

No. 07-343

IN THE
Supreme Court of the United States

PATRICK KENNEDY,
Petitioner,

v.

LOUISIANA,
Respondent.

On Writ of Certiorari
to the Louisiana Supreme Court

**BRIEF FOR PETITIONER IN
OPPOSITION TO REHEARING**

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BRIEF FOR PETITIONER IN OPPOSITION TO REHEARING

Pursuant to this Court's order of September 8, 2008, petitioner respectfully submits this brief in opposition to rehearing and respecting the merits of the State's argument in its petition for rehearing.

RELEVANT STATUTORY PROVISIONS

The pertinent provisions of the National Defense Authorization Act for Fiscal Year 2006 (NDAA), Pub. L. No. 109-163, 119 Stat. 3136, as well as the military law governing punishment for rape both before and after that enactment, are reproduced in the appendix to this brief.

STATEMENT

1. On June 25, 2008, this Court held that the Eighth Amendment prohibits imposing the death penalty for the crime of child rape. *Kennedy v. Louisiana*, 128 S. Ct. 2641 (2008). That decision was based on the national consensus against such punishment and this Court's own independent judgment that the Constitution reserves the use of the death penalty, "at this stage of evolving standards and in cases of crimes against individuals, for crimes that take the life of the victim." *Id.* at 2665. In the course of its assessment of consensus, this Court noted – correctly – that:

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 non-homicide 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.

128 S. Ct. at 2652. This Court also noted – again correctly – that “in 45 jurisdictions” (one of which is the “Federal Government”), “petitioner could not be executed for child rape of any kind.” *Id.* at 2653.

2. Petitioner is not a member of the military or otherwise subject to military jurisdiction. Nevertheless, following this Court's decision, the State petitioned for rehearing on the ground that military law is relevant to an Eighth Amendment assessment of consensus and that in 2006 Congress had “change[d] the] law” to make child rape subject to the death penalty. Pet. for Rhg. 2; *see also id.* at 7-8.

3. The National Defense Authorization Act for Fiscal Year 2006 (NDAA), Pub. L. No. 109-163, 119 Stat. 3136, recodified and amended various components of military rape law. *See generally* Jessica L. Cornett, Note, *The U.S. Military Responds to Rape: Will Recent Changes Be Enough?*, 29 WOMEN'S RTS. L. REP. 99 (Winter/Spring 2007-2008). One of the amendments clarified that when the victim is under twelve years of age, coercion need not be shown to establish a lack of consent. NDAA § 552(a)(1), 119 Stat. 3136, 3257 (codified at 10 U.S.C. § 920(b)); *compare* 10 U.S.C. § 920(a) (proof of coercion required when victim is an adult).

Nothing in the NDAA changed military law to authorize a new penalty for rape. For generations preceding the NDAA, military law provided that the punishment for rape – of anyone, adult or child – was “death or such other punishment as a court-martial may direct.” 10 U.S.C. § 920 (adopted 1956 and effective through 2006); *see also* Manual for Courts-Martial, Rule 1004(c)(9) (1984) (listing several aggravating circumstances, including the victim being a child); 50 U.S.C. § 714(a) (Supp. IV 1950) (effective from 1951 through 1956); 1920 Articles of War, Art. 92, 41 Stat. 759, 805 (1920); Army Articles of War, ch. 75, 12 Stat. 731, 736 (1863). The NDAA removed Section 920’s reference to “death,” leaving it to the President, acting in his role as Commander in Chief, U.S. CONST. art II, § 2, to set the prescribed range of punishment for military rape.¹ In 2007, the President directed that the Manual for Courts-Martial continue, as before, to provide that the maximum possible punishment for adult or child rape is death. *See* Exec. Order No. 13,447, § 3(d), 3 C.F.R. 278 (2008); Manual for Courts-Martial, Art. 120(f)(1) (2008).

The military, to our knowledge, has not sought to impose the death penalty for rape in over forty years.

