

## Sec. 1—The Congress

## Legislative Powers

and justify the individual imposition of the sentence.<sup>151</sup> In 1984, the President promulgated standards that purported to supply the constitutional validity the UCMJ needed.<sup>152</sup>

The Court in *Loving* held that Congress could delegate to the President the authority to prescribe standards for the imposition of the death penalty under military law—Congress' power under Article I, § 8, cl. 14, is not exclusive—and that Congress had done so in the UCMJ by providing that the punishment imposed by a court-martial may not exceed “such limits as the President may prescribe.”<sup>153</sup> Acknowledging that a delegation must contain some “intelligible principle” to guide the recipient of the delegation, the Court nonetheless held this not to be true when the delegation was made to the President in his role as Commander in Chief. “The same limitations on delegation do not apply” if the entity authorized to exercise delegated authority itself possesses independent authority over the subject matter. The President's responsibilities as Commander in Chief require him to superintend the military, including the courts-martial, and thus the delegated duty is interlinked with duties already assigned the President by the Constitution.<sup>154</sup>

**Delegations to States and to Private Entities**

Beginning in the nation's early years, Congress has enacted hundreds of statutes that contained provisions authorizing state officers to enforce and execute federal laws.<sup>155</sup> Challenges to the practice have been uniformly rejected. Although the Court early expressed its doubt that Congress could compel state officers to act, it entertained no such thoughts about the propriety of authorizing them to act if they chose.<sup>156</sup> When, in the *Selective Draft Law Cases*,<sup>157</sup> the contention was made that the 1917 statute authorizing a military draft was invalid because of its delegations of duties to state offi-

<sup>151</sup> The Court assumed the applicability of *Furman v. Georgia*, 408 U.S. 238 (1972), and its progeny, to the military, 517 U.S. at 755–56, a point on which Justice Thomas disagreed, *id.* at 777.

<sup>152</sup> Rule for Courts-Martial; *see* 517 U.S. at 754.

<sup>153</sup> 10 U.S.C. §§ 818, 836(a), 856.

<sup>154</sup> 517 U.S. at 771–74. *See also* *United States v. Mazurie*, 419 U.S. 544, 556–57 (1974) (limits on delegation are “less stringent” when delegation is made to an Indian tribe that can exercise independent sovereign authority over the subject matter).

<sup>155</sup> *See* Warren, *Federal Criminal Laws and the State Courts*, 38 HARV. L. REV. 545 (1925); Holcomb, *The States as Agents of the Nation*, 3 SELECTED ESSAYS ON CONSTITUTIONAL LAW 1187 (1938).

<sup>156</sup> *Prigg v. Pennsylvania*, 41 U.S. (16 Pet.) 539 (1842) (duty to deliver fugitive slave); *Kentucky v. Dennison*, 65 U.S. (24 How.) 66 (1861) (holding that Congress could not compel a governor to extradite a fugitive). Doubts over Congress' power to compel extradition were not definitively removed until *Puerto Rico v. Branstad*, 483 U.S. 219 (1987), in which the Court overruled *Dennison*.

<sup>157</sup> 245 U.S. 366, 389 (1918).