No. 23-861

In the Supreme Court of the United States

NICK FELICIANO, PETITIONER,

v.

DEPARTMENT OF TRANSPORTATION

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE PETITIONER

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QUESTION PRESENTED

This case presents a question of critical importance to hundreds of thousands of Americans who serve their country both as federal civilian employees and members of the Armed Services' reserve components.

Congress enacted the differential pay statute, 5 U.S.C. § 5538, to eliminate the financial burden that reservists face when called to active duty at pay rates below their federal civilian salaries. To ensure that these reservists suffer no financial penalty for active-duty service, the differential pay statute requires that the government make up the difference. Federal civilian employees are entitled to differential pay when performing active duty "pursuant to a call or order to active duty under * * * a provision of law referred to in section 101(a)(13)(B) of title 10." That provision, § 101(a)(13)(B), enumerates several statutory authorities and includes a catchall provision: "any other provision of law during a war or during a national emergency declared by the President or Congress."

Recently, in a decision that departed from settled understandings of this language, the Federal Circuit held that reservists relying on § 101(a)(13)(B)'s catchall provision to claim differential pay must show that they were "directly called to serve in a contingency operation." *Adams* v. *DHS*, 3 F.4th 1375, 1379 (Fed. Cir. 2021). Under that demanding, fact-intensive standard, the Federal Circuit has rejected claims for differential pay even by reservists like petitioner whose activation orders expressly invoked a presidential emergency declaration.

The question presented is:

Whether a federal civilian employee called or ordered to active duty under a provision of law during a national emergency is entitled to differential pay even if the duty is not directly connected to the national emergency.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-6a) is unreported, but available at 2023 WL 3449138. The order of the court of appeals denying rehearing (Pet. App. 51a-52a) is unreported. The decision of the Merit Systems Protection Board (Pet. App. 7a-50a) is unreported, but available at 2021 WL 4033810.

JURISDICTION

The judgment of the court of appeals was entered on May 15, 2023. The court of appeals denied a timely petition for rehearing en banc on Oct. 27, 2023. Chief Justice Roberts extended the time to file a petition for a writ of certiorari to February 8, 2024, and the Court granted the petition on June 24, 2024. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Pertinent statutory provisions are reproduced at Add. 1a-25a.

STATEMENT

Over one million Americans serve in the U.S. Armed Services' reserve components, which includes the Army Reserve, the Navy Reserve, the Marine Corps Reserve, the Air Force Reserve, the Coast Guard Reserve, the Army National Guard, and the Air National Guard. Of those one million reservists, roughly 200,000 work for the federal government as civilian employees when not serving in their military roles. When ordered to active duty, federal employee reservists leave behind their federal civilian jobs to serve full time in their miliary roles—roles that often pay less than their civilian jobs do.

To ensure financial security for reservists who also serve their country as federal civilian employees, Congress enacted the differential pay statute, which requires the government to make up the pay difference when those servicemembers perform qualifying active-duty military service. That statute, 5 U.S.C. § 5538, provides that a federal civilian employee is entitled to differential pay when "order[ed] to perform active duty in the uniformed services pursuant to a call or order to active duty under * * * a provision of law referred to in section 101(a)(13)(B) of title 10." 5 U.S.C. § 5538(a), Add. 1a. Section 101(a)(13)(B) cross-references thirteen provisions by title, chapter, and section number, and includes a catchall provision: "any other provision of law during a war or *during* a national emergency declared by the President or Congress." 10 U.S.C. § 101(a)(13)(B), Add. 4a (emphasis added).

The question in this case is whether the catchall provision's use of the word "during" requires only a temporal overlap with a war or national emergency or instead requires some kind of unspecified "connection" to a war or national emergency. The answer is plain from the ordinary meaning of the text: only a temporal overlap is required. "The term 'during' denotes a temporal link;

that is surely the most natural reading of the word." *United States* v. *Ressam*, 553 U.S. 272, 274 (2008). That conclusion is confirmed by other traditional interpretive tools—structure, context, legislative history, and the pro-veteran canon all favor giving the word "during" its ordinary meaning in this statute. The Court should hold that "during" refers to a purely temporal overlap here and reverse the decision below.