¹ The State asserts without qualification that Congress in the NDAA “explicitly subjected child rape to the death penalty.” Pet. for Rhg. 2. In truth, the NDAA amended 10 U.S.C. § 920 to provide simply that rape (whether of an adult or child) “shall be punished as a court-martial may direct.” 10 U.S.C. § 920 (a) & (b); *see also id.* § 856 (granting President authority to set maximum punishments for courts-martial). The NDAA further provided as an “interim” measure that military rape remained a capital crime until the President established the permissible range of punishment for the offense. *See* NDAA § 552(b)(1), 119 Stat. 3136, 3263.

REASONS FOR DENYING REHEARING

Had the State or some other party timely informed this Court about the treatment of rape under military law, it might have warranted a footnote in this Court's opinion. Military law certainly does not warrant revisiting this Court's decision now. This is so for three reasons. First, this Court has never looked to military law to provide guidance in conducting Eighth Amendment analyses of state capital punishment laws, for military laws raise distinctive issues not present in the civilian context. Second, if military law were relevant to such analyses, the military's longstanding (and long dormant) capital rape provisions would not evince public support for executing offenders such as petitioner. Finally, in any event, adding the military to this Court's tally of jurisdictions with statutes allowing the death penalty for child rape would not undermine this Court's overall conclusion that Louisiana's capital child rape statute is unconstitutional.

1. The only relevant question regarding federal law in a case in which a person challenges a state death sentence as disproportionate punishment is whether federal law renders such an individual death-eligible. *See Enmund v. Florida*, 458 U.S. 782, 791-93 & n.15 (1982) (assessing whether other jurisdictions would render the particular defendant "in this case" death-eligible). As this Court's opinion in *Kennedy* correctly indicated, federal law does not render a civilian like Patrick Kennedy death-eligible for his crime. 128 S. Ct. at 2652-53.

The State now seeks to temper the impact of that reality by asserting that military law subjects

members of the armed forces to the death penalty for the crime of child rape. Military law, however, is immaterial to this Court's assessment of whether a national consensus exists against a state's imposing the death penalty for a certain crime. The treatment of adult rape in *Coker v. Georgia*, 433 U.S. 584 (1977), illustrates the point. In *Coker*, this Court held that the Eighth Amendment prohibits imposing the death penalty for the rape of an adult. No party argued that the then-existing military law allowing capital punishment for rape (10 U.S.C. § 920(a) (1976)) was relevant to that analysis, and this Court did not reference that law in its opinion. Nor has this Court referenced military law in any of its other modern Eighth Amendment decisions concerning the permissible reach of the death penalty. *See, e.g., Enmund*, 458 U.S. 782 (holding that Eighth Amendment precludes capital punishment for felony murder when defendant did not kill or display reckless indifference to human life and not referencing military law, 10 U.S.C. § 918 (1980), that then allowed such punishment for such conduct); *Tison v. Arizona*, 481 U.S. 137 (1987) (allowing capital punishment for felony murder when defendant displays reckless indifference to human life and not referencing military law, 10 U.S.C. § 918 (1984) & Manual for Courts-Martial, Rule 1004(c)(8) (1984), that then precluded such punishment unless defendant was "actual perpetrator of the killing").

Instead of dealing with military law in the context of state prosecutions, this Court in military cases has reserved the question whether its Eighth Amendment holdings respecting the imposition of the death penalty apply with equal force to the military. *See Loving v. United States*, 517 U.S. 748, 755 (1996);

Schick v. Reed, 419 U.S. 256, 260 (1974). These reservations comport with this Court’s approach to other constitutional rights in the context of military controversies, where this Court has held that “[t]he differences between military and civilian communities” sometimes warrant “different application of those protections” in the Bill of Rights. *Parker v. Levy*, 417 U.S. 733, 743-44, 758 (1974) (First Amendment); *see also Middendorf v. Henry*, 425 U.S. 25, 43-48 (1976) (Fifth and Sixth Amendments).

