Nos. 19-108 and 19-184

In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER

v.

MICHAEL J.D. BRIGGS

UNITED STATES OF AMERICA, PETITIONER

v.

RICHARD D. COLLINS

UNITED STATES OF AMERICA, PETITIONER

v.

HUMPHREY DANIELS III

ON WRITS OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

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QUESTION PRESENTED

Whether the Court of Appeals for the Armed Forces erred in concluding—contrary to its own longstanding precedent—that the Uniform Code of Military Justice allows prosecution of a rape that occurred between 1986 and 2006 only if it was discovered and charged within five years.

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OPINIONS BELOW

The opinion of the Court of Appeals for the Armed Forces in *United States* v. *Briggs*, No. 19-108 (*Briggs* Pet. App. 1a-15a) is reported at 78 M.J. 289. The opinion of the Air Force Court of Criminal Appeals (*Briggs*

Pet. App. 16a-40a) is not published in the Military Justice Reporter but is available at 2016 WL 3682568.

The order of the Court of Appeals for the Armed Forces in *United States* v. *Collins*, No. 19-184 (*Collins*/*Daniels* Pet. App. 1a) is reported at 78 M.J. 415. The opinion of the Air Force Court of Criminal Appeals (*Collins*/*Daniels* Pet. App. 2a-18a) is reported at 78 M.J. 530.

The order of the Court of Appeals for the Armed Forces in *United States* v. *Daniels*, No. 19-184 (*Collins*/*Daniels* Pet. App. 19a-20a) is reported at 79 M.J. 150. The opinion of the Air Force Court of Criminal Appeals (*Collins*/*Daniels* Pet. App. 21a-41a) is not published in the Military Justice Reporter but is available at 2019 WL 2560041.

JURISDICTION

The judgment of the court of appeals in *Briggs* was entered on February 22, 2019. On May 14, 2019, the Chief Justice extended the time within which to file a petition for a writ of certiorari to and including June 22, 2019. On June 12, 2019, the Chief Justice further extended the time to and including July 22, 2019, and the petition was filed on that date. The petition for a writ of certiorari was granted on November 15, 2019. The jurisdiction of this Court rests on 28 U.S.C. 1259(3)-(4). See 19-108 U.S. Cert. Reply Br. 2-6.

The judgment of the court of appeals in *Collins* was entered on March 12, 2019. On June 6, 2019, the Chief Justice extended the time within which to file a petition for a writ of certiorari to and including July 10, 2019. On July 3, 2019, the Chief Justice further extended the time to and including August 9, 2019. The judgment of the court of appeals in *Daniels* was entered on July 22, 2019. The consolidated petition for *Collins* and *Daniels*

was filed on August 9, 2019. The petition was granted on November 15, 2019. The jurisdiction of this Court rests on 28 U.S.C. 1259(2). See 19-184 U.S. Cert. Reply Br. 2-6.

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

At the times of respondents' offenses in 1998, 2000, and 2005, Article 43(a) of the Uniform Code of Military Justice (UCMJ) provided that a "person charged with absence without leave or missing movement in time of war, or with any offense punishable by death, may be tried and punished at any time without limitation." 10 U.S.C. 843(a) (1994); 10 U.S.C. 843(a) (2000). Article 120(a) of the UCMJ provided that any "person subject to [the UCMJ] who commits an act of sexual intercourse, by force and without consent, is guilty of rape and shall be punished by death or such other punishment as a court-martial may direct." 10 U.S.C. 920(a) (1994); 10 U.S.C. 920(a) (2000).

The current version of Article 43(a) of the UCMJ provides that a "person charged with absence without leave or missing movement in time of war, with murder, rape or sexual assault, or rape or sexual assault of a child, or with any other offense punishable by death, may be tried and punished at any time without limitation." 10 U.S.C. 843(a). The current version of Article 120(a) of the UCMJ provides in relevant part that any "person subject to [the UCMJ] who commits a sexual act upon another person by * * * using unlawful force against that other person * * * is guilty of rape and shall be punished as a court-martial may direct." 10 U.S.C. 920(a)(1).

The Eighth Amendment to the United States Constitution provides that "[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. Const. Amend. VIII.

Other pertinent statutory provisions are reprinted in an appendix to this brief. App., *infra*, 1a-5a.

STATEMENT

Following a general court-martial by the United States Air Force, respondent Briggs was convicted of rape, in violation of 10 U.S.C. 920(a) (2000). The Air Force Court of Criminal Appeals (AFCCA) affirmed. *Briggs* Pet. App. 16a-40a. The Court of Appeals for the Armed Forces (CAAF) summarily affirmed in part and denied review in part. 76 M.J. 36; 76 M.J. 338. This Court granted a petition for a writ of certiorari, vacated the CAAF's judgment, and remanded. 139 S. Ct. 38. On remand, the CAAF reversed the AFCCA and dismissed the charge. *Briggs* Pet. App. 1a-15a.

Following a general court-martial by the United States Air Force, respondent Collins was convicted of rape, in violation of 10 U.S.C. 920(a) (1994). *Collins/Daniels* Pet. App. 2a-3a. The AFCCA reversed. *Id.* at 2a-18a. The Judge Advocate General (JAG) of the Air Force certified the case to the CAAF, which summarily affirmed. *Id.* at 1a.

Following a general court-martial by the United States Air Force, respondent Daniels was convicted of rape, in violation of 10 U.S.C. 920(a) (1994), and other offenses. *Collins/Daniels* Pet. App. 21a-22a. The AFCCA reversed the rape conviction. *Id.* at 21a-41a. The Air Force JAG certified the AFCCA's decision on the rape count to the CAAF, which summarily affirmed. *Id.* at 19a-20a.

A. Legal Background

1. Sexual assault in the military

a. Sexual assault "is one of the most destructive factors in building a mission-focused military." *Memorandum from James N. Mattis, Secretary of Defense, to All Members of the Department of Defense: Sexual Assault Prevention and Awareness* (Apr. 18, 2018) (*Mattis Memo*), https://dod.defense.gov/portals/1/features/2018/0418_sapr/saap-osd004331-18-res.pdf. For victims, the impact of sexual assault in the military is "devastating." United States Dep't of Defense, *Sex Crimes and the UCMJ: A Report for the Joint Service Comm. On Military Justice* 2 (*UCMJ Sex Crimes Report*), http://jpp.whs.mil/public/docs/03_Topic-Areas/02-Article_120/20150116/58_Report_SexCrimes_UCMJ.pdf. And that personal devastation comes with systemic effects that are unique to the military context. "An effective fighting force cannot tolerate sexual assault within its ranks." Sexual Assault Prevention and Response Office, United States Dep't of Defense, *Department of Defense Fiscal Year 2009 Annual Report on Sexual Assault in the Military* (Mar. 2010) 5 (*DoD FY 2009 Annual Report*), https://www.sapr.mil/public/docs/reports/fy09_annual_report.pdf.

The Pentagon has "identified military sexual trauma as a major deployment and readiness issue." *UCMJ Sex Crimes Report* 117 n.457. Sexual assault decreases the military's "ability to recruit and retain the finest all-volunteer force this world has ever known." *Mattis Memo*. And because the military "requires large numbers of young men and women to work together in close quarters that are often highly isolated," the "deterrence of sexual offenses in the military is especially critical." *UCMJ Sex Crimes Report* 117 n.456. Sexual assault "erodes unit integrity," *DoD FY 2009 Annual Report* 5,

by destroying the "very fiber" of "small groups of close knit people who must trust each other with their lives," Judicial Proceedings Panel, United States Dep't of Defense, *Report on Retaliation Related to Sexual Assault Offenses* 17 (Feb. 2016) (citation omitted) (*Retaliation Report*), http://jpp.whs.mil/Public/docs/08-Panel_Reports/04_JPP_Retaliation_Report_Final_20160211.pdf; see *Mattis Memo* ("Unit cohesion is what holds us together under stress and keeps us combat effective when the chips are down.").

Sexual assaults committed by military personnel overseas can undermine international alliances, "subvert[] strategic goodwill," and create diplomatic crises. *DoD FY 2009 Annual Report* 16. Even in times of peace, "military personnel represent the goodwill of the Department to the foreign national population." *Ibid.* Sexual offenses committed by military personnel overseas therefore "discredit the military service and by extension the United States government," and impair international relations. *UCMJ Sex Crimes Report* 117 n.456. Those concerns become even more acute in a combat setting. "History has demonstrated that in such an environment rape and murder become more tempting," while "the need for order in the force, in order not to encourage resistance by the enemy and to pacify the populace," is at its highest. Manual for Courts-Martial, United States (MCM) App. 21, at A21-66 (1984 ed.).

b. Compounding all of these problems is that "sexual assaults in the military remain chronically underreported." United States Dep't of Defense, *Report of the Response Systems to Adult Sexual Assault Crimes Panel* 8 (June 2014) (*RSP Report*), http://responsesystemspanel.whs.mil/Public/docs/Reports/00_Final/RSP_Report_Final_

20140627.pdf; see *Department of Defense Annual Report on Sexual Assault in the Military, Fiscal Year 2018* 15 (Apr. 2019) (*DoD FY 2018 Annual Report*), https://www.sapr.mil/sites/default/files/DoD_Annual_Report_on_Sexual_Assault_in_the_Military.pdf. In the military, sexual assault victims "face unique barriers to reporting that do not exist in the civilian world." *RSP Report* 60.