A. Legal Background

1. For over a century, lawmakers have recognized that military reservists should not suffer a reduction in pay when performing active duty. New York first provided differential pay benefits in 1911 for public employees ordered to active duty in the National Guard or Naval Militia. See Opinion of the Attorney General, *Military Law*, Section 245, Subdivision 1, 1940 N.Y. Op. Atty. Gen. No. 214 at 1 (N.Y.A.G. 1940). Over time, New York expanded coverage to state employees who volunteered or were ordered to serve in the National Guard, Naval Militia, or the reserves of the federal Army, Navy, or Marine Corps. *Ibid.* In 1955, Michigan authorized local governments to implement differential pay programs for their employees. See Military Leaves; Reemployment Protection Act 133 of 1955, 1955 Mich. Legis. Serv. P.A. 133 (codified at Mich. Comp. Laws § 32.273a). New Jersey enacted its first differential pay statute in 1963. N.J. Stat. Ann. § 38A:4-4 (1963). Other states followed suit, and by 2004 at least half of the states covered most or all differences in pay for state employee reservists. S. Rep. No. 108-409, at 2 (2004). Many private employers have adopted similar policies. U.S. Bureau of Lab. Stat., *National Compensation Survey, Percent of Private Industry Workers with Access to Paid Military Leave* (2023), https://bit.ly/3AvHOsT (29% of private industry workers had access to paid military leave).

The federal differential pay statute's story begins after the terrorist attacks of September 11, 2001. In the years that followed, the reserve components of the Armed Services began to perform, and continue to perform, an essential role in the war on terror. By the end of 2010, nearly eight hundred thousand reservists had served in active duty to both defend the homeland and prosecute the War on Terror in operations Noble Eagle, Enduring Freedom, and New Dawn. See Kathryn Roe Coker, *The Indispensable Force: The Post-Cold War Operational Army Reserve*, 1990-2010, at 301 (2013). Where reservists were once viewed as a "force of last resort," Lawrence Kapp, et al., Cong. Rsch. Serv., RL30802, *Reserve Component Personnel Issues: Questions and Answers* 9 (2021), the Defense Department began to wield them as an "operational force such that the [reserve components] provide operational capabilities while maintaining strategic depth to meet U.S. military requirements across the full spectrum of conflict." Dep't of Def., Dir. 1200.17, *Managing the Reserve components as an Operational Force,* at 5 (Oct. 29, 2008). In guidance issued in 2002, the Undersecretary of Defense instructed the Armed Services to use volunteer reservists to the maximum extent possible. See Gov't Accountability Off., GAO-03-921, *Military Personnel: DOD Actions Needed to Improve the Efficiency of Mobilizations for Reserve Forces*, at 13 (2003).

Recognizing the need for measures that would support sustained reservist deployment, Congress took up its first differential pay bills shortly after September 11. See, *e.g.*, Reservists Pay Security Act of 2001, S. 1818, 107th Cong. (2001). The bill's sponsors made clear that it was intended to cover all federal employee reservist activations, without exception: the bill "would ensure that Federal employees who take leave to serve in our military reserves receive the same pay as if no interruption in their

employment occurred." 149 Cong. Rec. 5,764 (2003) (statement of Sen. Mikulski). When scoring the bill, the Congressional Budget Office based its calculations on the cost "to pay the difference between civilian and military salaries for *any federal employees called to active duty* in the uniformed services or National Guard." Cong. Budget Off., Cost Estimate, S. 593: Reservist Pay Security Act of 2003, at 2 (May 1, 2003) (emphasis added). And when Congress changed the bill's wording to the language it ultimately enacted, the CBO conducted its new analysis under the same assumptions. See Cong. Budget Off., Cost Estimate, S. 593: Reservist Pay Security Act of 2004, at 2-3 (Aug. 4, 2004).

As enacted, the statute requires differential pay for federal civilian employees who "perform active duty * * * pursuant to a call or order to active duty under * * * a provision of law referred to in section 101(a)(13)(B) of title 10." 5 U.S.C. § 5538(a), Add. 1a. Section 101(a)(13)(B) lists statutes that can "result[] in the call or order to, or retention on, active duty," including "section 688, 12301(a), 12302, 12304, 12304a, 12305, or 12406 of [title 10], chapter 13 of [title 10], section 3713 of title 14, or any other provision of law during a war or during a national emergency declared by the President or Congress." 10 U.S.C. § 101(a)(13)(B), Add. 4a.

