

IS MILITARY LAW RELEVANT TO THE “EVOLVING STANDARDS OF DECENCY” EMBODIED IN THE EIGHTH AMENDMENT?

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On June 25, 2008, the United States Supreme Court issued an opinion in *Kennedy v. Louisiana* holding that the application of the death penalty to the crime of aggravated child rape violated the Eighth Amendment of the United States Constitution.¹ The Court reached a contentious five-to-four decision with Justice Kennedy writing for the majority. Applying the “evolving standards of decency” approach to determine whether the punishment at issue was “cruel and unusual,” the Court examined the laws of the states and federal government. In so doing, the Court wrote 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 nonhomicide offenses; but it did not do the same for child rape or abuse.”²

Just three days after the opinion was issued, Colonel Dwight Sullivan noted on the CAAFlog blog that the Court’s statement concerning federal law did not tell the whole story.³ In fact, amendments made by Congress in 2006 to the Uniform Code of Military Justice (UCMJ) explicitly allow for the death penalty in child rape cases.⁴ Colonel Sullivan’s post about the omission in the Court’s opinion might have been relegated to the dustbin of Internet history had the leading Supreme Court reporter not taken notice.

On July 2, Linda Greenhouse wrote an article in the *New York Times* that expanded upon the observation expressed in Colonel Sullivan’s blog

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¹ 128 S. Ct. 2641 (2008) (link).

² *Id.* at 2652. The dissent characterized the majority’s finding more starkly: “Congress has not enacted a law permitting the death penalty for the rape of a child . . .” *Id.* at 2672 (Alito, J., dissenting).

³ Posting of Colonel Dwight Sullivan to CAAFlog, <http://caaflog.blogspot.com/2008/06/supremes-dis-military-justice-system.html> (Jun. 28, 2008, 18:25 EST) (link).

⁴ See National Defense Authorization Act for Fiscal Year 2006, PUB. L. NO. 109-163, 119 STAT. 3136, 3263. There was also a subsequent executive order putting the amendment into force. Exec. Order No. 13,447 § 3(d), 3 C.F.R. § 278 (2008).

post.⁵ Greenhouse noted that it was not just Justice Kennedy's majority opinion that had overlooked the UCMJ amendment. There was no mention of the UCMJ in the party briefs, amicus curiae briefs, or Justice Alito's dissenting opinion.

Greenhouse's short column set off a firestorm of media criticism attacking the Court's opinion in *Kennedy*.⁶ While the criticism initially erupted from traditionally conservative media outlets, calls for rehearing were soon made by those across the political spectrum⁷ and throughout the legal blogosphere.⁸ Louisiana filed a petition for rehearing based largely upon the Court's failure to address the UCMJ amendment.⁹ Although absent from the initial briefing in the case, the Solicitor General's office also filed a motion in support of rehearing based upon the Court's omission.¹⁰ While rehearing motions have very rarely been granted, on September 8 the Court took the unusual step of requesting further briefing on whether the case should be reargued or the original opinion should be amended.¹¹ That move by the Court potentially indicates that it is seriously considering rehearing the *Kennedy* case.

While many of the critics and the Louisiana brief used the omission of the military code revision as a vehicle to attack the greater substance of the Court's opinion, there emerged a legal issue that clearly required attention: was military law relevant to the Court's reasoning in such cases? Based upon an exhaustive review of prior Supreme Court cases and the role of the military in American society, the answer is clearly "no." Consequently, it would be a mistake for the Court to grant Louisiana's motion to rehear the case.

⁵ Linda Greenhouse, *In Court Ruling on Executions, a Factual Flaw*, N.Y. TIMES, Jul. 2, 2008, at A1, available at <http://www.nytimes.com/2008/07/02/washington/02scotus.html> (link).

⁶ See, e.g., Andrew C. McCarthy, *Some Evolution*, NAT'L REV. ONLINE, Jul. 2, 2008, <http://article.nationalreview.com/?q=OTI2MmRmYTA3M2JiMThhZmVmN2M3YTgyY2U2NzJiZTA> (link).

