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# When U.S. Supreme Court Decisions Are Not Final: An Examination of the Rehearing Rule and the Court's Application of It in *Kennedy v. Louisiana*

Brian De Vito\*

## I. Introduction

Justice Robert H. Jackson observed once of the United States Supreme Court: “We are not final because we are infallible, but we are infallible only because we are final.”<sup>1</sup> But just how final is our nation's court of last resort?

*Kennedy v. Louisiana*,<sup>2</sup> which the Court handed down on June 25, 2008, held that a Louisiana State statute authorizing capital punishment for the crime of child rape is unconstitutional.<sup>3</sup> The Court, in a five-to-four ruling written by Justice Anthony Kennedy, anchored its holding to two rationales: 1) national consensus and 2) the Court's own independent judgment.<sup>4</sup> To discern national consensus, the Court surveyed state law and observed that Louisiana is among a small minority of states—one of six—that has made child rape a capital crime.<sup>5</sup> The Court also examined federal law and concluded that no federal statute authorizes the death penalty for child rape, thereby bolstering its

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<sup>1</sup> *Brown v. Allen*, 344 US 443, 540 (1953).

<sup>2</sup> 128 S. Ct. 2641 (2008), *reh'g denied* 129 S. Ct. 1 (2008).

<sup>3</sup> *Id.* at 2645.

<sup>4</sup> *Id.* at 2650.

<sup>5</sup> *Id.* at 2651. As the Court explained, thirty-six states authorize capital punishment. *Id.* at 2653. Thus, the Court's six-state minority represents approximately 16.67% of the states that authorize capital punishment; comparatively, the six states represent 12% of all fifty states. It is unclear whether the Court used the heavier or lighter percentage when it weighed the national consensus. It is clear, though, that the Court tallied the states that prohibit the death penalty: “[I]t is of significance that, in 45 jurisdictions, petitioner could not be executed for child rape of any kind.” *Id.* The forty-five jurisdictions the Court referred to include the forty-four states plus the federal government. *Id.*

national consensus finding.<sup>6</sup> The Court explained that Congress's failure to make child rape a capital crime is an appropriate metric of national tolerance.<sup>7</sup>

The national consensus plank, however, was promptly called into question. On June 28, 2008, an Internet site dedicated to military legal issues reported that part of *Kennedy's* conclusion—that no federal law authorizes the death penalty for child rape—was incorrect.<sup>8</sup> The National Defense Authorization Act (NDAA) is a federal statute that authorizes the death penalty for any member of the armed services convicted of raping a child under the age of twelve.<sup>9</sup> In 2006 Congress revised the Uniform Code of Military Justice (UCMJ) and passed the NDAA, reestablishing the application of the death penalty to child rape crimes by military personnel.<sup>10</sup> Despite the resources dedicated to adjudicating the *Kennedy* case, somehow all nine Justices, their law clerks, the litigating parties including the State of Louisiana, and all the *amici curiae*, failed to account for the NDAA. The result is that the Court, after establishing an adjudicatory framework aimed at polling and analyzing state and federal law, drew a national consensus conclusion based on incorrect data, thereby obscuring—if not weakening, or, in the most extreme case, destroying—the validity of its holding.

On July 21, 2008, less than one month after the Court's oversight was brought to light, the State of Louisiana petitioned the Court to rehear the case and weigh the previously unconsidered NDAA statute.<sup>11</sup> The State argued that the NDAA, passed by

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<sup>6</sup> *See id.* Justice Alito, in dissent, explained more succinctly that “Congress has not enacted a law permitting the death penalty for the rape of a child.” *Kennedy v. Louisiana*, 128 S. Ct. 2641, 2672 (2008) (Alito, J., dissenting), *reh'g denied* 129 S. Ct. 1 (2008).

<sup>7</sup> *Kennedy*, 128 S. Ct. at 2652; *see also* 18 U.S.C. § 2245 (2000).

<sup>8</sup> Posting of Dwight Sullivan to CAAFlog, <http://caaflog.blogspot.com/2008/06/supremes-dis-military-justice-system.html> (June 28, 2008, 18:25 EST).

<sup>9</sup> NDAA § 552(b); 119 Stat. 3136 (2006).

<sup>10</sup> *Id.*

<sup>11</sup> *See* Brief for Respondent in Petition for Rehearing, *Kennedy v. Louisiana*, 129 S. Ct. 1 (2008).

Congress and signed into law by the President, casts doubt on the Court's characterization that national consensus is against capital punishment for child rape.<sup>12</sup> Furthermore, the State argued that aside from curing the Court's error, rehearing was necessary to preclude rendering the NDAA unconstitutional without an opportunity for the United States to be heard.<sup>13</sup>

On October 1, 2008, the Court issued an Order denying the State's rehearing petition.<sup>14</sup> In addition to issuing the Order, the Court amended its June 25, 2008 opinion to include a footnote explaining that its decision stood, along with its national consensus conclusion, notwithstanding the existence of the NDAA.<sup>15</sup> Justice Kennedy, writing for five of the seven Justices voting to deny rehearing, explained in a three-page statement accompanying the Order that rehearing was unnecessary because *Kennedy* involved the constitutionality of capital punishment for child rape in a civilian—not military—context.<sup>16</sup>

Part II of this Comment examines the rehearing rule and how it functions in the disposition of U.S. Supreme Court cases. Part III discusses the *Kennedy* decision and the subsequent arguments for and against rehearing by the State of Louisiana, the United States, and Patrick Kennedy. Part IV focuses on the Court's standard for granting rehearing. In Part V, this Comment discusses those standards in the context of *Kennedy*. Finally, Part VI proposes that while the rehearing rule is an important and useful device, even if it is employed only sparingly, *Kennedy* demonstrates that the rule should be

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<sup>12</sup> *Id.* at 3 (“Such a clear expression of democratic will, at the very least, calls into question the conclusion that there is a ‘national consensus against’ the practice.”)

<sup>13</sup> *Id.* at 12.

<sup>14</sup> *See Kennedy v. Louisiana*, 129 S. Ct. 1 (2008).

<sup>15</sup> *Id.* at 1.

<sup>16</sup> *Id.* at 3–4.

amended. Specifically, the Court’s practice of issuing explanatory statements accompanying denials of rehearing serves to undermine the Court’s stature and to confuse the lower courts. The Court’s statement denying Louisiana’s rehearing petition illustrates the problems with the Court’s current rehearing standard while exposing serious problems with the *Kennedy* holding.

## II. The Rehearing Rule

The rehearing rule traces back to British equity courts.<sup>17</sup> Rehearing was useful because there were no higher courts to which litigants could appeal; the Chancellor’s judgment was final.<sup>18</sup> Thus, parties seeking rehearing were required only to convince the Chancellor that rehearing was in the interest of justice.<sup>19</sup> This is similar to the opaque standard at issue today.

The United States Supreme Court derives its authority from Article III of the United States Constitution.<sup>20</sup> With the passage of the Judiciary Act of 1789, Congress conferred on the Court the power to adopt the rules that are necessary for it to carry on its business.<sup>21</sup> Chief Justice Taney contrasted the American and British courts in an early opinion denying rehearing. In *Brown v. Mathias Aspden’s Adm’rs*,<sup>22</sup> Justice Taney noted that litigants at equity were often allowed to obtain more than one rehearing, which eroded litigants’ care and heightened the court’s “hesitation and indecision.”<sup>23</sup> The result was that precious time and expenses were squandered, a predicament the Court was

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<sup>17</sup> Rosemary Krimbel, Note, *Rehearing Sua Sponte in the U.S. Supreme Court: A Procedure for Judicial Policymaking*, 65 CHI.-KENT L. REV. 919, 930 (1989).

