute was invalid. They said
13 there had to be some additional aggravating circumstances,
14 and then they said either the President or the Congress
15 can do it. They were wrong about whether the President
16 can do it.

17 And now in this Court the issue is, one, can the
18 President do it and, two, even if he can do it, has
19 Congress allowed him to do it? And I think the answer to
20 both those questions is no.

21 QUESTION: But you said that the States reacted
22 to Furman, all of them, by having the legislature do the
23 repair job, but was there anything in this Court decision
24 that required the narrowing to be declared by a State
25 legislature, say, as opposed to the State's highest court?

1 MR. BLUME: There -- all the language in Furman
2 and Gregg and all the opinions indicates that this is a
3 quintessential legislative function, that it is the
4 legislatures which express the moral will of the people --

5 QUESTION: Do you know any case of our that
6 imposes a separation of powers obligation upon the States?
7 I had thought, as far as our case law is concerned, that
8 States can go to an English parliamentary system.

9 MR. BLUME: This case does not present the
10 question of whether there's a State separation of powers
11 doctrine. In this particular context, the answer may be
12 if you had a State case, then at least in this limited
13 regard, that the legislatures have to do this. That's not
14 presented here.

15 QUESTION: Just under the Eighth Amendment.
16 Nothing --

17 MR. BLUME: Under the Eighth Amendment, and this
18 Court has said -- what is the Eighth Amendment concerned
19 about? The evolution of standards, which is found in
20 legislative embodiments, the collective will of the
21 people, and in regularization of punishment.

22 QUESTION: I don't think it was concerned with
23 that. I thought it was concerned with avoiding flukish
24 results, and flukish results can be avoided whether it's
25 the legislature that promulgates the narrowing or anybody

1 else.

2 MR. BLUME: It's my understanding that the
3 Eighth Amendment has -- concerns both, regularization of
4 punishment, which is the nonarbitrariness, which is
5 certainly not an executive function, and evolution of
6 standards.

7 That's what, if you look at the categorical
8 cases, they say, well, we're going to look at how society
9 has evolved and where do we see that? We see that in the
10 collective will of the people, the legislatures.

11 QUESTION: What if you had a State that -- where
12 the legislature had never defined any crimes and the
13 result was that the common law crimes simply evolved
14 through the decisions of its highest court? You're saying
15 that the highest court of a State couldn't say if the
16 crime had the elements that we said was necessary to meet
17 the Eighth Amendment. It couldn't be promulgated by the
18 highest court rather than the legislature? That's a very
19 strange --

20 MR. BLUME: Well, I mean, my argument is not
21 contingent on that at all.

22 QUESTION: Well, but --

23 MR. BLUME: I'm saying in this particular
24 context the Court has indicated it is a legislative
25 responsibility to decide who should live and who should

1 die. It's a fundamental policy choice which should be
2 made --

3 QUESTION: I just want you to make in a sentence
4 remain -- your main argument. If I assume that Furman
5 talked about law and said the law to sentence someone to
6 death has to be reasonably specific. If the law prior to
7 the regulations was not specific enough, the law after the
8 regulations was specific enough. Then you said, but the
9 President does not have the authority to promulgate the
10 regulations because?

11 MR. BLUME: Because if you allow him to do so,
12 it will create the impermissible blending of functions
13 which is separate. Look at all the things he does in this
14 context.

15 QUESTION: That's the part I'd like you to
16 explain --

17 MR. BLUME: He --

18 QUESTION: -- a little bit because the President
19 does things very often under very broad delegations of
20 authority, and why does that general principle, the only
21 case to the contrary being Schechter and Panama Refining I
22 guess, not apply here?

23 MR. BLUME: Well, on the issue -- I understand
24 you to be asking me why would this create the blending of
25 functions problem, which is -- I mean, there are a number

1 of other -- on that particular issue, if you look at it,
2 he has executive prosecutorial power. He supervises the
3 judge advocate general who picks the prosecuting lawyer,
4 the defense lawyer, the trial judge, and the judges on the
5 intermediate court of appeals. He also picks the
6 convening authority. He supervises the convening
7 authority, the post commander who decides that this is a
8 capital case and then who selects the court-martial panel.
9 He, the President, then appoints the judges on the United
10 States Court of Appeals for the Armed Forces. He under
11 71(a) has clemency power.

12 So, now you're saying that not only does he
13 prosecute the cases, not only does he supervise the
14 judges, he has prosecutorial power and judicial power, but
15 he also has the substantive power to define the class, the
16 legislative power, the power to define the class of
17 persons eligible for the death penalty.