The federal government has continued after *Coker* to authorize the death penalty for adult rape, *see* 3 C.F.R. 278 (2008); Manual for Courts-Martial, Art. 120(f)(1) (2008) – as well as for child rape and nearly a dozen other nonhomicide offenses² – indicating that military policymakers believe that the “unique military requirements” that animate military law may warrant stiffer penalties for such crimes. Dep’t of Defense, *Sex Crimes and the UCMJ: A Report for the Joint Subcommittee on Military Justice* (“*DOD Report*”), at 1, *available at* http://www.dod.mil/dodge/p hp/docs/subcommittee_reportMarkHarvey1-13-05.doc; *see also* Kent Scheidegger, *Child Rape, The Death Penalty, and the Military*, http://www.crimeandconsequences.com/2008/07/child_rape_the_death_pena

² *See* 10 U.S.C. § 885 (desertion in a time of war); *id.* § 890 (assaulting or willfully disobeying a superior commissioned officer in time of war); *id.* § 894 (mutiny, sedition, attempted mutiny, or failure to suppress or report a military mutiny or sedition); *id.* § 899 (misbehavior before the enemy); *id.* § 900 (subordinate compelling surrender); *id.* § 901 (improper use of countersign in a time of war); *id.* § 902 (forcing a safeguard); *id.* § 904 (aiding the enemy); 906 (spying in a time of war); *id.* § 910 (improper hazarding of a vessel); *id.* § 913 (misbehavior of a sentinel in time of war).

lty_a.html (July 23, 2008) (opining that “[t]he crime of rape by soldiers is one that particularly inflames the local citizenry against the military, and the damage may go far beyond the individual victim to an impairment of the mission”).³ The decision in *Kennedy* does not foreclose that position. If and when the United States brings a future prosecution under military law seeking and obtaining the death penalty for child rape or any other nonhomicide offense, this Court will have ample opportunity to consider whether the crime is one against an individual or “against the State,” *Kennedy*, 128 S. Ct. at 2659, and whether special military requirements entitle the military to more leeway than states under the Eighth Amendment.

The important point for present purposes, however, is that this Court in *Kennedy* asked the right question – namely, whether petitioner is subject to the death penalty under federal law – and gave the right answer: he is not. Nothing more was, or is, required.

2. Even if military law were relevant to determining whether a national consensus exists with respect to punishing child rape, nothing about that law would cast any doubt on this Court’s finding in *Kennedy* that a national consensus opposes executing offenders such as petitioner. The military last executed someone for rape in 1961, and it apparently has not even sought – let alone obtained – such a sentence

³ The federal government takes a similar position with respect to homosexual sodomy between consenting adults, contending that “*Lawrence [v. Texas]*, 539 U.S. 558 (2003) is not applicable in the military environment due to the distinct and separate character of military life from civilian life.” *United States v. Marcum*, 60 M.J. 198, 202 (C.A.A.F. 2004).

since. See Death Penalty Information Center, *The U.S. Military Death Penalty*, [http:// www.deathpenaltyinfo.org/us-military-death-penalty](http://www.deathpenaltyinfo.org/us-military-death-penalty).⁴ There are currently nine people on the military's death row; all nine committed premeditated murder or felony murder. *Id.*

