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

REPLY BRIEF FOR THE UNITED STATES

NOEL J. FRANCISCO
Solicitor General
Counsel of Record
Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

TABLE OF CONTENTS

Page

I. Respondents' rapes were triable "at any time" because rape by a member of the military was "punishable by death" 2
   A. An offense that could "be punished by death" under the UCMJ was "punishable by death" for purposes of the UCMJ 2
   B. Military rape would also be "punishable by death" as a constitutional matter 13
II. The 2006 NDAA independently supports the timeliness of Briggs's rape prosecution 20

TABLE OF AUTHORITIES

Cases:

Atkins v. *Virginia*, 536 U.S. 304 (2002) 13
Blanton v. *City of North Las Vegas*, 489 U.S. 538 (1989) 3
Burns v. *Wilson*, 346 U.S. 137 (1953) 16
Circuit City Stores, Inc. v. *Adams*, 532 U.S. 105 (2001) 18
Coker v. *Georgia*, 433 U.S. 584 (1977) 9
Coon v. *United States*, 411 F.2d 422 (8th Cir. 1969) 8
Deal v. *United States*, 508 U.S. 129 (1993) 4
Epic Sys. Corp. v. *Lewis*, 138 S. Ct. 1612 (2018) 18
Fernandez-Vargas v. *Gonzalez*, 548 U.S. 30 (2006) 21
Fitzpatrick v. *United States*, 178 U.S. 304 (1900) 10
Kellogg Brown & Root Servs., Inc. v. *United States ex rel. Carter*, 135 S. Ct. 1970 (2015) 13
Kennedy v. *Louisiana*:
   554 U.S. 407, reh'g denied 554 U.S. 945 (2008) 12
   554 U.S. 945 (2008) 12, 15, 17
Landgraf v. *USI Film Prods.*, 511 U.S. 244 (1994) 20

Cases—Continued: Page

Loving v. *United States*, 517 U.S. 748 (1996) 7
Martin v. *Hadix*, 527 U.S. 343 (1999) 21
Merrill Lynch, Pierce, Fenner & Smith, Inc. v. *Curran*, 456 U.S. 353 (1982) 8
Microsoft Corp. v. *I4I Ltd. P'ship*, 564 U.S. 91 (2011) 11
Parker v. *Levy*, 417 U.S. 733 (1974) 16
Rotkiske v. *Klemm*, 140 S. Ct. 355 (2019) 3
Shular v. *United States*, No. 18-6662, 2020 WL 908904 (Feb. 26, 2020) 12
Smith v. *United States*, 568 U.S. 106 (2013) 2
Solorio v. *United States*, 483 U.S. 435 (1987) 15
Toussie v. *United States*, 397 U.S. 112 (1970) 5
United States v. *Bennett*, 21 C.M.R. 223 (C.M.A. 1956) 14
United States v. *Gallaher*, 624 F.3d 934 (9th Cir. 2010), cert. denied, 564 U.S. 1005 (2011) 9
United States v. *Kennedy*, 618 F.2d 557 (9th Cir. 1980) 8
United States v. *Kubrick*, 444 U.S. 111 (1979) 2
United States v. *Mangahas*, 77 M.J. 220 (C.A.A.F. 2018) 14, 21
United States v. *Matthews*, 16 M.J. 354 (C.M.A. 1983) 14
United States v. *Whittle*, 133 F.3d 919, 1998 WL 10372 (4th Cir. 1998) 9
Willenbring v. *Neurauter*, 48 M.J. 152 (C.A.A.F. 1998) 20
Yates v. *United States*, 574 U.S. 528 (2015) 18
Youngstown Sheet & Tube Co. v. *Sawyer*, 343 U.S. 579 (1952) 16

Constitution and statutes: Page

U.S. Const. Amend. VIII 4, 5, 12, 17, 19
Act of Aug. 4, 1939, ch. 419, 53 Stat. 1198 8
Act of June 25, 1948, ch. 645, 62 Stat. 827 10
National Defense Authorization Act for Fiscal Year 1993, Pub. L. No. 102-484, Div. A, Tit. X, § 1066(c), 106 Stat. 2506 17
National Defense Authorization Act for Fiscal Year 1996, Pub. L. No. 104-106, Div. A, Tit. XI, § 1113, 110 Stat. 462 17
National Defense Authorization Act for Fiscal Year 2004, Pub. L. No. 108-136, Div. A, Tit. V, Subtit. F, § 551(2), 117 Stat. 1481 11
National Defense Authorization Act for Fiscal Year 2006, Pub. L. No. 109-163, § 553(a), 119 Stat. 3264 20
Sexual Abuse Act of 1986, Pub. L. No. 99-654, § 3(a)(1), 100 Stat. 3663 17
Uniform Code of Military Justice, Act of May 5, 1950, ch. 169, 64 Stat. 107 (10 U.S.C. 801 *et seq.*):
10 U.S.C. 818 (Art. 18) 3, 4, 18
10 U.S.C. 843 (Art. 43) 6, 10, 11, 13, 20
10 U.S.C. 843(a) (1982) (Art. 43(a)) 6
10 U.S.C. 843(a) (1994) (Art. 43(a)) 1, 2, 3, 4, 6
10 U.S.C. 843(a) (2000) (Art. 43(a)) 1, 2, 3, 4, 6
10 U.S.C. 843(a) (Art. 43(a)) 5, 11
10 U.S.C. 853(c)(2) 4
10 U.S.C. 855 (Art. 55) 17, 18, 19
10 U.S.C. 886 (1994) 6
10 U.S.C. 886 18
10 U.S.C. 887 (1994) 6
10 U.S.C. 906 18
10 U.S.C. 910 18
10 U.S.C. 920 (2000) (Art. 120) 11