<sup>18</sup> *Id.*

<sup>19</sup> *Id.* The highest law court in Britain, by comparison, required litigants to show clear error before considering rehearing. *Id.*

<sup>20</sup> U.S. CONST. art. III.

<sup>21</sup> Judiciary Act of 1789, 1 Stat. 73 § 17.

<sup>22</sup> 55 U.S. (14 How.) 25 (1852).

<sup>23</sup> *Id.* at 27.

uninterested in replicating.<sup>24</sup> Instead, the Court concluded that it would continue to follow the rule it had theretofore employed: “But the rule of the court is this, -- that no reargument will be heard in any case after judgment is entered, unless some member of the court who concurred in the judgment afterwards doubts the correctness of his opinion, and desires a further argument on the subject.”<sup>25</sup>

The Court recited the rule several years later when it denied rehearing in *Ambler v. Whipple*.<sup>26</sup> The case involved a patent dispute between Ambler and Whipple after they entered into a partnership to exploit some of Ambler’s inventions.<sup>27</sup> Whipple sought to dissolve the partnership and obtain the benefits of the joint enterprise at the exclusion of Ambler, which he justified by claiming that Ambler’s unsavory lifestyle was detrimental to the partnership.<sup>28</sup> After an adverse judgment, Whipple petitioned the Court to rehear the case because the trial court erroneously determined that Ambler left the District of Columbia on August 21, 1872 rather than in early September.<sup>29</sup>

The Court denied rehearing, relying on the rule set forth in *Brown* that it called “well-settled.”<sup>30</sup> *Ambler* went further than *Brown*, though, explaining that material

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<sup>24</sup> *Id.*

<sup>25</sup> *Id.* at 27–28.

<sup>26</sup> 90 U.S. (23 Wall.) 278 (1874).

<sup>27</sup> *Ambler v. Whipple*, 87 U.S. (20 Wall.) 546, 558 (1874), *reh’g denied*, 90 U.S. (23 Wall.) 278 (1874). Ambler’s inventions involved the process of extracting gas from petroleum for heating and lighting purposes. *Id.*

<sup>28</sup> *Id.* at 556–57. Whipple sought to discredit Ambler by calling attention to Ambler’s “bad character, drunkenness, and dishonesty,” in addition to Ambler’s felony conviction. *Id.* at 557. The problem with Whipple’s argument, the Court noted, was twofold: first, Ambler’s moral standing was irrelevant to the patent partnership they undertook, and second, the charges and supporting evidence were duplicative—they were already part of the record that the Court reviewed when it decided the case originally. *Id.*

<sup>29</sup> *Id.* at 556–57. Ambler’s departure from the city concerned whether he abandoned the partnership, which the Court found he did not. *Id.* Furthermore, upon considering Whipple’s rehearing petition, the Court explained that the factual discrepancy bore no weight on the original judgment. *Ambler*, 90 U.S. (23 Wall.) at 283.

<sup>30</sup> *Ambler*, 90 U.S. (23 Wall.) at 281–82. The Court explained: “It is the well-settled rule of this court, to which it has steadily adhered, that no rehearing is granted unless some member of the court who concurred in the judgment, express a desire for it, and not then unless the proposition receives the support of a majority of the court.” *Id.*

omissions in the record that affect the disposition of a case provide a “strong appeal for reargument.”<sup>31</sup> Since the Court found that the error was immaterial to the outcome of the case, it denied Whipple’s petition.<sup>32</sup>

Today, the Court’s rule-making authority comes from the Rules Enabling Act,<sup>33</sup> whereby the Court “and all courts established by Act of Congress may from time to time prescribe rules for the conduct of their business.”<sup>34</sup> Supreme Court Rule 44 articulates the Court’s authority to rehear cases.<sup>35</sup> The first paragraph of the Rule provides that the Court can rehear cases on the merits—cases, like *Kennedy*, that the Court may have already been briefed on, heard oral arguments for, and rendered decisions on—if the party seeking rehearing petitions the Court within twenty-five days of the Court’s decision.<sup>36</sup> The Rule, while slightly more refined, is virtually identical to the one employed by the *Brown* and *Ambler* Courts. The rehearing petition must “state its grounds briefly and distinctly” and certify that it is “presented in good faith and not for delay.”<sup>37</sup> Furthermore, a majority of the Justices, including one who concurred in the original decision, must vote to rehear.<sup>38</sup> In essence, rehearing is granted only when at least one Justice from the majority believes that he or she may have decided in error. As

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<sup>31</sup> *Id.* at 282.

<sup>32</sup> *Id.* at 282–83.

<sup>33</sup> 28 U.S.C. §§ 2071 – 2077 (2006).

<sup>34</sup> 28 U.S.C. § 2071(a) (2006). Section 2071(a) continues that the Court’s rules must conform to 28 U.S.C. § 2072. *Id.* Section 2072 provides, “The Supreme Court shall have the power to prescribe general rules of practice and procedure and rules of evidence for cases in the United States district courts . . . and courts of appeals.” 28 U.S.C. § 2072(a) (2006).

<sup>35</sup> *See* SUP. CT. R. 44.

<sup>36</sup> *Id.* at 44.1 (“Any petition for the rehearing of any judgment or decision of the Court on the merits shall be filed within 25 days after entry of the judgment or decision, unless the Court or a Justice shortens or extends the time.”)

<sup>37</sup> *Id.*

<sup>38</sup> *Id.* (“A petition for rehearing . . . will not be granted except by a majority of the Court, at the instance of a Justice who concurred in the judgment or decision.”)

the Court announced in *Brown*, rehearing will not be granted unless a Justice who concurred in the judgment of the Court “doubts the correctness of his opinion.”<sup>39</sup>

Rule 44.2 pertains to rehearing denials of writs of certiorari.<sup>40</sup> Like the Rule governing rehearing cases on the merits, Rule 44.2 includes the twenty-five day time provision and the voting requirement.<sup>41</sup> Unlike Rule 44.1, however, Rule 44.2 constrains the justification on which litigants may rely in their petition; litigants are instructed to base their petition only on facts that have intervened since the Court’s original denial or on facts that have not already been presented to the Court.<sup>42</sup> Rule 44.2, therefore, seems to curtail the broad discretion implicit in Rule 44.1. The difference, though, is far less apparent in practice. An estimated 2000 paid writs of certiorari petitions are filed with the Court each term, of which the Court grants only eighty—approximately four percent.<sup>43</sup> The enormous amount of resources required to review all rehearing petitions would be unjustifiably high if litigants had complete discretion over their rehearing filings.<sup>44</sup>

Yet because cert denials are not issued as written opinions, there are few plausible grounds on which a party seeking rehearing can petition other than those enumerated in

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<sup>39</sup> *Brown v. Mathias Aspden’s Adm’rs*, 55 U.S. (14 How.) 25, 26–27 (1852).

<sup>40</sup> SUP. CT. R. 44.2.

<sup>41</sup> *Id.*

<sup>42</sup> *Id.* “[Any rehearing petition] shall be limited to intervening circumstances of a substantial or controlling effect or to other substantial grounds not previously presented.” *Id.* Furthermore, Rule 44.2 requires that counsel filing the petition certify that the petition is limited to those narrow grounds—in addition to certifying that counsel has presented the petition “in good faith and not for delay,” similar to Rule 44.1. *Id.*

<sup>43</sup> Messitt, Peter J., *The Writ of Certiorari: Deciding Which Cases to Review*, July 29, 2008, <http://www.america.gov/st/usg-english/2008/July/20080814211720XJyrreP0.5789301.html>. The numbers are even starker for unpaid petitions: an estimated 6000 such *in forma pauperis* petitions are filed each year, of which only about 5 petitions are granted. *Id.*

<sup>44</sup> Another explanation for the Court’s double standard is that the Court is more invested in cases that have already been partially or completely adjudicated. Once the Court has ruled on an issue, the litigants involved in the case should have confidence that they had a full and fair opportunity to make their arguments. Furthermore, denials of *cert* create no precedent, whereas written opinions do. The necessity for the Court to be correct is thus greater considering that its decisions affect more people than just the opposing litigants.