⁷ See, e.g., Laurence Tribe, *The Supreme Court is Wrong on the Death Penalty*, WALL ST. J., Jul. 31, 2008, at A13, available at http://online.wsj.com/article/SB121746018426398797.html?mod=opinion_main_commentaries (link).

⁸ See, e.g., Posting of Douglas Berman to Sentencing Law and Policy, http://sentencing.typepad.com/sentencing_law_and_policy/2008/07/add-prof-tribe.html (Jul. 31, 2008, 1:43 PM) (link).

⁹ Petition for Rehearing, *Kennedy v. Louisiana*, No. 07-343 (S. Ct. July 21, 2008) [hereinafter *Petition for Rehearing*], available at <http://www.scotusblog.com/wp/wp-content/uploads/2008/07/rehear-kennedy-v-la-7-21-08.pdf> (link).

¹⁰ Motion for Leave to File Brief and Brief for the United States as Amicus Curiae Supporting Petition for Rehearing, *Kennedy v. Louisiana*, No. 07-343 (U.S. July 2008) [hereinafter *Solicitor General's Brief*], available at http://www.scotusblog.com/wp/wp-content/uploads/2008/07/kennedy_07-343amicusrehearing1.pdf (link).

¹¹ *Kennedy v. Louisiana*, 07-343, 2008 WL 4125974 (U.S. Sept. 8, 2008) (mem.) (order in pending case), available at <http://www.scotusblog.com/wp/wp-content/uploads/2008/09/kennedy-07-343-on-9-8-08.pdf> (link).

I. EVOLVING STANDARDS OF DECENCY

The Eighth Amendment, as applied to the states by the Fourteenth Amendment,¹² prohibits “cruel and unusual punishments.”¹³ In 1958, in *Trop v. Dulles*,¹⁴ the Supreme Court altered the course of Eighth Amendment jurisprudence when it held that punishment must comport with, “the evolving standards of decency that mark the progress of a maturing society.”¹⁵ For better or worse, the examination of the evolving standards of decency continues to be the Court’s methodology for evaluating statutes challenged under the Cruel and Unusual Punishment Clause. To determine what constitutes “cruel and unusual” punishment under that approach, the Court looks at objective indicia to determine the national consensus regarding the application of the punishment at issue.¹⁶

In *Kennedy*, the Court found that the objective indicia showed a national consensus against the death penalty for child rape.¹⁷ The objective indicia included both the laws of sovereign governments in the United States and the decisions of juries to apply the death penalty in particular cases. The Court noted that forty-four states and the federal government did not allow for capital punishment in cases of child rape. There was no dispute as to the law of the forty-four states and the federal government generally. However, the Supreme Court’s omission of the new UCMJ policy led the Solicitor General to support Louisiana’s petition for rehearing because “there is (to say the least) a strong presumption that the recent determination by Congress and the President that capital punishment is an appropriate sanction for child rape accurately reflects the views of our society.”¹⁸ The persuasiveness of this claim can be evaluated by examining prior Court practice and the status of military law in the greater criminal justice system.

¹² See *Robinson v. California*, 370 U.S. 660, 664–67 (1962) (link).

¹³ U.S. CONST. amend. VII.

¹⁴ 356 U.S. 86 (1958) (link).

¹⁵ *Id.* at 101.

¹⁶ See *Kennedy v. Louisiana*, 128 S. Ct. 2641, 2650 (2008) (“In these cases the Court has been guided by ‘objective indicia of society’s standards as expressed in legislative enactments and state practice with respect to executions.’”) (quoting *Roper v. Simmons*, 543 U.S. 551, 563 (2005)) (link).

¹⁷ See *id.* at 2653.