In keeping with the catchall clause's broad language, the Merit Systems Protection Board consistently allowed differential pay for reservists called to active duty under any provision of law during the emergency declared following September 11, 2001, regardless of the nature of the reservists' service. See, *e.g.*, *Robinson* v. *Dep't of Veteran Affs.*, No. DC-4324-21-0219-I-1, 2021 WL 1961624 (M.S.P.B. May 12, 2021); *Del Colle* v. *DOJ*, No. SF-4324-21-0122-I-1, 2021 WL 1377041 (M.S.P.B. Apr. 8, 2021); *Santiago* v. *Dep't of Veterans Affs.*, No. DC-4324-20-0796-I-1, 2021 WL 1171023 (M.S.P.B. Mar. 22, 2021);

Colicelli v. *Dep't of Veterans Affs.*, No. DC-4324-19-0769-I-1, 2020 WL 1915737 (M.S.P.B. Apr. 14, 2020); *Woods* v. *Dep't of Veteran Affs.*, No. CH-4324-19-0031-I-1, 2019 WL 1315856 (M.S.P.B. Mar. 21, 2019); *Nicewicz* v. *Dep't of Navy*, No. DC-4324-18-0627-I-1, 2019 WL 438258 (M.S.P.B. Jan. 31, 2019); *Miller* v. *Dep't of Treasury*, No. CH-3330-16-0518-I-1, 2016 WL 6406552 (M.S.P.B. Oct. 24, 2016); *Doe* v. *Dep't of State*, No. NY-4324-15-0127-I-2, 2016 WL 5919634 (M.S.P.B. Oct. 6, 2016); *Marquiz* v. *Dep't of Def.*, No. SF-4324-15-0099-I-1, 2015 WL 1187022 (M.S.P.B. Mar. 12, 2015). As the MSPB explained in case after case, the statutory language is "straightforward" and "unambiguous." *Marquiz*, 2015 WL 1187022.

2. In *Adams* v. *Department of Homeland Security*, 3 F.4th 1375 (2021), the Federal Circuit imposed a new requirement for reservists called to active duty under § 101(a)(13)(B)'s catchall clause. The court considered it "implausible" that Congress had intended to cover "voluntary duty that was unconnected to the emergency at hand." *Adams*, 3 F.4th at 1380. To qualify for differential pay, the court held, reservists activated under provisions of law not expressly enumerated in 10 U.S.C. § 101(a)(13)(B) would be required to show that that they were "directly called to serve in a contingency operation." *Id.* at 1379.

In reaching that conclusion, the Federal Circuit principally relied on the canon of *ejusdem generis*. In its view, § 101(a)(13)(B)'s catchall must be read, like "all of the identified statutes" in the provision, to "involve a connection to the declared national emergency." *Adams*, 3 F.4th at 1380. The government has since acknowledged that the Federal Circuit's characterization that all the enumerated provisions "involve a connection to [a] declared national emergency" was a "misstatement." Gov't C.A. En Banc Br. 12 n.4. The very first provision mentioned, 10 U.S.C. § 688, Add. 7a, for example, allows

retiree activation "at any time" without any connection to a national emergency. And the fourth provision mentioned, 10 U.S.C. § 12304, Add. 12a, explicitly permits activation "other than during a war or national emergency." In its briefing of this case at the certiorari stage, the United States declined to defend the Federal Circuit's reasoning.

B. Factual and Procedural Background

1. At any time, more than a million Americans serve in the Armed Services' reserve components, including each branch's reserve components and each state's national guard. Department of Defense, *2020 Demographics Profile of the Military Community* 3 (2020). And at any moment, those reservists can be called to active duty, asked to leave behind friends, families, and civilian jobs to serve their country. When activated, those reservists leave behind not only their loved ones but also higher-paying jobs. The financial burden can be severe. In addition to reduced pay, reservists frequently incur increased expenses because of mobilization. Lawrence Kapp, et al., at 27. As a result, reservists are "more likely to have debts referred to collection, have utilities shut off, or to have two or more overdrawn checks per year" compared to other uniformed servicemembers. Kristy N. Kamarck, Cong. Rsch. Serv., R46983, *Military Families and Financial Readiness* 5 (2022).

2. Petitioner served as a civilian air traffic controller and a member of the Coast Guard Reserve. Pet. App. 9a. From 2012 to 2017, he was absent from his civilian position at the Department of Transportation to perform active-duty military service in the Coast Guard. Pet. App. 14a. After completing a period of involuntary active-duty military service under 10 U.S.C. § 12302, petitioner performed an additional fourteen months of consensual active-duty military service under 10 U.S.C. § 12301(d). Pet. App. 2a; see Pet. App. 74a-75a, C.A. App. 573, 579.