Statutes—Continued: Page

10 U.S.C. 920(a) (1994) (Art. 120(a)) 1, 2, 3
10 U.S.C. 920(a) (2000) (Art. 120(a)) 1, 2, 3
10 U.S.C. 920(b) (2000) (Art. 120(b)) 11
18 U.S.C. 3148 (1976) 8
18 U.S.C. 3281 ..... 4, 8, 9, 10
21 U.S.C. 841(b) 4
21 U.S.C. 849(b)(1) 4

Miscellaneous:

132 Cong. Rec. (1986):
p. 13,376 7
p. 20,295 7
Manual for Courts-Martial, United States:
1984 ed. 15
1998 ed. 3
2000 ed. 3
2005 ed. 3
2019 ed. 18
Offices of the U.S. Att'ys, U.S. Dept. of Justice, *United States Attorneys' Manual* (Mar. 1984) 8
S. Rep. No. 215, 76th Cong., 1st Sess. (1939) 10
S. Rep. No. 331, 99th Cong., 2d Sess. (1986) 7
Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* (2012) 21
Steven M. Shapiro et al., *Supreme Court Practice* (10th ed. 2013) 14
Uniform Code of Military Justice: Hearings Before a Subcomm. of the House Comm. on Armed Services, 81st Cong., 1st Sess. (1949) 19
22 Weekly Comp. of Pres. Doc. 1598 (Nov. 24, 1986) 7

In the Supreme Court of the United States

No. 19-108

UNITED STATES OF AMERICA, PETITIONER

v.

MICHAEL J.D. BRIGGS

No. 19-184

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

REPLY BRIEF FOR THE UNITED STATES

Respondents ask this Court to hold that even though Article 120(a) of the Uniform Code of Military Justice (UCMJ) specified that rape could "be punished by death," 10 U.S.C. 920(a) (1994 & 2000), rape was nevertheless not "punishable by death" for purposes of the accompanying statute of limitations in Article 43(a), 10 U.S.C. 843(a) (1994 & 2000). In doing so, they urge the Court

not only to disregard the plain meaning, context, and history of those provisions, but also to break new statutory and constitutional ground. They identify no precedent for a legislature importing judicial decisions about the Eighth Amendment as a restriction on its own prerogative to determine an appropriate statute of limitations. And they identify no precedent that deems capital punishment unconstitutional for rape in the military context, notwithstanding its explicit adoption by both the National Legislature and the Commander in Chief. The judgments below—which required novel holdings in both respects—should be reversed.

I. RESPONDENTS' RAPES WERE TRIABLE "AT ANY TIME" BECAUSE RAPE BY A MEMBER OF THE MILITARY WAS "PUNISHABLE BY DEATH"

A. An Offense That Could "Be Punished By Death" Under The UCMJ Was "Punishable By Death" For Purposes Of The UCMJ

As the government's opening brief demonstrates (Br. 24-31), respondents' rapes were "punishable by death" for purposes of the UCMJ, 10 U.S.C. 843(a) (1994 & 2000), because rape could be "punished by death" under the UCMJ, 10 U.S.C. 920(a) (1994 & 2000). That straightforward reading of the text is confirmed by both context and history. Respondents' efforts to complicate and undermine it are unsound.

1. A statute of limitations represents an exclusively "legislative judgment" that must be given "effect in accordance with what [the Court] can ascertain the legislative intent to have been." *United States* v. *Kubrick*, 444 U.S. 111, 117, 125 (1979); see *Smith* v. *United States*, 568 U.S. 106, 112 (2013) (similar for criminal statutes of limitations). In interpreting statutes of limitations, this

Court "simply enforce[s] the value judgments made by Congress." *Rotkiske* v. *Klemm*, 140 S. Ct. 355, 361 (2019). And here, the "value judgments made by Congress" were clearly expressed in the text of the UCMJ.