¹⁸ Solicitor General’s Brief, *supra* note 10, at 8. While it is beyond the scope of the arguments specifically developed in this Essay, there is substantial reason to question Louisiana’s characterization of the UCMJ amendment as a “recent determination” that child rape should be punished by death. In fact, prior to the 2006 amendment, under the UCMJ, rape of any person (child or adult) was punishable by death. See 10 U.S.C. § 920(a) (2006) (those convicted of rape “shall be punished by death or such other punishment as a court-martial may direct”). The amendment did not actually make any new criminal conduct death eligible.

II. PRIOR OPINIONS CONCERNING THE EVOLVING STANDARDS

To determine Court practice regarding the inclusion of the UCMJ in Eighth Amendment cases requires a thorough examination of prior Court opinions. Louisiana and the Solicitor General were only able to marshal the most meager evidence in support of their contention that an amendment to the UCMJ has been relevant in determining the national consensus. Louisiana's petition for rehearing offered two precedents where the Court may have considered military law in evaluating a claim under the Cruel and Unusual Punishment Clause.¹⁹ The Solicitor General's brief did not cite even a single opinion in which the Court considered military law in its Eighth Amendment analysis. Neither of the prior opinions cited concerned the use of military law in evaluating the national consensus as to the emerging standards of decency embodied in the Eighth Amendment.

The first opinion cited by Louisiana was the 1879 case of *Wilkerson v. Utah*.²⁰ However, *Wilkerson* predated the advent of the Court's current evolving standards of decency methodology and the enactment of the UCMJ by over seventy years. The *Wilkerson* Court did not cite military practice to gauge a national consensus. In *Wilkerson*, the Court was only concerned with whether there were uses of the firing squad outside of the Utah Territory. Never did the Court consider the military's use of the firing squad as representative of a larger consensus on the issue. Further, the military at that time did not have a fully functioning criminal code separate from civil authority in times of war and peace.²¹ The opinion simply has no value as precedent to support the notion that the 2006 UCMJ amendment is indicative of an emerging national consensus concerning the constitutionality of a punishment under the Eighth Amendment.

The second opinion cited was the more recent decision in *Furman v. Georgia*.²² Notably, Louisiana did not cite the majority opinion, but rather Justice Brennan's concurring opinion. Even Justice Brennan's concurrence does not do the work that Louisiana would hope. The reference in *Furman* was a citation to *Wilkerson* concerning the use of shooting as a method of execution.²³ The passing reference was only a citation to *Wilkerson* as precedent and did not amount to a consideration of military law at the time. Thus, again, existing military law simply did not factor into any analysis of the evolving standards of decency.

¹⁹ See Petition for Rehearing, *supra* note 9, at 10.

²⁰ 99 U.S. 130 (1879) (link).

²¹ At that time, the military justice system was operated under the Articles of War. Consequently, there was no peacetime military justice system until the UCMJ went into effect in 1951. See Brigadier General (Ret.) John S. Cooke, *Military Justice and the Uniform Code of Military Justice*, 2000 ARMY LAW. 1, 1–2 (2000).

²² See Petition for Rehearing, *supra* note 9, at 10 (citing *Furman v. Georgia*, 408 U.S. 238 (1972)).

²³ *Furman*, 408 U.S. at 275 (Brennan, J., concurring) (link).

In contrast to the claims made by Louisiana, a more substantial review of the Court's Eighth Amendment opinions demonstrates that the UCMJ has not been used to support even one majority holding. The United States Supreme Court has issued twenty-seven opinions—including *Kennedy*—that have utilized the evolving standards of decency approach in analyzing claims under the Cruel and Unusual Punishment Clause of the Eighth Amendment.²⁴ While several Court opinions mentioned the military or the UCMJ, not one opinion considered the military's criminal code as part of the objective indicia in determining the national consensus.

