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

SUPPLEMENTAL BRIEF FOR RESPONDENT IN SUPPORT OF THE PETITION FOR REHEARING

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES Page

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

SUPPLEMENTAL BRIEF FOR THE STATE OF LOUISIANA URGING REHEARING

Pursuant to this Court's order of September 8, 2008, the State of Louisiana submits this supplemental brief.

ARGUMENT

1. In its Petition, Louisiana identified four reasons why this Court should grant rehearing and reargument in light of Section 552(b) of the 2006 National Defense Authorization Act:

(1) The recently enacted Section 552(b), in conjunction with President Bush's Executive Order 13,447, calls into question this Court's finding of "a national consensus against capital punishment for the crime of child rape," Slip op. 23;
(2) The June 2008 opinion effectively voided a federal statute without full briefing and argument by the Solicitor General;
(3) Modifications to the June 2008 opinion are required in light of the actions of both political branches, and the degree and specificity of those modifications will benefit enormously from additional argument, particularly when the initial opinion categorically prohibited the death penalty no matter

what the circumstances of the offense; and

(4) To the extent that individuals might seek to justify the June 2008 decision solely on this Court's "independent judgment" prong, that move itself would require rehearing because it would be a dramatic break with this Court's Eighth Amendment precedents and would benefit from reargument.

Petitioner attempts to minimize Congress's and the President's actions, stating they "might have warranted a footnote in this Court's opinion." Opp. 4. That statement nicely describes his brief's treatment of the matter, but should not guide this Court's opinion. This Court should grant rehearing and reargument, and rule in favor of Louisiana on the merits. This course of action will respect, not pretermit, the continuing development of "evolving standards of decency."

Military law is American law. Yet the briefing to this Court continues to be marred by misstatements that demonstrate an inattention to military law. See *infra* pp. 6, 15 (discussing these misstatements). These harried and inaccurate treatments are not consistent with the respect this Court has traditionally afforded our proud system of military justice, nor are they consistent with the way this Court treats Congressional enactments. "A statute enacted by Congress expresses the will of the people of the United States in the most solemn form." *United States* v. *Lee Yen Tai*, 185 U.S. 213, 222 (1902). As the United States put it, "This Court has never found a 'national consensus' *against* capital

punishment for a particular offense . . . when Congress, consisting of Representatives from all 50 States, has affirmatively authorized such punishment." U.S. Br. 4. Rehearing, and reargument, is necessary to set the record straight.

Louisiana believes that recent trends, in both the federal government and the States, explain why the Eighth Amendment does not prohibit the death penalty for child rapists. Nowhere in his brief does Petitioner acknowledge (let alone answer) the key point that the recency of federal and State action overwhelmingly favors Louisiana. Reh'g Pet. 7-8. "It is not so much the number of these States that is significant, but the consistency of the direction of change." *Atkins* v. *Virginia*, 536 U.S. 304, 315 (2002).

That elected legislatures have taken this recent action despite imprecise language in *Coker* v. *Georgia*, 433 U.S. 584 (1977), only underscores the need to revisit the June 2008 opinion. See *Ambler* v. *Whipple*, 90 U.S. 278, 282 (1875) ("[I]f 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.").

2. Reconsideration respects democratic processes. Without rehearing, there will be no practical way for our polity to demonstrate, now or in the future, that this Court's reading of the Eighth Amendment was incorrect. Legislation will be impossible; opponents can, in good faith, point to this Court's June decision as evidence that proponents are acting unconstitutionally in violation of their Oath. U.S. Const. art. VI. Facing such opposition,

even the hardiest proponents of legislation similar to Louisiana's statute would, and rightly should, fold.

There will, in short, be no way for the "evolving standards of decency" to develop further or to demonstrate that the death penalty for child rape is not "cruel and unusual." While it may be appropriate for this Court to permanently freeze legislation that imposes the death penalty against immutable classes, such as the mentally deficient, that is not the case here.[1] "[W]hat basis is there in any of those sources for concluding that it is the Members of this Court, rather than the elected representatives of the people, who should determine whether the Constitution contains the unwritten rule that the Court announces today?" *Printz* v. *United States*, 521 U.S. 898, 940 (1997) (Stevens, J., dissenting).

The Constitution's commitment to democratic solutions and our federal system favors rehearing. It

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[1] Deferring to the democratic process takes on more, not less, importance in light of Petitioner's claim that no one has been executed for child rape in some decades. Opp. 7. Should this Court grant rehearing, it is highly unlikely that anyone will be executed for child rape during reconsideration. That time could not only provide this Court with briefing and reargument, but also permit a democratic conversation to unfold. "We therefore have a clear question about which institution, a legislature or a court, is relatively more competent to deal with an emerging issue as to which facts currently unknown could be dispositive. . . . [T]he legislative process is to be preferred." *Washington* v. *Glucksberg*, 521 U.S. 702, 788 (1997) (Souter, J., concurring).

The reaction to the June decision illustrates that even a short period of time can shed light on the national consensus, including reactions from the two major Presidential candidates and Members of Congress. See Supp. Br. App. A-E. There is no downside to granting rehearing and much upside.

is up to this Court to "judge whether the Eighth Amendment permits imposition of the death penalty." *Enmund* v. *Florida*, 458 U.S. 782, 797 (1982). However, "[w]hen asked to encroach on the legislative prerogative [the Court is] well counseled to proceed with the utmost reticence." *Furman* v. *Georgia*, 408 U.S. 238, 431 (1972) (Powell, J., dissenting).

