2008

Petition for Rehearing, Kennedy v. Louisiana, No. 07-343 (U.S. July 21, 2008)

Viet D. Dinh
Georgetown University Law Center

Neal K. Katyal
Georgetown University Law Center

Docket No. 07-343

No. 07-343

IN THE

Supreme Court of the United States

PATRICK KENNEDY,
Petitioner,

v.

LOUISIANA,
Respondent.

On Writ of Certiorari to the Supreme Court of Louisiana

PETITION FOR REHEARING

VIET D. DINH
BRIAN J. FIELD
BANCROFT ASSOCIATES PLLC
1919 M Street, N.W.
Suite No. 470
Washington, D.C. 20036
(202) 234-0090

NEAL KUMAR KATYAL *
600 New Jersey Avenue, N.W.
Washington, D.C. 20001
(202) 662-9000

PAUL D. CONNICK, JR.
District Attorney
JEFFERSON PARISH
STATE OF LOUISIANA

JULIET L. CLARK
TERRY M. BOUDREAUX
Assistant District Attorneys
OFFICE OF THE DISTRICT ATTORNEY
200 Derbigny Street
Gretna, Louisiana 70053
(504) 368-1020

* Counsel of Record

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

TABLE OF CONTENTS

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

PETITION FOR REHEARING

The State of Louisiana respectfully petitions for rehearing of the Court's June 25, 2008 decision. Specifically, it asks for an order (1) granting rehearing and (2) setting the case for reargument.

Because Sup. Ct. R. 29.4(b) and 28 U.S.C. § 2403(a) may apply, the Solicitor General of the United States has been served with this Petition.

GROUNDS FOR REHEARING

Although this Court almost never grants petitions for rehearing, this case meets the rare exception contemplated by Sup. Ct. R. 44.1 and articulated in *Ambler* v. *Whipple*, 90 U.S. 278, 282 (1875): If "the omissions in the transcript on which the case was heard are material to the decision of the case, it presents a strong appeal for reargument."[1]

Section 552(b) of the National Defense Authorization Act, Pub. L. No. 109-163, 119 Stat. 3136, 3263 (2006), specifies maximum sentences: "For an offense under subsection (a) (rape) or subsection (b) (rape of a child), death or such other punishment as a court-martial may direct."

Before this provision, child rape was subsumed under the Uniform Code of Military Justice ("UCMJ") definition of rape ("an act of sexual intercourse, by force and without consent"[2]), a charge punishable by

---

[1] See, *e.g.*, *Reid* v. *Covert*, 351 U.S. 487 (1956), *reh'g granted*, 352 U.S. 901 (1956), *aff'd on reh'g*, 354 U.S. 1 (1957); *Graver Tank & Mfg. Co.* v. *Linde Air Products Co.*, 336 U.S. 271 (1949), *reh'g granted*, 337 U.S. 910 (1949), *aff'd on reh'g*, 339 U.S. 605 (1950).

[2] 10 U.S.C. § 920(a) (2006).

death at least since the 1863 Army Articles of War.[3] The 1950 UCMJ reaffirmed the availability of the death penalty for certain nonhomicide offenses—including rape—and extended military law to apply during peacetime.

In 2006, Congress separated the rape provision into several subsections (aggravated sexual assault, child rape, etc.), and explicitly subjected child rape to the death penalty. The House of Representatives voted 374-41 to pass this law. 151 Cong. Rec. H12242 (Dec. 18, 2005). The Senate approved it by voice vote. 151 Cong. Rec. S14275 (Dec. 21, 2005).

This change in law was deliberate and premeditated. The Department of Defense prepared a comprehensive report recommending changes to the UCMJ that examined the death penalty for child rape. Dept. of Defense, *Sex Crimes and the UCMJ: A Report for the Joint Service Committee on Military Justice*, at 72-76, 301, *available at* http://www.dod.mil/dodgc/php/docs/subcommittee_reportMarkHarvey1-13-05.doc. The report discussed Louisiana's child rape law and attached Louisiana's statute as an appendix. *Id.* at 75, 599-602. When DOD submitted its proposed changes to Congress, it highlighted the capital child-rape provision. See Dept. of Defense, *Proposed Amendments to the UCMJ*, 17, 21, *available at* http://www.dod.mil/dodgc/php/docs/HASCMeeting42105.pdf.