Significantly, the Court's decision in *Coker v. Georgia*,²⁵ concerning the constitutionality of capital punishment for the crime of rape, made no mention of the existing UCMJ provision allowing for the death penalty in such cases.²⁶ That *Coker* omitted the UCMJ is especially notable because, like *Kennedy*, *Coker* concerned the use of the death penalty for rape. Further, the methodology of *Coker* was used as the basis for the majority opinion in *Kennedy*. Thus, it should be no surprise that *Kennedy*, like *Coker*, ignored military law. Also, the UCMJ provision that was seemingly contrary to the outcome in *Coker* remained in place even after the Court's decision in *Coker*.²⁷ The Court's indifference as to the military in the *Coker* opinion highlights the uniqueness of the military within the criminal justice system. Even after the Supreme Court struck down statutes authorizing capital punishment for rape, neither the military nor Congress felt the need to amend the UCMJ in response to the *Coker* decision.²⁸

In contrast to the Solicitor General's contention that the UCMJ amendment, "underscores the emerging 'national consensus' supporting—

²⁴ See *Kennedy v. Louisiana*, 128 S. Ct. 2641 (2008); *Baze v. Rees*, 128 S. Ct. 1520 (2008); *Roper v. Simmons*, 543 U.S. 551 (2005); *Atkins v. Virginia*, 536 U.S. 304 (2002); *Harris v. Alabama*, 513 U.S. 504 (1995); *Farmer v. Brennan*, 511 U.S. 825 (1994); *Hudson v. McMillian*, 503 U.S. 1 (1992); *Stanford v. Kentucky*, 492 U.S. 361 (1989); *Penry v. Lynaugh*, 492 U.S. 302 (1989); *Thompson v. Oklahoma*, 487 U.S. 815 (1988); *Mills v. Maryland*, 486 U.S. 367 (1988); *McClesky v. Kemp*, 481 U.S. 279 (1987); *Ford v. Wainwright*, 477 U.S. 399 (1986); *Spaziano v. Florida*, 468 U.S. 447 (1984); *Enmund v. Florida*, 458 U.S. 782 (1982); *Rhodes v. Chapman*, 452 U.S. 337 (1981); *Rummel v. Estelle*, 445 U.S. 263 (1980); *Coker v. Georgia*, 433 U.S. 584 (1977); *Ingraham v. Wright*, 430 U.S. 651 (1977); *Estelle v. Gamble*, 429 U.S. 97 (1976); *Gregg v. Georgia*, 428 U.S. 153 (1976); *Woodson v. North Carolina*, 428 U.S. 280 (1976); *Roberts v. Louisiana*, 428 U.S. 325 (1976); *Furman*, 408 U.S. 238; *McGautha v. California*, 402 U.S. 183 (1971); *Witherspoon v. Illinois*, 391 U.S. 510 (1968); *Trop v. Dulles*, 356 U.S. 86 (1958). This list omits opinions where only the dissent discussed the evolving standards of decency and instances where a writ of certiorari was denied.

²⁵ 433 U.S. 584 (link).

²⁶ See *id.*

²⁷ 10 U.S.C. § 920(a) (2006) (those convicted of rape "shall be punished by death or such other punishment as a court-martial may direct").

²⁸ See *id.* Nor, in fact, do the 2006 amendments to the UCMJ remove the death penalty as an option for rape of an adult. National Defense Authorization Act for Fiscal Year 2006, PUB. L. NO. 109-163, § 552, 119 STAT. 3136, 63 (2006) (stating that, "until the President otherwise provides," the maximum punishments for rape—of an adult or a child—is "death or such other punishment as a court-martial may direct").

not opposing—capital punishment in cases of child rape,²⁹ there simply is no reason, based upon prior Court practice, to conclude that omission of military law is anything but normal practice for the Court. To call into the question the legitimacy of the *Kennedy* opinion based upon the omission of the UCMJ amendment would warrant the Court revisiting all of its prior precedents under the evolving standards of decency approach to determine if there was similar military law in place at the time. There is no precedent for including military law in evaluating the national consensus as to the evolving standards. Perhaps this lack of precedent stems from the recognition by the Court of the unique role the military plays in American law and society.