Unlike § 12302, § 12301(d) is not expressly enumerated in 10 U.S.C. § 101(a)(13)(B), the provision cross-referenced by the differential pay statute.

Petitioner's activation orders under § 12302 and § 12301(d) stated that his call-up was "in support of a DOD contingency operation." Pet. App. 74a-75a, C.A. App. 573, 579. Specifically, the § 12302 order referred to his service in support of "Operation Expeditionary SPOE [Sea Port of Embarkation]"; the order calling him to active duty under § 12301(d) noted that he was being activated "in support of * * * Operation Iraqi Freedom, Operation Enduring Freedom, etc." Pet. App. 75a, C.A. App. 573; Pet. App. 74a, C.A. App. 579. As authority for petitioner's activation, both orders invoked President Bush's September 14, 2001, executive order lifting the Armed Services' strength limitations under authority conferred by the National Emergencies Act. Pet. App. 74a-75a, C.A. App. 573, 579; see Executive Order No. 13223, 66 Fed. Reg. 48,201 (Sept. 14, 2001). Petitioner's orders further stated that the Defense Department had determined that he was exempt from length-of-service limitations under 38 U.S.C. § 4312(c)(4)(B), which applies to reservists ordered to active duty "because of a war or national emergency." Pet. App. 74a-75a, C.A. App. 573, 579.

Although the statutory authority cited in the orders calling him to active duty changed from § 12302 to § 12301(d), petitioner's duties and responsibilities remained the same. Under both his § 12301(d) and § 12302 orders, petitioner manned a Coast Guard vessel to escort other military vessels to and from safe harbor, protecting both the ships and the harbor itself. Despite the similarity of the orders and petitioner's identical duties when called to serve under each statutory provision, the Department of Transportation failed to

provide him differential pay for the portion of his service performed when he was called to serve under § 12301(d).

3. Petitioner challenged the failure to provide differential pay for his § 12301(d) service at the MSPB as a violation of the Uniformed Services Employment and Reemployment Rights Act ("USERRA"). Citing the Federal Circuit's decision in *Adams*, the MSPB denied relief. Pet. App. 34a-37a. According to the MSPB, *Adams* required a reservist seeking differential pay under the statute's catchall provision to present "evidence that he was directly involved in a contingency operation" to qualify for differential pay. Pet. App. 37a.

4. The court of appeals affirmed. Applying *Adams*, the court held that petitioner was ineligible for differential pay because "[his] service does not qualify as an active duty contingency operation." Pet. App. 4a. The court acknowledged that the orders calling petitioner to active duty under § 12301(d) expressed their purpose "to support various operations—Operation Iraqi Freedom, Operation Enduring Freedom, etc." Pet. App. 2a (quotation marks omitted). But the court nonetheless concluded that petitioner would have needed "new evidence" to demonstrate a sufficient "connection between his service and the ongoing national emergency." Pet. App. 4a-5a.

The court of appeals denied rehearing en banc. Pet. App. 51a-52a.

SUMMARY OF ARGUMENT

Congress provided that federal civilian employees in the reserves are entitled to receive their ordinary civilian pay during active-duty service so long as they are called to active duty under any "provision of law during a war or *during* a national emergency declared by the President or Congress," 10 U.S.C. § 101(a)(13)(B), Add. 4a (emphasis added). The word "during" in § 101(a)(13)(B)

unambiguously refers to a temporal overlap, rather than a substantive relationship between the reservist's service and the emergency.

I. A. The Court need look no further than the statute's plain meaning to resolve this case. The plain text of § 5538(a) of Title 5 and 10 U.S.C. § 101(a)(13)(B) together provide for differential pay whenever a federal civilian employee is called or ordered to active duty under several cross-referenced provisions or under "any other provision of law during a war or during a national emergency declared by the President or Congress." 10 U.S.C. § 101(a)(13)(B), Add. 4a. The statute does not say that the employee must have been called or ordered to active duty "in relation to" a war or national emergency, nor does it contain any language that can bear that construction. "[D]uring" requires only a temporal connection; it means "at the same time as," not "at the same time and in connection with." As this Court has held, "[t]he term 'during' denotes a temporal link; that is surely the most natural reading of the word." *Ressam*, 553 U.S. at 274.

B. That straightforward reading is reinforced by every other ordinary tool of statutory interpretation in this case. Statutory structure, context, legislative history, and the pro-veteran canon all confirm that the statute's use of "during" means only a temporal overlap.