The "hierarchical structure of military service and its focus on obedience, order, and mission before self * * * discourage victims from reporting." *RSP Report* 60. "Particularly when an offender is a superior, victims may believe that others will ignore or tend to disbelieve their allegations of sexual assault," and may fear that "nothing will happen to the[] perpetrator." *Id.* at 60-62. Military victims may also fear "discipline for any collateral misconduct —underage drinking and other related alcohol offenses, adultery, fraternization, or other violations of certain regulations or orders—that occurred at the time they were assaulted." *Id.* at 61. And some victims may additionally fear "reprisal or retaliation" if they report the assault, including being "labeled a troublemaker." *Id.* at 60; *DoD FY 2018 Annual Report* 10 (same).

Notwithstanding these challenges, preventing sexual assault is a top priority for the Department of Defense. "Sexual assault is incompatible with military culture, and the costs and consequences for mission accomplishments are unbearable." *DoD FY 2009 Annual Report* 5. And the destruction of "morale, good order and discipline" is only exacerbated by a failure to bring assailants to justice. *UCMJ Sex Crimes Report* 2.

2. Penalties for rape in the military

Rape in the military has traditionally been a capital offense. The "military death penalty for rape [was] the

rule for more than a century," as "military law * * * included the death penalty for rape of a child or adult victim since at least 1863." *Kennedy* v. *Louisiana*, 554 U.S. 945, 946 (2008) (statement of Kennedy, J., respecting the denial of rehearing) (citing Act of Mar. 3, 1863, ch. 75, § 30, 12 Stat. 736).

From its inception in 1950, subject only to some refinement of the definition of the offense, the UCMJ long classified rape as a capital crime. See Act of May 5, 1950 (1950 UCMJ), ch. 169, 64 Stat. 140 (Art. 120); Act of Aug. 10, 1956 (1956 Codification), ch. 1041, 70 Stat. 1126, 70A Stat. 73 (Art. 120). In 1984, President Ronald Reagan promulgated a revised edition of the Manual for Courts Martial, which is the official guide to the conduct of courts-martial. See Exec. Order 12,473, 3 C.F.R. 201 (1984 Comp.). That version of the Manual, consistent with the UCMJ, authorized the death penalty for rape where certain "aggravating circumstances" were proved. MCM, Rule for Courts Martial 1004(c) (1984 ed.); see also Exec. Order 12,460, 3 C.F.R. 156 (1984 Comp.) (promulgating aggravating factors). And from 1993 to 2006, Article 120(a) of the UCMJ provided that any "person subject to [the UCMJ] who commits an act of sexual intercourse, by force and without consent, is guilty of rape and shall be punished by death or such other punishment as a court-martial may direct." 10 U.S.C. 920(a) (1994).

The National Defense Authorization Act for Fiscal Year 2006 (2006 NDAA) revised Article 120 by, among other things, removing the express directive that the death penalty be available for rape and instead providing that a person "guilty of rape * * * shall be punished as a court-martial may direct." Pub. L. No. 109-163, § 552(a)(1), 119 Stat. 3257; see *ibid.* (classifying adult

and child rape as different offenses). Congress specified, however, that "[u]ntil the President otherwise provides * * * , the punishment which a court-martial may direct for" rape includes "death." § 552(b), 119 Stat. 3263; see also 10 U.S.C. 856(a) ("The punishment which a court-martial may direct for an offense may not exceed such limits as the President may prescribe for that offense."). In 2007, President George W. Bush issued an Executive Order maintaining the death penalty as a punishment for rape. Exec. Order No. 13,447, 3 C.F.R. 243 (2007 Comp.); see also 10 U.S.C. 818 (2006) ("[G]eneral courts-martial have jurisdiction to try persons subject to this chapter for any offense made punishable by this chapter and may, under such limitations as the President may prescribe, adjudge any punishment not forbidden by this chapter, including the penalty of death when specifically authorized by this chapter.").

Congress amended portions of Article 120 again in the National Defense Authorization Act for Fiscal Year 2012 (2012 NDAA), Pub. L. No. 112-81, § 541(a)(1), 125 Stat. 1405. Although the 2012 NDAA, unlike the 2006 NDAA, did not contain any express congressional authorization for the death penalty for rape, Congress again stated that a person found guilty of rape "shall be punished as a court-martial may direct." *Ibid.* In 2016, President Barack Obama promulgated Executive Order 13,740, 3 C.F.R. 510 (2016 Comp.), which amended the Manual for Courts Martial. The revised Manual stated that the maximum punishment for rape committed after June 28, 2012 is "confinement for life without eligibility for parole." MCM, pt. IV, ¶ 45.e.(1) (2016 ed.). The current version provides the same. See MCM, pt. IV ¶ 60.d(1) (2019 ed.).

3. The statute of limitations for rape under the UCMJ

a. When Congress first enacted the UCMJ in 1950, the UCMJ's statutes of limitations distinguished among three categories of offenses. 1950 UCMJ, 64 Stat. 121; 1956 Codification, 70A Stat. 51. The default limitations period, under UCMJ Article 43(c), was two years. See *Willenbring* v. *Neurauter*, 48 M.J. 152, 178 (C.A.A.F. 1998). Under Article 43(b), certain designated offenses, including rape, had a three-year statute of limitations. *Ibid.* And under Article 43(a), specific offenses—"desertion or absence without leave in time of war, * * * aiding the enemy, mutiny, [and] murder"—could "be tried and punished at any time without limitation." *Ibid.*

In 1986, Congress overhauled the UCMJ's limitations provisions. Instead of providing a self-contained list of offenses exempt from a time limit on prosecution, Congress adopted a new approach to Article 43(a), specifying that "[a] person charged with * * * any offense punishable by death, may be tried and punished at any time without limitation." National Defense Authorization Act for Fiscal Year 1987, Pub. L. No. 99-661, Div. A, Tit. VIII, § 805(a) and (b), 100 Stat. 3908. Article 43(b) was amended to provide that all remaining offenses were subject to a five-year statute of limitations. § 805(a), 100 Stat. 3908.

The Senate Report accompanying the 1986 revisions to Article 43 explained that, under the revised text of Article 43(a), "no statute of limitation would exist in prosecution of offenses for which the death penalty is a punishment prescribed by or pursuant to the UCMJ." S. Rep. No. 331, 99th Cong., 2d Sess. 249 (1986) (Senate Report). At the time, as described above, the UCMJ provided that rape "shall be punished by death or such

other punishment as a court-martial may direct." 10 U.S.C. 920(a) (1982).

b. In 1998, the CAAF explicitly recognized in *Willenbring* v. *Neurauter* "that rape is an 'offense punishable by death' for purposes of exempting it from the 5–year statute of limitations." 48 M.J. at 180. In arguing otherwise, the defendant in that case had relied in part on *Coker* v. *Georgia*, 433 U.S. 584 (1977), which concluded that the Eighth Amendment prohibits imposition of the death penalty on a civilian defendant convicted of raping an adult woman. *Willenbring*, 48 M.J. at 178. The CAAF, however, explained that rape in the military context was "punishable by death" for purposes of Article 43(a)—and therefore not subject to a limitations period—because the UCMJ itself expressly authorized the death penalty for rape as a statutory matter. *Ibid.*

The CAAF emphasized that the "exemption from Article 43 for offenses 'punishable by death' was meant to apply to the most serious offenses without listing each one in the statute, no more, no less." *Willenbring*, 48 M.J. at 180. The CAAF additionally noted, quoting the Senate Report, that Congress had revised Article 43 to bring it "more in line" with statutes of limitations in the general federal criminal code. *Id.* at 178 (quoting Senate Report 249). And it observed that federal courts of appeals had uniformly interpreted 18 U.S.C. 3281—the parallel provision in the federal criminal code that provides that any offense "punishable by death" may be prosecuted at any time without limitation—to apply to any crime for which the death penalty is authorized by statute, regardless of whether the death penalty could constitutionally be imposed. *Willenbring*, 48 M.J. at 179.

The CAAF reiterated *Willenbring*'s holding a few years later in *United States* v. *Stebbins*, 61 M.J. 366 (2005). See *id.* at 369.

c. In connection with its other revisions to the sexual-assault provisions of the UCMJ, the 2006 NDAA also updated Article 43(a)'s limitations provision. As described above, the 2006 NDAA removed from Article 120 the express directive that the death penalty be a punishment for rape. 2006 NDAA, § 552(a)(1), 119 Stat. 3257. At the same time, Congress updated Article 43(a) to explicitly state that a person charged with rape could be tried and punished at any time without limitation: "A person charged with absence without leave or missing movement in time of war, with murder or rape, or with any other offense punishable by death, may be tried and punished at any time without limitation." 10 U.S.C. 843(a) (2006); see 2006 NDAA, § 553(a), 119 Stat. 3264. The Conference Report accompanying the 2006 NDAA explained that the update would "clarify" that rape is "an offense with an unlimited statute of limitations." H.R. Conf. Rep. No. 360, 109th Cong., 1st Sess. 703 (2005) (Conference Report); see H.R. Rep. No. 89, 109th Cong., 1st Sess. 332 (2005) (House Report) (similar).