18 QUESTION: Does he oppress people into the army?

19 MR. BLUME: No, they volunteer.

20 But still -- I mean, the fact that the service
21 members have -- may have limited rights under certain
22 circumstances, this Court has repeatedly held that that's
23 true, that it is a separate society, and there are some
24 things you can do to military people you can't do to
25 others.

1 But it's also said on every single occasion that
2 it is Congress' job not the President's. The Framers
3 specifically wanted to keep the President out of this,
4 that they wanted the Congress to decide and to balance the
5 rights of service members, not the President.

6 QUESTION: I should think it is obvious from our
7 history that the degree of separation of powers that we
8 insist upon in the rest of society we have not insisted
9 upon in the system of justice in the military. I mean, it
10 has always been the case that at least the executive and
11 the judicial functions have been combined. Is that not
12 true?

13 MR. BLUME: There has been some combination, but
14 it's also that's why in Milligan and Reid v. Covert they
15 said if the President can define crimes which is --
16 although this is not strictly the definition of a crime,
17 functionally it works much more like that. Aggravating
18 circumstances create the pool. That's on a spectrum from
19 beginning to end. It's much closer to that. Then the
20 blending is complete.

21 And this Court, in the military context, has
22 said the President cannot have all that power. I mean, in
23 a way they -- sure, they do have less power, but are we
24 going to tell the parents of these service members that,
25 yes, join the army and if you commit a capital crime, you

1 have absolutely no rights? This Court has never said
2 that.

3 QUESTION: But there's a different way to look
4 at it --

5 MR. BLUME: It's Congress' job.

6 QUESTION: -- because the aggravating
7 circumstances are not an element -- are not elements of
8 the crime. And Congress has authorized the President to
9 prescribe limitations on punishment, including for the
10 death penalty, and that seems to be a pretty specific
11 authorization. So, viewed in that way, why isn't it
12 properly viewed as a limitation on punishment that the
13 President has prescribed?

14 MR. BLUME: My time is up. May I answer the
15 question?

16 QUESTION: You may answer the question, Mr.
17 Blume.

18 MR. BLUME: Article 56 is what you're referring
19 to, Justice O'Connor, but it has no applicability in a
20 capital case. All it says is the President can set
21 maximum punishments. That has no applicability here. The
22 maximum is set.

23 But if you look at the history of the Uniform
24 Code of Military Justice and you see the history of
25 article 56 and these other articles, Congress was

1 attempting to make clear that only it had the power to
2 decide when a service member should be sentenced to death.
3 The when otherwise -- when authorized by this chapter, the
4 penalty of death under article 18 was put in there to
5 assure Members of Congress that only the Congress could
6 decide when you got death and 56 has no applicability.

7 QUESTION: I think you've answered the question.

8 MR. BLUME: Thank you.

9 QUESTION: We'll hear now from you, Mr.
10 Kneedler.

11 ORAL ARGUMENT OF EDWIN S. KNEEDLER

12 ON BEHALF OF THE RESPONDENT

13 MR. KNEEDLER: Mr. Chief Justice, and may it
14 please the Court:

15 The President acted within his statutory and
16 constitutional authority when he promulgated rule for
17 courts-martial 1004 to limit the circumstances in which
18 the death penalty, when otherwise specifically authorized
19 by the Uniform Code of Military Justice, may be imposed.

20 If the President had promulgated rule 1004 in
21 1964 prior to Furman, rather than in 1984 after Furman,
22 his action would have been applauded by most as
23 enlightened and protective of the rights of service
24 members and properly so.

25 The rule establishes important limitations on

1 the imposition of the death penalty and therefore guards
2 against the arbitrary or wanton imposition of that penalty
3 that this Court was concerned about in Furman.

4 The rule establishes procedures to be followed
5 by a court-martial in determining whether to impose the
6 penalty, and it provides that the death penalty may be
7 imposed only when the court-martial finds one of -- at
8 least one of enumerated factors, aggravating factors, that
9 the President concluded warranted the imposition of the
10 death penalty.

11 Few would have --

12 QUESTION: Was it clear in this case that it was
13 the felony aspect of the homicides committed with
14 premeditation that were the aggravators?

15 MR. KNEEDLER: There were three aggravating
16 factors, one of which was the murder -- the killing
17 committed in the course of the felony, in the case the
18 robbery.

19 QUESTION: Were they specific in their findings,
20 or did they just say that they were all aggravated under C
21 which is the felony murder --

22 MR. KNEEDLER: The court-martial found all three
23 aggravating factors to be present as -- they were required
24 to identify which aggravating factors they relied upon.
25 And then once having done that, the court-martial is left

1 to determine whether the aggravating factors substantially
2 outweigh any mitigating factors that have been advanced.