Rule 44.2. *Kennedy* illustrates this point. Louisiana argued that the Court overlooked a critical piece of information, the NDAA. Without the benefit of a written opinion, Louisiana could not have argued that the NDAA was unjustifiably overlooked because Louisiana could not have known how the law applied to the Court’s rationale, nor could it have known that the law was even overlooked. So the apparent additional burden articulated by Rule 44.2 is just an assertion of the only practical means by which the Court would grant rehearing.<sup>45</sup>

Returning to *Ambler*, the Court explained that because of both the rehearing rule and “the better reason that the pressure of business in the court does not permit it,” the Court refused to accept a response from the opposing party and refrained from issuing a response itself to any rehearing petition.<sup>46</sup> *Ambler*, however, established that the case before it required a “departure” from the practice of denying rehearing petitions without discussion.<sup>47</sup> The basis for the departure, according to *Ambler*, was that certain facts had been omitted from the “transcript certified to [the] court.”<sup>48</sup> *Ambler* found that if such omissions could have assisted the Court’s disposition of the case, rehearing may be warranted:

If this statement be correct, and if the omissions in the transcript on which the case was heard are material to the decision of the case, it presents a strong appeal for reargument; and we have, therefore, given a careful

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<sup>45</sup> While not contained within the Rules, the Court has exercised its authority to request rehearings on its own accord, or *sua sponte*, after hearing arguments but before rendering a decision. Krimbel, *supra* note 17 at 919. Krimbel explained that the Court’s authority to rehear cases *sua sponte* is necessary to the judiciary’s duties. *Id.* This authority raises the following question: what purpose do the Supreme Court Rules really serve? Are the Rules intended to inform Congress how the Court proceeds, thus allowing Congress more effective oversight? Are the Rules meant to bind the Court? Both questions are likely answered in the negative; the Court detailed two of the three methods by which it rehears cases, leaving the third undisclosed. A plausible explanation is that the Rules are intended as a reference for litigants. Parties contemplating rehearing benefit by learning the Court’s legal and procedural guidelines. Comparatively, litigants need not understand why or when the Court requests rehearing on its own accord.

<sup>46</sup> *Ambler v. Whipple*, 90 U.S. (23 Wall.) 278, 282 (1874).

<sup>47</sup> *Id.*

<sup>48</sup> *Id.*

consideration to the very full petition for rehearing, and availed ourselves of its copious references to the original and supplemental transcripts.<sup>49</sup>

The Court denied rehearing because it found that the omission under consideration was not material.<sup>50</sup> *Ambler* is significant because it represents such a clear expression of the Court's understanding of why a case should be reheard. Yet it implicitly raises the question of the kind of rehearing arguments the Court had received until *Ambler*; that is, *Ambler* departed from the practice of denying rehearing petitions without discussion but found that discussion was warranted in that case because an omission from the certified transcript was a good reason for rehearing. The underlying proposition of *Ambler* was that strong rehearing arguments deserve discussion more than do weaker arguments.

### Part III. *Kennedy* and the Arguments For and Against Rehearing

*Kennedy* was bound to be contentious; death penalty cases often are. Considering that the case involved the gruesome rape of an eight-year old girl by her stepfather, the likelihood that *Kennedy* would attract significant attention was that much greater. Thus, the inherent difficulty of the issue, the five-to-four ruling, and the NDAA oversight assured the vitriol accompanying the case.

#### A. The Opinion

Before discussing the *Kennedy* rehearing arguments, it is important to ascertain a more detailed explanation of the ideas presented in the opinion itself. As noted above, *Kennedy* was decided in the modern trend of Eighth Amendment jurisprudence: “cruel and unusual” is interpreted by what those terms mean today, not what they meant when the Constitution was adopted.<sup>51</sup> The applicable and operative method of Eighth

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<sup>49</sup> *Id.*

<sup>50</sup> *Id.* at 282–83.

<sup>51</sup> *Kennedy v. Louisiana*, 128 S. Ct. 2641, 2649 (2008).

Amendment analysis was first announced in *Trop v. Dulles*,<sup>52</sup> cited by *Kennedy*, whereby judges discerning whether punishment is cruel or unusual should apply the “evolving standards of decency that mark the progress of a maturing society.”<sup>53</sup>

Capital punishment for child rape was permissible and meted out until 1964.<sup>54</sup> The Court noted that between 1930 and 1964, the states, the District of Columbia, and the federal government executed 455 people for the rape of a child.<sup>55</sup> Since 1964, no State has executed anyone for child rape.<sup>56</sup> While outside the scope of this Comment, some scholars have focused on the racial component underlying capitalizing child rape.<sup>57</sup>

In *Kennedy*, the Court looked to its previous Eighth Amendment holdings to find support to limit its authorization of the death penalty.<sup>58</sup> The Court relied on three cases in particular. In *Roper v. Simmons*,<sup>59</sup> the Court had held that capital punishment for a person under the age of majority is unconstitutional.<sup>60</sup> The Court in *Atkins v. Virginia*<sup>61</sup> had held that executing a mentally retarded person is unconstitutional.<sup>62</sup> In *Enmund v. Florida*,<sup>63</sup> also cited in *Kennedy*, the Court struck down as unconstitutional a Florida law that made felony murder a capital offense.<sup>64</sup> The number of states that did not make child

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<sup>52</sup> 356 U.S. 86 (1958).

<sup>53</sup> *Kennedy*, 128 S. Ct. at 2649 (quoting *Dulles*, 356 U.S. at 101).

<sup>54</sup> *Id.*

<sup>55</sup> *Id.*

<sup>56</sup> *Id.*

<sup>57</sup> See, e.g., Susan A. Bandes, *Child Rape, Moral Outrage, and the Death Penalty*, 103 NW. U. L. REV. COLLOQUY 17, 27–28 (2008). In her article on the emotional aspect of the death penalty, Bandes notes the racial undertones to the issues in *Kennedy*, suggesting that making child rape a capital crime began in the deep south and was implemented disproportionately on blacks accused of raping white women—eighty-nine percent of those put to death were black and all fourteen people executed in Louisiana during the 1940s and 1950s were black. *Id.*

<sup>58</sup> *Kennedy v. Louisiana*, 128 S. Ct. 2641, 2650 (2008).

<sup>59</sup> 543 U.S. 551 (2005).

<sup>60</sup> *Kennedy*, 128 S. Ct. at 2653.

<sup>61</sup> 536 U.S. 304 (2002).

<sup>62</sup> *Kennedy*, 128 S. Ct. at 2653.

<sup>63</sup> 458 U.S. 782 (1982).