Since 2006, Congress has amended Article 43(a) to add additional sexual offenses to the specified list of offenses with no limitations period. Article 43(a) currently provides that a "person charged with absence without leave or missing movement in time of war, with murder, rape or sexual assault, or rape or sexual assault of a child, or with any other offense punishable by death, may be tried and punished at any time without limitation." 10 U.S.C. 843(a).

B. Proceedings Below

Respondents are three Air Force service members who committed rapes between 1998 and 2005 that military authorities did not have enough evidence to prosecute for many years. Consistent with the CAAF's decisions in *Willenbring* and *Stebbins*, they were all charged and convicted outside the UCMJ's default five-year statute of limitations, and none raised a statute-of-limitations defense at trial. While their cases were on direct review, however, the CAAF reversed its view on whether rape was an offense "punishable by death" under the limitations provision that was in force from 1986 to 2006, upsetting the long-held understanding that no limitations period applied to such rapes. Specifically, in *United States* v. *Mangahas*, 77 M.J. 220 (2018), which involved a 2015 military prosecution for a rape committed in 1997, the CAAF overruled *Willenbring* and *Stebbins* "to the extent that they hold that rape was punishable by death" and therefore not subject to a limitations period under the UCMJ. *Id.* at 222. The CAAF took the view that *Coker* was controlling in the military context, *id.* at 223; stated that "where the death penalty could *never* be imposed for the offense charged, the offense is *not* punishable by death for purposes of" Article 43(a), *id.* at 224-225; and concluded that the UCMJ's default five-year statute of limitations applied to the 1997 rape at issue in that case, see *ibid.* In the cases below, the CAAF then relied on *Mangahas* to set aside respondents' rape convictions.

1.* United States *v.* Briggs*, No. 19-108

a. In May 2005, respondent Briggs was a captain and F-16 instructor pilot in the Air Force. *Briggs* Pet. App. 2a. "Following an evening of heavy drinking," Briggs "went to [the] room" of DK, a junior member of

his squadron, and "forced her to have sex with him even though she said 'no' and 'stop' and tried to roll away." *Ibid.* "DK did not immediately report the incident to law enforcement authorities, but she did tell others about it." *Ibid.*

Eight years later, DK obtained proof, sufficient to enable prosecution, that Briggs had raped her. In July 2013, DK called Briggs and, "[w]ithout [his] knowledge, * * * recorded their conversation." *Briggs* Pet. App. 2a. In that conversation, Briggs "acknowledged his misconduct." *Ibid.* Specifically, Briggs told DK, "I will always be sorry for raping you." *Ibid.*

b. In 2014, Briggs was charged with one count of rape, in violation of 10 U.S.C. 920(a) (2000). See *Briggs* Pet. App. 2a-3a. At his court-martial, Briggs was found guilty of rape and sentenced to "a dismissal, confinement for five months, and a reprimand." *Id.* at 3a. On appeal to the AFCCA, Briggs argued that his 2005 rape was subject to the UCMJ's default five-year statute of limitations, which would have expired before he was charged in 2014. *Ibid.* The AFCCA declined to consider that argument because Briggs had failed to raise the argument at trial, and it affirmed his conviction. *Ibid.*

Briggs then sought review in the CAAF. He alleged ineffective assistance of counsel based on his counsel's failure to assert a statute-of-limitations defense at trial, and he also challenged the judicial composition of the AFCCA. *Briggs* Pet. App. 3a-4a. The CAAF denied review with respect to the limitations issue and summarily affirmed as to the AFCCA's judicial composition. *Id.* at 4a; see 76 M.J. 36; 76 M.J. 338. In July 2017, Briggs and numerous other service members filed a petition for a writ of certiorari seeking review of CAAF decisions up-

holding the composition of intermediate military appellate courts. *Abdirahman* v. *United States*, 138 S. Ct. 2702 (2018) (No. 17-243).

c. While that petition was pending, the CAAF decided *Mangahas*. Briggs subsequently filed a supplemental brief in this Court requesting that, if the Court declined to grant review on the AFCCA composition question, it nevertheless grant his petition, vacate the CAAF's judgment, and remand so that the CAAF could consider the effect of *Mangahas* on his case. Pet. Supp. Br. at 1-2, *Abdirahman*, *supra* (No. 17-243). After upholding the composition of the AFCCA in *Ortiz* v. *United States*, 138 S. Ct. 2165 (2018), this Court ultimately granted Briggs's request to remand his case to the CAAF to address the limitations issue. 139 S. Ct. 38.

On remand, the CAAF ordered dismissal of the rape charge against Briggs on statute-of-limitations grounds. *Briggs* Pet. App. 1a-15a. The CAAF stated that, under its decision in *Mangahas*, the UCMJ at the time of respondent's 2005 offense "established a five-year period of limitations," which had expired before the 2014 prosecution. *Id.* at 7a. The CAAF also concluded that the 2006 NDAA's directive that rape may be prosecuted without a limitations period did not apply to Briggs's crime. *Id.* at 7a-12a. In the court's view, even though the 2006 NDAA was consistent with the CAAF's own interpretation of the UCMJ's limitations provision at the time of Briggs's crime (and at the time of his court-martial), applying it to Briggs's case would constitute an improper retroactive application of the law. *Ibid.*

2.* United States *v.* Collins*, No. 19-184

a. In August 2000, respondent Collins was a course instructor at Sheppard Air Force Base (AFB) in Texas. *Collins/Daniels* Pet. App. 4a. HA, a fellow Air Force service member, was a student in the course. *Ibid.* One evening, HA encountered Collins while she was "eating dinner alone at a club on base." *Ibid.* Collins "appeared to be intoxicated." *Ibid.* HA suggested that he "take a taxi or shuttle home," but he would not do so. *Ibid.* HA then drove Collins "to his on-base residence," and helped him "out of the vehicle and to his front door due to his apparently impaired condition." *Ibid.* "[O]nce inside," Collins "suddenly pushed HA against the wall and then threw her onto the floor." *Ibid.* "HA initially resisted," but Collins "struck her in the face." *Ibid.* Collins "then raped HA." *Ibid.* HA suffered multiple injuries, including "a black eye," *ibid.*, "scratches on her face and knuckles," *ibid.*, and "trauma" to her vaginal area, C.A. App. 626-627.

Three days after the assault, HA "reluctantly admitted to a female instructor that she had been raped." *Collins/Daniels* Pet. App. 4a. "As a result, HA was transported to a hospital where she underwent a sexual assault forensic exam," and both the Air Force and civilian police initiated investigations. *Ibid.* At the time, HA feared that Collins would "flunk [her] or * * * kill [her]" if she told anyone about the attack. C.A. App. 440. She accordingly told investigators that "she was assaulted by an unknown" man "in an off-base store parking lot." *Collins/Daniels* Pet. App. 4a. When security-camera footage failed to corroborate her account, HA admitted that she had "made it up because she did not want to identify the attacker." *Ibid.* She added that she

"knew who the assailant was," but she "refused to identify" him. *Id.* at 5a.

b. In April 2011, "HA made a restricted sexual assault report to an Air Force mental health provider, stating that she had previously been physically and sexually assaulted by an instructor but 'did not want to be involved.'" *Collins/Daniels* Pet. App. 5a. The provider "referred HA to a Sexual Assault Response Coordinator, to whom HA also made a restricted report that she had been sexually assaulted by an active duty Air Force member at Sheppard AFB, but she did not identify the assailant." *Ibid.*

In March 2014, "HA made an unrestricted report to the Chief of Military Justice at Sheppard AFB, this time identifying [Collins] as having raped her at Sheppard AFB in 2000." *Collins/Daniels* Pet. App. 5a. The Air Force then reopened its investigation. *Ibid.* Among other details of the attack, HA told investigators that, during the rape, she was "fixated" on a family portrait hanging on the wall above the couch in the front room of Collins's home. C.A. App. 380; see *id.* at 437-439. HA described the portrait in detail. *Id.* at 541-542, 677-678. She also provided Air Force investigators with sketches of the portrait and the room. *Id.* at 868-869.