Congress determined that an offense serious enough to be "punishable by death" could be "tried and punished at any time without limitation" and that "rape * * * shall be punished by death or such other punishment as a court-martial may direct." 10 U.S.C. 843(a), 920(a) (1994 & 2000). Those legislative judgments fully resolve this case. See *Blanton* v. *City of North Las Vegas,* 489 U.S. 538, 541 (1989) ("The judiciary should not substitute its judgment as to seriousness for that of a legislature, which is far better equipped to perform the task.") (citation and internal quotation marks omitted).

That plain and direct application of the statutory text fully accords with respondents' own primary argument—namely, that the "ordinary meaning" of "punishable by death" is "that death may be imposed as a punishment." Resp. Br. 17 (capitalization altered; emphasis omitted). Article 18 of the UCMJ empowered courts-martial to impose capital punishment for rape, by specifying that courts-martial "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." 10 U.S.C. 818. Article 120(a) specifically authorized the penalty of death for rape, as did the President in the Manual for Courts-Martial. 10 U.S.C. 920(a) (1994 & 2000); Manual for Courts-Martial, United States (MCM) Part IV, ¶ 45.e.(1) (1998, 2000, 2005 eds.).

The text of Article 18 also refutes respondents' proposed dichotomy between the terms "authorized" and "punishable." Respondents acknowledge that the term

"authorized" does not incorporate Eighth Amendment jurisprudence, but contend that the term "punishable," by focusing on the actual imposition of a penalty, does. See Resp. Br. 18-19. Article 18, however, defines a court-martial's power to impose a penalty based on whether the penalty is "specifically authorized by this chapter," 10 U.S.C. 818, without importing any constitutional inquiries into the statute. Thus, even assuming respondents' asserted distinction might have purchase in other contexts, it has none here. If Congress did not make constitutional constraints part of the statutory inquiry for purposes of actually imposing punishment, it did not make them part of the statutory inquiry into whether a punishment may be imposed for statute-of-limitations purposes.

As this Court has recognized, "Congress sometimes uses slightly different language to convey the same message." *Deal* v. *United States*, 508 U.S. 129, 134 (1993) (citation omitted). As Article 18 and respondents' own examples (Br. 19) illustrate, Congress often uses "authorized by" or "authorized under" when cross-referencing the source of a court's own sentencing authority in a particular case. See 10 U.S.C. 853(c)(2) (sentence may include certain "punishments authorized under this chapter"); 21 U.S.C. 849(b)(1) (sentence may be "twice the maximum punishment authorized by" 21 U.S.C. 841(b) under certain circumstances). The term "punishable" does not easily fit in that context. But it does fit well in the statute-of-limitations context, where it has been used in both the civilian and military criminal codes. See 10 U.S.C. 843(a) (1994 & 2000); 18 U.S.C. 3281.

2. Tellingly, respondents identify no instance in which Congress, or any other legislature, has used the term "punishable" to implicitly incorporate judicial decisions

interpreting the Eighth Amendment. Instead, respondents have offered (Br. 21) only the general observation that Congress sometimes incorporates other areas of law into its legislation. But the insignificance of that observation is evident in respondents' own two examples. One consists of statutes that incorporate this Court's constitutional standards (*e.g.*, for obscenity) in order to avoid crossing a constitutional line. The other consists of statutes that apply state-law standards to fill gaps in federal law. Neither scenario is present here.

Respondents do not dispute the constitutionality of allowing prosecution of rape at any time. The Constitution does not require incorporating Eighth Amendment punishment jurisprudence into a statute of limitations for rape; instead such incorporation would simply impose a novel external constraint. And the UCMJ's statutes of limitations do not have any gaps that need to be filled by another body of law. To the contrary, like all statutes of limitations, they depend on self-contained determinacy, which incorporation of future judicial decisions on the Eighth Amendment would disrupt. See, *e.g.*, *Toussie* v. *United States*, 397 U.S. 112, 114 (1970) ("The purpose of a statute of limitations is to limit exposure to criminal prosecution to a certain fixed period of time."). On respondents' interpretation, rather than providing the government with certainty about when it can bring charges, and the defendant with certainty about when (if ever) he may enjoy repose despite his crime, Article 43(a) would be contingent on future judicial resolution of constitutional questions directly relevant only to death-penalty cases.

Respondents offer no sound reason why Congress would have used the term "punishable" in such a novel

and impractical way. Congress itself plainly viewed military rape as a crime that could potentially be punished by death, or it would not have made such punishment available. Nothing required Congress to take an all-or-nothing approach under which judicial disagreement with that judgment would preclude *any* punishment for *any* rapes unless prosecution was commenced within five years. Capital punishment and an unlimited charging period are correlated—both are features of serious crimes—but have no direct logical connection. See U.S. Br. 27-28. Indeed, Article 43 itself prescribed an unlimited charging period for two offenses—"absence without leave or missing movement in time of war"—that were not capital crimes. 10 U.S.C. 843(a) (1994 & 2000); see 10 U.S.C. 886, 887 (1994). A judicial conclusion that the maximum constitutional sentence for a military rapist is life without parole would not suggest that Congress intended a rapist whose crime is not discovered for six years to go entirely unpunished.