After Congress adopted the DOD recommendations, the President signed Executive Order 13,447,

---

[3] 1863 Army Articles of War, ch. 75, 12 Stat. 731, 736 (1863). Military law did not extend to peacetime domestic offenses until 1950. Compare 1916 Army Articles of War, 39 Stat. 619, 664 with UCMJ, 64 Stat. 107, 140 (1950).

which specifically implemented the child-rape capital provision. 72 Fed. Reg. 56,179 (Sept. 28, 2007). Now, Rule for Courts-Martial 1004(c)(9) (2008) and Manual for Courts-Martial, Part IV, Paragraph 45 (2008), directly allow for the death penalty for child rape.[4]

Thus, both political branches have recently and affirmatively authorized the death penalty for child rape. Such a clear expression of democratic will, at the very least, calls into question the conclusion that there is a "national consensus against" the practice. *Kennedy* v. *Louisiana*, No. 07-343, slip op. 23 (June 25, 2008).

Respondent regrettably did not know of this Federal provision. This was a significant error, for which Respondent accepts full responsibility. Respondent first became aware of Section 552(b) from a legal "blog" that attracted subsequent commentary.[5]

Respondent's mistake, however, should neither inhibit the Court's work nor diminish its fealty to the Constitution. Section 552(b) is directly relevant, if not essential, to the Questions Presented. And the Court's opinion answering those questions is factually erroneous without reference to it. Absent

---

[4] Exec. Order No. 12,460, 49 Fed. Reg. 3,169 (1984), "amended the Manual for Courts-Martial to provide a new procedure for capital cases." *United States* v. *Curtis*, 32 M.J. 252, 257 (C.M.A. 1991). This new procedure, set forth in R.C.M. 1004, and upheld in *Loving* v. *United States*, 517 U.S. 748 (1996), requires courts-martial to unanimously find at least one aggravating factor before imposing death. One of these factors, R.C.M. 1004(c)(9)(A), specifically authorized the death penalty for the rape of a child under the age of 12. It has remained unchanged since its inception in 1984.

[5] See posting of CAAFlog to CAAFlog, http://caaflog.blogspot.com/ (June 28, 2008, 18:25 EDT).

rehearing, a federal law may be invalidated without argument and briefing. The State of Louisiana therefore respectfully, and humbly, submits that rehearing is warranted.

I. REHEARING IS WARRANTED IN LIGHT OF THE FACT THAT CONGRESS RECENTLY AUTHORIZED THE DEATH PENALTY FOR THE RAPE OF A CHILD

This Court's decision was grounded in two rationales: (1) "a national consensus against capital punishment for the crime of child rape," slip op. 23; and (2) this Court's "independent judgment, that the death penalty is not a proportional punishment for the rape of a child." Slip op. 35.

The decision did not quantify which factor, if any, predominated, instead stating that the first one was "entitled to great weight." Slip op. 23. If, as the State of Louisiana believes, Section 552(b) calls into question the national consensus found by this Court, the question arises whether the second factor, standing alone, justifies an Eighth Amendment holding that supplants the will of not only the several States, but of the Federal Government as well.

Furthermore, the existence of Section 552(b) may require this Court to examine whether the two factors are hermetically sealed. The Court may well decide that what is disproportional is a function, at least in part, of what is recently authorized by legislatures. Because this Court was not presented with all of the evidence of recent legislative enactments, its "independent judgment" was not fully informed.

In any event, were this Court to rest its decision more heavily on disproportionality, the opinion may need to be modified with respect to both Questions Presented. For example, this Court held that "the death penalty should not be expanded to instances where the victim's life was not taken." Slip op. 26-27. But under a proportionality analysis, there may well be nonhomicide crimes so heinous that the death penalty is an appropriate response. Cf. Dissent slip op. 1 (Alito, J., dissenting) (specifying some possible circumstances). This Court did not have occasion to examine the myriad circumstances relevant to a proportionality calculation because it found a national consensus against the death penalty for all forms of child rape. But if that social consensus is more textured as a result of the Federal statute, a more finely grained proportionality analysis would be required.