3 QUESTION: Mr. Kneedler, supposing that the
4 President had never promulgated these regulations, but
5 that the military trial court judge had simply instructed,
6 simply perhaps making them up or looking at cases and
7 saying I think we need these, would the defendant have
8 standing to object that they had not been promulgated by
9 either Congress or the President?

10 MR. KNEEDLER: I think you would have standing
11 to object that there were not pre-specified factors and
12 procedures to guide the court-martial. Now, whether
13 that --

14 QUESTION: But they were all beneficial to him.

15 MR. KNEEDLER: That's correct. Now, whether or
16 not such a claim would be meritorious is different. I was
17 just addressing the question of standing.

18 And under Furman, the -- what the Court was
19 concerned about was that the death penalty had been
20 imposed under a scheme that allowed for too high a risk
21 that the death penalty may be imposed or may be imposed in
22 a particular case in an arbitrary or wanton manner. And
23 that's what the President addressed by narrowing the
24 circumstances under which the death penalty may be
25 imposed.

1 QUESTION: Mr. Kneedler, did he narrow -- is
2 there a -- an intent to kill requirement in section 918?

3 MR. KNEEDLER: In paragraph 1, there is. There
4 has to be a -- it has to be premeditated. Under 118(4),
5 it's -- it is sufficient --

6 QUESTION: Accidental killing would be enough to
7 impose the death penalty under 4?

8 MR. KNEEDLER: In the -- if -- in this -- under
9 118(4), the crime is defined as a killing committed in the
10 course of a felony, including robbery.

11 QUESTION: That's --

12 MR. KNEEDLER: The aggravating factors provide
13 -- for 118(4) --

14 QUESTION: I'm asking just about 4, not the
15 aggravating factors. Suppose --

16 MR. KNEEDLER: 4 --

17 QUESTION: Suppose I drop a gun during a holdup.
18 The guns goes off and kills somebody. Is that enough to
19 satisfy the requirements of 10 U.S.C., section 918(4)?

20 MR. KNEEDLER: That -- I believe that would be
21 sufficient to satisfy 118(4). It would not be sufficient
22 to satisfy this Court's Eighth Amendment jurisprudence.

23 But in this case the aggravating factor includes
24 the -- the one relied upon in this case is that the
25 defendant was the triggerman in this case. He committed

1 the killing.

2 QUESTION: Yes, but that still doesn't get you
3 to intent and the aggravating factor isn't an element.
4 How does the rescue the statute?

5 MR. KNEEDLER: Well, for purposes of the death
6 penalty, the aggravating factor limits -- in this case
7 limits the imposition of the death penalty in
8 circumstances to where the defendant was the triggerman.

9 QUESTION: Well, it may limit it but it doesn't
10 provide the missing element.

11 MR. KNEEDLER: Well, the element of 118(4) -- I
12 misunderstood. The element for 118(4) for the crime of
13 murder does not require an intent to kill under 118(4)
14 where you have felony murder. He has to intend to commit
15 the robbery, and in this case he was also --

16 QUESTION: Is that sufficient?

17 MR. KNEEDLER: Well, in this case he was also
18 the triggerman. It's sufficient to convict --

19 QUESTION: Yes, but the triggerman -- that's --

20 QUESTION: The triggerman can do it
21 accidentally.

22 QUESTION: That's still enough.

23 MR. KNEEDLER: Well, that would be -- that's
24 enough to convict him of murder. There's the further
25 question of whether it's sufficient under this Court's

1 Eighth Amendment jurisprudence --

2 QUESTION: Right.

3 MR. KNEEDLER: -- to impose the death penalty,
4 and that's where the aggravating factor comes in that he
5 was the triggerman.

6 Now, in this case there was that he also, it
7 seems quite clear, intentionally killed both taxi drivers.

8 QUESTION: You can have an accidental
9 triggerman, can't you? I mean --

10 MR. KNEEDLER: You could. You could. I mean,
11 that --

12 QUESTION: Well, but your -- the basic
13 introduction to the statute says unlawfully kills. It
14 doesn't just say kills.

15 MR. KNEEDLER: Right, and there would have to be
16 presumably some level of culpability, recklessness or
17 gross negligence or something like that.

18 But in this case the petitioner has not
19 challenged the substance of the aggravating factors or the
20 court-martial's finding of guilt for either 118(1) or
21 118(4). All that has been challenged in this case is not
22 the substance of the aggravating factors, but whether the
23 President could properly promulgate them. And as to that
24 question, we think the answer is clearly yes.

25 Three provisions of the Uniform of Code of

1 Military Justice are relevant to this case and in our view
2 specifically authorize the President to promulgate factors
3 in these circumstances. Those are articles 18, 36, and
4 56.