The reason for this reticence is simple: "It is too easy to propound our subjective standards of wise policy under the rubric of more or less universally held standards of decency." *Id.* (citing *Trop* v. *Dulles*, 356 U.S. 86, 103 (1958) ("This task requires the exercise of judgment, not the reliance upon personal preferences.")). Yielding to this temptation would make the Court, "under the aegis of the *Cruel and Unusual Punishment Clause*, the ultimate arbiter of the standards of criminal responsibility." *Powell* v. *Texas*, 392 U.S. 514, 533 (1968) (plurality, per Marshall, J.). "The deference we owe to the decisions of the state legislatures under our federal system is enhanced where the specification of punishments is concerned, for 'these are peculiarly questions of legislative policy.'" *Gregg* v. *Georgia*, 428 U.S. 153, 176 (1976) (citations omitted).

3. The recent federal and State enactments suggest that rehearing and reversal of the June 2008 opinion are appropriate. This Court, heeding *Trop*'s warning of interjecting "personal preferences," is "informed by 'objective factors to the maximum possible extent.'" *Atkins*, 536 U.S. at 312 (citations omitted). See also *Roper* v. *Simmons*, 543 U.S. 551, 564 (2005).

The federal government can punish child rapists only in limited situations, so it is hardly surprising that Congress has not enacted a general law on the matter. However, when Congress *does* act—and in the uniquely federal realm of military law—such action presents compelling objective indicia, particularly when coupled with recent State enactments.

a. This Court has looked to military law in interpreting the Eighth Amendment. For example, *Wilkerson* v. *Utah*, 99 U.S. 130, 134-35 (1879)—discussed at Reh'g Pet. 10 (but not mentioned in Petitioner's opposition)—held: "Cruel and unusual punishments are forbidden by the Constitution, but the authorities referred to [including military law] are quite sufficient to show that the punishment of shooting as a mode of executing the death penalty for the crime of murder in the first degree is not included in that category."

In *Furman*—again not mentioned by Petitioner—Justice Brennan emphasized that the Eighth Amendment "establis[hes] a safeguard against arbitrary punishments," and that military law helps determine such safeguards. *Id.* at 274 (Brennan, J., concurring). "This principle has been recognized in our cases. In *Wilkerson*, the Court reviewed various treatises on military law in order to demonstrate that under 'the custom of war' shooting was a common method of inflicting the punishment of death." *Id.* at 275 (citation omitted).

The Court did not refer to military law as an inferior or different class of laws, but rather as illustrative of—in modern terms—objective indicia under a national consensus analysis. U.S. Br. 4-5.

This Court has followed this practice outside of the Eighth Amendment. For example, *Miranda* v. *Arizona*, 384 U.S. 436, 489 (1966), observed that the UCMJ "has long provided that no suspect may be interrogated without first being warned" of his rights. "Conditions of law enforcement in our country *are sufficiently similar to permit reference to this experience* as assurance that lawlessness will not result from warning an individual of his rights." *Id.* (emphasis added).

b. This Court's Eighth Amendment decisions have been in agreement with federal law. *E.g.*, *Atkins*, 536 U.S. at 313; *Roper*, 543 U.S. at 567. Petitioner claims that in three cases, Eighth Amendment challenges have been decided contrary to the UCMJ. Opp. 5. His claims are exaggerated. In *Coker*, because the military death penalty had been thrown into doubt after *Furman*, the UCMJ was not an authoritative guide. 408 U.S. at 412 (Blackmun, J., dissenting) (suggesting that the decision may invalidate UCMJ death-penalty provisions); Gregory English, *The Constitutionality of the Court-Martial Death Sentence*, 21 A.F. L. REV. 552, 552 (1979). See generally, *United States* v. *Matthews*, 16 M.J. 354 (C.M.A. 1983); *United States* v. *Curtis*, 32 M.J. 252 (C.M.A. 1991); *Loving* v. *United States*, 517 U.S. 748, 753-754 (1996).

Coker relied on recent evidence from the "immediate, post-*Furman* legislative reaction." *Id.* at 594. It did not look at stale capital statutes, such as the UCMJ, that omitted aggravating factors. Indeed, *Coker* cited a pre-*Furman*, on-the-books federal provision authorizing civilian capital punishment for adult rape, yet described the federal government as

lacking the death penalty for that crime. 433 U.S. at 593 n.6 (plurality) (citing 18 U.S.C. § 2031 (repealed 1986)); *id.* at 595-96 ("Georgia is the sole jurisdiction in the United States at the present time that authorizes a sentence of death when the rape victim is an adult woman.").

Coker's one-State reauthorization stands in marked contrast to this case. Recently, the *federal government* and six other jurisdictions have imposed the death penalty for child rape.