The broad applicability of the statute of limitations across all rape cases reinforces the independence of the charging period from the constitutionality of the maximum available punishment. Neither respondents nor the court below have disputed that the same statute of limitations applies to *all* defendants charged with a covered offense, whether or not the death penalty is sought—or even available. See, *e.g.*, Resp. Br. 1 (framing question as whether "'punishable by death'" includes "a criminal offense for which a death sentence can *never* be lawfully imposed") (emphasis altered); see also pp. 13-14, *infra*. They do not contend, for example, that the 1986 amendments to Article 43 reduced the previously unlimited period for all murder charges, see 10 U.S.C. 843(a) (1982), to five years in non-death-penalty cases;

that even death-penalty cases would have to be dismissed after trial on statute-of-limitations grounds if the aggravating factors for death eligibility were not sufficiently proved, see *Loving* v. *United States*, 517 U.S. 748, 755-756 (1996); or that the government was required to seek the death penalty in order to charge any late-discovered rape. And if the statute of limitations does not depend on whether the death penalty is available in the current case, then it should not logically depend on whether the death penalty would be available in some other hypothetical case.

3. As the government's opening brief details (Br. 29-31), the context of the 1986 legislation confirms that respondents' rapes could be tried at any time. The Senate Report accompanying the legislation expressly explained that "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) (emphasis added). That explanation, which is on all fours with the statutory text, could not have been any clearer.

Respondents' characterization (Br. 27) of the Senate Report as "subsequent legislative history" is misplaced. The Report was filed in July 1986, one month before the Senate voted on the bill, and about four months before the President signed it into law. See 132 Cong. Rec. 16,376 (1986) (report filed July 8, 1986); *id.* at 20,295 (Senate voted Aug. 9, 1986); 22 Weekly Comp. of Pres. Doc. 1598 (Nov. 24, 1986) (President signed Nov. 14, 1986). Respondents nevertheless assert (Br. 27) that the relevant legislative history occurred nearly a half-century earlier, in 1939, when Congress enacted the

provision now codified at 18 U.S.C. 3281, which eliminated a statute of limitations for civilian federal crimes "punishable by death." See Act of Aug. 4, 1939, ch. 419, 53 Stat. 1198. But while the 1986 legislation was modeled on Section 3281, what matters is how the 1986 Congress understood the 1939 language. See *Merrill Lynch, Pierce, Fenner & Smith, Inc.* v. *Curran*, 456 U.S. 353, 378 (1982) ("[W]e must examine Congress' perception of the law that it was shaping or reshaping."). And as the Senate Report demonstrates, the 1986 Congress understood the phrase "punishable by death" solely as a reference to statutorily authorized punishments.

The 1986 Congress's understanding matched the courts'. As the government explained in its opening brief (Br. 29-30), civilian courts of appeals had recognized that an offense was "punishable by death" so long as the death penalty was authorized under the statute that defined the crime, even if that penalty could not constitutionally be imposed. See *Coon* v. *United States*, 411 F.2d 422, 425 (8th Cir. 1969); 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)). Respondents attempt (Br. 22-23) to distinguish the relevant circuit decisions on the ground that each case involved a constitutional infirmity in statutory procedures for imposing the death penalty, rather than a constitutional prohibition on capitally punishing a particular type of crime. But the word "punishable" does not admit of such a distinction, the relevant decisions did not draw one, and the government's charging practices did not reflect one. See Offices of the U.S. Att'ys, U.S. Dep't of Justice, *United States Attorneys' Manual*, § 9-10.100

(Mar. 1984) (stating that an unrestricted limitations period under Section 3281 "remain[s] in effect in prosecutions for capital offenses with unconstitutional death penalty provisions * * * so long as Congress has not downgraded the offense to non-capital status"). Respondents provide no evidence that those charging practices were rejected by the courts.

Thus, contrary to respondents' contention (Br. 29), it appears that even the invalidation of the death penalty for civilian rape in *Coker* v. *Georgia*, 433 U.S. 584 (1977), was not understood to limit Section 3281's application to that crime, while it remained a capital offense under federal statutory law. Cf. *United States* v. *Whittle*, 133 F.3d 919, 1998 WL 10372 at *2 (4th Cir. 1998) (Tbl.) (per curiam) (concluding that a rape committed in 1982 was "punishable by death" and could therefore be prosecuted in 1996). And, again contrary to respondents' contention, Section 3281 has since 1986 been interpreted "to include a specific offense for which the death penalty had been substantively foreclosed," Resp. Br. 24 (emphasis omitted); see *United States* v. *Gallaher*, 624 F.3d 934, 939-941 (9th Cir. 2010) (applying Section 3281 to statutory capital offense notwithstanding that Indian tribe had not exercised federal statutory authority to allow death penalty for that crime), cert. denied, 564 U.S. 1005 (2011). The logic of that interpretation—that "'punishable by death' is a calibration of the seriousness of the crime as viewed by Congress, not of the punishment that could actually be imposed on the defendant in an individual case," *Gallaher*, 624 F.3d at 940-941—applies with equal force here.