A. Section 552(b) Calls into Question this Court's Conclusion that There Is a "National Consensus" Against the Death Penalty for Child Rape

This Court found that six states authorized the death penalty for child rape. Slip op. 12. It then observed:

> By contrast, 44 States have not made child rape a capital offense. As for federal law, Congress in the Federal Death Penalty Act of 1994 expanded the number of federal crimes for which the death penalty is a permissible sentence, including certain nonhomicide offenses; but it did not do the same for child rape or abuse. See 108 Stat. 1972 (codified as amended in scattered sections of 18 U. S. C.). Under 18 U. S. C. §2245, an

> offender is death eligible only when the sexual abuse or exploitation results in the victim's death.

Id. at 12-13.

The Majority comprehensively analyzed whether Georgia and Florida had authorized the punishment. *Id.* at 13-14. It then concluded: "Thirty-seven jurisdictions—36 States plus the Federal Government—have the death penalty" but "only six of those jurisdictions authorize the death penalty for rape of a child." *Id.* at 15.

Justice Alito, joined by the Chief Justice, Justice Scalia, and Justice Thomas, dissented: "The Court notes that Congress has not enacted a law permitting the death penalty for the rape of a child . . . ." Dissent slip op. 13. He continued, "Congress' failure to enact a death penalty statute for this tiny set of cases is hardly evidence of Congress' assessment of our society's values." *Id.*

Section 552(b) calls the above analysis into question, and demonstrates that the Court's decision supplants not only the will of the States, but that of the Federal Government. While Congress has not, as yet, applied the death penalty to child rape in the civilian context, the recent trend (not to mention the general parity between military and civilian law today) indicates that it very well may do so, if given the opportunity.

That the Federal legislation, like the State enactments, is of recent vintage underscores that the national consensus is evolving.[6] Just over a decade

---

[6] Recent polls suggest, if anything, the national consensus favors Louisiana's law. *E.g.*, Quinnipiac Univ. Polling Inst.,

ago, no State nor the Federal Government had a specific statute permitting the death penalty for child rape. Since that time, Louisiana enacted its law (1995), followed by Georgia (1999), Montana (1997), Oklahoma (2006), South Carolina (2006), Texas (2007), slip op. 12, and the Federal court-martial system (2006). This *authorizing* trend is just as much part of the "evolving standards of decency" as are practices that *restrict* particular punishments.[7] In just fourteen years, America has decided democratically that jurisdictions governing nearly 50 million of her people may subject child rapists to the death penalty:

Americans Oppose Same-Sex Marriage (July 17, 2008) (finding that 55% favor the death penalty for child rape and 38% oppose), *available at* http://www.quinnipiac.edu/x1295.xml?ReleaseID=1194.

[7] To be sure, no one has been executed in recent years for the crime of child rape. But by the same token, "[n]obody has been executed for treason since John Brown in 1859." James Wilson, *Chaining the Leviathan: The Unconstitutionality of Executing Those Convicted of Treason*, 45 U. Pitt. L. Rev. 99, 156 (1983). That fact was not relevant to the Court's suggestion that treason is constitutionally punishable by death. Slip op. 26.

Year	Total Population Impacted By Death Penalty Statutes for Child Rape	States Punishing Child Rape with the Death Penalty
1994	0	0
1995	4,378,779	Louisiana[8]
2005	14,539,173	Louisiana,[9] Georgia,[10] Montana[11]
2007	48,099,420	Louisiana,[12] Georgia,[13] Montana,[14] Oklahoma,[15] South Carolina,[16] Texas,[17] Armed Forces[18]

[8] U.S. Census Bureau, *Time Series of Louisiana Intercensal Population Estimates by County: April 1, 1990 to April 1, 2000* (2002), *available at* http://www.census.gov/popest/archives/2000s/vintage_2001/CO-EST2001-12/CO-EST2001-12-22.html.

[9] Louisiana population in 2005 was 4,495,670. U.S. Census Bureau, *Annual Estimates of the Populations of the United States, Regions, States, and Puerto Rico: April 1, 2000 to July 1, 2007* (2007), *available at* http://www.census.gov/popest/states/NST-ann-est.html.