Petitioner's two other cases fare no better. *Enmund* did not cite 10 U.S.C. § 918, but that omission, once again, likely reflects the fact that the military death-penalty process had not yet been revised after *Furman*. Further, § 918 may not have been relevant to the question in *Enmund* (vicarious felony murder) because it only applied to someone who "unlawfully kills a human being." At the time, military courts had not "confronted directly" whether § 918 permitted vicarious felony murder. *United States* v. *Jefferson*, 22 M.J. 315, 321 (C.M.A. 1986). Instead, *Enmund* cited on-point federal law supporting its conclusion. U.S. Br. 5.

Tison v. *Arizona* favors rehearing; the Court found that the "substantial and recent legislative authorization . . . powerfully suggests that our society does not reject the death penalty as grossly excessive under these circumstances." 481 U.S. 137, 154 (1987) (citations omitted). The essential point was not military law, but "substantial and recent legislative authorization." Moreover, *Tison upheld* the death penalty, rendering discussion of military law superfluous. Indeed, *Tison* cited other federal law reflecting the consensus. *Id.* at 154 n.6 (citing 49 U.S.C.App. § 1473(c)(6)(D) (1982)).

Ultimately, in not one of the cases Petitioner cites did this Court cut back on *Wilkerson* or announce that military law was irrelevant to civilian Eighth Amendment challenges.

c. Petitioner contends 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." Opp. 7. Petitioner's reasoning would ultimately plunge this Court's Eighth Amendment jurisprudence into jeopardy.

It is undoubtedly true that Petitioner is not (and will never be) in the military. But Louisiana is *not* arguing that he should be court-martialed. Rather, the point is much simpler and all the more powerful: when Congress enacts a law, be it military or civilian, that law is relevant objective evidence of a national consensus.

Every time the Court decides whether a national consensus exists, it examines the laws of other States not party to the case before it. For example, it would have been no answer in *Roper* to claim that the law of Alabama (which permitted the death penalty for juveniles) and the law of Illinois (which forbade it) were irrelevant because Mr. Simmons faced punishment in Missouri. 543 U.S. at 579-580 (cataloguing Alabama and Illinois law). To accept Petitioner's argument would undo this Court's well-trodden path of resolving Eighth Amendment challenges. Indeed, the failure to consider domestic military law would *a fortiori* call into question any reliance on the laws and practices of foreign jurisdictions.

4. The Court's June 2008 analysis of "objective indicia of consensus" "follow[ed] the approach" of *Roper, Atkins*, *Coker*, and *Enmund*. Slip op. 11. Under *Atkins*, "[i]t is not so much the number of these States that is significant, but the consistency of the direction of change." 536 U.S. at 315.

However, despite the recent statutes and the active consideration of similar measures in at least five other States when *certiorari* was granted, this Court found "no showing of consistent change ha[d] been made." Slip op. 20. At minimum, the recent federal action invites reconsideration.

Reversal may also be appropriate to ensure consistency with *Atkins*, where this Court looked to the entire corpus of legislative action, including *pending measures*.[2] *Atkins* also observed "the evidence carries even greater force when it is noted that the legislatures that have addressed the issue have voted overwhelmingly in favor of the prohibition." 536 U.S. at 316.

Thus, not only are pending measures potential "evidence" of a national consensus, the relevant votes further bolster that evidence. Federal and State legislators have overwhelmingly supported the death penalty for child rape—1170 to 149.[3]

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[2] *Atkins* cited a vetoed Texas bill as well as "bills [that] have passed at least one house in other States, including Virginia and Nevada." 536 U.S. at 315. See also *id.* at 315 nn.16-17.

[3] The U.S. House vote was 374-41; Louisiana, 113-23; Georgia, 195-2; Montana, 126-23; Oklahoma, 127-16; South Carolina, 83-26; and Texas, 152-18. These statistics understate support since they omit voice votes in the U.S. and South Carolina Senates.

This consistently growing trend is even stronger when considered alongside the overwhelming movement in the Federal Government and States toward greater punishment for abusing and raping children after recent highly publicized crimes. U.S. Br. 7-8.

The societal trend supports not only rehearing, but also a decision to uphold Louisiana's law as a constitutional exercise of its power to prescribe proportionate punishment for an egregious crime. "Congress often can better reflect state concerns for autonomy in the details of sophisticated statutory schemes than can the Judiciary, which cannot easily gather the relevant facts and which must apply more general legal rules and categories." *United States* v. *Morrison*, 529 U.S. 598, 661 (2000) (Breyer, J., dissenting).

5. Petitioner contends that Section 552 was part of a "334-page fiscal appropriations" bill and that the "President's reaffirmation of death as a permissible punishment appears within the 800-plus-page Manual for Courts-Martial." Opp. 9. These claims are flatly wrong and irrelevant to boot.

a. As the Petition explained, the President's decision was made in a specific Executive Order, not the Manual. The Order was devoted almost entirely to overhauling sexual offense punishments. Reh'g Pet. 2-3.

b. Section 552(b) was *not* part of an "appropriations bill"; it was in the 2006 Authorization Act. It was a deliberate response to a DOD report examining the UCMJ's treatment of sex

crimes and particularly the death penalty for child rape. Reh'g Pet. 2; U.S. Br. 3 n.1.