<sup>64</sup> *Kennedy*, 128 S. Ct. at 2653.

rape a capital offense, forty-four, was far lower than the number of states that authorized the now unconstitutional punishments at issue in *Roper* (30), *Atkins* (30), or *Enmund* (42).<sup>65</sup>

*Coker v. Georgia*<sup>66</sup> also figured prominently in both the *Kennedy* majority and dissent. *Coker* held that sentencing a man to death for raping an adult woman without killing her was unconstitutional.<sup>67</sup> One of *Kennedy*'s principal reasons for its holding was that capital punishment "should not be expanded to instances where the victim's life was not taken."<sup>68</sup> Like in *Coker*, the victim in *Kennedy* survived her assailant's sexual attacks.<sup>69</sup> In *Kennedy*, the broader justification for finding the death penalty unconstitutional when the underlying crime did not result in the victim's death informed the Court's own independent judgment about the death penalty while satisfying the Court's dual objectives: 1) comports with the standards of today's mores and 2) limiting states' availability of capital punishment.<sup>70</sup>

In dissent, Justice Alito argued that *Coker* created confusion among state courts about whether states were permitted to make child rape a capital crime.<sup>71</sup> A number of state courts, according to Justice Alito, misinterpreted *Coker* and extended it to include

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<sup>65</sup> *Id.*

<sup>66</sup> 433 U.S. 584 (1977).

<sup>67</sup> *Id.* at 592. The confusion that *Coker* created for *Kennedy* is illustrated in the way the Court in *Coker* framed the question and articulated its answer. The question was "with respect to rape of an adult woman." *Id.* The answer seemed much broader, whereby "a sentence of death is grossly disproportionate and excessive punishment for the crime of rape." *Id.*

<sup>68</sup> *Kennedy*, 128 S. Ct. at 2653.

<sup>69</sup> *Id.* at 2641.

<sup>70</sup> *Id.*

<sup>71</sup> *Kennedy v. Louisiana*, 128 S. Ct. 2641, 2665 (2008) (Alito, J., dissenting).

child rape.<sup>72</sup> Additionally, several state legislatures failed to write legislation making child rape a capital offense because of their misguided understanding of *Coker*.<sup>73</sup>

Justice Alito also criticized the majority for engaging in policy considerations that lawmakers are better equipped for—including the efficacy of the punishment as a deterrent, the value of capital punishment to the victim and society, the welfare of the child, and the reliability of a child as a witness.<sup>74</sup> Finally, Justice Alito disputed as unfounded the majority’s pronouncement that murder is more morally depraved than rape.<sup>75</sup> The crime at issue in *Kennedy*, according to Justice Alito, exemplified a criminal who demonstrated “the epitome of moral depravity.”<sup>76</sup>

#### B. After the Opinion

Shortly after the online report about the Court’s omission in its analysis, the New York Times reported the issue.<sup>77</sup> The article stated that the Court’s “assertion about the absence of federal law was wrong.”<sup>78</sup> The Washington Post ran a story several days later stating that the Court missed a “key fact” that it should have considered in making its decision.<sup>79</sup> According to the Post, since the Court derives its legitimacy from “the substance of its rulings” and the “quality of its deliberations,” the State should petition the Court for rehearing, which the Court should grant.<sup>80</sup> The Post expressed its desire for

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<sup>72</sup> *Id.* Among those cases cited were *State v. Barnum*, 921 So. 2d 513 (Fla. 2005); *State v. Gardner*, 947 P.2d 630 (Utah 1997); and *Parker v. State*, 216 Ga. App. 649 (1995). *Id.*

<sup>73</sup> *Id.* Among the legislatures cited by Alito were Oklahoma, South Carolina, and Texas. *Id.*

<sup>74</sup> *Id.* at 2673–75.

<sup>75</sup> *Id.* at 2675.

<sup>76</sup> *Id.*

<sup>77</sup> Linda Greenhouse, *In Court Ruling on Executions, A Factual Flaw*, N.Y. TIMES, July 2, 2008, at A10.

<sup>78</sup> *Id.*

<sup>79</sup> *Supreme Slip-Up*, WASH. POST, July 5, 2008, at A14.

<sup>80</sup> *Id.*

the outcome of the case to remain, but that it would be better if the Court deliberated on an accurate record.<sup>81</sup>

On July 21, 2008, the State of Louisiana filed its Petition for Rehearing.<sup>82</sup> The United States filed its Brief in Support of Rehearing in September 2008 pursuant to the Court’s request.<sup>83</sup> Also pursuant to the Court’s request, Patrick Kennedy filed a Brief in Opposition to the State’s rehearing request on September 17, 2008.<sup>84</sup>

The State petitioned the Court to rehear the case and consider the NDAA, arguing that the military law undermined the Court’s national consensus argument.<sup>85</sup> The State argued that section 552(b) of the NDAA separated child and adult rape as distinct crimes and authorized the punishment of death for each.<sup>86</sup> The law was passed by both Houses of Congress: the House of Representatives voted 374 to 41 in favor of it,<sup>87</sup> and the Senate voted for it by a voice vote.<sup>88</sup> President George W. Bush signed the bill into law on January 6, 2005,<sup>89</sup> thereby enacting what the State referred to as “a clear expression of democratic will.”<sup>90</sup> As the State further noted, while the absence of a federal law authorizing capital punishment for child rape may not prove decisive, the existence of the NDAA—passed by both Houses of Congress and signed into law by the President—

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<sup>81</sup> *Id.*

<sup>82</sup> See Brief for Respondent, *supra* note 11.

<sup>83</sup> See Brief for the United States as Amicus Curiae Supporting Respondent, *Kennedy v. Louisiana*, 129 S. Ct. 1 (2008).

<sup>84</sup> See Brief for Petitioner in Opposition to Rehearing, *Kennedy v. Louisiana*, 129 S. Ct. 1 (2008).

<sup>85</sup> See generally Brief for Respondent, *supra* note 11.

<sup>86</sup> *Id.* at 2.

<sup>87</sup> 151 CONG. REC. H12242-01 (daily ed. Dec. 18, 2005).

<sup>88</sup> 151 CONG. REC. S14275-01 (daily ed. Dec. 21, 2005).

<sup>89</sup> National Defense Authorization Act for Fiscal Year 2006, Pub. L. No. 109-163, 119 Stat. 3136, 3557 (2006).

<sup>90</sup> Brief for Respondent, *supra* note 11, at 2–3.

affirmatively establishes that there is no national consensus against capital punishment for child rape.<sup>91</sup>

The defendant, Patrick Kennedy, responded that the federal military law is not new but has been a “long-standing” part of the UCMJ.<sup>92</sup> Furthermore, he argued that the law has been long ignored by prosecutors: the last execution under the UCMJ for child rape occurred in 1961.<sup>93</sup> In lieu of death sentences, those convicted of child rape received prison terms ranging from five to forty years.<sup>94</sup> Thus, according to the defendant, while the NDAA does theoretically authorize capital punishment for child rape by military personnel, it provides no support for a federal mandate or proclivity for carrying out such a punishment.<sup>95</sup>

Whether or not the UCMJ sufficiently tilts the balance of consensus in the State’s favor forcing the Court to reconsider its holding, the defendant argued against the validity of weighing the NDAA at all because the Court excludes military laws from Eighth Amendment analyses in a civilian context.<sup>96</sup> In this respect, according to the defendant, whether an Eighth Amendment question arises in the civilian or military context is a threshold question.<sup>97</sup> The defendant cited *Loving v. United States*<sup>98</sup> to demonstrate that the Court distinguishes civilian and military Eighth Amendment jurisprudence.<sup>99</sup> Thus, the defendant not only attempted to disprove the Louisiana’s argument that the NDAA

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<sup>91</sup> *Id.* at 6. Justice Alito in his dissenting opinion raised the issue that using federal legislation to gauge national consensus on rape is generally problematic because rape charges are largely filed in state courts not in federal courts. *Kennedy v. Louisiana*, 128 S. Ct. 2641, 2672 (2008) (Alito, J. dissenting).

<sup>92</sup> Brief for Petitioner, *supra* note 81, at 9.

<sup>93</sup> *Id.* at 7.

<sup>94</sup> *Id.* at 8.