4. The "[c]ontext" on which respondents' own argument relies, Br. 19 (emphasis omitted), is both anachronistic and unsupportive of their position. First, even if

the 1939 history of Section 3281's own adoption were relevant to Congress's amendment of Article 43 a half-century later, it would cut against them. The 1939 letter they cite (Br. 20) from then-Attorney General Murphy, which recommended no limitations period for "any offense for which the death penalty may be imposed," identified such offenses based on their *statutory* penalties and specifically listed rape as such an offense. See S. Rep. No. 215, 76th Cong., 1st Sess. 1 (1939).

Second, respondents err in suggesting (Br. 20, 27) that Congress would understand the phrase "offense punishable by death" to be narrower than "capital offense." As this Court explained over a century ago, to determine whether an offense is "a capital crime," the "test is not the punishment which is imposed, but that which may be imposed under the statute." *Fitzpatrick* v. *United States*, 178 U.S. 304, 307 (1900) (emphasis omitted). And since 1948, Section 3281 has been entitled "Capital offenses" and defined such offenses based on whether they are "punishable by death." 18 U.S.C. 3281 (emphasis omitted); see Act of June 25, 1948, ch. 645, 62 Stat. 827.

Finally, respondents' belated endorsement (2/20/20 Resp. Supp. Letter) of an amicus's focus on a 2003 amendment to the UCMJ's statute of limitations is mistaken. See Nat'l Ass'n Crim. Def. Lawyers (NACDL) Amicus Br. 8-10. As a threshold matter, the 2003 amendment sheds no light on Congress's meaning in 1986, particularly since the amendment was not even in force when respondents Daniels and Collins committed their rapes in 1998 and 2000. In any event, the amendment does not suggest that Congress in 2003 believed that rape was subject to a five-year statute of limitations. Amicus's multistep inferential argument ultimately rests on the

antisurplusage canon, but the surplusage they suggest would exist under their own reading of the statute as well. See *Microsoft Corp.* v. *I4I Ltd. P'ship*, 564 U.S. 91, 106 (2011) (declining to apply "the canon against superfluity" where "no interpretation * * * avoids excess language").

The 2003 amendment provided that defendants who committed certain "child abuse offense[s]" were "liable to be tried by court-martial" if charges were brought before the victim's 25th birthday. National Defense Authorization Act for Fiscal Year 2004, Pub. L. No. 108-136, Div. A., Tit. V, Subtit. F, § 551(2), 117 Stat. 1481. The term "child abuse offense" was defined as "an act that involves sexual or physical abuse of a person who has not attained the age of 16 years and constitutes any of [five listed] offenses," including "[r]ape or carnal knowledge in violation of section 920 of this title (article 120)." *Ibid.* The inclusion of Section 920 had the effect of extending the period for charging certain *non*-capital offenses covered by that section. See 10 U.S.C. 920(b) (2000). It did not suggest that the phrase "punishable by death" in Article 43 incorporated judicial decisions under the Eighth Amendment.

In amicus's view, unless Congress believed that the phrase "punishable by death" incorporated the Eighth Amendment, it would have gerrymandered child rape out of the definition of "child abuse offense," because child rape (which was encompassed in the general capital offense of rape) would already be "tri[able] * * * at any time," 10 U.S.C. 843(a). See NACDL Amicus Br. 8-10. But Congress's reasons for adopting a more intuitively inclusive definition of "child abuse offense" were necessarily independent of its construction of "punishable by death." Even if that phrase incorporated judicial

Eighth Amendment decisions, specific authority to prosecute child rape until the victim's 25th birthday (as well as "at any time") was unnecessary. Congress in 2003 would have understood child rape, particularly in the military context, to be both statutorily *and* constitutionally "punishable by death."

This Court did not decide *Kennedy* v. *Louisiana*, 554 U.S. 407, reh'g denied 554 U.S. 945, which held that child rape may not be punished by death in the civilian legal system, until 2008. As *Kennedy* itself explained, the Court's earlier decision in *Coker* about civilian adult rape "d[id] not speak to the constitutionality of the death penalty for child rape," and no evidence suggested that legislatures had "misinterpreted *Coker* to hold that the death penalty for child rape is unconstitutional" prior to *Kennedy*. *Id.* at 428-431. And Congress would have had even less basis for concluding—and evidently did not conclude—that *Coker*'s invalidation of the death penalty in a civilian context would apply to the military context. See *Kennedy* v. *Louisiana*, 554 U.S. 945, 947-948 (2008) (statement of Kennedy, J., respecting the denial of rehearing).