Petitioner asserts that Louisiana was "seriously misleading" about this Report. Opp. 10. While it is true that other State laws were attached alongside Louisiana's (and Louisiana never contended otherwise), he overlooks the portion of the report recommending Interim Maximum Sentences:

> *Coker* effectively invalidated the death penalty authorization in Article 120 in the case of rape involving adult victims in the absence of some particularly aggravating factor. The Supreme Court has not ruled on the constitutionality of the death penalty as it applies to the rape of children. At least one state believes the death penalty is appropriate and constitutional for the rape of a child younger than twelve. In 1995, Louisiana amended its aggravated rape statute…[to allow] the district attorney the discretion to seek the death penalty for cases involving the rape of a child under the age of twelve.

Sex Crimes and the UCMJ: A Report for the Joint Service Committee on Military Justice at 74-75, *available at* http://www.dod.mil/dodgc/php/. DOD then highlighted the provision before Congress. Reh'g Pet. 2.

Hence, both Congress and DOD were aware of the questions inherent to applying the death penalty to child rape, and when they had occasion to do so, the political branches restructured the statute to

comply with *Coker*. Just as Louisiana's action influenced federal law, Louisiana's action may well have influenced other jurisdictions had they possessed the time to study these reforms.

c. Petitioner misreads the 2006 Act. He asserts that the Act withdrew legislative support for the death penalty for child rape. Opp. 9 & n.5. Not. At. All.

The Act's interim provisions explicitly *provided* the death penalty for child rape. See § 552(b)(1). The Act put those provisions in place "[u]ntil the President otherwise provides pursuant to section 856 of title 10." *Id.* That is not a withdrawal of the death penalty; it affirmed the child-rape provision and made it consistent with other UCMJ punishments:

> It is clear that Congress has been willing for the President to play the major role in determining what punishments may be imposed by courts-martial. . . . Under Article 56, UCMJ, 10 USC § 856, "[t]he punishment which a court-martial may direct for an offense may not exceed such limits as the President may prescribe for that offense." Article 18, UCMJ, 10 USC § 818, states that a general court-martial "may, *under such limitations as the President may prescribe,* adjudge any punishment not forbidden by [the Code], including the penalty of death when specifically authorized by" the Code. (Emphasis added.) When these Articles are taken together, they reveal that—

> instead of legislating maximum punishments as it has done in Title 18 of the United States Code for cases tried in the District Courts—Congress has decided that the President shall set the maximum punishments imposable in trials by courts-martial.

Curtis, 32 M.J. at 261.

The President has not provided otherwise; he has *confirmed* Congress' imposition of the death penalty for child rape. Petitioner's bizarre claim that the death penalty has been withdrawn ignores the plain text of the Congressional enactment.

d. Finally, the fact that the Parties did not raise § 552(b) beforehand does not make the statute any less deliberate. Opp. 9-11. "[C]ourts must presume that a legislature says in a statute what it means and means in a statute what it says there." *Connecticut National Bank* v. *Germain*, 503 U.S. 249, 253-54 (1992). Petitioner's argument would damage the fabric of law—letting courts second-guess which statutes were passed with sufficient attention and which ones were not. Because sufficiency will always be in the eye of the beholder, this is a recipe for disaster.

6. Petitioner also contends that "[t]he military last executed someone for rape in 1961, and it apparently has not even sought—let alone obtained—such a sentence since." Opp. 7-8. This is also wrong. See *United States* v. *Straight*, 42 M.J. 244, 247 (C.A.A.F. 1995) (stating that the Navy sought the death penalty for rape and attempted-

murder).[4] In any event, the recency of the statutes, including Section 552(b), explains these statistics. And due to *Coker*'s broad language, prosecutors may have been unwilling to test the water.[5]

That the death penalty has not been used recently for child rape is no more indicative of a consensus than the fact that no one has been executed for treason since 1859. Reh'g Pet. 7 n.7. In fact, due to the recency of child rape statutes, evidence of a consensus is stronger here than even for treason.

Petitioner also argues that the number of jurisdictions with the death penalty for child rape is small, even counting the federal government. Opp. 11. But the Eighth Amendment test does not employ an abacus; it is a careful inquiry into whether a social consensus exists. This Court has warned that recent and consistent trends far eclipse raw numbers. And here, *the Federal Government*, and jurisdictions encompassing nearly 50 million individuals, recently authorized the death penalty for child rape. Reh'g Pet. 7.

7. Petitioner suggests two ways to sweep the above difficulties under the rug. Both fail.

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[4] Petitioner's brief is marred by a number of other factual errors about the military-justice system. See posting of CAAFlog to CAAFlog, http://caaflog.blogspot.com (Sept. 17, 2008, 21:21 EDT) (discussing some of these errors).

[5] Louisiana understands that this argument is speculative, as is Petitioner's response to it. The only way to find out is to let the democratic process unfold, which favors rehearing for reasons explained in Part 2.

a. He first suggests that this Court can simply leave Section 552(b) for another day. Opp. 7. That solution, deemed insufficient by the very Government administering the statute, is precluded by the categorical opinion below. U.S. Br. 7. Moreover, it would not grapple with the serious questions Section 552(b) raises about this Court's June 2008 opinion. That June decision is susceptible to the same interpretive dilemma as the one *Coker* created. While the military ultimately interpreted that case correctly,[6] other courts and legislators did not. Dissent slip op. at 3-4 (Alito, J., dissenting). Likewise, in this case, legislatures and courts alike may question whether the June opinion is limited to child rape or whether it applies more broadly.