<sup>95</sup> *Id.* at 7–8.

<sup>96</sup> *Id.* at 5.

<sup>97</sup> *Id.* at 6.

<sup>98</sup> 517 U.S. 748 (1966).

<sup>99</sup> Brief for Petitioner, *supra* note 81, at 5.

strongly suggests that the Court may have erred in its national consensus determination, he also pointed to the military and civilian Eighth Amendment separation to rebut Louisiana's charge that the Court's decision made the NDAA null and void without affording the United States an opportunity to be heard.<sup>100</sup> The defendant argued that when and if the military's child rape sentencing scheme is challenged, the government is not precluded from raising its concerns and mounting its arguments then.<sup>101</sup>

Louisiana, in addition to citing the NDAA as evidence of the national consensus supporting capital sentences for child rape, attached to its Supplemental Brief a letter signed by eighty-five members of Congress, statements by Presidential candidates Senators John McCain and Barack Obama, an opinion piece by Harvard Law Professor Laurence Tribe published in the Wall Street Journal, and the Washington Post article discussed above, all expressing strong disapproval of *Kennedy*.<sup>102</sup>

Both parties presented arguments and counterarguments pertaining to how the Court should interpret the newly discovered military law in relation to its opinion. Neither party, though, sought to tether its argument to a rehearing rationale. Louisiana came closest. Citing *Ambler*, Louisiana argued that while it recognized that the Court seldom grants rehearing, these circumstances were within the category of cases that the Court has recognized as an exception: the NDAA was an omission in the record that was important to the disposition of the case.<sup>103</sup> Louisiana also stated that the test for rehearing

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<sup>100</sup> *Id.* at 7.

<sup>101</sup> *Id.*

<sup>102</sup> See Supplemental Brief for Respondent in Support of Rehearing, *Kennedy v. Louisiana*, 129 S. Ct. 1 (2008).

<sup>103</sup> Brief for Petitioner, *supra* note 81 at 1 (citing *Ambler v. Whipple*, 90 U.S. 278, 282 (1875)) (“[If] the omissions in the transcript on which the case was heard are material to the decision of the case, it presents a strong appeal for reargument.”).

is whether there are compelling reasons that the Court had not considered before.<sup>104</sup>

Thus, while Louisiana focused mostly on the weight it argued the NDAA was entitled to in connection with the Court’s national consensus determination, it made at least a passing effort to place its arguments within a framework of the Court’s precedent. In a way Louisiana did what any advocate before the Court does—it appealed to what it believed the majority of the Justices would respond to.

Defendant, as noted, argued that the NDAA does not directly apply to *Kennedy* for several reasons, but did not explain rejecting rehearing was in accord with the Court’s rehearing preferences. Defendant presumably believed that he gained no benefit by describing a standard for rehearing and how the circumstances in this case fell short. Of course, Defendant in opposing rehearing has no burden to bear, he merely has to argue that Louisiana has not met its showing. So, Defendant succinctly stated that Louisiana “provided no good reason to revisit [the case].”<sup>105</sup>

#### Part IV. The Standard for Rehearing

Supreme Court Rule 44.1 establishes only that the Court will grant rehearing when a majority of the Justices vote to rehear at the instance of one who voted in the majority. Otherwise there is precious little guidance. The obvious deduction is that the Court will rehear a case if a petitioner presents it with the type of information that is likely to persuade enough members of the Court, including one in the majority, that its decision may have been incorrect. But such analysis is unhelpful; it amounts to little more than that the Court will vote to rehear when it votes to rehear.

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<sup>104</sup> *Id.* at 11.

<sup>105</sup> *Id.* at 12.

At least one attempt has been made to categorize the Court’s rehearing voting record, suggesting that a case will probably fall into one of three categories if the Court is going to rehear it.<sup>106</sup> First, the Court has granted rehearing in cases with even splits when it believed that it could find a majority with a new member on the Court who had not participated in the original judgment.<sup>107</sup> While the Rule may appear susceptible to advocates, as well as Justices, exploiting new membership to reopen prior rulings with the expectation that the new Justice would be more sympathetic to a particular disposition, the custom is that new Justices—that is, those who did not participate in the original decision—do not vote on rehearing.<sup>108</sup> In this way, a new member to the Court does not vote to rehear cases that he or she did not decide and cannot seek to influence close cases decided before he or she arrived on the Court. This probably constitutes the rehearing scenario most likely to be granted.<sup>109</sup>

The Court has also granted rehearing when petitioners have demonstrated that the Court’s decision would have unexpected adverse effects.<sup>110</sup> Additionally, the Court has granted rehearing when “the Court itself, not losing counsel, has substantial doubt as to the correctness of what it has decided.”<sup>111</sup>

Whether the Court considers rehearing a case sua sponte or in response to a litigant’s petition, the Court’s most problematic rehearing issues involve questions

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<sup>106</sup> See GRESSMAN ET AL., SUPREME COURT PRACTICE 816–17 (9th ed. 2007).

<sup>107</sup> *Id.* at 816 (citing, for example, *U.S. v. One 1936 Model Ford V-8*, 305 U.S. 564 666 (1938); *Toucey v. N.Y. Life Ins. Co.*, 313 U.S. 538, 596 (1941); and *Commercial Molasses Corp. v. N.Y. Tank Barge Corp.*, 313 U.S. 541, 596 (1941)).

<sup>108</sup> *Id.*

<sup>109</sup> *Id.* at 816–17. For example, arguments for several cases—including *Garcetti v. Ceballos*, 547 U.S. 410 (2006), and *Kansas v. Marsh*, 548 U.S. 163 (2006)—were heard before the Court during the time between the death of Chief Justice Rehnquist and the confirmation of Justice Alito. *Id.* at 817 n.22. The Justices, excluding Justice Alito, voted to rehear the cases upon the start of Justice Alito’s tenure on the bench. *Id.*

<sup>110</sup> *Id.*

<sup>111</sup> *Id.*

concerning the possibility that the Court may have erred in a holding. Essentially, with the exception of resolving a draw, which is more akin to a procedural adjustment, the Court when deciding to rehear a case must be determining whether to cure any problem with a holding if it determines one likely occurred. Since the rehearing rule depends on the subjective assessments of the Justices, to which the litigants and the public are not privy unless the Court issues an opinion accompanying its decision, the general rehearing standard is actually no standard at all. Except in rehearing situations that are specific and require scant deliberation, like to overcome an equally divided Court, the rehearing rule dissolves to the tautology that the Court will vote to rehear when it votes to rehear.

Is it even useful to try to ascertain what the Court might be doing when it decides to rehear cases? Congress authorized the Court to use its uninhibited discretion in determining which cases it will rehear, if any at all. Furthermore, the rehearing decisions have no value as precedent; the decisions to rehear do not bind the lower courts—the questions are procedural in nature, and while rehearing may prove important to the ultimate disposition, which will affect lower courts, the means by which the Court proceeds to adjudge the case are not important. Neither do rehearing decisions bind the Court itself.<sup>112</sup> The practice is for the Court to issue its order without explanation. In so doing, the Court provides litigants with little to fix rehearing arguments on. Thus, as with the State’s petition to rehear *Kennedy*, the arguments focus less on why rehearing is proper and more on why the Court erred in its judgment.