⁴ Indeed, it appears quite rare for military courts even to impose a sentence of life imprisonment for child rape. The sentences imposed in all reported military cases of child rape over the past decade are as follows: *United States v. Pauly*, 2008 CCA LEXIS 292 (2008) (17 years); *United States v. Russell*, 66 M.J. 597 (2008) (10 years); *United States v. Ortiz*, 66 M.J. 334 (2008) (25 years); *United States v. Schroder*, 65 M.J. 49 (2007) (10 years); *United States v. Paxton*, 64 M.J. 484 (2007) (26 years); *United States v. Kogan*, 2006 CCA LEXIS 337 (2006) (30 years); *United States v. Mullins*, 2006 CCA LEXIS 327 (2006) (10 years); *United States v. Pace*, 2006 CCA LEXIS 200 (2006) (14 years); *United States v. Cooper*, 2006 CCA LEXIS 127 (2006) (29 years); *United States v. Berg*, 2006 CCA LEXIS 40 (2006) (26 years); *United States v. Tanner*, 63 M.J. 445 (2006) (18 years); *United States v. Lovett*, 63 M.J. 211 (2006) (14 years); *United States v. LaTorre*, 2005 CCA LEXIS 343 (2005) (40 years); *United States v. Williams*, 2005 CCA LEXIS 167 (2005) (40 years); *United States v. Diaz*, 61 M.J. 594 (2005) (9 years); *United States v. Davis*, 60 M.J. 469 (2005) (life in prison); *United States v. Stebbins*, 61 M.J. 366 (2005) (30 years); *United States v. Farley*, 60 M.J. 492 (2005) (23 years); *United States v. McMaster*, 2003 CCA LEXIS 248 (2003) (20 years); *United States v. Bilczo*, 2002 CCA LEXIS 13 (2002) (16 years); *United States v. Rodriguez-Lopez*, 2001 CCA LEXIS 223 (2001) (40 years); *United States v. Moore*, 2001 CCA LEXIS 100 (2001) (5 years); *United States v. Goode*, 54 M.J. 836 (2001) (10 years); *United States v. Hurn*, 55 M.J. 446 (2001) (life in prison); *United States v. Norris*, 55 M.J. 209 (2001) (5 years); *United States v. Knighten*, 2000 CCA LEXIS 7 (2000) (20 years); *United States v. Rios*, 1999 CCA LEXIS 142 (1999) (30 years). Some of these offenses involved facts even more egregious than those here. See, e.g., *Mullins*, 2006 CCA LEXIS 327 (rape and sodomy of seven- and nine-year-old daughters); *McMaster*, 2003 CCA LEXIS 248 (repeated and violent rape and sodomy of six-year-old stepdaughter); *Rios*, 1999 CCA LEXIS 142 (same).

Contrary to the State's claim (Pet. for Rhg. 2), the 2006 NDAA did not "change [the] law" to signal any recent uptick in support for executing child rapists. If anything, the NDAA *withdrew* legislative support for subjecting child rapists to the death penalty by removing the reference in 10 U.S.C. § 920 to death as a possible punishment for the crime and leaving it up to the President, as Commander in Chief, to determine the maximum permissible punishment for the offense. *See supra* at 3 & n.1. And the President's executive order providing that courts-martial retain the authority to impose the death penalty for rape did nothing more than recodify the military's previously long-standing (and long dormant) maximum penalty for the crime – if it even did that.⁵

Nor is there any evidence that federal policymakers addressed the military's penalties for rape in 2006, as the State claims, in a "deliberate and premeditated" manner. Pet. for Rhg. 2. The NDAA's provisions respecting the penalties for rape appear amidst a 334-page fiscal appropriations bill. The President's reaffirmation of death as a permissible punishment appears within the 800-plus-page Manual for Courts-Martial. And neither of the Department of Defense reports that preceded these enactments

⁵ It is unclear whether the President's continuation in Article 120(f)(1) of the Manual for Courts-Martial of the possibility of punishing rape with the death penalty is sufficient to authorize such punishment. The Uniform Code of Military Justice (UCMJ) provides that a court-martial may impose capital punishment only when "the penalty of death [is] *specifically authorized by this chapter.*" 10 U.S.C. § 818 (emphasis added). Now that the NDAA has removed any reference to the death penalty from the UCMJ's rape provisions, the UCMJ itself no longer "specifically authorize[s]" such punishment.