Petitioner contends that this Court has carved out the military in previous cases. Opp. 5-6. But this Court has never held that military personnel could be subject to punishments that it deems "cruel and unusual" for the rest of the population. None of the cases cited by Petitioner at 5-6 suggest otherwise. To do so could create grave equal protection problems. See Laurence Tribe, *The Supreme Court is Wrong on the Death Penalty*, WALL ST. J., July 31, 2008. If a particular child is raped in the suburbs of New Orleans it does not alter the "cruel and unusual" analysis to know that the rapist is in the Coast Guard as opposed to the local police. To give the petty officer death, and the police officer life, is in

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6 "*Coker*, however, leaves open the question of whether it is permissible to impose the death penalty for the rape of a minor by an adult." 2008 Manual for Courts-Martial, Appendix 23, Section 45 (2008).

deep tension with "equal *protection* of the laws." U.S. Const. amend. XIV.

In the rare instances when modern military law employs noncivilian rules, a unique military interest is at stake. For example, in *Parker* v. *Levy*, the issue of disobeying command orders justified special punishment. 417 U.S. 733, 737 (1974). There is no similar argument about child rape, and military courts have drawn no such distinction with adult rape. See *Matthews*, 16 M.J. at 380 (applying *Coker* to courts-martial); *United States* v. *McReynolds*, 9 M.J. 881, 882 (A.F.C.M.R. 1980) (referring to *Coker* as "binding upon us." (citation omitted)); *United States* v. *Clark*, 18 M.J. 775, 776 (N-M.C.M.R. 1984); *Straight*, 42 M.J. at 247.

Petitioner proposes that child rape in the military could be an offense "against the State." Opp. 7. That argument, once again, proves Louisiana's point: The very same observation applies to other, nonmilitary, forms of child rape. The rape of children who are wards of the State or in foster homes could be easily characterized as crimes "against the State." So, too, the rape of a child by a law enforcement officer can have the same impact upon a local community as that hypothesized by Petitioner for the military.[7] However, under the June 2008 decision, these cases, and all others, would be ineligible for the death penalty—no matter how many legislators believe otherwise.

If this Court does not address the relevance of a recent federal law to its objective indicia analysis, it would implicitly subordinate that analysis to this

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[7] Section 552(b) does not limit the death penalty to battlefield situations, as Petitioner's brief implies. Opp. 7.

Court's independent judgment. It would furthermore subject the military justice system to piecemeal application of this Court's holdings and invite uncertainty.

b. In a single paragraph at the end of his brief, Petitioner alternatively suggests that the Court's second prong, its independent judgment, justifies the June 2008 decision. Opp. 11-12. He does not explain how this factor, standing alone, would suffice for a task of such magnitude. This Court has never resorted to its independent judgment alone to void a punishment under the Eighth Amendment: "All of our cases condemning a punishment under this mode of analysis also found that the objective indicators of state laws or jury determinations evidenced a societal consensus against that penalty." *Stanford* v. *Kentucky*, 492 U.S. 361, 379 (1989) (plurality) (citations omitted).

Moreover, the recent action by Congress and the President evince their independent judgment that the death penalty is appropriate for child rape. Such decisions are relevant not only as indicia of national consensus, but also because they inform this Court's own judgment about what is cruel and unusual. "The usual presumption is that Members of Congress, in accord with their oath of office, considered the constitutional issue and determined the amended statute to be a lawful one . . . ." *Boumediene* v. *Bush*, 128 S. Ct. 2229, 2243 (2008).

Petitioner's suggestion, if anything, boomerangs. His notion that this Court's "independent judgment" alone could void a specific punishment would, on its own terms, require rehearing by jettisoning settled Eighth Amendment jurisprudence. Although this

Court could determine that its independent judgment is controlling, at present that factor is but one aspect of a complex Eighth Amendment analysis. As the Petition explained, such a dramatic departure from precedent would need to be tested and shaped appropriately through reargument. Reh'g Pet. 4-5, 12-13. Petitioner's Opposition never contends otherwise.

CONCLUSION

Accordingly, the Petition should be granted.

Respectfully submitted,

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September 24, 2008

APPENDIX A

Statement of Senator John McCain

TITLE: Statement of Senator John McCain: McCain Disappointed with Supreme Court Ruling that Fails to Protect our Children.

DATE: June 25, 2008

SOURCE: Office of Senator John McCain, Press Release

WASHINGTON, D.C. – U.S. Senator John McCain (R-Ariz.) today released the following statement regarding the Supreme Court's decision issued in *Kennedy v. Louisiana*:

"As a father, I believe there is no more sacred responsibility in American society than that of protecting the innocence of our children. I have spent over twenty-five years in Congress fighting for stronger criminal sentences for those who exploit and harm our children. Today's Supreme Court ruling is an assault on law enforcement's efforts to punish these heinous felons for the most despicable crime. That there is a judge anywhere in America who does not believe that the rape of a child represents the most heinous of crimes, which is deserving of the most serious of punishments, is profoundly disturbing."

APPENDIX B

Statement of Senator Barack Obama

TITLE: Obama Disagrees with High Court on Child Rape Case

DATE: June 25, 2008

AUTHOR: Sara Kugler

SOURCE: Associated Press

Democrat Barack Obama said Wednesday he disagrees with the Supreme Court's decision outlawing executions of people who rape children, a crime he said states have the right to consider for capital punishment.