If rehearing is just a second attempt to litigate the same issue, is rehearing not an impediment to finality and a strain on judicial resources? Judge Learned Hand pledged that he would never vote to rehear a case, which he never did during his tenure on the

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<sup>112</sup> GRESSMAN ET AL., *supra* note 103, at 804.

bench, a disposition that has been attributed to his fidelity to finality.<sup>113</sup> Yet rehearing is an important device to help correct mistakes and ensure that justice is served.<sup>114</sup> The tension in balancing justice with efficiency and finality is exactly what is likely informing the Court in deciding how to decide issues of rehearing. Judge Arnold set forth his assessment of rehearings from his experience on the Eighth Circuit: “Petitions for rehearing are generally denied unless something of unusual importance—such as a life—is at stake, or a real and significant error was made . . . .”<sup>115</sup>

Part of the problem with deducing a rehearing standard is that in most instances the decisions exclude any underlying reasoning. Thus, developing a system amounts to parsing voting records, which produce no binding or even persuasive authority for later decisions.

Still, there are several important insights from some dissenting opinions written in denials of rehearing that help explain what justices think about when confronted with whether to rehear. In *City of Detroit v. Murray Corp. of America*,<sup>116</sup> for example, Justice Frankfurter dissented from a rehearing denial because he believed that the Court should have corrected an “erroneous hypothesis about Michigan law underlying the Court’s opinion.”<sup>117</sup> While an erroneous analysis of state law may invoke issues of justice, the Court cannot be held to such a high standard, particularly in circumstances when interpreting state laws is itself an art that is subject to variance and intense scrutiny. In

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<sup>113</sup> Hon. Richard S. Arnold, *Why Judges Don’t Like Petitions for Rehearing*, 3 J. APP. PRAC. & PROCESS 29, 29 (2001).

<sup>114</sup> *Id.* at 34.

<sup>115</sup> *Id.* at 36. While circuit judges contemplating petitions for rehearing courts of appeals decisions necessarily weigh different considerations, Judge Arnold underscores the applicability to Supreme Court rehearings with a discussion of the history of the rehearing process. Judge Arnold notes that the federal judicial system “did not offer most litigants even one chance, let alone two chances, to be heard by an intermediate appellate tribunal.” *Id.* at 30.

<sup>116</sup> 357 U.S. 913 (1958).

<sup>117</sup> *Id.* at 1146.

*Murray Corp.*, Justice Frankfurter cited the importance of the underlying issue: “Due regard for the importance of these cases as a matter of federal finance, of course, but even more so from the point of view of federal-state relations and the demands of sound adjudication call for reargument.”<sup>118</sup> In this context, however, particularly since the Court only hears a small number of cases and implicitly imputes significance to each of them, most losing parties would petition for rehearing on grounds of error and importance.

In *Burns v. Wilson*,<sup>119</sup> Frankfurter again dissented from the majority’s vote to deny rehearing. Frankfurter would have reheard the case because there were important matters that were not addressed but should have been.<sup>120</sup> Much like in *Murray Corp.*, Frankfurter would not have allowed for issues, which he called “important questions,” to be left without conclusive determination.<sup>121</sup> Again, few losing parties, if afforded the opportunity, would likely resist an opportunity to explain that the Court misapplied or misunderstood an important issue underlying the case, giving rise to the need for the Court to rehear the case considering the significance of the underlying question. From a litigant’s standpoint, not only is a second chance advantageous in its own right, it is one for which the litigant has accrued valuable insight regarding the methodology that the Court would likely apply in rehearing considering that the Court already issued an opinion on the matter.

The practice of denying rehearing with statements from the Court or from individual Justices, as in *Kennedy*, is not a new practice. In *Ambler*, a case cited to as an

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<sup>118</sup> *Id.*

<sup>119</sup> 346 U.S. 844 (1953).

<sup>120</sup> *Id.*

<sup>121</sup> *Id.*

early articulation of the rehearing rule that exists now, the Court denied rehearing on a factual error that had no legal effect on the merits of the case.<sup>122</sup> The Court, though, provided its reasoning why the timing of Ambler’s departure from Washington was immaterial to the case in addition to its explanation of the Court’s proper role as arbiters of rehearing petitions.<sup>123</sup> In *Brown*, the Court also issued a statement explaining its denial to rehear the case, although unlike *Ambler*, which focused more on the factual basis for the petition, the *Brown* statement focused primarily on the procedural implications of rehearing.<sup>124</sup> The case was considered for rehearing because an evenly divided Court affirmed the original decision.<sup>125</sup> The *Brown* Court explained that the basis for preventing gratuitous rehearing petitions is judicial efficiency.<sup>126</sup> Chief Justice Taney believed so strongly in judicial efficiency that he not only voted in the majority to deny rehearing a case decided by an equally divided Court,<sup>127</sup> a situation that is now a common occurrence for rehearing,<sup>128</sup> he also wrote an Order providing his reasoning.

More recently, in a series of cases decided by the Court in the 1940s, the Court issued denials of rehearing with abbreviated explanations as it did in response to the *Ambler* and *Brown* rehearing petitions. In *Dobson v. Commissioner*,<sup>129</sup> the parties disagreed about whether, for tax purposes, the sale of stock should be treated as ordinary income or as capital gain, a dispute that involved the extent of the taxpayer’s taxable liability to the Internal Revenue Service (IRS).<sup>130</sup> The taxpayer filed for rehearing asking

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<sup>122</sup> See generally *Ambler v. Whipple*, 90 U.S. (23 Wall.) 278 (1875); see *supra* Part II.

<sup>123</sup> See *id.*

<sup>124</sup> See generally *Brown v. Mathias Aspden’s Adm’rs*, 55 U.S. (14 How.) 25 (1852); see *supra* Part II.

<sup>125</sup> See *id.*

<sup>126</sup> *Id.* at 27–28.

<sup>127</sup> *Id.* at 28.

<sup>128</sup> GRESSMAN ET AL., *supra* note 103, at 816.

<sup>129</sup> 321 U.S. 231 (1944).

<sup>130</sup> *Id.* at 231.

the Court to find, as a matter of law, that the sale of stock in question was a capital gain rather than ordinary income.<sup>131</sup> The Court rejected the taxpayer’s argument because the Court was not persuaded that the question was clear as a matter of law; it did not reject the argument because the taxpayer first presented the question to the Court on petition to rehear the case.<sup>132</sup>

In *Commissioner v. Smith*,<sup>133</sup> another case involving the IRS and the treatment of income for purposes of tax return filings, the Court addressed whether a taxpayer receives taxable income from a stock option purchase at the time of the purchase or at the time of delivery of stock.<sup>134</sup> The Court noted that it was presented with the question for the first time during the rehearing process—neither party raised the issue when the question was before the Court originally.<sup>135</sup> It found that there was “ample support” to defer to the Tax Court, against the taxpayer.<sup>136</sup>

The practice, thus, of the Court issuing a rehearing denial with an accompanying explanation did not start with *Kennedy*. But *Kennedy* denied rehearing, explained the reasons for the denial, and amended the original opinion. It would be misleading to imply that any amendment reflects an issue of fundamental importance. Had *Ambler* amended the original opinion to account for the factual discrepancy that the Court deemed inconsequential to the case’s disposition, the amendment would stand merely as an attempt to recount the case’s factual circumstances as accurately as possible. This occurred, in fact, in *New Mexico v. Texas*.<sup>137</sup> In denying rehearing, the Court explained

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<sup>131</sup> *Id.*

<sup>132</sup> *Id.* at 232.

<sup>133</sup> 324 U.S. 695 (1945).

<sup>134</sup> *See id.* at 695.