5 Article 18 in particular provides that the
6 court-martial, quote, may under such limitations as the
7 President may prescribe, comma, adjudge any punishment not
8 forbidden by this chapter, including the penalty of death
9 when specifically authorized.

10 QUESTION: Mr. Kneedler, may I interrupt you at
11 this point? Because you are assuming that a statute
12 written before Furman with this regime can govern
13 afterwards.

14 In other words, you're assuming the correctness
15 of the military court's position in Matthews that there
16 was an infirmity, the lack of narrowing circumstances, and
17 that that infirmity could be cured by the executive or by
18 the legislature.

19 So, you're rejecting Mr. Blume's first point.
20 You're assuming that that's not worth arguing.

21 MR. KNEEDLER: Well, we think that's not
22 correct, and as you pointed out, the rationale of the
23 decision in Matthews was not that the death authorizing
24 provision in 118 was unconstitutional and had to be
25 stricken. To the contrary, the court in Matthews

1 concluded that the statute was still valid and
2 specifically contemplated that the President could
3 promulgate the aggravating factors and indeed contemplated
4 that those could then be applied in the case of Matthews
5 himself.

6 QUESTION: My question --

7 MR. KNEEDLER: Now, the President did not do
8 that.

9 QUESTION: My question to you is, was Matthews
10 right to that extent?

11 MR. KNEEDLER: Yes. We think Matthews was
12 correct because there's nothing in this Court's -- in
13 Furman or this Court's Eighth Amendment jurisprudence that
14 establishes the separation of powers principle requiring
15 that it be a legislature to prescribe the aggravating
16 factors.

17 QUESTION: Well, not so far as the State level
18 is concerned, as Justice Scalia asked -- said. I don't
19 know anything that requires the States to have any
20 particular separation of powers. But the -- on the
21 Federal level, the Constitution does require the division
22 that we know between the legislature and the executive.

23 MR. KNEEDLER: Right, and under the Federal
24 system we believe the Matthews court got it right as well
25 because in the military justice system, the -- using the

1 Furman framework, what the Matthews court found was that
2 the overall system for determining whether death shall be
3 imposed did not sufficiently protect against the arbitrary
4 imposition of the death penalty.

5 Well, in the military the system is erected by
6 the combined power of Congress in passing statutes, in
7 this case a statute both authorizing the imposition of the
8 death penalty and authorizing the President to establish
9 procedures and limits on the penalties, and of course, the
10 President's powers both pursuant to that statute and
11 pursuant to his inherent authority as commander-in-chief.

12 So, the -- particularly in the military context,
13 we think that the separation of powers argument does not
14 carry any force because the President has preexisting
15 inherent authority which is aided and augmented by the
16 Congress in the Uniform Code of Military Justice.

17 The Matthews court recognized that and said all
18 we are holding is that the system currently in place, as
19 erected by the combined powers of the Congress and the
20 President, is not sufficient, but either one can cure the
21 defect we've identified. And, of course, the President
22 immediately did exactly that.

23 QUESTION: In a non-military case, could
24 Congress have the authority to delegate the power to the
25 President to specify aggravating factors for capital

1 offenses? es between substance and procedure, but
2 notwithstanding. MR. KNEEDLER: We think -- go to the sentencing
3 commission. QUESTION: It's obviously a much different
4 case -- There's another important distinction between
5 this case. MR. KNEEDLER: Yes, and I would think Congress
6 -- we think Congress could delegate that power under
7 Mistretta. The delegation of the authority to the There's
8 sentencing commission was sustained, and whether it would
9 go to the President would not be a question of delegation.
10 The Court had a footnote in Mistretta putting to one side
11 the question of delegation to the executive, but on the
12 military justice system where the President sits at the --
13 as commander-in-chief sits at the head of the military and
14 the military justice system, he's uniquely positioned.
15 members. QUESTION: Turning back to the hypothetical case
16 of delegation in the civil -- or the non-military context,
17 is your statement that the delegation would be permitted
18 based on the premise that this is a procedural act versus
19 a substantive act? really two reasons. One was the concern
20 about a MR. KNEEDLER: Well -- sentences imposed by
21 courts. QUESTION: The act of aggravating? sentences
22 way in MR. KNEEDLER: Well, we do believe it's the
23 procedural as it has been -- as was described in Dobbert
24 and other cases. But also in Mistretta, the Court
25 addressed that very question and said that this may be in

1 a gray area between substance and procedure, but
2 notwithstanding that, it may be a sign to the sentencing
3 commission.