Based on that information, Air Force investigators obtained permission to search Collins's home at Eglin AFB in Florida. C.A. App. 700-701, 865-867. There, in a storage closet, they found a family portrait that matched HA's description. *Id.* at 701-706, 836, 887. When investigators showed the portrait to HA, "she placed her hands over her mouth," "wip[ed] tears away from her eyes," and "stated [that] this photo was in [the] house" the night she was raped. *Id.* at 706. During the

search, Air Force investigators also discovered a separate photograph taken in the front room of the house at Sheppard AFB where Collins lived in 2000. *Id.* at 837, 888. That photograph showed the same family portrait, hanging on the wall above the couch, just as HA had described. *Id.* at 888-891. Air Force authorities charged Collins with one count of rape, in violation of 10 U.S.C. 920(a) (1994). *Collins/Daniels* Pet. App. 5a.

c. At his 2016 court-martial, Collins "pleaded not guilty" and contested the rape charge. *Collins/Daniels* Pet. App. 5a-6a. He did not, however, "object or move to dismiss the charge and specification on the grounds that they were barred by the statute of limitations in effect at the time of the alleged offense." *Id.* at 6a. Collins was found guilty of the rape charge and sentenced to "a dishonorable discharge, confinement for 198 months, forfeiture of all pay and allowances, and [a] reduction" in grade. *Id.* at 3a.

Collins appealed to the AFCCA on various grounds. While the appeal was pending, the CAAF decided *Mangahas*. The AFCCA applied *Mangahas* to Collins's case and reversed his conviction. *Collins/Daniels* Pet. App. 2a-18a. The court reasoned that, under *Mangahas*, the 2000 rape for which Collins was convicted was subject to a five-year limitations period, which expired before the Air Force charged him in 2016. *Id.* at 6a-9a. The court then noted that, applying *Mangahas*, the limitations period had expired before Congress expressly provided in 2006 that rape can be prosecuted without a limitations period, and it concluded that the 2006 NDAA accordingly could not render the prosecution timely. *Id.* at 16a-18a. Although Collins had not raised a limitations objection at trial, the

AFCCA concluded he was entitled to relief on plain-error review. *Id.* at 9a-14a. The court did not address any of Collins's other challenges to his conviction. See *id.* at 3a.

d. The Air Force JAG certified the limitations issue to the CAAF for appellate review. See *Collins/Daniels* Pet. App. 1a. While the appeal was pending, the CAAF decided *Briggs*, 78 M.J. 289. The CAAF then summarily affirmed the AFCCA's decision in Collins's case. *Collins/Daniels* Pet. App. 1a.

3. **United States *v.* Daniels*, No. 19-184***

a. In July 1998, respondent Daniels was stationed at Minot AFB in North Dakota. He met TS, a civilian, at the gym, and they exchanged phone numbers. R. 841-843. Late in the evening of July 14, 1998, Daniels called TS at home, where she lived with her two-year-old son. R. 843-844. Daniels asked to come over to TS's home, and TS reluctantly agreed. *Ibid.* After the two talked for some time, Daniels repeatedly asked to stay the night at TS's home. R. 847. TS told him that he could not, because her son slept in her bed and she had nowhere else for Daniels to sleep. *Ibid.* Daniels, however, "wouldn't take 'no' for an answer," and TS eventually "got tired of fighting the issue." R. 847-848. The two then went to TS's bed, where her son was sleeping. R. 849. Daniels kept "trying to touch" TS, and she "kept pushing him off." R. 850. Eventually, Daniels "pushed [TS's] shorts to the side" and "entered [her] with his penis" without consent. R. 852. Daniels left the next morning and called TS later in the day as if "nothing happened." R. 854.

TS told a friend about the rape, who reported it to the local police. R. 854-855. The Air Force also opened

an investigation. *Collins/Daniels* Pet. App. 25a. TS ultimately "declined to participate in the investigation," *ibid.*, in part because the police told her that the crime "would be very hard to prove," R. 855. TS subsequently "ran away" from Minot because she "wanted this to go away." R. 856.

b. In 2015, a police detective in Fairfax County, Virginia, contacted TS about Daniels. *Collins/Daniels* Pet. App. 24a-25a. The detective was investigating Daniels for stalking a woman with whom he had previously been romantically involved. *Id.* at 24a. In the course of that investigation, the detective discovered classified information at Daniels's home, which led the detective to contact Air Force investigators. *Id.* at 25a. The Air Force investigators told the detective that Daniels had been investigated for raping TS in 1998. *Ibid.*

When the detective contacted TS, she "agreed to go forward with the * * * rape allegation." *Collins/Daniels* Pet. App. 25a. Daniels was then charged with rape, in violation of 10 U.S.C. 920(a) (1994), and numerous other violations of military law, *Collins/Daniels* Pet. App. 21a-26a. He was convicted by a court-martial in 2017, and the convening authority approved a sentence of "a dismissal, confinement for [nearly] three years, and a reprimand." *Id.* at 22a.

c. Daniels appealed to the AFCCA. *Collins/Daniels* Pet. App. 22a-23a. Before his appeal was resolved, the CAAF issued its decision in *Mangahas*. The AFCCA accordingly reversed Daniels's rape conviction, explaining that the 2017 prosecution for a 1998 rape was barred by the five-year statute of limitations in 10 U.S.C. 843(b) (1994), as interpreted by the CAAF in *Mangahas*. *Collins/Daniels* Pet. App. 26a-28a. The AFCCA affirmed some of Daniels's additional convictions, set

aside others, and remanded for resentencing. *Id.* at 40a-41a.

The Air Force JAG certified to the CAAF the AFCCA's holding that Daniels's rape charge was barred by the statute of limitations. *Collins/Daniels* Pet. App. 19a. While maintaining that *Mangahas* and the CAAF's subsequent decision in *Briggs* were "incorrectly decided," the government acknowledged that the AFCCA's decision reversing Daniels's rape conviction should be summarily affirmed if the CAAF were not willing to reconsider those recent decisions. Gov't Mot. for Summ. Disposition 1-2. The CAAF summarily affirmed the AFCCA's decision. *Collins/Daniels* Pet. App. 19a-20a.

SUMMARY OF ARGUMENT

The CAAF erred in overturning its longstanding precedent and reinterpreting the UCMJ to require that respondents' rape convictions be set aside. The CAAF's rulings are contrary to the plain language of the UCMJ, fail to appreciate the unique legal and practical implications of rape in the military context, and disregard Congress's express provision in 2006 of an unlimited statute of limitations for rape. This Court should make clear that the CAAF had it right the first time, and that the law allows the military to address the grave harms of rape in the military ranks whenever it is discovered.

1. When respondents committed their rapes, UCMJ Article 43(a) provided that an offense "punishable by death" could be "tried and punished at any time without limitation," 10 U.S.C. 843(a) (1994 & 2000). Article 120(a), in turn, provided that "rape * * * shall be punished by death or such other punishment as a court-martial may direct." 10 U.S.C. 920(a) (1994 & 2000).

The natural reading of those provisions, which is confirmed by context and history, is that Congress eliminated any time limitation on the prosecution of crimes serious enough to be classified as capital offenses, and that rape was such a crime. Those statutory classifications should be the end of the matter. Congress had no reason to provide, and did not provide, courts with veto power over the appropriate limitations period for rape in the military. When Congress enacted the statute of limitations, it understood such rape to be "punishable by death," and a judicial decision about the constitutionality of capital punishment would not logically suggest to Congress that *no* military rapist should be subject to prosecution after five years.

2. Even if Congress had taken the unprecedented step of subjugating the ability to prosecute late-discovered rapes to the development of Eighth Amendment jurisprudence, Congress was correct in its understanding that rape in the military ranks can constitutionally be classified as a capital crime. It is well established that the Constitution imposes fewer restrictions on military prosecutions than it does on civilian ones. And although the Court has never explicitly determined whether, or how, the Eighth Amendment applies to courts-martial, the same structural and practical considerations that generally counsel against judicial interference in military discipline apply with full force to the issue of punishment. The military and the political Branches are better positioned to assess the appropriate level of deterrence and retribution for military rapists, whose crimes cause not only individualized injuries to the direct victims, but also systemic harms to morale, readiness, and other important military objectives. The independent judicial judgment, and other factors, that

informed this Court's decision barring the death penalty for rape in the civilian context provide no basis for overriding the military, congressional, and presidential determinations about the appropriate punishment for rape in the military context.

3. The CAAF's reversal of Briggs's rape conviction was particularly unsound, as his prosecution was timely even if he was originally subject to the UCMJ's default five-year statute of limitations. The year after he raped DK, Congress expressly provided in the 2006 NDAA that "rape" is one of the offenses to which no statute of limitations applies. The circumstances surrounding the 2006 NDAA make plain that Congress understood it simply to codify preexisting law, as then explicated by the CAAF, under which rape could be prosecuted at any time. Even if Congress's understanding was incorrect, and it was actually extending Briggs's still-running statute of limitations, the fact remains that it would have expected—as Briggs himself would have every reason to expect—that the time for prosecuting him would not expire. In allowing Briggs nevertheless to escape prosecution for his crime, the CAAF compounded its previous statutory and constitutional errors.

ARGUMENT

Sexual assault in the military is difficult to uncover, but devastating to the morale, discipline, and effectiveness of our Armed Forces. Congress has accordingly enabled rape to be prosecuted whenever it is discovered and long made rape a capital offense. Under the version of the UCMJ in effect when respondents raped their victims, offenses "punishable by death" were not subject to any limitations period, 10 U.S.C. 843(a) (1994 & 2000), and rape could be "punished by death," 10 U.S.C.