1. The statute's structure shows that "during" carries a temporal meaning. The cross-reference to 10 U.S.C. § 101(a)(13)(B) directs an inquiry into whether a provision of law was used to make a call or order to active duty "during" a national emergency; it does not direct an inquiry into whether a particular reservist's duties were themselves "during" the emergency. Moreover, the statute contemplates that servicemembers will receive differential pay in real time, *i.e.* with each paycheck while on active duty. The government's test would frustrate

that mandate because civilian agencies will be unable to determine *ex ante* precisely what duties a reservist will perform. Additionally, the statute provides for differential pay "during a war." The Government could not credibly argue that only some federal civilian employees ordered to active duty "during a *war*" would be eligible for differential pay.

2. Context further establishes that Congress used "during" in its ordinary sense because that is how Congress has consistently used that term throughout the United States Code. When Congress has sought to require both a temporal link and a substantive relationship, it has ordinarily done so expressly. Moreover, Congress enacted the differential pay statute less than a year after this Court's decision in *Ressam*, which held squarely that when Congress uses the word "during" in a statute—even in a criminal statute—the word carries only a temporal meaning. 553 U.S. 272.

3. Legislative history further shows that Congress understood the word "during" would take its most natural reading in the statute. To ensure reservists called to active duty would suffer no financial hardship, Congress crafted the differential pay statute to sweep broadly and provide differential pay to all active-duty servicemembers. When the CBO scored the bill, it did so under the assumption that, because an emergency declaration was then in effect, the statute would cover *all* activated reservists. Were there any doubt about legislative intent, members of Congress have filed a brief in this case stating that they intended for the statute to mean precisely what it says.

4. Finally, the pro-veteran canon requires the Court to construe the differential pay statute in favor of those who serve our nation in times of crisis.

II. Adopting the government's interpretation of "during" would have disastrous consequences for all reservists.

A. The government's interpretation of "during" would obstruct access to differential pay for thousands. Limiting the availability of differential pay will inflict serious financial harm on servicemembers and their families. And the uncertainty of the government's interpretation will mean that reservists leaving their loved ones for active duty will have no idea how much their families can spend on necessities in their absence.

B. The consequences of an adverse ruling would sweep far beyond federal civilian employees and harm virtually every member of the reserve. Section 209(h) of Title 18, using language identical to that of the differential pay statute, permits private employers to offer differential pay to employee reservists whenever the federal government is required to do so. Narrowing the availability of differential pay to federal civilian employees, therefore, will likewise limit the ability of private employers to offer differential pay to the hundreds of thousands of reservists they employ. Under the government's proposed scheme, private employers would open themselves to criminal liability under 18 U.S.C. § 209(a) whenever they provide differential pay to a reservist activated under provisions of law not expressly enumerated in the statute.

ARGUMENT

Under the differential pay statute, a reservist in federal civilian service is entitled to the difference between her military and civilian pay when called to active duty "during" a declared national emergency. Any lay person reading that language would understand that eligibility turns on one fact: whether a national emergency was ongoing at the time. Nothing in the statutory text

limits its reach, as the Federal Circuit held below, to only those situations in which there is a substantive "connection between [the reservist's] service and the ongoing national emergency." Pet. App. 4a. To the contrary, the statutory text says nothing about the nature of a reservist's service *at all*.

The government defends the Federal Circuit's result (having long abandoned its reasoning) on the theory that the word "during" requires a substantive relationship—not merely a temporal one. But whether the word "during" denotes more than a temporal link is a question this Court has faced and answered before. Just over fifteen years ago, Attorney General Mukasey argued to this Court that it does not. Reading "during" to require a substantive connection, he explained, would "read in a relational element" that was "not in th[e] statute." Oral Arg. Tr. 31:21-31:23, *Ressam* v. *United States*, 553 U.S. 272 (2008) (No. 07-455). The Court agreed. See *Ressam*, 553 U.S. at 274-275. The government now seeks to deny reservists a key financial lifeline based on exactly the argument it denounced in *Ressam*.

The government of course cannot contend that its interpretation of the word "during" reflects its "most natural reading"—it does not. *Ressam*, 553 U.S. at 274. But even if "during" *could* take on the atypical meaning the government urges, nothing would favor that counterintuitive interpretation here. Not structure, which shows that case-by-case assessment of a reservist's service record would confound the statutory scheme. Not context, given Congress's consistent use of the word in other statutes. Not history, which confirms that those who enacted the statute understood it to cover all reservists during times of emergency. Not substantive canons, which break any interpretative tie in favor of servicemembers. And the government's interpretation

would have devastating consequences for reservists in the public sector and private sector alike.