4 There's another important distinction between
5 this case and Mistretta, and that is in this case all the
6 President is doing is imposing a limit on the sentences,
7 unlike in Mistretta in the sentencing guidelines. There's
8 no floor. There's no minimum prescribed by the President
9 here.

10 So, the President's authority is entirely
11 ameliorative both as authorized in articles 18 and 56 and
12 also in practice. What the President has done is impose
13 limits. We think that that confirms that this power was
14 confirmed -- was conferred for the benefit of service
15 members and that in fact that's the way that it operates.

16 When the power was first given to the President
17 expressly by statute in 1890 to impose limitations on
18 sentences established by court-martial -- courts-martial,
19 that was done for really two reasons. One was the concern
20 about a lack of uniformity in the sentences imposed by
21 courts-martial and also by concerns that those sentences
22 may in many cases be excessive. Both of those are the
23 sorts of concerns that animated this Court's decision in
24 Furman and subsequent cases.

25 QUESTION: If Congress had enacted a statute or

1 a scheme where there were four aggravating factors and
2 then the President added, say, four more, you wouldn't
3 consider that as being ameliorative or limiting, would
4 you? Because then President is expanding the universe of
5 offenses that are subject to capital punishment.

6 MR. KNEEDLER: Well --

7 QUESTION: The specification of aggravating
8 factors is -- isn't always a limiting function.

9 MR. KNEEDLER: No, but under the statutory
10 authorization in this case in article 18 and 56, we think
11 that it clearly has that effect, and that was the purpose
12 that was behind Congress -- Congress' giving that power to
13 the President was to ensure some rationality and
14 consistency with sentences. And Congress concluded that
15 the commander-in-chief was the natural officer to provide
16 for that.

17 QUESTION: Whether aggravating -- the
18 specification of aggravating factors are limiting or not
19 limiting, it seems to me is quite important given article
20 56.

21 MR. KNEEDLER: Well, both article 56 and article
22 18.

23 QUESTION: And article 18.

24 MR. KNEEDLER: Right. Petitioner argues that
25 article 56 makes no reference to the death penalty and

1 then somehow the President's authority to limit sentences
2 doesn't apply to the death penalty. Well, article 18,
3 which establishes the jurisdiction and concomitant
4 sentencing authority of the courts-martial, specifically
5 refers to the sentence of death. It says that the -- a
6 court-martial shall have jurisdiction over all offenses
7 and also may impose any punishment authorized by the code
8 and not specifically forbidden by it.

9 QUESTION: If the President tomorrow were to add
10 a further list of aggravating factors, would this be
11 limiting the punishment, do you think?

12 MR. KNEEDLER: Well, if Congress -- Congress
13 would be expanding the category of cases in which the
14 death penalty may now be imposed under what the
15 President --

16 QUESTION: No. My assumption is, is that the
17 President tomorrow --

18 MR. KNEEDLER: I'm sorry.

19 QUESTION: -- enacts of further list of
20 aggravating factors. It would be a little bit hard to say
21 that that limits the death penalty.

22 MR. KNEEDLER: Well, but I think for
23 constitutional purposes, what Congress has done is
24 authorized the death penalty in any case falling within
25 118, and what the President has done is draw back from

1 that and limit the circumstances in which the death
2 penalty may be imposed.

3 QUESTION: In the hypothetical, I asked how is
4 that limiting.

5 MR. KNEEDLER: Because prior to the promulgation
6 of rule 1004, the court-martial could have imposed the
7 death penalty in any case.

8 QUESTION: No, no. My hypothetical is that
9 tomorrow he adds a further list of aggravating factors.
10 I'm asking how that is limiting.

11 MR. KNEEDLER: Right. I -- my point about
12 limitation is only what the President is limiting from the
13 universe of cases Congress has authorized the death
14 penalty --

15 QUESTION: In limiting the statutory
16 authorization --

17 MR. KNEEDLER: Right.

18 QUESTION: -- not the constitutional
19 authorization is your point.

20 MR. KNEEDLER: That -- that's correct. The
21 President has drawn back from the category of cases and
22 therefore satisfies the concerns in this Court's Eighth
23 Amendment jurisprudence by genuinely narrowing. And,
24 again, petitioner doesn't claim that there's not a genuine
25 narrowing.

1 QUESTION: But to say that it's ameliorative is
2 a little bit playing with words I think because without
3 these regulations issued by the President, nobody could
4 have been sentenced to death. With the regulations issued
5 by the President, if they're valid, people can be
6 sentenced to death.

7 MR. KNEEDLER: Right. I'm addressing here --
8 and let me make myself clear. I'm addressing here the
9 question of whether the relevant articles of the Uniform
10 of Code of Military Justice should be read as a statutory
11 matter to authorize the President to do this.