920(a) (1994 & 2000). As the CAAF originally recognized, before its turnabout in *United States* v. *Mangahas*, 77 M.J. 220 (2018), those interlocking provisions plainly subjected military rapists like respondents to prosecution at any time. Congress did not tie the statute of limitations to the development of Eighth Amendment jurisprudence. And even if Congress had adopted such an approach, this Court's decision in *Coker* v. *Georgia*, 433 U.S. 584 (1977), does not preclude the death penalty for military rape, which is constitutional for legal and practical reasons that have no civilian analogue. The timeliness of the charges here is especially clear for Briggs, who is subject to the unlimited time period for prosecution in the 2006 NDAA. The decisions below should be reversed.

I. RESPONDENTS' RAPES WERE SUBJECT TO PROSECUTION AT ANY TIME UNDER THE UCMJ BECAUSE RAPE WAS "PUNISHABLE BY DEATH"

Respondents' rapes were not subject to a limitations period under Article 43 of the UCMJ for two independent reasons. First, Article 43's provision that offenses "punishable by death," 10 U.S.C. 843(a) (1994 & 2000), may be prosecuted without a time limit refers to offenses for which the death penalty was authorized *by statute*—as it was at the time of respondents' rapes, see 10 U.S.C. 920(a) (1994 & 2000). Second, even if Congress did intend the military's authority to prosecute rapes to turn on developments in Eighth Amendment jurisprudence, the Constitution does not preclude capital punishment for rape in the military context.

A. A Crime That Could Be "Punished By Death" Under The UCMJ Was "Punishable By Death" For Purposes Of The UCMJ's Statute Of Limitations

The resolution of this case should begin and end with the plain text of the UCMJ. See, *e.g.*, *National Ass'n of Mfrs.* v. *Department of Defense*, 138 S. Ct. 617, 631 (2018) (explaining that, where the "plain language" of a statute is "'unambiguous,'" the Court's "'inquiry begins with the statutory text, and ends there as well'") (citation omitted). At the time of respondents' offenses, the UCMJ allowed trial and punishment "at any time without limitation" for a "person charged * * * with any offense punishable by death." 10 U.S.C. 843(a) (1994 & 2000). And it specified that rape could "be punished by death." 10 U.S.C. 920(a) (1994 & 2000). In enacting those provisions, Congress necessarily understood that because rape could be "punished by death" under the UCMJ, it was "punishable by death" for statute-of-limitations purposes. The CAAF's contrary interpretation is erroneous.

1. A statute of limitations "reflects a policy judgment by the legislature that the lapse of time may render criminal acts ill suited for prosecution." *Smith* v. *United States*, 568 U.S. 106, 112 (2013). For some crimes, the legislature may conclude that evidentiary considerations or interests in repose justify a bar on prosecution after a certain "passage of time." *Toussie* v. *United States*, 397 U.S. 112, 114 (1970). For other crimes, the legislature may determine that "no statute of limitations" is justified. *Dickey* v. *Florida*, 398 U.S. 30, 47 (1970) (Brennan, J., concurring). "In general, the graver the offense, the longer the limitations period; indeed, many serious offenses, such as murder, typically

carry no limitations period." *Doggett* v. *United States*, 505 U.S. 647, 668 (1992) (Thomas, J., dissenting).

Because statutes of limitations represent an exclusively "legislative judgment," they must be given "effect in accordance with what [courts] can ascertain the legislative intent to have been." *United States* v. *Kubrick*, 444 U.S. 111, 117, 125 (1979); see, *e.g.*, *Stogner* v. *California*, 539 U.S. 607, 615 (2003) (stating that a criminal statute of limitations "reflects a legislative judgment"); *United States* v. *Marion*, 404 U.S. 307, 322 (1971) (similar). As this Court recently reiterated, "[i]t is Congress, not this Court, that balances" the interests associated with limitations periods and makes the ultimate "value judgment[]" about what length, if any, a limitations period should be. *Rotkiske* v. *Klemm*, No. 18-328, 2019 WL 6703563, at *4 (Dec. 10, 2019). In interpreting a limitations provision, this Court "simply enforce[s] the value judgments made by Congress." *Ibid.*

2. Here, Congress's plainly expressed intent was to allow for prosecution of rapes within the military at any time. At the time of respondents' rapes, Article 43(a) of the UCMJ provided that "[a] person charged * * * with any offense punishable by death, may be tried and punished at any time without limitation." 10 U.S.C. 843(a) (1994 & 2000). Article 120(a) of the UCMJ, in turn, provided that "rape * * * shall be punished by death or such other punishment as a court-martial may direct." 10 U.S.C. 920(a) (1994 & 2000). Under a straightforward reading of those provisions, respondents' rapes were not subject to a limitations period. Because no limitations period applied to an "offense punishable by death," 10 U.S.C. 843(a) (1994 & 2000), and the UCMJ provided that rape could be "punished by death,"

10 U.S.C. 920(a) (1994 & 2000), Congress's "legislative judgment" was that no limitations period applied to a military prosecution for rape, *Kubrick*, 444 U.S. at 117.

As the CAAF originally recognized, Article 43's provision that offenses "punishable by death" may be prosecuted without a time limitation was Congress's way of ensuring that "the most serious offenses" could be prosecuted at any time "without listing each one" of those offenses "in the statute." *Willenbring* v. *Neurauter*, 48 M.J. 152, 178, 180 (1998). Article 43(a) thus reflected Congress's "policy judgment," *Smith*, 568 U.S. at 112, that any offense sufficiently serious to warrant classification as a capital crime, including rape, was also sufficiently serious to warrant prosecution without a time limitation. That type of judgment is well within Congress's authority to define crimes and available defenses. See *ibid.*; *Marion*, 404 U.S. at 322; *Toussie*, 397 U.S. at 115.

3. It makes little sense to interpret the language of former Article 43 to make the timeliness of a rape charge contingent on jurisprudence about the constitutionality of capital punishment for military rape. Congress could not have intended a potential judicial application of the Eighth Amendment to preclude not only the imposition of capital punishment, but the imposition of any punishment at all, for military rapes that occurred more than five years before charges were brought. Nothing in a court's assessment of the constitutional limitations on punishment would impugn Congress's own judgment that military rape is a serious offense that military authorities should be able to prosecute at any time.

The elimination of a time limit on prosecution and the availability of capital punishment are both hallmarks of

serious crimes, but they are not otherwise logically connected. A crime can be punishable by death without being prosecutable at any time, see, *e.g.*, Ga. Code Ann. § 17-3-1(b) (2013) (providing that prosecutions for "crimes punishable by death or life imprisonment" other than murder "shall be commenced within seven years"), and vice versa, see, *e.g.*, 18 U.S.C. 3299 (permitting prosecutions "at any time without limitation" for numerous federal sex crimes not punishable by death); Ky. Rev. Stat. Ann. § 500.050(1) (LexisNexis 2014) (providing that "the prosecution of a felony is" generally "not subject to a period of limitation," regardless of whether it is punishable by death). And the same limitations period, or lack thereof, typically applies to all "criminal acts" in violation of a particular criminal prohibition, *Smith*, 568 U.S. at 112, irrespective of what punishment is sought or imposed in a particular case. Article 43(a)'s cross-reference to authorized punishment was therefore just a simple way of *identifying* the set of crimes that Congress deemed to be the most serious. It was not a signal that Congress was somehow incorporating constitutional limits on punishment into a statute of limitations.

By eliminating the statute of limitations for any crimes "punishable by death," 10 U.S.C. 843(a) (1994 & 2000), Congress avoided the need to manually maintain a running list of serious offenses (as the previous version of the UCMJ had). Instead, Congress could speak to the seriousness of particular crimes in only one place—their individual penalty provisions—and the statute of limitations would automatically remain consistent with those legislative judgments. But Congress's determination that the most serious crimes defined in the UCMJ should *both* be "punishable by death"

and "tried and punished at any time without limitation," *ibid.*, in no way suggests that it wanted to abandon the latter if a court concluded that the Constitution barred the former.

4. The circumstances surrounding Congress's enactment of the UCMJ limitations provision at issue here confirm that Congress did not make the military's ability to prosecute late-discovered rapes contingent on Eighth Amendment jurisprudence. The Senate Report accompanying the 1986 revision of Article 43 explained that, under the provision's text, "no statute of limitation would exist in prosecution of offenses for which the death penalty is a punishment *prescribed by or pursuant to the UCMJ*." Senate Report 249 (emphasis added). And as explained above, rape could be punished by death "pursuant to the UCMJ" at the time of respondents' crimes. *Ibid.*; see 10 U.S.C. 920(a) (1994 & 2000).