<sup>135</sup> *Id.*

<sup>136</sup> *Id.*

<sup>137</sup> 275 U.S. 279 (1927), *reh’g denied*, 276 U.S. 557 (1928).

that the petition for rehearing referred to an error in the Court’s opinion that, “while not affecting the ultimate decision, require[d] correction.”<sup>138</sup> There, the two states disputed the exact coordinates of their shared border.<sup>139</sup> In assessing the border location, the Court considered the effects of accretion.<sup>140</sup> The Court, in its original opinion, explained that neither party asked the Court to consider accretions of the Rio Grande River, which the Court found were otherwise immaterial to its determination.<sup>141</sup> In denying rehearing, though, the Court corrected a factual error in its original opinion that omitted references to accretions when the Court described the border when New Mexico became a state in 1912.<sup>142</sup>

The error in *New Mexico v. Texas* involved a factual issue that did not affect the outcome of the case. Even if the factual issue was actually more important than the Court acknowledged, the case presented a specific question that turned more on factual issues than legal ones. The *Kennedy* error concerned a question—if not several questions—of law.

In *Kennedy* the Court’s amended error—that no American law allowed for capital punishment of child rape—was integral to its holding. The Court, however, was unclear as to just how integral the assertion was; it simply stated that its holding was “[b]ased both on consensus and [its] own independent judgment.”<sup>143</sup> The Court provided no guidance as to the weight of consensus compared to its own judgment, nor did the Court explain whether each factor alone was sufficient to support its holding.<sup>144</sup> The rehearing

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<sup>138</sup> *New Mexico v. Texas*, 276 U.S. 557 (1928).

<sup>139</sup> *New Mexico*, 275 U.S. at 282–83.

<sup>140</sup> *Id.*; *see also id.* at 301.

<sup>141</sup> *Id.* at 301.

<sup>142</sup> *New Mexico*, 276 U.S. at 557–58.

<sup>143</sup> *Kennedy*, 128 S. Ct. 2641 at 2650.

<sup>144</sup> *See Kennedy*, 128 S. Ct. 2641.

argument challenged the consensus rationale; if it were successfully challenged, the Court did not explain whether the holding could still stand.

After considering the rehearing arguments, the Court modified its opinion to recognize in a footnote the NDAA.<sup>145</sup> The Court incorporates by reference its opinion accompanying its rehearing denial as the basis for its decision to discount the NDAA as sufficient to change the original disposition.<sup>146</sup> The Court thereby implies much, says little, and leaves much in doubt. National consensus is a critical component of the “evolving standards of decency” analysis that encapsulates Eighth Amendment jurisprudence. The opinion does not indicate whether military law lies entirely outside national consensus. *Kennedy*, thus, could actually mark a shift away from the decency test toward one of only the Court’s independent judgment. Or, as the *Kennedy* rehearing opinion suggests upon conclusion, the State of Louisiana may simply have been late in advancing the NDAA argument: “Until the petition for rehearing, none of the briefs or submissions filed by the parties or the amici in this case cited or discussed the UCMJ provisions.”<sup>147</sup> That statement explains away the specific rehearing argument at issue by dismissing the purpose of the rehearing rule.

Still, a question remains whether it represents good practice.

#### Part V. A New Standard

What the inconclusiveness of Rule 44 may mean is that the Court enjoys too much discretion in deciding rehearing issues. There are three options available in considering policy with respect to the rule: leave the rule as it currently stands, amend the

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<sup>145</sup> *Kennedy v. Louisiana*, 129 S. Ct. 1 (2008).

<sup>146</sup> *Id.* (“In a petition for rehearing respondent argues that the military penalty bears on our consideration of the question in this case. For the reasons set forth in the statement respecting the denial of rehearing, . . . we find that the military penalty does not affect our reasoning or conclusions.”)

<sup>147</sup> *Id.*

rule to include more guidance for the benefit of litigants and those interested in the Court's business, or abolish the rule.

Leaving the rule as it stands is compelling. The rule is not well known precisely because the Court so seldom exercises its power to grant rehearing. The virtue of leaving the rule undisturbed is that the Court can continue to function as it did, in its tradition, whether flawed or well guided, and avoid criticisms that will invariably befall any reform attempts. The need for reform seems muted by the rule's obscurity, and while the *Kennedy* case may have had the potential to attract criticism regarding the rehearing rule, none has materialized thus far.

Abolishing the rule may serve the interest of finality and efficiency best, but it is difficult to justify removing the option from the Court to correct situations that must be remedied, by whatever applicable standard. Also, with respect to finality and efficiency, the infrequency with which the Court grants rehearing is probably the best counterargument.

Finally, the rule can change. The Court can define conditions under which it will rehear cases, or at a minimum explain and document its position on rehearing petitions. *Kennedy*, though, presents an interesting illustration that decisions granting rehearing are markedly different from those denying rehearing. It is instructive to understand why the Court believes that a case should be reheard, especially considering how rarely it grants rehearing. It is important that the Court maintain a degree of unity and predictability. Once the Court explains why a case should not be reheard, however, it invites criticism, suspicion, and uncertainty.

In response to Louisiana’s rehearing petition, the Court included one footnote explaining that for the reasons provided by Justice Kennedy, the “military penalty” did not “affect [the Court’s] reasoning or conclusions.”<sup>148</sup> In Justice Kennedy’s brief statement accompanying the Order to deny rehearing, he cited to five cases,<sup>149</sup> all five of which he referred to in the original June 25, 2008 opinion.<sup>150</sup>

By comparison, one commentator argued that the Court was on sound legal ground in denying rehearing.<sup>151</sup> The article set forth three reasons in support of its argument: child rape has long been punishable by death under military law, the U.S. Supreme Court does not consider military law with respect to its Eighth Amendment inquiries, and military law does not represent the national consensus on punishment for civilian crimes.<sup>152</sup> Another article, published before the Court denied rehearing, argued that Louisiana’s petition should be denied because military law is inconsequential to Eighth Amendment jurisprudence.<sup>153</sup> Combined, the articles cited to numerous military-law related sources including six cases,<sup>154</sup> numerous statutes,<sup>155</sup> and a list of every Eighth Amendment case the Court considered since adopting the evolving standards of decency test.<sup>156</sup> As Louisiana noted in its petition, it did not doubt that the Court could well have reached the same decision as originally decided in June 2008; rather, it merely argued

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<sup>148</sup> Kennedy v. Louisiana, 129 S. Ct. 1, 2 (2008).

<sup>149</sup> See *id.*

<sup>150</sup> See generally Kennedy v. Louisiana, 128 S. Ct. 2641 (2008).

<sup>151</sup> Bidish Sarma, *Still in Search of a Unifying Principle: What Kennedy v. Louisiana and the Supreme Court’s Denial of the State’s Petition for Rehearing Signal for the Future*, 118 YALE L.J. 55, 56 (2008).

<sup>152</sup> *Id.* at 56.

<sup>153</sup> Corey Rayburn Yung, *Is Military Law Relevant to the “Evolving Standards of Decency” Embodied in the Eighth Amendment?*, 103 NW. U. L. REV. COLLOQUY 140, 141 (2008).

<sup>154</sup> See generally *id.*; see generally Sarma, *supra* note 137.

<sup>155</sup> See generally Sarma *supra* note 137; see generally Yung, *supra* note 139.

<sup>156</sup> See Yung, *supra* note 139, at 144 n.24.

that demonstrating that the outcome is certain to change is not the working standard for rehearing.<sup>157</sup>

Although the Yung and Sarma articles defended the Court's decision to deny rehearing, they illustrated precisely why the Court erred. Evaluating fundamental principles of the Eighth Amendment is what published opinions are for. Yung and Sarma argued that military law has no bearing on the evolving standards of decency that inform death penalty questions. Such a proposition, if it is to govern future Eighth Amendment questions, deserves fuller treatment than the Court provided. These scholars' analyses simply point to the importance of the question; rather than provide a defense of the Court's decision, the articles highlight what was lacking from Justice Kennedy's reasoning.