"I have said repeatedly that I think that the death penalty should be applied in very narrow circumstances for the most egregious of crimes," Obama said at a news conference. "I think that the rape of a small child, 6 or 8 years old, is a heinous crime and if a state makes a decision that under narrow, limited, well-defined circumstances the death penalty is at least potentially applicable, that that does not violate our Constitution."

The court's 5-4 decision Wednesday struck down a Louisiana law that allows capital punishment for people convicted of raping children under 12, saying it violates the Constitution's ban on cruel and unusual punishment.

The ruling spares the only people in the U.S. under sentence of death for that crime — two Louisiana men convicted of raping girls 5 and 8. It also invalidates laws on the books in five other states that allowed executions for child rape that does not result in the death of the victim.

Obama's Republican rival, John McCain, also criticized the court's decision, calling it "an assault on law enforcement's efforts to punish these heinous felons for the most despicable crime."

"That there is a judge anywhere in America who does not believe that the rape of a child represents the most heinous of crimes, which is deserving of the most serious of punishments, is profoundly disturbing," McCain said in a statement.

Obama, the likely Democratic presidential nominee, said that had the court "said we want to constrain the abilities of states to do this to make sure that it's done in a careful and appropriate way, that would have been one thing. But it basically had a blanket prohibition and I disagree with that decision."

Obama has two daughters, ages 7 and 9.

He has long supported the death penalty while criticizing the way it is sometimes applied.

As an Illinois legislator, he helped rewrite the state's death penalty system to guard against innocent people being sentenced to die. The new safeguards included requiring police to videotape interrogations

and giving the state Supreme Court more power to overturn unjust decisions.

He also opposed legislation making it easier to impose the death penalty for murders committed as part of gang activity. Obama argued the language was too vague and could be abused by authorities.

But Obama has never rejected the death penalty entirely. He supported death sentences for killing volunteers in community policing programs and for particularly cruel murders of elderly people.

“While the evidence tells me that the death penalty does little to deter crime, I believe there are some crimes — mass murder, the rape and murder of a child — so heinous, so beyond the pale, that the community is justified in expressing the full measure of its outrage by meting out the ultimate punishment,” he wrote in his book “The Audacity of Hope.”

In 1988, a question about rape and capital punishment tripped up Democratic presidential nominee Michael Dukakis.

Dukakis was asked during a nationally televised debate with Republican George H. W. Bush whether he’d still oppose the death penalty if his wife were raped and murdered.

His unemotional, dispassionate answer was ridiculed, and gave Republicans more material to paint him as an emotionless liberal.

At the news conference Wednesday, Obama answered questions on a number of topics, including a compromise eavesdropping bill the Senate was preparing to consider. He said he supports the bill, which would establish new rules to govern when the National Security Agency, CIA, FBI or others can tap American phone and computer lines.

The bill also effectively gives legal immunity to telecommunications companies that helped the government eavesdrop on calls and e-mails for years after the Sept. 11 terrorist attacks, without the approval of a special, secret court.

Obama, who opposed an earlier version of the bill, said he supports the compromise partly because it would prohibit presidents from superseding surveillance rules in the future.

APPENDIX C

Letter from Representative Roy Blunt, *et al.*

July 10, 2008

Chief Justice John G. Roberts, Jr.
Justice John Paul Stevens
Justice Antonin Scalia
Justice Anthony M. Kennedy
Justice David H. Souter
Justice Clarence Thomas
Justice Ruth Bader Ginsburg
Justice Stephen G. Breyer
Justice Samuel A. Alito, Jr.
Supreme Court of the United States
Washington, DC 20543

Dear Justices,

We were deeply dismayed by the Court's decision in *Kennedy v. Louisiana* on June 25, 2008, that failed to understand both the immeasurable pain, anguish and life-long scars of children under twelve who are brutally raped by an adult and the legislative response that balanced that harm by making the death penalty the maximum punishment for these horrific crimes. However, we were even more troubled to learn that a central factual basis for the majority opinion was not only incomplete, but inaccurate.

Specifically, the Court in the majority opinion noted that in the Federal Death Penalty Act of 1994 Congress "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." The Court went on to state that "[t]he evidence of a national consensus with respect to the death penalty for child rapists… shows divided opinion but, on balance, an opinion against it." Further, the Court noted that "[t]hirty-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."

Apparently, the Court was unaware of the "national consensus" on this issue enacted just two years ago. In particular, Congress in 2005 through the duly elected representatives from all across the country enacted the death penalty for child rapists under the Uniform Code of Military Justice. That provision—Section 552(b) of the National Defense Authorization Act for Fiscal Year 2006 (became Public Law No. 109-163 on January 6, 2006)—provides that until the President otherwise provides the punishment for the rape of a child may not exceed "death or such other punishment as a court-martial may direct." In September 2007, President Bush issued Executive Order 13447 that codified the provisions of Public Law 109-163, including the provision of the death penalty for child rape, into the 2008 edition of the Manual for Courts-Martial. Accordingly, the Federal Government does indeed have the death penalty for the rape of a child.