12 And we think that question really has to be
13 analyzed without regard to the intervening decision in
14 Furman. And if one puts Furman to one side and we have a
15 regime, as we did prior to rule 1004's promulgation in
16 which it was essentially up to the court-martial to decide
17 whether to impose the death penalty or not, and the
18 President then establishes a regime under which a far
19 narrower category of cases would be eligible for the death
20 penalty, we think that, as I said at the outset, that that
21 would have been regarded by most as an enlightened and
22 ameliorative sort of undertaking by the President --

23 QUESTION: Simply because narrowing factors
24 categorically limit. I mean, that's in a nutshell.

25 MR. KNEEDLER: Right. That's exactly right, and

1 therefore we --

2 QUESTION: So, any narrowing -- any aggravating
3 factor should be subsumed in that category, and if you
4 subsume it in that category, it is in fact performing a
5 limiting function.

6 MR. KNEEDLER: That's correct and --

7 QUESTION: Perhaps we shouldn't call them
8 narrowing factors because the same thing is true about any
9 narrowing factor. It's really an expanding factor. If a
10 State does not adopt them, the State cannot impose the
11 death penalty.

12 MR. KNEEDLER: Right. But for these purposes --
13 and we think particularly for whether the code should be
14 read to authorize the President to adopt these factors, we
15 think it would be odd, indeed, if Congress had withheld
16 from the commander-in-chief the authority to narrow the
17 circumstances in which courts-martial, convened under his
18 ultimate authority, may impose the death penalty. And
19 there --

20 QUESTION: I still think there's a problem. Are
21 you -- you're not saying, are you, that the President --
22 if the President promulgates five aggravating
23 circumstances, that's somewhat ameliorating, but if he
24 promulgates 15 aggravating circumstances, that's even more
25 ameliorating?

1 MR. KNEEDLER: No. I would think in common
2 parlance, that would be less so. Again, I am addressing
3 the question of whether Congress should be thought to have
4 withheld from the President --

5 QUESTION: The reason I brought that up -- and I
6 still have some trouble -- is because articles 18 and is
7 it 50?

8 MR. KNEEDLER: 56.

9 QUESTION: 56. You talk about the President
10 limiting the punishment, and I had thought that was a very
11 strong argument for his delegation authority in this case.
12 But I'm having a problem in that I don't think that
13 expanding the universe is a limitation.

14 MR. KNEEDLER: Well, it's always limiting
15 whenever the President is permitting the death penalty in
16 less than the full category of cases that Congress has
17 authorized.

18 And, again, when the Congress gave the President
19 the power --

20 QUESTION: Except that assuming Furman applies
21 to the military and is applicable here, the Congress can't
22 do that under this statute.

23 MR. KNEEDLER: I'm sorry. Congress --

24 QUESTION: Assuming the applicability of Furman
25 here, that statute is not operative.

1 MR. KNEEDLER: Well, the court in Matthews did
2 not so hold. What the court held is that the death
3 penalty could not be imposed under that statute unless
4 something further happened to prevent the arbitrary
5 imposition, which is what the President did in filling it
6 up.

7 But we think that there are -- given the special
8 concerns with the death penalty in the Uniform Code of
9 Military Justice, it would be perverse to conclude that
10 Congress withheld from the President power over that.
11 There's automatic appellate review of that --

12 QUESTION: Well, Mr. Kneedler, let's go back to
13 the -- putting Furman in because that's the big question.
14 It would be perverse. All of this is highly speculative
15 because Congress passed this regime with article 18, 36,
16 56 long before there was a Furman. So, it's now going
17 back and saying if Congress knew about Furman, it would
18 have done the same thing.

19 And I know about the special context in which
20 we're operating, but can you give me an example of any
21 other situation in which there is a constitutional flaw,
22 as the military court said, in a statute and the executive
23 is allowed to do the repair job? Is there any other
24 example that comes to mind?

25 MR. KNEEDLER: I -- with all respect, I would

1 respond by saying the problem was not in the statute but
2 in the overall scheme in which the death penalty was
3 assessed, and this is the framework for imposition of the
4 penalties. It would be very much like a situation where
5 any agency had rule-making authority and -- altogether

6 QUESTION: I thought, am I wrong, that the
7 military court said this statutory regime, as it now
8 exists, won't do. There must be something more -- he

9 MR. KNEEDLER: No. promulgated rule 1004, but
10 also the QUESTION: -- added to what Congress has
11 legislated.

12 MR. KNEEDLER: What the court said is the death
13 penalty may not be imposed under the combination of
14 situations that were then available, but specifically said
15 that the President could fill up that gap by -- under his
16 article 36 authority.