At bottom, any defense of the Federal Circuit's rule rests on the mistaken view that because national emergency declarations have become common, Congress could not have meant what it said. That view is wrong. But regardless, the executive branch is not at liberty to impose a limitation on reservist pay found nowhere in the statute's text; "that is something that should be done, if [by] anybody, by Congress." Oral Arg. Tr. at 31:23–31:25, *Ressam*, *supra*.

I. RESERVISTS CALLED TO ACTIVE DUTY WHILE A NATIONAL EMERGENCY DECLARATION IS IN EFFECT ARE ENTITLED TO DIFFERENTIAL PAY

The plain meaning rule and other established interpretive tools compel the same outcome in this case: federal civilian employes called to active duty while a national emergency is ongoing are activated "during" that national emergency under the differential pay statute.

A. The Statute's Text Resolves This Case, And When The Text Is Clear, The Court's Task Is At An End

The differential pay statute's text resolves this case. Statutory interpretation begins with the text and, "[i]f the words of a statute are unambiguous, this first step of the interpretive inquiry is [the] last." *Rotkiske* v. *Klemm*, 589 U.S. 8, 13 (2019); see *Conn. Nat'l Bank* v. *Germain*, 503 U.S. 249, 253-254 (1992). The relevant statutory provisions here are clear.

Reservists in federal civilian service are entitled to differential pay if activated "pursuant to a call or order to active duty under * * * a provision of law referred to in section 101(a)(13)(B) of title 10." 5 U.S.C. § 5538(a), Add. 1a. Section 101(a)(13)(B) in turn lists several statutory activation authorities as well as "any other provision of law during a war or during a national

emergency declared by the President or Congress." Thus, while a declared national emergency is ongoing, a reservist activated under "any other provision of law" is entitled to differential pay.

The ordinary meaning of the word "during" compels that result. "The term 'during' denotes a temporal link; that is surely the most natural reading of the word." *Ressam*, 553 U.S. at 274. Indeed, this Court has held that the word's plain meaning is so readily apparent that "[t]here is no need to consult dictionary definitions." *Ibid.* Ask anyone what "during" means, and that person will say that it means "while," "at the same time as," or "for the duration of." Or, in this Court's words, "contemporaneous with." *Id.* at 275. Under the statute's plain meaning, then, a reservist called to active duty under any "other provision of law"—that is, one not expressly enumerated in the statute—qualifies for differential pay if that person is activated while a national emergency is in effect.

Dictionaries confirm that "during" means "contemporaneous with." See, *e.g.*, Black's Law Dictionary 456 (6th ed. 1990) (defining "during" as "[t]hroughout the course of; throughout the continuance of; in the time of; after the commencement and before the expiration of"); The American Heritage Dictionary of the English Language 556 (4th ed. 2006) ("[t]hroughout the course or duration of" or "[a]t some time in"); Random House Webster's Unabridged Dictionary 608 (2d ed. 2001) ("throughout the duration, continuance, or existence of" or "at some time or point in the course of"); Webster's Third New International Dictionary of the English Language 703 (1993) (when used as a preposition, "during" means "throughout the continuance or course of" or "at some point in the course of").

It would be unnatural to read "during" as requiring any sort of substantive relationship. As this Court has repeatedly held, the word "during" and the phrase "in

relation to" are separate requirements, and "during," standing alone, does not mean both. *Ressam*, 553 U.S. at 274-275; see, *e.g.*, *Muscarello* v. *United States*, 524 U.S. 125, 137 (1998) (recognizing "during" and "in relation" to as separate requirements in a statute); *Smith* v. *United States*, 508 U.S. 223, 237 (1993) (same). Indeed, the Court has expressly rejected—at the government's urging—precisely the argument the government now advances: that the word "during" "implicitly included" a "relational requirement." *Ressam*, 553 U.S. at 276; see U.S. Br. at 13-14, *Ressam*, *supra* ("The plain everyday meaning of 'during' is 'at the same time' or 'at a point in the course of.' It does not normally mean 'at the same time and in connection with.'") (quoting *United States* v. *Rosenberg*, 806 F.2d 1169, 1178-1179 (3d Cir. 1986)).

In sum, nothing in the word's ordinary meaning supports the government's position that "during" should mean anything different here than the "plain everyday meaning" the government advanced in *Ressam*. U.S. Br. at 13-14, *Ressam*, *supra*. Everyday usage and close textual parsing lead to the same sensible result: federal civilian employee reservists should suffer no financial harm for performing active duty in times of greatest need. The Court could and should stop here.