More importantly, the adoption of that provision clearly demonstrated a "national consensus" of which the Justices were not aware. The

provision was included in a bill that passed the House by a vote of 374-41, and the Senate by a vote of 95-0. In the House, the 374 Members supporting the bill represented all 50 states, while the 41 Members voting against the bill were from just 16 states and together none of those opposing the bill represented a majority of that state's Congressional delegation. In the Senate, both Senators from 45 States voted in favor of the bill. In addition, one senator from the other five states supported the bill and no Senator voted in opposition; putting all 50 states in support of this provision.

As such, we the undersigned Members of Congress respectfully ask the Court to sua sponte withdraw its June 25, 2008 opinion in this matter and reconsider the case in light of the full and complete factual picture.

Sincere Regards,

1. Aderholt, Robert B., AL (4th)
2. Akin, W. Todd, MO (2nd)
3. Alexander, Rodney, LA (5th)
4. Bachmann, Michele, MN (6th)
5. Barrett, J. Gresham, SC (3rd)
6. Bilirakis, Gus M., FL (9th)
7. Blackburn, Marsha, TN (7th)
8. Blunt, Roy, MO (7th)
9. Boehner, John A., OH (8th)
10. Boozman, John, AR (3rd)
11. Boustany, Charles, LA (7th)
12. Brady, Kevin, TX (8th)
13. Broun, Paul C., GA (10th)
14. Brown-Waite, Ginny, FL (5th)

15. Buyer, Steve, IN (4th)
16. Camp, Dave, MI (4th)
17. Cantor, Eric, VA (7th)
18. Carter, John R., TX (31st)
19. Chabot, Steve, OH (1st)
20. Cole, Tom, OK (4th)
21. Conaway, Michael, TX (11th)
22. Crenshaw, Ander, FL (4th)
23. Cubin, Barbara, WY (At Large)
24. Culberson, John, TX (7th)
25. Davis, David, TN (1st)
26. Davis, Geoff, KY (4th)
27. Dent, Charles W., PA (15th)
28. Duncan, John J., Jr., TN (2nd)
29. Feeney, Tom, FL (24th)
30. Forbes, J. Randy, VA (4th)
31. Foxx, Virginia, NC (5th)
32. Gohmert, Louie, TX (1st)
33. Goodlatte, Bob, VA (6th)
34. Granger, Kay, TX (12th)
35. Graves, Sam, MO (6th)
36. Hastings, Doc, WA (4th)
37. Hayes, Robin, NC (8th)
38. Heller, Dean, NV (2nd)
39. Hensarling, Jeb, TX (5th)
40. Hunter, Duncan, CA (52nd)
41. Johnson, Sam, TX (3rd)
42. Jones, Walter B., NC (3rd)
43. Jordan, Jim, OH (4th)
44. Kingston, Jack, GA (1st)
45. Kirk, Mark Steven, IL (10th)
46. Kline, John, MN (2nd)
47. Kuhl, Randy, NY (29th)
48. Latta, Bob, OH (5th)
49. Lamborn, Doug, CO (5th)

50. LoBiondo, Frank, NJ (2nd)
51. Lungren, Daniel E., CA (3rd)
52. McCarthy, Kevin, CA (22nd)
53. McHenry, Patrick, NC (10th)
54. McKeon, Buck, CA (25th)
55. McMorris Rodgers, Cathy, WA (5th)
56. Manzullo, Donald, IL (16th)
57. Miller, Candice S., MI (10th)
58. Miller, Gary G., CA (42nd)
59. Miller, Jeff, FL (1st)
60. Myrick, Sue, NC (9th)
61. Neugebauer, Randy, TX (19th)
62. Pence, Mike, IN (6th)
63. Pitts, Joseph R., PA (16th)
64. Platts, Todd, PA (19th)
65. Poe, Ted, TX (2nd)
66. Price, Tom, GA (6th)
67. Putnam, Adam H., FL (12th)
68. Rehberg, Dennis, MT (At Large)
69. Rogers, Harold, KY (5th)
70. Roskam, Peter J., IL (6th)
71. Sali, Bill, ID (1st)
72. Scalise, Steve, LA (1st)
73. Sensenbrenner, James, WI (5th)
74. Sessions, Pete, TX (32nd)
75. Shuster, Bill, PA (9th)
76. Simpson, Michael, ID (2nd)
77. Smith, Lamar, TX (21st)
78. Sullivan, John, OK (1st)
79. Terry, Lee, NE (2nd)
80. Tiahrt, Todd, KS (4th)
81. Tiberi, Patrick J., OH (12th)
82. Walden, Greg, OR (2nd)
83. Wamp, Zach, TN (3rd)
84. Westmoreland, Lynn, GA (3rd)

85. Wilson, Joe, SC (2nd)

APPENDIX D

Laurence Tribe, Wall Street Journal

TITILE: The Supreme Court is Wrong on the Death Penalty

AUTHOR: Laurence H. Tribe

DATE: July 31, 2008

SOURCE: Wall Street Journal

It's not often that the U.S. Supreme Court is asked by a state and the federal government to reconsider a case it has just handed down because it missed key evidence.