[10] Georgia population in 2005 was 9,107,719. *Id.*

[11] Montana population in 2005 was 935,784. *Id.*

[12] Louisiana population in 2007 was 4,293,204. *Id.*

[13] Georgia population in 2007 was 9,544,750. *Id.*

[14] Montana population in 2007 was 957,861. *Id.*

[15] Oklahoma population in 2007 was 3,617,316. *Id.*

[16] South Carolina population in 2007 was 4,407,709. *Id.*

[17] Texas population in 2007 was 23,904,380. *Id.*

[18] There were 1,374,200 active-duty members in 2007. Office of Mgmt. & Budget, *Budget of the United States Government,*

Whatever may be said about State legislative trends, Congress and the President, representing all citizens and States of the Union, have decided that child rape is subject to capital punishment. At the very least, any conclusion that a prohibitory national consensus exists must overcome the burden of showing that there exists a better way to decide democratically than that embodied in Article I, section 7 of our Constitution. Such a showing is possible, if at all, only with reargument.

B. This Court's Decisions Examining Whether Particular Death Penalty Practices Violate the Eighth Amendment Have Consistently Examined Federal Practice

This Court has consistently examined federal law when evaluating the "evolving standards of decency." For example, *Woodson* v. *North Carolina*, 428 U.S. 280, 291 (1976), examined national legislative trends on mandatory sentencing, and specifically noted that the "Federal Government had made death sentences discretionary for first-degree murder . . . ." Likewise, *Payne* v. *Tennessee*, 501 U.S. 808, 820 (1991), looked to the Federal Sentencing Guidelines to determine whether the Eighth Amendment prohibited victim-impact evidence. Later, *Roper* v. *Simmons*, 543 U.S. 551, 567 (2005), examined the Federal Death Penalty Act of 1994 regarding juveniles. More recently, *Baze* v. *Rees*, 128 S. Ct. 1520, 1527 (2008), surveyed both

---

Fiscal Year 2008, DOD Military Personnel Active and Reserve Forces, available at http://www.whitehouse.gov/omb/budget/fy2008/pdf/appendix/mil.pdf. This number is conservative, since the UCMJ applies to far more than simply active-duty personnel. 10 U.S.C. § 802 (2006).

state and federal law when evaluating the constitutionality of lethal injection.

Section 552(b) also reveals why this case does not have a "close[] resemblance" to *Enmund* v. *Florida*, 458 U.S. 782 (1982). Slip op. 22. In *Enmund*, the Federal statute, along with Colorado's, "*preclude[d]* the death penalty" under the circumstances of that case, 458 U.S. at 791 (emphasis added), whereas Section 552(b) *authorizes* the death penalty for child rape.

The better analogy is therefore *Tison* v. *Arizona*, 481 U.S. 137, 158 (1987), which limited *Enmund* by permitting the death penalty for felony-murder where the nonhomicide offense was committed with "reckless indifference to human life." In so deciding, the Court specifically cited Federal law authorizing such penalties. *Id.* at 153-54. ("Two jurisdictions require that the defendant's participation be substantial").

C. Military Law Is Deeply Relevant to Interpretation of the Eighth Amendment

This Court has looked to military law to interpret the Eighth Amendment since at least 1879. *Wilkerson* v. *Utah*, 99 U.S. 130, 133-35 (1879), contained an extensive discussion of military practice, citing not only the Articles of War but also military treatises. That discussion led the Court to conclude that "the authorities referred to are quite sufficient to show that the punishment of shooting" did not violate "the eighth amendment." *Id.* at 134-35. Later, *Furman* v. *Georgia*, 408 U.S. 238, 275 (1972) (Brennan, J., concurring), referred to the practice of "review[ing] various treatises on military law" when seeking societal trends.

While not an Eighth Amendment case, *Loving*, *supra*, upheld the President's constitutional authority to specify aggravating factors. Those factors permitted the death penalty for rape when the victim was under the age of 12. R.C.M. 1004(c)(9). R.C.M. 1004 "was drafted in an effort to accommodate" *Coker* v. *Georgia*, 433 U.S. 584 (1977). *United States* v. *Straight*, 42 M.J. 244, 247 (C.A.A.F. 1995). The current Manual for Courts-Martial similarly acknowledges that *Coker* "leaves open the question of whether it is permissible to impose the death penalty for the rape of a minor by an adult." M.C.M., A23-14.