mentions the penalty for child (or adult) rape in its executive summary. *See DOD Report, supra*, at 1-8; Dep't of Defense, *Proposed Amendments to the UCMJ ("DOD Proposed Amendments")*, at 4, available at <http://www.dod.mil/dodgc/php/docs/HASCMeting42105.pdf>. The State trumpets that the initial report "attached Louisiana's statute as an appendix." Pet. for Rhg. 2. Yet that statement, while technically true, is seriously misleading: the report attached the complete sexual-offense laws of *all fifty states*, including the forty-seven that did not at the time authorize capital punishment for child rape. *See DOD Report, supra*, at 493-821. The appendix drew no special attention to Louisiana law.⁶

Lest there be any doubt that the NDAA and ensuing amendments to the Manual for Courts-Martial were non-events, neither the State, its *amici*, the Solicitor General, nor a single person in the White House or Congress mentioned military law while this case was under submission. If the NDAA had triggered a "change" in federal law to reflect a supposedly "evolving" "national consensus" in favor of executing child rapists (Pet. for Rhg. 2, 6-7), one would have

⁶ The State also says that the report transmitting the Department of Defense's proposed statutory changes to Congress "highlighted the capital child-rape provision" in the proposal. Pet. for Rhg. 2. There are two problems with this assertion. First, Congress did not enact the report's proposed statutory language, opting instead to leave to the President the decision whether to continue providing that rape was punishable by death. *See supra* at 3 & n.1. Second, the report did not even "highlight" the proposed legislative reauthorization of punishing rape with the death penalty. Rather, it simply recited without comment the language proposing to reaffirm that rape shall be punished by "death or such other punishment as a court-martial shall direct." *DOD Proposed Amendments, supra*, at 17, 21.

expected at least someone in federal or state government to have been aware of it.

3. Even if military law mattered in this case and if it evinced some modicum of public support for punishing child rape with the death penalty, those facts would still not undermine this Court's ultimate holding that Louisiana's law violates the Eighth Amendment. In counting the number of jurisdictions with statutes allowing capital punishment for child rape, this Court acknowledged "there may be disagreement over the statistics" concerning exactly how many jurisdictions have laws that would permit such punishment. *Kennedy*, 128 S. Ct. at 2652. The salient point was that only a small number of jurisdictions had statutes allowing capital punishment for child rape. *Id.* at 2657. Even if military law could be carved out of federal law to add one more jurisdiction to the tally on the State's side of the ledger, there still would be fewer jurisdictions authorizing the death penalty here than the eight jurisdictions in *Enmund*, 458 U.S. at 792, and the twenty in *Roper v. Simmons*, 543 U.S. 551, 564 (2005), and in *Atkins v. Virginia*, 536 U.S. 304, 313-16 (2002). This Court held in each of those cases that the Constitution precluded those highly unusual applications of the death penalty, and thus the Court properly did so here as well.

Furthermore, the *Kennedy* decision was "[b]ased both on consensus and [on this Court's] own independent judgment" that "the death penalty is not a proportional punishment for the rape of a child." *Kennedy*, 128 S. Ct. at 2650, 2664. In reaching the latter judgment, this Court relied upon its "precedents and [its] own understanding of the Constitution and the rights it secures" to conclude that "[a]s it relates to

crimes against individuals, . . . the death penalty should not be expanded to instances where the victim's life was not taken." *Id.* at 2658-59. Military law does not affect that careful analysis. And the State has provided no good reason to revisit it.

CONCLUSION

For the foregoing reasons, this Court should deny the State's petition for rehearing.

Respectfully submitted.

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September 17, 2008

APPENDIX A

Military Law Prior to October 1, 2007 (the effective date of the National Defense Authorization Act for Fiscal Year 2006)

Article 120 of the Uniform Code of Military Justice, 10 U.S.C. § 920, provided in part:

(a) Any person subject to this chapter who commits an act of sexual intercourse, by force and without consent, is guilty of rape and shall be punished by death or such other punishment as a court-martial may direct.

The Manual for Courts-Martial, Article 120 provided in part:

e. Maximum punishment.

(1) *Rape.* Death or such other punishment as a court martial may direct.