17 And this is -- it's something like a
18 severability question. Does the bare authorization from
19 Congress survive or not? And the Matthews court said
20 clearly that it does. It's clear we think that Congress
21 wanted the death penalty to be available in appropriate
22 cases in the military.

23 And when you combine that with a -- with
24 provisions -- the Uniform Code of Military Justice has a
25 severability clause, and when you combine it too with

1 provisions for the President to adopt limitations on
2 punishment and to establish procedures under article 36,
3 we think it's clear, that putting all those together, that
4 the Matthews court got it right in not striking down the
5 death penalty authorization in article 118 altogether.

6 I should also say that what we have here is the
7 combined judgment of not only the President of the United
8 States, as advised by the Justice Department and the
9 Secretary of Defense when he promulgated rule 1004, but
10 also the Court of Military Appeals in Matthews itself and
11 later in Curtis and finally by Congress a year after the
12 promulgation of rule 1004 when Congress enacted the
13 special espionage provision. Congress identified
14 aggravating factors, but then went on to say plus any
15 other aggravating factor adopted by the President pursuant
16 to article 36, thereby recognizing that the President had
17 this authority under article 36, and the legislative
18 history of that 1985 enactment makes that clear. So, we
19 have the --

20 QUESTION: Mr. Kneedler, help me out here. This
21 may be a little bit beside the path, but it's just bugging
22 me. I cannot figure out where the intent to kill
23 requirement in article 118 comes from. All the President
24 has added to the text by his order is that the defendant
25 be the actual perpetrator of the killing.

1 MR. KNEEDLER: That's right.

2 QUESTION: You can perpetrate the killing
3 without intending to kill.

4 MR. KNEEDLER: Right. I did not mean to suggest
5 that the -- first of all, 118 doesn't contain that intent
6 requirement, but the aggravating factor --

7 QUESTION: Is that you be the perpetrator. But
8 you do say there is an intent to kill requirement in 118,
9 or isn't there?

10 MR. KNEEDLER: No, there's not -- no. In 118 --
11 no, I'm sorry.

12 QUESTION: There isn't.

13 MR. KNEEDLER: I misspoke if I said that.
14 118(4) does not --

15 QUESTION: No, no. By -- it hasn't been
16 imported into it by the presidential order and --

17 MR. KNEEDLER: In 118 --

18 QUESTION: So, is it now -- as it now stands, I
19 guess that means 118(4) is invalid, constitutionally
20 invalid.

21 MR. KNEEDLER: Again, for the substantive
22 offense it's not invalid because there's -- Congress does
23 not have to have an intent requirement in a murder
24 statute.

25 Then the only question is --

1 QUESTION: The death penalty.

2 MR. KNEEDLER: -- what limitations may be
3 imposed for the death penalty. And as to that, again
4 there has been no claim here that the aggravating factor
5 is substantively --

6 QUESTION: I don't want to make matters worse,
7 but as I read this, at least on page 4 of the petitioner's
8 appendix where they have it here, the aggravating factors
9 in respect to robbery, felony murder, et cetera apply only
10 in the case of violation of article 118(1), and article
11 118(1) is the article that says you have to have
12 premeditation. So, am I right about that?

13 MR. KNEEDLER: Yes. Paragraph 8, which is
14 reproduced immediately before that --

15 QUESTION: Oh, it's paragraph --

16 QUESTION: H.

17 QUESTION: -- in other words.

18 QUESTION: It's H.

19 MR. KNEEDLER: No, 8. Number 8 addresses the
20 circumstances under article 118(4) for felony murder, and
21 in that case it says where the accused was the actual
22 perpetrator of the --

23 QUESTION: Well, then I'm, with Justice Scalia,
24 somewhat confused because of the -- 118(4) does permit
25 conviction of a person engaged in robbery who, let's say,

1 negligently and therefore unlawfully without excuse or
2 justification kills someone else. And that, provided he's
3 the person who did it negligently and therefore
4 unlawfully, would permit the imposition of the death
5 penalty.

6 MR. KNEEDLER: If negligence is sufficient to
7 satisfy the unlawful requirement, and I'm not --

8 QUESTION: Or, let's say, gross negligence or
9 whatever.

10 MR. KNEEDLER: And I'm not sure what it is. But
11 he would have to have specific intent with respect to the
12 robbery.

13 QUESTION: This person has been convicted under
14 number 8, which I hadn't focused on.

15 MR. KNEEDLER: The aggravating factor, and that
16 was --

17 QUESTION: And which means that this person has
18 been convicted under a provision that allows a person to
19 be sentenced to death if that person has either
20 negligently or recklessly, let's say, without excuse in
21 the course of a robbery killed someone.