Justice Kennedy, thus, confronted a dilemma: provide little and risk appearing arbitrary and careless, or provide too much and demonstrate exactly why rehearing was necessary.<sup>158</sup> Kennedy may or may not have been trying to strike a balance along those lines, but his attempt was unsatisfactory.

Neither article discussed the standard for rehearing, yet both argued that the Court's denial was or would be proper. On what basis, though, is an argument on "sound legal ground" if it is detached from an analytical framework? Put differently, whether or not the merits of the military law work to support Justice Kennedy's reasoning, neither article provided sufficient explanation for why such seemingly substantial questions

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<sup>157</sup> Brief for Respondent, *supra* note 11, at 11.

<sup>158</sup> See *Counting to Five in the Kennedy Rehearing Debate*, SentencingLawandPolicy, [http://sentencing.typepad.com/sentencing\\_law\\_and\\_policy/2008/07/counting-to-fiv.html](http://sentencing.typepad.com/sentencing_law_and_policy/2008/07/counting-to-fiv.html) (July 23, 2008, 09:38 EST).

should be resolved in the cryptic spaces of a rehearing order and ultimately fought over in law review articles and other scholarly journals.

Indeed, both articles referred to the substantial criticism that closely followed the opinion when the existence of the NDAA became known shortly after it was handed down—characterized by “intense public scrutiny”<sup>159</sup> and “calls for rehearing . . . by those across the political spectrum.”<sup>160</sup> In a notable commentary cited by the State’s Brief<sup>161</sup> petitioning for rehearing and by one of the above articles arguing against rehearing,<sup>162</sup> Laurence Tribe framed the problem by explaining that the U.S. Supreme Court has been asked by a State and the federal government to “reconsider a case it [had] just handed down because [the Court] missed key evidence.”<sup>163</sup> Tribe argued that the NDAA stood in the way of the Court’s national consensus findings, a problem that the Court could not just evade by following the view that the military and civilian contexts exist in “parallel universe[s].”<sup>164</sup> Underlying Tribe’s concerns is that the NDAA presents Fourteenth Amendment equal protection problems for the Court’s ruling.<sup>165</sup> In order for the Court to keep itself in the public’s esteem, its “candor” and “correctness” with respect to “the factual predicates of its rulings” must be protected.<sup>166</sup>

Justice Kennedy’s statement denying rehearing addressed the merits of the Louisiana’s arguments about how the military law affects the June 25, 2008 opinion. The

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<sup>159</sup> Sarma, *supra* note 137, at 55.

<sup>160</sup> Yung, *supra* note 139, at 141 (footnote omitted).

<sup>161</sup> See Supplemental Brief for Respondent, *supra* note 11, at 12a.

<sup>162</sup> Yung, *supra* note 139, at 141.

<sup>163</sup> Laurence H. Tribe, *The Supreme Court is Wrong on the Death Penalty*, WALL ST. J., July 31, 2008, at A13.

<sup>164</sup> *Id.*

<sup>165</sup> *Id.* Tribe suggests that the Court in *Kennedy*, ruling that capital punishment is limited to crimes that result in the victim’s death and certain crimes against the state, is constraining the legislative branch’s ability to determine the punishments for particular crimes. *Id.* Thus, the Court is simultaneously usurping the democratically elected representatives’ power and using it in a way that authorizes meting death sentences out to some but not others. *Id.*

<sup>166</sup> *Id.*

statement did not attempt to explain how the overlooked federal law is insufficient to meet a rehearing standard, though. Thus, the three-page statement acts like a proxy for a determination of several important questions raised by the State, such as the influence of the NDAA on the national consensus in connection with capital sentencing for child rape, the extent to which the Court’s dual reasoning—national consensus and its own judgment—could be severed and still be kept intact, and the nature of the distinction, generally, between the law in a military and civilian context.<sup>167</sup> In this respect, the short opinion was audacious.

Justice Scalia also voted to deny rehearing, although he was in the dissent in *Kennedy*, and issued a separate statement, joined by Chief Justice Roberts, explaining his reasons: “I am voting against the petition for rehearing because the views of the American people on the death penalty for child rape were, to tell the truth, irrelevant to the majority’s decision in this case.”<sup>168</sup> Justice Scalia, exhibiting his belief that the majority was disingenuous in its analysis, did not believe that the majority demonstrated consensus in the first instance.<sup>169</sup> To the extent the majority did succeed, Justice Scalia explained that the majority’s basis for any such belief is “utterly destroy[ed]” given the NDAA.<sup>170</sup>

Setting aside the merits of Justice Kennedy’s arguments, the amended opinion and statement accompanying the order denying rehearing took up the issues raised by Louisiana served as an abbreviated analysis of the briefs that the parties and the U.S.

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<sup>167</sup> See generally *Kennedy v. Louisiana*, 129 S. Ct. 1 (2008).

<sup>168</sup> *Kennedy v. Louisiana*, 129 S. Ct. 1, 3 (2008) (Scalia, J., concurring).

<sup>169</sup> *Id.*

<sup>170</sup> *Id.*

Solicitor General provided to the Court. Thus, the Court apparently departed from its usual practice of issuing an Order simply stating its decision to deny.

Most cases incite strong reactions from supporters and detractors, and resulting debates—regardless of pronouncements of severity—cannot justify rehearing. If it were otherwise, finality and efficiency would suffer. Rather, the discussion generated in the wake of *Kennedy* coincided with the State’s petition to rehear the case and new evidence that appeared to relate materially to the Court’s reasoning. If it were obvious that the evidence did not relate to the decision in any material way, then the Court should have denied rehearing without explanation. The Yung article arguing against rehearing concluded—“[b]ased upon an exhaustive review of prior Supreme Court cases and the role of the military in American society”<sup>171</sup>—that the evidence was immaterial to the case. If the answer to an important constitutional question required research of so comprehensive a nature, then the Court itself should have undertaken it and ruled on it properly and authoritatively. Instead the Court was brief and dismissive, but provided enough of an explanation to indicate that justification was in order.

The Court should revise its rules to require that it discuss issues of law only in full, published opinions rather than through statements attached to rehearing orders. Otherwise, as was the case with *Kennedy*, the Court undermines the public’s confidence in the Court’s ability to properly consider the important questions of the cases that it hears. If the Court properly denied rehearing in *Kennedy*, it should have sufficed for the Court to simply deny rehearing. By explaining why the NDAA was inadequate justification to disturb its original opinion, the Court did not respect the purpose of the rehearing petition that asked the Court to consider whether the NDAA was sufficient to

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<sup>171</sup> Yung, *supra* note 139, at 141.

warrant rehearing. The opinion evidenced that rehearing was warranted. The Court, therefore, should issue opinions accompanying orders denying rehearing with particular care to the content of the opinion. The Court should not issue opinions including discussions of law in rehearing opinions.

#### Part VI. Conclusion

Rehearing—an important feature of our judiciary, to guarantee sound interpretation of the law—can come under criticism when it is forced into public view. The *Kennedy* case provides just such an example. Few Supreme Court cases are handed down without detractors. Avoiding controversy is not the purpose of the rehearing rule. *Kennedy* illustrates, however, an example that seems better than most when rehearing may be advantageous. Rather than avail itself of the rule designed for such a situation, the Court amended its original opinion and issued a statement explaining why it refused to grant rehearing. The Court should not have issued its opinion regarding military and civilian law and their impact on Eighth Amendment jurisprudence in its opinion denying rehearing. It would be a substantial improvement to the Court's standing if it adopts a rule prohibiting it from such practice. Thus, litigants and the public will better understand the Court's deliberations and help perpetuate the widespread trust and esteem for the Court as an essential institution of our government.