The Manual for Courts-Martial, Rule 1004(c) provided in part:

(c) *Aggravating factors.* Death may be adjudged only if the members find, beyond a reasonable doubt, one or more of the following aggravating factors:

* * *

(9) That, only in the case of a violation of Article 120:

(A) The victim was under the age of 12; or

(B) The accused maimed or attempted to kill the victim.

APPENDIX B

**Relevant Provisions of the National Defense
Authorization Act for Fiscal Year 2006**

Section 552 of the National Defense Authorization Act for Fiscal Year 2006, Pub. L. 109-163, 119 Stat. 3136, states in relevant part:

**SEC. 552. RAPE, SEXUAL ASSAULT, AND OTHER
SEXUAL MISCONDUCT UNDER UNIFORM CODE
OF MILITARY JUSTICE.**

(a) REVISION TO UCMJ.--

(1) IN GENERAL.--Section 920 of title 10, United States Code (article 120 of the Uniform Code of Military Justice), is amended to read as follows:

“§ 920. Art. 120. Rape, sexual assault, and other sexual misconduct

“(a) RAPE.--Any person subject to this chapter who causes another person of any age to engage in a sexual act by--

“(1) using force against that other person;

“(2) causing grievous bodily harm to any person;

“(3) threatening or placing that other person in fear that any person will be subjected to death, grievous bodily harm, or kidnaping;

“(4) rendering another person unconscious; or

“(5) administering to another person by force or threat of force, or without the knowledge or permission of that person, a drug, intoxicant, or other similar substance and

3a

thereby substantially impairs the ability of that other person to appraise or control conduct;

is guilty of rape and shall be punished as a court-martial may direct.

“(b) RAPE OF A CHILD.--Any person subject to this chapter who--

“(1) engages in a sexual act with a child who has not attained the age of 12 years; or

“(2) engages in a sexual act under the circumstances described in subsection (a) with a child who has attained the age of 12 years;

is guilty of rape of a child and shall be punished as a court-martial may direct.

* * *

(b) INTERIM MAXIMUM PUNISHMENTS.--Until the President otherwise provides pursuant to section 856 of title 10, United States Code (article 56 of the Uniform Code of Military Justice), the punishment which a court-martial may direct for an offense under section 920 of such title (article 120 of the Uniform Code of Military Justice), as amended by subsection (a), may not exceed the following limits:

(1) SUBSECTIONS (a) AND (b).--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.

APPENDIX C

Current Military Law

Article 120 of the Uniform Code of Military Justice, 10 U.S.C. § 920, provides:

(a) Rape.--Any person subject to this chapter who causes another person of any age to engage in a sexual act by--

- (1) using force against that other person;
- (2) causing grievous bodily harm to any person;
- (3) threatening or placing that other person in fear that any person will be subjected to death, grievous bodily harm, or kidnaping;
- (4) rendering another person unconscious; or
- (5) administering to another person by force or threat of force, or without the knowledge or permission of that person, a drug, intoxicant, or other similar substance and thereby substantially impairs the ability of that other person to appraise or control conduct;

is guilty of rape and shall be punished as a court-martial may direct.

(b) Rape of a child.--Any person subject to this chapter who--

- (1) engages in a sexual act with a child who has not attained the age of 12 years; or
- (2) engages in a sexual act under the who has attained the age of 12 years;

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is guilty of rape of a child and shall be punished as a court-martial may direct.

The Manual for Courts-Martial, Article 120 (2008) provides in part:

f. *Maximum punishment.*

(1) *Rape and rape of a child.* Death or such other punishment as a court martial may direct.

The Manual for Courts-Martial, Rule 1004(c) (2008) provides in part:

(c) *Aggravating factors.* Death may be adjudged only if the members find, beyond a reasonable doubt, one or more of the following aggravating factors:

* * *

(9) That, only in the case of a violation of Article 120:

(A) The victim was under the age of 12; or

(B) The accused maimed or attempted to kill the victim.