III. THE SPECIAL ROLE OF THE MILITARY

The military has always had a unique place in American domestic law. It was that special role that led Colonel Sullivan to write that “military justice remains the Rodney Dangerfield of legal systems.”³⁰ Part of the military’s special role is that those subject to military law enjoy differing levels of constitutional protection than do nonmilitary persons. Members of the military have greater limitations on their constitutional rights under the First,³¹ Fourth,³² Fifth,³³ Sixth,³⁴ and Seventh³⁵ Amendments. While the Supreme Court has not ruled on whether there exists less protection for mili-

²⁹ Solicitor General’s Brief, *supra* note 10, at 5.

³⁰ Sullivan, *supra* note 3.

³¹ See *Goldman v. Weinberger*, 475 U.S. 503, 507–10 (1986) (holding that review of military regulations challenged on First Amendment grounds is far more deferential than constitutional review of similar laws or regulations designed for civilian society) (link); *United States v. Gray*, 42 C.M.R. 255 (C.M.A. 1970) (holding that declaration of personal belief can amount to disloyal statement if it disavows allegiance owed to the United States by the declarant).

³² See *United States v. Middleton*, 10 M.J. 123, 126–27 (C.M.A. 1981) (holding that although the Fourth Amendment applies to military searches and seizures, it also takes into account the exigencies of military necessity and unique conditions that may exist within military society); *United States v. Lewis*, 11 M.J. 188, 191 (C.M.A. 1981) (holding that expectations of privacy in the military are considerably different from what might be expected in civilian community).

³³ The Fifth Amendment expressly limits its applicability in military settings. U.S. CONST. amend. V (“No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, *except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War of public danger . . .*”) (emphasis added). See also *Kahn v. Anderson*, 255 U.S. 1, 8–9 (1921) (holding that the guaranty of presentment or indictment by a grand jury is not violated by providing for trials by courts-martial of persons subject to military law).

³⁴ See *Middendorf v. Henry*, 425 U.S. 25, 43–48 (1976) (concluding that servicemen do not have the right to counsel in summary courts-martial proceedings) (link); *United States v. Culp*, 33 C.M.R. 411, 419 (C.M.A. 1963) (“The Supreme Court has held, consistently, that one whose status subjects him to trial by court-martial is not entitled to trial by jury.”).

³⁵ See generally 10 U.S.C. §§ 816–821 (describing the nature and composition of courts-martial). The first Congress reenacted the Articles of War previously enacted by the Continental Congress on September 20, 1776, which provided no jury in courts-martial. After the adoption of the Bill of Rights, on April 10, 1806, Congress enacted “rules and articles by which the armies of the United States shall be governed,” and included no provision for a trial by jury. *Culp*, 33 C.M.R. 411, 418–19 (C.M.A. 1963).

tary defendants under the Eighth Amendment, such a lessened protection follows from the prior treatment of persons under military justice in regard to every other relevant constitutional amendment.³⁶

If Congress's decisions concerning military criminal justice actually indicated a national consensus about such policies, we would be living in a truly bizarre world. America has always treated the military as marching to the beat of its own drummer. Policies that would never be supported for civilians have been enacted specifically for the military. Outside of the military, gays are allowed to declare their sexual orientation without penalty; women are not legally barred from a substantial portion of jobs; and adultery is not a crime punishable by substantial prison time.³⁷ Yet, under military law, each of those situations is explicitly codified.

Among the many differences between military and civilian law are the laws of rape—the very laws at issue in *Kennedy*. As Major Jennifer Knies noted, the current UCMJ definition of rape is “virtually identical to the common law definitions used in the seventeenth and eighteenth centuries.”³⁸ Against the modern trend in rape law, the military still imposes a showing of resistance by the victim in rape cases as part of the “force” requirement.³⁹ Consequently, the substantive nature of the military’s law concerning sex-

³⁶ Of the Bill of Rights, the Eighth Amendment is the only remaining amendment for which limitation would even be remotely cognizable. The Second Amendment’s right to bear arms surely cannot be limited for military personnel whose jobs necessarily require the use of such weapons. The Third Amendment actually limits military conduct to protect nonmilitary persons. The Ninth Amendment has been so limited in scope that there is little room for someone in the military to have a lesser right. See Laurence Claus, *Protecting Rights from Rights: Enumeration, Disparagement, and the Ninth Amendment*, 79 NOTRE DAME L. REV. 585, 631 (2004) (“The Ninth Amendment [does not provide individual rights; it] just recognizes that reconciling rights has a larger role to play in constitutional adjudication.”). And the Tenth Amendment guarantees rights to the states and has no applicability to individuals in society or the military.