B. Every Other Traditional Tool Of Interpretation Confirms The Statute's Plain Meaning

Because the statute's text is clear, the Court need look no further. *Rotkiske*, 589 U.S. at 13-14. But statutory structure, context, history, and the pro-veteran canon confirm its plain meaning: a reservist called to active duty while a national emergency is ongoing is entitled to differential pay.

1. Statutory structure forecloses the argument that reservists must demonstrate a substantive relationship between their service and a declared national emergency. A reservist is entitled to differential pay when ordered to

perform active duty "pursuant to a call or order to active duty under * * * a provision of law referred to in section 101(a)(13)(B) of title 10." 5 U.S.C. § 5538(a), Add. 1a. Eligibility for differential pay thus turns on the provision of law authorizing a reservist's "call or order to active duty"—not an uncertain fact-intensive *post hoc* review of each reservist's individual service record. *Id.* Under this provision-by-provision inquiry, the statute covers any reservist activated under a "provision of law" referred to in § 101(a)(13)(B) including "any * * * provision of law during a war or during a national emergency." 5 U.S.C. § 5538(a), Add. 1a (first quotation); 10 U.S.C. § 101(a)(13)(B), Add. 4a (second quotation). Reading "during" to limit differential pay to emergency-related service would run directly counter to the statute's focus on the "provision of law" under which a reservist is called to active duty. And it would allow two reservists who are "call[ed] or order[ed] to active duty" under the same "provision of law," but perform different service, to receive different treatment, a result that § 5538(a) forbids.

Other provisions of the differential pay statute reinforce this conclusion. As the Court has explained, "[a] fair reading of legislation demands a fair understanding of the legislative plan." *King* v. *Burwell*, 576 U.S. 473, 498 (2015). And "[a] provision that may seem ambiguous in isolation is often clarified by the remainder of the statutory scheme * * * because only one of the permissible meanings produces a substantive effect that is compatible with the rest of the law." *United Sav. Assn. of Tex.* v. *Timbers of Inwood Forest Associates, Ltd.*, 484 U.S. 365, 371 (1988).

Here, to ensure that reservists and their families are not left in the lurch, the statute requires that differential pay "shall be payable with respect to each pay period" and "to the extent practicable, at the same time and in the

same manner as would basic pay." 5 U.S.C. § 5538(b), (c)(3), Add. 1a-2a. In other words, Congress directed civilian agencies to provide differential pay as it is earned at the same time as the reservist's basic pay, not as a lump sum long after the fact. Under the government's interpretation, which looks to the nature of a reservist's service, compliance with that statutory mandate would be all but impossible. An agency would have no way to determine, *ex ante*, whether a reservist's service will bear a sufficiently close connection to a national emergency to satisfy the government's test. And a reservist cannot possibly come forward with "evidence that he was 'directly involved' in a contingency operation," Pet. App. 3a, as the Federal Circuit requires, until after that service is well underway.

The facts of this case illustrate the unworkability of the service-focused test the government urges. Petitioner served on active duty for five years, returning home in early 2017. But despite his activation orders expressly invoking a presidential national emergency declaration, the MSPB did not adjudicate his claim for differential pay until more than *four years* later. See Pet. App. 7a. A standard that requires such searching *post hoc* review of a reservist's service record is incompatible with a statutory framework mandating that differential pay be provided "at the same time and in the same manner" as the reservist's civilian basic pay. Replacing the differential pay statute's bright-line standard with a byzantine system under which reservists have no way to know if they will receive differential pay until long after the fact would upend Congress's careful design as expressed in the statutory text.

That the statute provides for differential pay not only "during a national emergency" but also "during a war" is likewise significant. Under the presumption of consistent usage, the Court presumes "that a given term is used to

mean the same thing throughout a statute, a presumption surely at its most vigorous when a term is repeated within a given sentence." *Brown v. Gardner*, 513 U.S. 115, 118 (1994) (citation omitted). The government cannot credibly dispute that federal civilian employees ordered to active duty "during a war" would be eligible for differential pay regardless of the connection between their service and the war effort. There is no reason to believe the second use of the word "during"—in the same textual sentence and three words away—should carry any different meaning.

2. Context confirms that Congress uses "during" in its ordinary sense to mean a purely temporal overlap. That is how Congress has consistently used that term throughout the United States Code.