Indeed, the Senate Report accompanying the 1986 revision of Article 43 indicates that the provision's "punishable by death" language was copied from language that courts had uniformly construed as referring solely to the maximum penalty authorized by statute. The report explains that the 1986 amendment was designed to bring the UCMJ limitations provision "more in line with federal criminal code provisions" in "Chapter 213 of Title 18." Senate Report 249. The principal relevant federal criminal code provision in that chapter provides that "[a]n indictment for any offense punishable by death may be found at any time without limitation." 18 U.S.C. 3281. In construing that provision and parallel federal statutes, courts of appeals had consistently recognized that an offense was "punishable by death" so long as the death penalty was *statutorily* authorized for

the offense. See *Coon* v. *United States*, 411 F.2d 422, 425 (8th Cir. 1969) ("[I]n deciding which limitation is applicable [under Section 3281], we must look directly to the statute."); see also *United States* v. *Kennedy*, 618 F.2d 557, 557 (9th Cir. 1980) (per curiam) (adopting the same reading of "punishable by death" in the federal bail statute, 18 U.S.C. 3148 (1976)); cf. *United States* v. *Payne*, 591 F.3d 46, 59 (2d Cir.) (observing that federal courts of appeals continue to uniformly interpret Section 3281 in the same way today), cert. denied, 562 U.S. 950 (2010). And "when 'judicial interpretations have settled the meaning of an existing statutory provision, repetition of the same language in a new statute indicates, as a general matter, the intent to incorporate its . . . judicial interpretations as well.'" *Jerman* v. *Carlisle, McNellie, Rini, Kramer & Ulrich, L.P.A.*, 559 U.S. 573, 590 (2010) (citation omitted).

5. The CAAF's reliance on *Coker* to curtail the limitations period for military rape prosecutions, see *Mangahas*, 77 M.J. at 223-225, was misplaced. *Coker*, which held that the death penalty for rape in the civilian context is unconstitutional, 433 U.S. at 592 (plurality opinion), was decided in 1977, nearly a decade before the 1986 enactment of the limitations provision at issue here. And while Congress in 1986 repealed the federal criminal statute that had previously authorized the death penalty for rape in the civilian system, see Sexual Abuse Act of 1986, Pub. L. No. 99-654, § 3(a)(1), 100 Stat. 3663, Congress retained capital punishment for military rape long after *Coker*, see pp. 8-9, *supra*.

Congress's differential treatment of rape in the civilian and military contexts illustrates its view that even though *Coker* precludes the death penalty for the former, the latter may be "punishable by death," 10 U.S.C.

843(a) (1994 & 2000), in both a statutory and a constitutional sense. Had Congress believed that rape was not "punishable by death" as a constitutional matter, it would not have prescribed such punishment. Cf. *Rust* v. *Sullivan*, 500 U.S. 173, 191 (1991) ("assum[ing]" that Congress "legislates in the light of constitutional limitations"). Whether or not a court would ultimately agree with Congress's interpretation of the Constitution, see Part I.B., *infra*, Congress's own evident understanding that rape was "punishable by death" in every possible sense should be controlling on the statutory question here. See *Lebron* v. *National R.R. Passenger Corp.*, 513 U.S. 374, 392 (1995) (explaining that congressional labels are "dispositive * * * for purposes of matters that are within Congress's control").

B. Even If A Constitutional Analysis Were Required, The Constitution Does Not Forbid Capital Punishment For Rape In The Military Context

In any event, even if the statute of limitations for military rape does turn on the constitutionality of the death penalty for the crime, that would not change the result here. Congress did not exceed its constitutional authority when it designated rape in the military as a capital offense.

1. This Court has long recognized that many constitutional rights apply differently in the context of the military. See, *e.g.*, *Loving* v. *United States*, 517 U.S. 748, 767 (1996); *Chappell* v. *Wallace*, 462 U.S. 296, 300 (1983). When the Framers empowered Congress to "make Rules for the Government and Regulation of the land and naval Forces," U.S. Const. Art. I, § 8, Cl. 14, they thereby gave "the power to regulate the Armed Forces, like other powers related to the common defense, * * * to Congress 'without limitation.'" *Loving*,

517 U.S. at 767 (quoting *The Federalist No. 23*, at 147 (Alexander Hamilton) (Jacob E. Cooke ed., 1961)); see *ibid.* ("The circumstances that endanger the safety of nations are infinite, and for this reason no constitutional shackles can wisely be imposed on the power to which the care of it is committed.") (quoting *The Federalist No. 23*, at 147 (Alexander Hamilton) (Jacob E. Cooke ed., 1961)). Although "[t]he later-added Bill of Rights limited this power to some degree," it "did not alter the allocation to Congress of the 'primary responsibility for the delicate task of balancing the rights of servicemen against the needs of the military.'" *Ibid.* (quoting *Solorio* v. *United States*, 483 U.S. 435, at 447 (1987)).

The Court has therefore repeatedly emphasized that "judicial deference is at its apogee when legislative action under the congressional authority to raise and support armies and make rules and regulations for their governance is challenged." *Solorio*, 483 U.S. at 447 (brackets, citations, and ellipsis omitted). The Court has never explicitly determined whether—and, if so, how—the Eighth Amendment might apply to courts-martial. See *Kennedy* v. *Louisiana*, 554 U.S. 945, 947-948 (2008) (statement of Kennedy, J., respecting the denial of rehearing) (reserving the question); *Loving*, 517 U.S. at 755 (same, and declining to view *Trop* v. *Dulles*, 356 U.S. 86 (1958), as dispositive of that issue); *Schick* v. *Reed*, 419 U.S. 256, 260 (1974) (same). But "'perhaps in no other area has the Court accorded Congress greater deference'" than in its "plenary" authority to determine "regulations, procedures, *and remedies* related to military discipline." *Chappell*, 462 U.S. at 301 (emphasis added; citation omitted).

The structural and practical considerations that generally counsel judicial hesitation in the context of military discipline apply with full force to Congress's identification of appropriate punishments for violations of the military code. The Court has consistently recognized the "need for special regulations in relation to military discipline" that make distinctive "demands on [military] personnel 'without counterpart in civilian life.'" *Chappell*, 462 U.S. at 300 (citation omitted). The Court has accordingly resolved constitutional challenges to military disciplinary regulations with a focus on the "very significant differences between military law and civilian law and between the military community and the civilian community." *Parker* v. *Levy*, 417 U.S. 733, 752 (1974); see, *e.g.*, *Chappell*, 462 U.S. at 300-305; *Brown* v. *Glines*, 444 U.S. 348, 360 (1980); *Greer* v. *Spock*, 424 U.S. 828, 840 (1976); *Burns* v. *Wilson*, 346 U.S. 137, 140 (1953) (plurality opinion).

The Court has taken a similar approach even to procedural questions that do not directly affect primary conduct. In particular, the Court has explained that it will enforce procedures adopted by Congress for military prosecutions unless the "factors militating in favor" of broader due-process protections "are so extraordinarily weighty as to overcome the balance struck by Congress." *Middendorf* v. *Henry*, 425 U.S. 25, 44 (1976). And the Court has accordingly upheld Congress's judgments that courts-martial should not require petit juries, *Kahn* v. *Anderson*, 255 U.S. 1, 8-9 (1921), that summary courts-martial can be held without counsel, *Middendorf*, 425 U.S. at 44, and that military judges need not have fixed terms of office, see *Weiss* v. *United States*, 510 U.S. 163, 177-178 (1994). It would be anomalous to accord any less deference to

Congress's determinations of the appropriate punishment for crimes by military personnel.

2. The particular punishment for military rape reflects over a century and a half of military practice, over half a century of express congressional authorization in the UCMJ, and the independent judgment of multiple Presidents. See pp. 7, *supra* (historical roots); *id.* at 8 (codification in the UCMJ and adoption in MCM); *id.* at 9 (express authorization by President Bush). No sound basis exists for a court to conclude that the Constitution forbids it. See *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U.S. 579, 637 (1952) (Jackson, J., concurring in the judgment and opinion of the Court) (explaining that an action "by the President pursuant to an Act of Congress would be supported by the strongest of presumptions and the widest latitude of judicial interpretation").

The judgment that military rape should be a capital offense reflects the distinctive harms to military discipline, recruitment, morale, combat readiness, and coalition-building that are caused by rape in the military ranks. Rape in any context is an egregious and destructive crime. And rape by a member of the military—to whom the country entrusts both the practice and the symbolism of national security—creates a unique set of harms that goes even beyond those of rape by a civilian. As explained above, see pp. 5-7, *supra*, "the costs and consequences" of sexual assault "for mission accomplishments are unbearable." *DoD FY 2009 Annual Report* 5. It undermines "morale, good order and discipline and the unit cohesion and combat effectiveness of military personnel and units." *UCMJ Sex Crimes Report* 2-3. It can threaten relations with important allies and "subvert[] strategic goodwill." *DoD FY 2009 Annual Report* 16. And it erodes public confidence in the

military and impedes continued recruitment and development. *Mattis Memo*.