But that is what is happening now in *Kennedy v. Louisiana*. In that case, the court ruled in late June that Louisiana could not execute someone convicted of violently raping a child. Dividing along familiar 5-4 lines, the court held, speaking through Justice Anthony Kennedy, that the death penalty must be reserved for killers and traitors. To apply it to others, including the most reprehensible violators of young children, would constitute a "cruel and unusual punishment" violating the Constitution's Eighth Amendment.

Emphasizing the evolving character of what constitutes an "unusual" if not an unduly "cruel" punishment, the court rested its condemnation of executing the rapists of children largely on what it

described as a trend away from the use of death to punish such crimes both here and abroad.

But there was a problem with the court's understanding of the basic facts. It failed to take into account—because nobody involved in the case had noticed—that in 2006 no less an authority than Congress, in the National Defense Authorization Act, had prescribed capital punishment as a penalty available for the rape of a child by someone in the military.

Defenders of the court's decision in *Kennedy v. Louisiana* would have it ignore that embarrassing wrinkle by treating the military as a parallel universe that simply does not intersect civilian justice on the plane of constitutional principle. But a court searching for universal principles of justice in the name of the Eighth Amendment would be hard pressed to accept that view of the military/civilian distinction. Particularly when the court's division tracks the usual liberal/conservative divide, its credibility depends on both candor and correctness when it comes to the factual predicates of its rulings.

Whatever one's view of the death penalty—and I have long expressed misgivings on both its wisdom and its constitutionality—it's important that the inequities and inequalities in its administration be minimized. Commitment to that principle, not a rush to the center, lay behind Barack Obama's disagreement with the court's ruling in this case even before the 2006 federal death penalty provision came to public attention.

Many who applauded the court's original ruling did so not on the basis of the court's (now evidently faulty) trend-spotting rationale but, rather, on the premise that any way of containing the spread of capital punishment—such as by confining its use to murderers and traitors—is a good idea. But even those who harbor serious doubts about capital punishment should feel duty-bound to oppose carve-outs from its reach that denigrate certain classes of victims, or that arbitrarily override democratic determinations that such victims deserve maximum protection.

If a legislature were to exempt the killers of gay men or lesbians from capital punishment, even dedicated death penalty opponents should cry foul in the Constitution's name. So too, should they cry foul when the judiciary holds the torturers or violent rapists of young children to be constitutionally exempt from the death penalty imposed by a legislature judicially permitted to apply that penalty to cop killers and murderers for hire. In doing so, the court is imposing a dubious limit on the ability of a representative government to enforce its own, entirely plausible, sense of which crimes deserve the most severe punishment.

To be sure, holding the line at murder and treason gives the judiciary a bright line that blurs once one says a legislature may include other offenses in its catalogue of what it deems the most heinous of all crimes. But the same may be said of virtually any bright line. Placing ease of judicial administration above respect for democracy and for principles of equal justice under law is inexcusable.

The Eighth Amendment's cruel and unusual punishment clause should not be construed in a manner that puts it on a collision course with the 14th Amendment's equal protection clause. The Supreme Court would do well to take that overriding consideration into account as it decides whether to revisit its seriously misinformed as well as morally misguided ruling.

APPENDIX E

Washington Post Op-Ed

TITLE: Supreme Slip-Up; A recent high court ruling is factually flawed. The justices should correct it.

DATE: Saturday, July 5, 2008; A14

SOURCE: Washington Post

When a newspaper gets its facts wrong, it's supposed to publish a correction, and, if someone's reputation has been harmed, a retraction and apology. It can be embarrassing, but the occasional taste of crow probably does more good than harm to the media's credibility.

But what if the Supreme Court not only blows a key fact but also bases its ruling, in part, on that error? There was quite a goof in the court's 5 to 4 decision on June 25 banning the death penalty for those who rape children. The majority determined that capital punishment for child rape was unconstitutional, in part because a national consensus had formed against it. As evidence, the court noted that "37 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." Actually, only two years ago, Congress enacted a death penalty for soldiers who commit child rape, as part of an update to the Uniform Code of Military Justice (UCMJ). Irony of ironies: The court has cast doubt on the

constitutionality of an act of Congress based on the erroneous claim that the statute did not exist.

This is not the court majority's fault alone. In his dissent, Justice Samuel A. Alito, Jr. did not spot the error. Neither party in the case—the state of Louisiana and convicted rapist Patrick Kennedy—raised it. Nor was it mentioned in 10 friend-of-the-court briefs on both sides. The Justice Department, which normally weighs in on cases affecting federal statutes, has admitted that it should have noted the 2006 law. (Blame the media, too; only after a legal blogger, Col. Dwight H. Sullivan, had pointed out the mistake did a newspaper, the New York Times, take note.) The UCMJ change was quietly tucked into a huge defense authorization bill. Still, it passed both houses and President Bush signed it, so it enjoyed the same presumptions of validity and constitutionality as any other law.

The Supreme Court's legitimacy depends not only on the substance of its rulings but also on the quality of its deliberations. That's why we think the court needs to reopen this case—even though we supported its decision. The losing party, Louisiana, still has time to seek a rehearing, which the court could grant with the approval of five justices, including at least one from the majority. The court could limit reargument to briefs on the significance of the UCMJ provision. We doubt the case will come out much differently; we certainly hope not. But this is an opportunity for the court to show a little judicial humility. Before the court declares its final view on national opinion about the death penalty, it should accurately assess the view of the national legislature.