22 MR. KNEEDLER: Well, that was one of three
23 aggravating factors. There was also -- yes, that was one
24 of three aggravating factors. But there was -- there were
25 two others, one that the -- premeditated murder committed

1 in the course of another crime as well as murder where the
2 person was convicted in the same proceeding of another
3 murder, which we --

4 QUESTION: Mr. Kneedler, where's the number 8
5 you're referring to? I don't --

6 MR. KNEEDLER: On page 4 of the petition, there
7 is -- it identifies the aggravating factors that are
8 relevant to the case. There's paragraph 7(b) and (j) and
9 then paragraph 8 which specifically deals with murder
10 under article 118(4).

11 But, again, there's been no claim by petitioner
12 in this case that the aggravating factors are
13 substantively invalid, and there has been independent
14 weighing of all the aggravating circumstances and
15 mitigating circumstances by the Court of Military Appeals.

16 QUESTION: That's in the manual. 8 in the
17 manual is H in the statute -- in the executive order, as I
18 read it.

19 MR. KNEEDLER: Yes. The executive order, as
20 originally promulgated, was lettered and numbered
21 differently. Rule 1000 -- the executive order, as first
22 issued in January 1984, was before the entire revision of
23 the rules for court-martial. That may have been --

24 QUESTION: Mr. Kneedler, going back to our
25 earlier point, if I don't think that the listing of

1 aggravators is a limiting of the sentence, then what is
2 the strongest statutory authority that I can cite for the
3 proposition that Congress has delegated this power to the
4 President?

5 MR. KNEEDLER: Article 36 is a further
6 authorization for the President to establish --

7 QUESTION: The general rules and procedures.

8 MR. KNEEDLER: Right. And Congress we think
9 confirmed that in 1985 when it enacted the espionage
10 statute and referred to further aggravating circumstances
11 that the President could adopt pursuant to article 36.

12 QUESTION: In the espionage --

13 MR. KNEEDLER: And we think the two of them
14 together -- even if there was doubt as to one of them, the
15 two of them together is certainly authorization enough.

16 I should also point out that article 71 provides
17 that before the death penalty may be imposed, the -- it
18 has to be approved by the President. So, we think it's
19 particularly unlikely that Congress would have -- would
20 not have authorized the President to adopt restrictions to
21 be imposed directly on the court-martials themselves.

22 With respect to the President's constitutional
23 authority, we think that 200 years of practice of the
24 President's inherent powers as commander-in-chief, as well
25 as Congress's broader than usual delegations of power to

1 the President and to courts-martial, are sufficient to
2 answer any delegation claims. Such cases as Swaim and
3 Mott by this Court recognize both the President's inherent
4 authority to convene the court-martial and, in addition,
5 the President's inherent authority in identifying
6 circumstances that warrant military discipline.

7 QUESTION: Mr. Kneedler, does the Government
8 believe that premeditation is a sufficient narrowing to
9 comply with Furman?

10 MR. KNEEDLER: We have not taken issue with
11 that. The court in Matthews held that it was not as
12 premeditation as defined -- or has been defined under the
13 military statute.

14 We do say, though, in footnote 6 of our brief
15 that there may be sufficient narrowing in this case within
16 the Lowenfield definition because this is a statute that
17 applies in the special separate society that this Court
18 has recognized in Parker v. Levy. That combined with the
19 existence of the element of premeditation, for example, we
20 think would -- might well be sufficient to satisfy
21 requirements.

22 But we have not taken issue with that. The
23 President acted in response to Matthews, and we believe
24 acted responsibly in response to Matthews. It fills out
25 an overall system and scheme within the military justice

1 system to protect against the arbitrary or wanton
2 imposition of the death penalty which is the fundamental
3 principle of this Court's decision in Furman.

4 I would also point out that article 55 of the
5 U.C.M.J. contains its own cruel or unusual punishment
6 prohibition, and we think that that adds further force to
7 the authority of the President to tailor punishments
8 within the military justice system in response to a
9 situation such as Furman to -- not to mention his
10 responsibility to take care that the laws be faithfully
11 executed, to tailor the military justice system to satisfy
12 constitutional requirements and in this case to tailor the
13 imposition of the death penalty to article 55 which the
14 Court of Military Appeals has read to contain much the
15 same standards.

16 CHIEF JUSTICE REHNQUIST: Thank you, Mr.
17 Kneedler.

18 The case is submitted.

19 (Whereupon, at 12:06 p.m., the case in the
20 above-entitled matter was submitted.)
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CERTIFICATION

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DWIGHT J. LOVING, Petitioner v. UNITED STATES

CASE NO: 94-1966

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BY *Ann Marie Federico*

(REPORTER)