In addition, some military punishments must be imposed in wartime conditions unlike anything that might arise in the civilian sphere. See, *e.g.*, *Curry* v. *Secretary of the Army*, 595 F.2d 873, 878 (D.C. Cir. 1979) ("[T]he administration of justice on the battlefield involves consideration of factors far removed from day-to-day civilian life."). In a "combat environment," for example, a sanction of "confinement, even of a prolonged nature, may be an inadequate deterrent" for crimes like rape. MCM App. 21, at A21-66 (1984 ed.). And even in cases that do not involve combat, "conduct in combat inevitably reflects the training that precedes combat; for that reason, centuries of experience have developed a hierarchical structure of discipline and obedience to command, unique in its application to the military establishment and wholly different from civilian patterns." *Chappell*, 462 U.S. at 300.

3. The "very significant differences" between the civilian and military communities, *Parker*, 417 U.S. at 752, counsel strongly against importing *Coker*'s ban on the death penalty for civilian rape to bar the classification of military rape as a capital crime. The military-specific factors that informed the 150-year history of that classification are far outside the realm of the harms considered by this Court in determining proportional punishments for civilian rape. Cf. *Kennedy* v. *Louisiana*, 554 U.S. 407, 437, reh'g denied, 554 U.S. 945 (2008) (explaining, in addressing constitutional challenge to death penalty for child rape, that "[o]ur concern here is limited to crimes against individual persons," and that "[w]e do not address * * * offenses against the State").

In civilian Eighth Amendment cases, this Court has emphasized "that in the end our own judgment will be brought to bear on the question of the acceptability of the death penalty under the Eighth Amendment." *Coker*, 433 U.S. at 597 (plurality opinion). In military cases, in contrast, the Court has found it "difficult to conceive of an area of governmental activity in which the courts have less competence" than the "complex, subtle, and professional decisions as to the composition, training, equipping, and control of a military force," *Chappell*, 462 U.S. at 302 (citation omitted). Because "courts are ill-equipped to determine the impact upon discipline that any particular intrusion upon military authority might have," *id.* at 305 (quoting Earl Warren, *The Bill of Rights and the Military*, 37 N.Y.U. L. Rev. 181, 187 (1962)), they would be ill-advised to substitute their own "judgment" for the political Branches' considered judgment of the appropriate maximum punishment for rape by a member of the military.

Other factors on which the plurality in *Coker* relied to bar the death penalty for civilian rape would likewise be inapposite here. See *Coker*, 433 U.S. at 593-600 (plurality opinion); see also *id.* at 600 (Brennan, J., concurring in the judgment) (taking view that death penalty is always unconstitutional); *id.* at 600-601 (Marshall, J., concurring in the judgment) (same). No meaningful "guidance in history and from the objective evidence of the country's present judgment," *id.* at 593 (plurality opinion), suggests the unconstitutionality of capital punishment for military rape. To the contrary, at the time of respondents' crimes, the American military had authorized the death penalty for rape "since at least 1863." *Kennedy* v. *Louisiana*, 554 U.S. at 946 (state-

ment of Kennedy, J., respecting the denial of rehearing). Nor does the *Coker* plurality's view that "for the rape victim, life may not be nearly so happy as it was, but it is not over and normally is not beyond repair," 433 U.S. at 598, undermine the gravity of the "injur[ies] to the person and to the public," *ibid.*, caused by rape in the military.

Military rape is not the same as civilian rape. The *Coker* plurality's view of the limited retributive and deterrent interests of individual victims of civilian rape does not apply to victims of military rape, whose injuries may have been exacerbated by, among other things, pressures to keep silent, or continued close-quarters exposure to the rapist. See pp. 6-7, *supra*. And even if the plurality's assessment of the limited harm to rape victims did apply, the systemic harms to the military fabric as a whole in themselves change the nature of the offense. Accordingly, even if the *Coker* plurality's analytical framework could be imported wholesale into the military context, it would counsel the same result as this Court's military-discipline cases do—namely, respect for the long-time judgment of the military and the political Branches that military rape should be a capital offense.

4. Although the CAAF's own conclusion that military rape cannot be a capital offense was premised on its belief that *Coker* was controlling, see *Mangahas*, 77 M.J. at 223 & n.3, respondents' defense of the CAAF's decision has relied largely on Article 55 of the UCMJ, 10 U.S.C. 855. See *Briggs* Br. in Opp. 13-14; *Collins* Br. in Opp. 5-6; *Daniels* Br. in Opp. 17. Respondents' reliance on that provision, which prohibits "[p]un-

ishment by flogging, or by branding, marking, or tattooing on the body, or any other cruel or unusual punishment," 10 U.S.C. 855, is misplaced.

It is implausible that Article 55 of the UCMJ would forbid a punishment that Article 120 of the UCMJ specifically authorized. When Congress enacted Article 55 as part of the UCMJ in 1950, 64 Stat. 126, it also enacted Article 120, which provided that rape may be "punished by death," 64 Stat. 140. And it subsequently maintained that punishment through multiple other amendments to Article 120, notwithstanding the presence of Article 55. See, *e.g.*, 1956 Codification, 70A Stat. 73 (Art. 120); National Defense Authorization Act for Fiscal Year 1993, Pub. L. No. 102-484, Div. A, Tit. X, § 1066(c), 106 Stat. 2506; National Defense Authorization Act for Fiscal Year 1996, Pub. L. No. 104-106, Div. A, Tit. XI, § 1113, 110 Stat. 462. In the UCMJ, as in any other context, statutory provisions should be read, if possible, to form a coherent whole—not to nullify one another. See, *e.g.*, *United States* v. *Fausto*, 484 U.S. 439, 453 (1988). Article 55's bar on "cruel or unusual punishment" thus cannot reasonably be understood to implicitly invalidate Article 120's more specific authorization of the death penalty for military rape. 10 U.S.C. 855; see *NLRB* v. *SW Gen., Inc.*, 137 S. Ct. 929, 941 (2017) ("It is a commonplace of statutory construction that the specific governs the general.") (brackets and citation omitted).

Congress appears to have enacted Article 55 on the understanding that the Eighth Amendment does not, by its own force, apply directly to the military justice system. Cf. *Uniform Code of Military Justice: Hearings Before a Subcom. of the Senate Comm. on Armed Services*, 81st Cong., 1st Sess. 112 (1949) (Statement of Senator McCarran) (describing Article 55 as "relating

to cruel and unusual punishments (on the basis, apparently, that the [E]ighth [A]mendment is inapplicable)"). And in interpreting Article 55's bar on "cruel or unusual punishment," the military courts have "s[ought] guidance from Supreme Court precedent," while recognizing that "since in many ways the military community is unique, there may be circumstances under which the rules governing capital punishment of servicemembers will differ from those applicable to civilians." *United States* v. *Matthews*, 16 M.J. 354, 368 (C.M.A. 1983) (citation omitted). Article 55 does not and cannot require courts to reflexively treat *Coker* as precluding capital punishment for rape in the military context, or to erroneously treat the military and civilian contexts as identical.

Such an interpretation would be contrary to the basic purpose of a Uniform Code of *Military* Justice, with different crimes and punishments than exist in civilian life. See, *e.g.*, *Parker*, 417 U.S. at 749 ("In civilian life there is no legal sanction—civil or criminal—for failure to behave as an officer and a gentleman; in the military world, Art. 133 imposes such a sanction on a commissioned officer."). To whatever extent Article 55 may limit punishments in the military context, it does not suggest that the expressly prescribed punishment for military rape was in fact unlawful. And it has no bearing on the ultimate question here—whether Congress viewed rape as one of the "punishable by death" offenses for which it lifted the five-year statute of limitations.

II. BRIGGS'S RAPE CHARGE WAS ALSO TIMELY UNDER THE 2006 NDAA

Even if respondents were correct that military rape was not "punishable by death" for purposes of the pre-

2006 statute of limitations, the 2006 NDAA would provide an independent basis for reinstating Briggs's conviction for the rape he committed in 2005. By its plain terms, the 2006 amendment provides that "rape * * * may be tried and punished at any time without limitation." 10 U.S.C. 843(a). The CAAF identified no constitutional impediment to the application of that amendment to Briggs, as to whom even the default five-year statute of limitations would not yet have expired at the time the amendment was enacted. See 10 U.S.C. 843(b) (2000); *Stogner*, 539 U.S. at 616-618 (treating extension of unexpired statute of limitations as constitutionally permissible). The CAAF instead invoked the "presumption against retroactive legislation" to conclude that Congress would not have intended an unlimited time period for prosecuting defendants like Briggs. *Briggs* Pet. App. 8a. That conclusion was unsound.

A. As a threshold matter, the "presumption against retroactive legislation" is inapplicable in this circumstance. That presumption is based on the principle "that individuals should have an opportunity to know what the law is and to conform their conduct accordingly"—*i.e.*, that "settled expectations should not be lightly disrupted." *Landgraf* v. *USI Film Prods.*, 511 U.S. 244, 265 (1994); see *Martin* v. *Hadix*, 527 U.S. 343, 358 (1999) (recognizing that retroactivity analysis "should be informed and guided by 'familiar considerations of fair notice, reasonable reliance, and settled expectations'") (citation omitted). Accordingly, the presumption applies only when the new statute "would have a retroactive consequence in the disfavored sense," *Fernandez-Vargas* v. *Gonzales*, 548 U.S. 30, 37 (2006). That is not the case here.