5. Finally, respondents urge (Br. 24) this Court to address "any ambiguity" in the statute of limitations by relying on canons in favor of lenity and repose. But no ambiguity exists that would trigger those doctrines. See *Shular* v. *United States*, No. 18-6662, 2020 WL 908904, at *8 (Feb. 26, 2020) (Kavanaugh, J., concurring) ("Under this Court's longstanding precedents, the rule of lenity applies when a court employs all of the traditional tools of statutory interpretation and, after doing so, concludes that the statute still remains grievously ambiguous, meaning that the court can make no

more than a guess as to what the statute means."); *Kellogg Brown & Root Servs., Inc.* v. *United States ex rel. Carter*, 135 S. Ct. 1970, 1978 (2015) (applying canon in favor of repose to "resolve * * * ambiguity"). The text, context, and history all show that a crime that could be "punished by death" under the UCMJ was "punishable by death" for purposes of the UCMJ.

B. Military Rape Would Also Be "Punishable By Death" As A Constitutional Matter

In any event, even assuming that the UCMJ's express prescription of "punish[ment] by death" for rape were not itself sufficient to identify rape as "punishable by death" for purposes of the UCMJ, respondents' rape prosecutions would still be timely. As the government explained in its opening brief (Br. 31-39), Congress and the President did not exceed their constitutional authority by designating military rape a capital offense. Accordingly, military rape was "punishable by death" as both a statutory and a constitutional matter.

1. As noted above (see pp. 6-7, *supra*), respondents do not dispute that an offense, including military rape, would be "punishable by death" so long as capital punishment would be constitutionally permissible for at least some defendants. They do not suggest a case-specific interpretation of Article 43 under which, for example, a long-final murder conviction might be dismissed on statute-of-limitations grounds based on post-trial proof of an intellectual disability that renders the defendant death-ineligible. See, *e.g.*, *Atkins* v. *Virginia*, 536 U.S. 304 (2002). Instead, their argument in this case, like the decision below, rests on the proposition that the phrase "'punishable by death'" excludes "offenses that can *never* be punished by death." Resp. Br. 4 (emphasis added); see, *e.g.*, *id.* at 1; *id.* at 2 (quoting

similar language from *United States* v. *Mangahas*, 77 M.J. 220, 224-225 (C.A.A.F. 2018)).

But even assuming that were the correct way to read the statutory text, respondents make little attempt to show that military rape "can never be punished by death," Resp. Br. 4, under the Constitution. Relying principally on *United States* v. *Matthews*, 16 M.J. 354 (C.M.A. 1983), respondents assert (Br. 35) that the military courts have "dismissed" the possibility that "military necessity" would justify the death penalty for "offenses such as murder and rape." But *Matthews* simply speculated in passing that *Coker* would "[p]robably" apply to military rape "at least, where there is no purpose unique to the military mission that would be served by allowing the death penalty for this offense," and stated that no such necessity existed on the facts before it. 16 M.J. at 380; see *id.* at 369. To the extent that *Matthews*—which was decided shortly before Congress authorized the government to seek certiorari review of adverse military decisions, see Steven M. Shapiro et al., *Supreme Court Practice* § 2.14, at 129 (10th ed. 2013)—might be informative here, it actually undercuts respondents' argument by acknowledging the possibility of military necessity in some cases.

Unfortunately, rape historically *has* occurred in contexts "unique to the military mission," *Matthews*, 16 M.J. at 380, that highlight the differences between civilian and military rapes and show why the Constitution does not preclude capital punishment for the latter. The only capital offense supporting the last military execution, for example, was the rape of an 11-year-old girl in occupied territory. See *United States* v. *Bennett*, 21 C.M.R. 223 (C.M.A. 1956). Respondents fail to explain why the

devastating effects that military rape can have—on discipline, morale, combat readiness, civilian support for the military, and international relations, see U.S. Br. 5-6, 34-35—could never justify capital punishment. Even if some military courts may have presumed application of *Coker* in the military context, see Resp. Br. 32-33, this Court has not. *Kennedy*, 554 U.S. at 946 (statement of Kennedy, J., respecting the denial of rehearing).

Raping a child, other local civilian, or a subordinate while deployed, for example, is not analogous to the civilian rape of an adult, and punishment of the former crime should not be subject to the same constraints as the latter. In a "combat environment" in particular, a sanction of "confinement, even of a prolonged nature, may be an inadequate deterrent" for rape, as confinement may simply spare a defendant from combat. MCM App. 21, at A21-66 (1984 ed.). More generally, the military's overriding need for order and discipline sets it apart from the civilian context. As the government's opening brief explains (Br. 35-37), the considerations on which the *Coker* plurality relied to bar the death penalty for civilian adult rape do not apply to military rape.