Congress, apparently aware that this Court upheld the military capital sentencing regime, determined that death sentences were constitutionally appropriate for child rape. Accordingly, in 2006, it stated a national commitment to this belief in Section 552(b).

II. REHEARING IS APPROPRIATE EVEN IF OTHER GROUNDS SUFFICE TO JUSTIFY THE COURT'S CLOSELY-CONTESTED DISPOSITION

The State of Louisiana does not doubt that it is possible, even with the existence of Section 552(b), for this Court to reach the same disposition on rehearing as it did on June 25. But that is not the test.[19] Rather, rehearing is warranted where, as here, substantial grounds not previously presented exist.

This test serves several important goals. It protects the public's trust that the Court has before it all relevant information before reaching a final decision.

---

[19] The Court has granted rehearing petitions after a decision on the merits on at least 22 occasions. Eugene Gressman *et al.*, *Supreme Court Practice* 815-18 (9th ed. 2007).

It also safeguards the perception of fairness, underscoring that the Court's decisions in momentous cases will not be finalized for technical and procedural niceties. Substantively, it ensures that the Court's final decision accurately reflects the state of facts and the law, permitting its Members to grapple with new evidence and its implications for the rationales underlying their decision. And it ensures that the Court hear from the Federal Government before its law is set aside by this Court.

Indeed, if a majority of this Court believes that the second factor (its independent judgment) alone justified the decision, that view would militate for, not against, rehearing. This Court would then be subordinating, perhaps for the first time, the "national consensus" factor to the Court's independent judgment. Such a rule would have tremendous implications for state and federal punishment regimes. Rehearing ensures that, before this Court follows this path, it has before it a fully developed factual and legal record in a concrete case.

Furthermore, rehearing would promote the guidance function of this Court. Legislatures could then create punishment systems in light of this Court's new pronouncement about this second factor.

If, conversely, this Court were to deny rehearing, it would sow confusion about the proper weighting of the "national consensus" and "independent judgment" factors. It would create doubt about whether recent legislative acts can ever inform this Court's "independent judgment." And denial would cast uncertainty over military law's relevance to the Eighth Amendment.

Rehearing, moreover, would inform consideration of the second Question Presented. Recent legislative

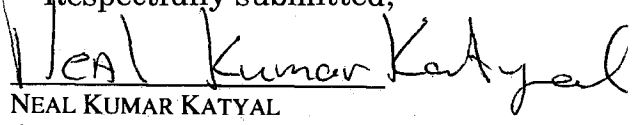
action is relevant in assessing whether a specific statute's narrowing provisions offend a national consensus or are a disproportionate response.

Finally, the Court's June 25 decision invalidates a federal statute without argument. There is no obvious way to read the decision that maintains Section 552(b). Military courts, for example, have applied *Coker* without entertaining any notion that courts-martial are exempt from this Court's Eighth Amendment pronouncements regarding civilians. See *United States* v. *Clark*, 18 M.J. 775, 776 (N-M.C.M.R. 1984). This Court has not hesitated to hear from the United States before one of its laws is set aside, and should not do so now.

CONCLUSION

Accordingly, this Petition should be granted. Alternatively, the Court may wish to first seek the views of the Solicitor General of the United States.

Respectfully submitted,



NEAL KUMAR KATYAL
Counsel of Record for Respondent Louisiana
600 New Jersey Avenue, N.W.
Washington, D.C. 20001
(202) 662-9000

PAUL D. CONNICK, JR.
District Attorney
JEFFERSON PARISH
STATE OF LOUISIANA

JULIET L. CLARK
TERRY M. BOUDREAUX
Assistant District Attorneys
OFFICE OF THE DISTRICT ATTORNEY
200 Derbigny Street
Gretna, Louisiana 70053
(504) 368-1020

VIET D. DINH
BRIAN J. FIELD
BANCROFT ASSOCIATES PLLC
1919 M Street, N.W.
Suite No. 470
Washington, D.C. 20036
(202) 234-0090

* Counsel of Record

July 21, 2008

Blank Page