³⁷ The analogy to adultery statutes is especially notable. If there was a civilian Eighth Amendment challenge to a criminal adultery conviction, it would make little sense to consider the military’s policy in such a hypothetical case. However, as CAAFlog commenter John O’Connor noted, it is not as easily comparable to civilian law because “the adultery criminalized by the UCMJ most assuredly is [a military offense], as an element of the offense is that the adultery had a negative effect on good order” Posting of John O’Connor to CAAFlog, <https://www.blogger.com/comment.g?blogID=34853720&postID=1796883615599221311&pli=1> (Sept. 16, 2008, 12:08 EST) (link). Nonetheless, the national consensus approach regularly ignores such statutory differences in statutes. In *Kennedy*, the Louisiana statute was different than that of the other five statutes because it was the only one that did not require a conviction for a prior sex offense. See Posting of Corey Rayburn Yung to Sex Crimes Blog, http://sexcrimes.typepad.com/sex_crimes/2008/04/one-of-these-st.html (Apr. 16, 2008, 11:06 AM) (link). Yet, the Court treated the six statutes as essentially the same for measuring the national consensus. Thus, the hypothetical adultery case is a viable example of where it would be preferable for the Court to ignore military law in measuring national consensus.

³⁸ Maj. Jennifer S. Knies, *Two Steps Forward, One Step Back: Why the New UCMJ’s Rape Law Missed the Mark, and How an Affirmative Consent Statute Will Put It Back on Target*, ARMY LAW., Aug. 2007, at 1, 14, available at http://findarticles.com/p/articles/mi_m6052/is_2007_August/ai_n21108188 (link).

³⁹ *Id.* at 15.

ual violence has no relation to the modern societal consensus about defining “rape.”

When Congress enacts a law to modify the UCMJ, it only reflects a national consensus of the legitimacy of such a modification *in the military*—not to society at large. Some may have misgivings about this special status for the military.⁴⁰ However, a rehearing in *Kennedy* should not be the vehicle to test whether this special status makes constitutional sense—if only because the defendant in *Kennedy* has no connection at all to the military. Further, at the time the *Kennedy* opinion was issued, the unique status of the military rendered any potential consideration of the UCMJ amendment a non sequitur.

THE COURT SHOULD NOT REVISIT ITS DECISION

As Louisiana noted in its petition, the Supreme Court “almost never grants petitions for rehearing.”⁴¹ Given (i) that the Court has never considered military law in its evolving standards of decency cases and (ii) the special place the military occupies under American law and in American society, the omission of the UCMJ from the *Kennedy* decision is not at all noteworthy. Rather, for the Court to have considered the UCMJ amendment would mark a sharp deviation from prior Court practice and would ignore the way that Congress has treated military law throughout American history. If Louisiana wishes to argue that the Court’s opinion was so fundamentally misguided that only a rehearing could cure that injustice, it is free to do so. And if commentators believe that the evolving standards of decency methodology is fundamentally flawed, then they are still able to make such a criticism of the *Kennedy* opinion. However, using the omission of the UCMJ amendment as a Trojan horse to repeat the same arguments rejected in the original opinion is simply unsupportable as a matter of law, history, and practice.

⁴⁰ Lawrence Tribe, for example, recently argued that the Court should reconsider its decision in *Kennedy* because of the inconsistencies inherent in “treating the military as a parallel universe that simply does not intersect civilian justice on the plane of constitutional principle.” Tribe, *supra* note 7.

⁴¹ Petition for Rehearing, *supra* note 9, at 1.