2. The considered determinations of Congress and the President as Commander in Chief, rather than the plurality's discussion of civilian adult rape in *Coker*, provide the proper guideposts for determining the constitutionality of capital punishment for rape in the military context. The Constitution allocates to Congress the "primary responsibility for the delicate task of balancing the rights of servicemen against the needs of the military." *Solorio* v. *United States*, 483 U.S. 435, 447 (1987)). And where the President acts "pursuant to an Act of Congress"—as multiple Presidents have done in authorizing the death penalty for military rape, see U.S.

Br. 7-9—his act is "supported by the strongest of presumptions and the widest latitude of judicial interpretation." *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U.S. 579, 637 (1952) (Jackson, J., concurring in the judgment and opinion of the Court).

Respondents assert that the traditional deference accorded to Congress and the President in military matters is unwarranted in "the specific context of military punishment." Resp. Br. 34 (emphasis omitted). But neither first principles nor this Court's decisions support such a carve-out. In rejecting a constitutional challenge to a military criminal law, for example, this Court has explained that "[f]or the reasons which differentiate military society from civilian society, * * * Congress is permitted to legislate both with greater breadth and with greater flexibility when prescribing the rules by which the former shall be governed than it is when prescribing rules for the latter." *Parker* v. *Levy*, 417 U.S. 733, 756 (1974); see, *e.g.*, *Burns* v. *Wilson*, 346 U.S. 137, 140 (1953) (plurality opinion) (stating, in reviewing military criminal conviction, that "the rights of men in the armed forces must perforce be conditioned to meet certain overriding demands of discipline and duty, and the civil courts are not the agencies which must determine the precise balance to be struck in this adjustment").

Respondents also suggest that Congress's judgment with respect to the punishment for military rape warrants deference only if Congress deliberately adopted "a different rule for courts-martial as compared to civilian courts." Resp. Br. 34 (emphasis omitted). As a threshold matter, respondents offer no reason why the constitutionality of the death penalty for military rape—which had been in place in at least some form

"since at least 1863," *Kennedy*, 554 U.S. at 946 (statement of Kennedy, J., respecting the denial of rehearing) —turns on whether Congress anticipated that *Coker* would invalidate the death penalty for civilian adult rape and sufficiently distinguished the different crimes. In any event, Congress did distinguish between the two crimes. Although Congress repealed the death penalty for civilian rape in 1986, see Sexual Abuse Act of 1986, Pub. L. No. 99-654, § 3(a)(1), 100 Stat. 3663, it repeatedly amended the military-rape statute after *Coker* without doing so, see 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.

3. In the absence of a sound basis for concluding that the Eighth Amendment overrides Congress's (and the President's) judgment on the appropriate penalties for military rape, respondents make the alternative suggestion that Congress itself implicitly overrode its own judgment by enacting Article 55 of the UCMJ. See Resp. Br. 36-40. But as the government's opening brief observes (Br. 37-39), Article 55's generalized bar on "[p]unishment by flogging, or by branding, marking, or tattooing on the body, or any other cruel or unusual punishment," 10 U.S.C. 855, cannot reasonably be interpreted to forbid a punishment that the UCMJ elsewhere expressly authorizes. Respondents' argument also rests on a misinterpretation of Article 55. That provision, which has been part of the UCMJ since its adoption in 1950, does not incorporate a proportionality principle from the Eighth Amendment, but instead prohibits certain methods of punishment that the UCMJ might otherwise have allowed.

In contrast to the civilian criminal code—which frequently specifies precise ranges of permissible imprisonment, supervised release, or fines—punishments under the UCMJ have historically been much less determinate. In particular, the authorized penalty for many crimes under the UCMJ is either partially or entirely defined to be such "punish[ment] as a court-martial may direct." See, *e.g.*, 10 U.S.C. 886 (absence without leave); 10 U.S.C. 906 (impersonation of an officer); 10 U.S.C. 910 (improper hazarding of vessel or aircraft). Article 18, in turn, gives courts-martial broad discretion as to the punishments that they may impose, subject to "such limitations as the President may prescribe." 10 U.S.C. 818. And since 1984, the President has exercised his authority to specify an exclusive list of potential punishments, which now include such punishments as reprimand, forfeiture of pay and allowances, hard labor, and confinement. See MCM, Rule for Courts-Martial 1003 (2019 ed.).

In the context of that scheme, the "work" that Article 55 does, Resp. Br. 38, is to constrain the *forms* of punishment that courts-martial may impose (or the President may prescribe) for *any* crime. It categorically prohibits the listed punishments, such as "flogging," and other forms of punishment that are "cruel or unusual." Under the *ejusdem generis* canon of construction, the catchall phrase "cruel or unusual punishment," 10 U.S.C. 855, should be "understood to '"embrace only objects similar in nature to those objects enumerated by the preceding specific words."'" *Epic Sys. Corp.* v. *Lewis*, 138 S. Ct. 1612, 1625 (2018) (quoting *Circuit City Stores, Inc.* v. *Adams*, 532 U.S. 105, 115 (2001)); see, *e.g.*, *Yates* v. *United States*, 574 U.S. 528, 545 (2015) (plurality opinion). The preceding specific words here—"flogging,"

"branding," "marking," and "tattooing on the body," 10 U.S.C. 855—are all forms of punishment. See also *ibid.* (prescribing appropriate circumstances for "use of irons"). None invites courts to second-guess the proportionality of punishments that Congress itself has explicitly prescribed, to invalidate punishments that the UCMJ elsewhere expressly authorizes, or to incorporate general Eighth Amendment jurisprudence.

