

## Sec. 1—The Congress

## Legislative Powers

and criminal procedure and of evidence it directed that such rules supersede previously enacted statutes with which they conflict.<sup>144</sup>

**Delegations to the President in Areas of Shared Authority**

It was asserted in *United States v. Curtiss-Wright Corporation*<sup>145</sup> that the delegation of discretion in dealing with foreign relations stands upon a different footing than the transfer of authority to regulate domestic concerns. There, the Court upheld a joint resolution of Congress making it unlawful to sell arms to certain warring countries upon certain findings by the President, a typically contingent type of delegation. But Justice Sutherland for the Court proclaimed that the President is largely free of the constitutional constraints imposed by the nondelegation doctrine when he acts in foreign affairs.<sup>146</sup> Whether or not the President is the “sole organ of the nation” in its foreign relations, as asserted in *Curtiss-Wright*,<sup>147</sup> a lesser standard of delegation is applied in foreign affairs and other areas of power shared by the President and Congress.

Sixty years later, the Court, relying on *Curtiss-Wright*, reinforced such a distinction in a case involving the President’s authority over military justice.<sup>148</sup> The Court in *Loving v. United States*<sup>149</sup> approved a virtually standardless delegation to the President. Article 118 of the Uniform Code of Military Justice (UCMJ)<sup>150</sup> provides for the death penalty for premeditated murder and felony murder, but the statute does not comport with the Court’s capital punishment jurisprudence. Generally, application of the death sentence must be cabined by standards that require the sentencing authority to narrow the class of convicted persons to be so sentenced

<sup>144</sup> See 28 U.S.C. § 2072. In *Davis v. United States*, 411 U.S. 233, 241 (1973), the Court referred in passing to the supersession of statutes without evincing any doubts about the validity of the results. When Congress amended the Rules Enabling Acts in the 100th Congress, Pub. L. 100–702, 102 Stat. 4642, 4648, amending 28 U.S.C. § 2072, the House would have altered supersession, but the Senate disagreed, the House acquiesced, and the old provision remained. See H.R. 4807, H. REP. NO. 100–889, 100th Cong., 2d sess. (1988), 27–29; 134 CONG. REC. 23573–84 (1988), id. at 31051–52 (Sen. Hefflin); id. at 31872 (Rep. Kastenmeier).

<sup>145</sup> 299 U.S. 304, 319–29 (1936).

<sup>146</sup> 299 U.S. at 319–22. For a particularly strong, more recent assertion of the point, see *Haig v. Agee*, 453 U.S. 280, 291–92 (1981). This view also informs the Court’s analysis in *Dames & Moore v. Regan*, 453 U.S. 654 (1981). See also *United States v. Chemical Foundation*, 272 U.S. 1 (1926) (Trading With Enemy Act delegation to dispose of seized enemy property).

<sup>147</sup> 299 U.S. at 319.

<sup>148</sup> *Loving v. United States*, 517 U.S. 748, 772–73 (1996).

<sup>149</sup> 517 U.S. 748 (1996).

<sup>150</sup> 10 U.S.C. §§ 918(1), (4).