The 2006 NDAA had no "impermissibly retroactive effect" on Briggs. *Fernandez-Vargas*, 548 U.S. at 38. When Briggs raped DK, he had clear notice that, under Article 43(a) and the CAAF's then-binding decision in *Willenbring*, the UCMJ imposed no time limit on prosecutions for rape. See 48 M.J. at 178. Thus, when he committed his crime, Briggs had "an opportunity to know what the law is and to conform [his] conduct accordingly." *Landgraf*, 511 U.S. at 265. Even if *Willenbring*'s reading of the pre-2006 statute was wrong, the application of a lifetime statute of limitations in the 2006 NDAA should not have surprised Briggs; it was instead exactly what he would have expected. Cf. *Judulang* v. *Holder*, 565 U.S. 42, 63 n.12 (2011) (finding that Board of Immigration Appeals' (BIA) decision had no "impermissibly retroactive" effect on alien petitioner, where BIA's prior practice was not consistently more favorable to similarly situated aliens and therefore could not have encouraged reliance).

The only change to Briggs's settled expectations came from the CAAF's 2018 decision in *Mangahas*, which occurred 13 years after Briggs's rape of DK, four years after Briggs was charged with rape, and three years after Briggs was convicted of rape. Indeed, as the CAAF recognized, had he raised a statute of limitations defense before or at trial, it "most likely would have been futile because precedents in effect at the time of trial held that there was no period of limitations for the offense of rape." *Briggs*, Pet. App. 13a.

B. In any event, the presumption against retroactivity would be controlling only if Congress had neither "'expressly prescribed the statute's proper reach'" nor allowed a court "to draw a comparably firm conclusion

about the temporal reach specifically intended by applying '[its] normal rules of construction.'" *Fernandez-Vargas*, 548 U.S. at 37 (citations omitted); see *id.* at 40 (explaining that the presumption against retroactivity is not "a tool for interpreting the statute" in the first instance); *Landgraf*, 511 U.S. at 280 (explaining that when Congress has "prescribed the statute's proper reach," then "there is no need to resort to judicial default rules"). Here, the "'normal rules of construction'" make clear that the "temporal reach specifically intended" by Congress was for a military rape committed in 2005 to be prosecutable at any time. *Fernandez-Vargas*, 548 U.S. at 37 (citation omitted).

Before enacting the 2006 NDAA, Congress commissioned a report from the Department of Defense, which had reviewed military law "with the objective of determining what changes are required to improve the ability of the military justice system to address issues relating to sexual assault and to conform" military law "more closely to other Federal laws and regulations that address such issues." Ronald W. Reagan National Defense Authorization Act for Fiscal Year 2005, Pub. L. No. 108-375, Div. A, Tit. V, § 571(a), 118 Stat. 1920. The Defense Department's report recommended (among other things) that Congress "clarif[y] that the holding of [*Willenbring*] is still good law" and emphasized that the "military statute of limitations for rape of an adult female should continue to be unlimited." *UCMJ Sex Crimes Report* 285. The Conference Report accompanying the 2006 NDAA accordingly explained that the amended limitations provision would "clarify" that rape is "an offense with an unlimited statute of limitations." Conference Report 703; see House Report 332 (same).

The language that Congress enacted—specifying that "rape * * * may be tried and punished at any time without limitation," 10 U.S.C. 843(a)—can thus be understood only as a codification of *Willenbring*. See, *e.g.*, *Midlantic Nat'l Bank* v. *New Jersey Dep't of Envtl. Prot.*, 474 U.S. 494, 501 (1986) ("The normal rule of statutory construction is that if Congress intends for legislation to change the interpretation of a judicially created concept, it makes that intent specific."). Because Congress was revising Article 120 to remove the express reference to the death penalty for rape, it would have perceived a need to correspondingly update the statute of limitations in order to maintain *Willenbring's* unlimited statute of limitations for rape. And it enacted language naturally suited to providing such confirmation.

The CAAF rejected that interpretation of the 2006 NDAA on the ground that 2006 NDAA altered the "status quo" in *other* respects—namely, by eliminating the statute of limitations for unpremeditated murder. *Briggs* Pet. App. 11a & n.6. But the textual and contextual evidence is clear that, as to rape, Congress believed that it was simply preserving preexisting law and—critically—that no time limit should be imposed on prosecuting pre-2006 rapes like the one Briggs committed. Even if Congress's understanding about preexisting law was incorrect, its evident expectation that defendants like Briggs would be subject to prosecution at any time for their rapes would control the result here.

CONCLUSION

The judgments of the court of appeals should be reversed.

Respectfully submitted.

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APPENDIX

1. 10 U.S.C. 843(a) and (b) (1994) provides:

Art. 43. Statute of limitations

(a) A person charged with absence without leave or missing movement in time of war, or with any offense punishable by death, may be tried and punished at any time without limitation.

(b)(1) Except as otherwise provided in this section (article), a person charged with an offense is not liable to be tried by court-martial if the offense was committed more than five years before the receipt of sworn charges and specifications by an officer exercising summary court-martial jurisdiction over the command.

(2) A person charged with an offense is not liable to be punished under section 815 of this title (article 15) if the offense was committed more than two years before the imposition of punishment.

2. 10 U.S.C. 843(a) and (b) (2000) provides:

Art. 43. Statute of limitations

(a) A person charged with absence without leave or missing movement in time of war, or with any offense punishable by death, may be tried and punished at any time without limitation.

(b)(1) Except as otherwise provided in this section (article), a person charged with an offense is not liable to be tried by court-martial if the offense was committed more than five years before the receipt of sworn charges and specifications by an officer exercising summary court-martial jurisdiction over the command.

(2) A person charged with an offense is not liable to be punished under section 815 of this title (article 15) if the offense was committed more than two years before the imposition of punishment.

3. 10 U.S.C. 843(a) and (b) provides:

Art. 43. Statute of limitations

(a) NO LIMITATION FOR CERTAIN OFFENSES.—A person charged with absence without leave or missing movement in time of war, with murder, rape or sexual assault, or rape or sexual assault of a child, or with any other offense punishable by death, may be tried and punished at any time without limitation.

(b)(1) FIVE-YEAR LIMITATION FOR TRIAL BY COURT-MARTIAL.—Except as otherwise provided in this section (article), a person charged with an offense is not liable to be tried by court-martial if the offense was committed more than five years before the receipt of sworn charges and specifications by an officer exercising summary court-martial jurisdiction over the command.

(2)(A) A person charged with having committed a child abuse offense against a child is liable to be tried by court-martial if the sworn charges and specifications are received during the life of the child or within ten years after the date on which the offense was committed, whichever provides a longer period, by an officer exercising summary court-martial jurisdiction with respect to that person.

(B) In subparagraph (A), the term "child abuse offense" means an act that involves abuse of a person who

has not attained the age of 16 years and constitutes any of the following offenses:

(i) Any offense in violation of section 920, 920a, 920b, 920c, or 930 of this title (article 120, 120a, 120b, 120c, or 130), unless the offense is covered by subsection (a).

(ii) Maiming in violation of section 928a of this title (article 128a).

(iii) Aggravated assault, assault consummated by a battery, or assault with intent to commit specified offenses in violation of section 928 of this title (article 128).

(iv) Kidnapping in violation of section 925 of this title (article 125).

(C) In subparagraph (A), the term "child abuse offense" includes an act that involves abuse of a person who has not attained the age of 18 years and would constitute an offense under chapter 110 or 117 of title 18 or under section 1591 of that title.

(3) A person charged with an offense is not liable to be punished under section 815 of this title (article 15) if the offense was committed more than two years before the imposition of punishment.

4. 10 U.S.C. 855 provides:

Art. 55. Cruel and unusual punishments prohibited

Punishment by flogging, or by branding, marking, or tattooing on the body, or any other cruel or unusual punishment, may not be adjudged by any court-martial or inflicted upon any person subject to this chapter. The

use of irons, single or double, except for the purpose of safe custody, is prohibited.

5. 10 U.S.C. 920(a) (1994) provides:

Art. 120. Rape and carnal knowledge

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

6. 10 U.S.C. 920(a) (2000) provides:

Art. 120. Rape and carnal knowledge

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

7. 10 U.S.C. 920(a) provides:

Art. 120. Rape and sexual assault generally

(a) RAPE.—Any person subject to this chapter who commits a sexual act upon another person by—

(1) using unlawful force against that other person;

(2) using force causing or likely to cause death or grievous bodily harm to any person;

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

(4) first rendering that other person unconscious; or

(5) administering to that other person by force or threat of force, or without the knowledge or consent of that person, a drug, intoxicant, or other similar substance and thereby substantially impairing the ability of that other person to appraise or control conduct;

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

8. 18 U.S.C. 3281 provides:

Capital offenses

An indictment for any offense punishable by death may be found at any time without limitation.