As respondents' amicus points out, Article 55 was described to the Congress that enacted it as "just tak[ing] us out of the dark ages" by forbidding "branding, marking or tattooing on the body, and so forth." *Uniform Code of Military Justice: Hearings Before a Subcomm. of the House Comm. on Armed Services,* 81st Cong., 1st Sess. 1087 (1949) (statements of Robert W. Smart, Professional Staff Member, and Felix Larkin, Assistant General Counsel to the Secretary of Defense); see U.S. Army Def. Appellate Div. Amicus Br. 28. Nothing about its history suggests that, when adopting the Article in 1950, Congress meant to displace its own contemporaneous judgment about the appropriate maximum penalty for military rape—let alone to uncritically transplant Eighth Amendment decisions from the civilian context into the military one. Respondents' suggestion (Br. 39) to interpret it that way as a matter of "constitutional avoidance" is unsound. Far from avoiding constitutional questions, respondents' interpretation would invite them in a myriad of cases, like this one. And interpreting Article 55 to eliminate the constitutional deference that courts would otherwise accord to the political Branches would invalidate more federal laws, not fewer.

II. THE 2006 NDAA INDEPENDENTLY SUPPORTS THE TIMELINESS OF BRIGGS'S RAPE PROSECUTION

As the government's opening brief explains (Br. 39-43), even if respondents are correct that military rape was not "punishable by death" for purposes of the pre-2006 statute of limitations, the prosecution of respondent Briggs was timely pursuant to a 2006 amendment to Article 43(a) that expressly identified rape as having no statute of limitations. See National Defense Authorization Act for Fiscal Year 2006, Pub. L. No. 109-163, § 553(a), 119 Stat. 3264. Respondents err in arguing (Br. 40-46) that Congress in 2006 would not have intended its 2006 amendment to apply to defendants like Briggs, who committed their rapes the year before.

Like the court below, respondents rely (Br. 41-42) on the "presumption against retroactivity," faulting Congress for the absence of statutory language "expressly prescrib[ing]" the 2006 amendment's temporal scope. Resp. Br. 41 (quoting *Landgraf* v. *USI Film Prods.*, 511 U.S. 244, 272, 280 (1994)). But they identify no decision of this Court or any other that requires Congress to include such language where, as here, Congress understood its legislation as simply preserving the status quo. And it makes little sense to impose such a requirement in that circumstance, as the facts here illustrate.

Respondents cannot meaningfully dispute that when Congress enacted the 2006 amendment, the binding interpretation of Article 43 allowed military rape to be prosecuted at any time. See U.S. Br. 42; see also *Willenbring* v. *Neurauter*, 48 M.J. 152, 178, 180 (C.A.A.F. 1998). Thus, when it updated Article 43 in a manner consistent with that settled law, Congress would not have perceived any need to address the temporal scope of any change. As far as Congress was aware, it was not

making a change. On its understanding, the government was already, and would continue to be, able to prosecute a defendant like Briggs whenever his crime became provable. Congress could not have predicted that, 12 years later, the Court of Appeals for the Armed Forces would reverse course and expressly "overrule[]" its pre-2006 precedent. *Mangahas*, 77 M.J. at 222. And Congress should not be penalized for failing to include an express statement that would address retroactivity in that unforeseeable circumstance.

The "presumption against retroactivity is a guide to interpretation, not a constitutional imperative." Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 261 (2012). It relies on "familiar considerations of fair notice, reasonable reliance, and settled expectations." *Martin* v. *Hadix*, 527 U.S. 343, 358 (1999) (citation omitted). The settled expectations both before and after the 2006 legislation—of the government, of Congress, and of military personnel who had committed rapes—were that rapes by members of the military could be tried at any time. Applying the presumption against retroactivity to upset those settled expectations would be directly contrary to the underlying rationale for that presumption. Even if the presumption were deemed to apply as a purely formalistic matter, the circumstances here would show that the "temporal reach specifically intended" by Congress, *Fernandez-Vargas* v. *Gonzalez*, 548 U.S. 30, 37 (2006), was for a military rape committed in 2005 to be prosecutable at any time. See U.S. Br. 41-43. That intent should not be frustrated by viewing it through the lens of hindsight.

* * * * *

For the foregoing reasons and those stated in our opening brief, the judgments of the court of appeals should be reversed.

Respectfully submitted.

NOEL J. FRANCISCO
Solicitor General

MARCH 2020