Other statutory provisions granting the President authority "during a national emergency" illustrate that Congress uses "during" with respect to national emergencies in its strictly temporal sense. Section 1435 of Title 50, for example, provides that "[t]his chapter shall be effective only during a national emergency declared by Congress or the President and for six months after the termination thereof or until such earlier time as Congress, by concurrent resolution, may designate." There is no way to read the word "during" in that provision as having anything other than a purely temporal meaning. The same goes for 10 U.S.C. § 8624, which provides that "[i]n time of war or during a national emergency declared by the President, such persons as the Secretary of the Navy authorizes by regulation may be transported and subsisted on naval vessels at Government expense." There is no way to read the word "during" in that provision as having anything other than a purely temporal meaning either.

Even provisions governing a reservist's active-duty service reflect that same temporal meaning. Section

20103 of Title 10, for example, allows retention of a reservist whose "period of service" expires "during a national emergency." It would make no sense to ask whether a "period of service" has expired "in connection with" or "in relation" to an emergency; here too, the word "during" can refer only to time. Nor can the government say that these provisions date from an era when national emergency declarations were less frequent. Both § 20103 and § 8624 were enacted or amended within the past five years. See National Defense Authorization Act for Fiscal Year 2024, Pub. L. No. 118-31, div. A, tit. XVII, § 1715, 137 Stat. 136; National Defense Authorization Act for Fiscal Year 2019, Pub. L. No. 115-232, div. A, tit. XVIII, § 807, 132 Stat. 1636.

The Office of Legal Counsel has also recognized that other statutory language authorizing action while a national emergency is ongoing is equivalent to authorizing action "during" that emergency—that is, that during has a purely temporal meaning. See Applicability of the National Emergencies Act to Statutes That Do Not Expressly Require the President to Declare A National Emergency, 2016 WL 10590109, at *3 (O.L.C. Aug. 24, 2016). Section 367(3) of Title 14, for example, allows retention of enlisted personnel "during a period of * * * national emergency"—language that plainly refers to a period of time. Section 331 of Title 14 similarly allows retirees to be called to active duty "[i]n time of * * * national emergency." And § 12302(a) of Title 10, which is among the activation authorities expressly enumerated in § 101(a)(13)(B), allows mobilization of Ready Reserve units "[i]n time of national emergency declared by the President." Yet, contrary to the position the government advances here, OLC determined that the language in each of these statutes was equivalent to allowing the President to act "*during* a national emergency" as that phrase is used in the National Emergencies Act. Applicability of the

National Emergencies Act to Statutes, 2016 WL 10590109, at *3 (emphasis added).

In contrast, when Congress has sought to require both a temporal relationship and a substantive relationship, it has always done so expressly. A host of federal statutes govern conduct undertaken "during and in relation to" a predicate crime.[1] Even elsewhere within the statutes governing servicemember benefits, Congress has used the phrase "during and because of" to describe leave that was both contemporaneous with and related to a reservist's active-duty service. 5 U.S.C. § 6323(b). When Congress has sought to limit authorities available "during a national emergency" to emergency-related activities, it has done that explicitly, too. See, *e.g.*, 7 U.S.C. § 4208(b) (exempting from statutory requirements acquisition of farmland that is both "during a national emergency" and "for national defense purposes"). That is, "Congress knows exactly how" to require a substantive relationship "when it wishes." *Ysleta Del Sur Pueblo* v. *Texas*, 596 U.S. 685, 704 (2022).

Ressam, decided less than a year before Congress enacted the differential pay statute, confirms the point. In *Ressam* the Court held that the word "during" in 18 U.S.C. § 844(h) requires a purely temporal link. That statute provides in relevant part that "[w]hoever * * * carries an explosive during the commission of any felony which may be prosecuted in a court of the United States" "shall, in addition to the punishment provided for such felony, be sentenced to imprisonment for 10 years." *Ressam*, 553 U.S. at 274 (quoting 18 U.S.C. § 844(h)). The Court concluded that "[t]he term 'during' denotes a

[1] *See, e.g.*, 8 U.S.C. § 1324(a)(1)(B)(iii); 18 U.S.C. § 115(b)(1)(B)(iv) (same); 18 U.S.C. § 924(c)(1)(A), (c)(5) (same); 18 U.S.C. § 929(a)(1) (same); 18 U.S.C. § 1028A(1), (2) (same); 18 U.S.C. § 1752(b)(1)(A) (same); 18 U.S.C. § 3559(c)(2)(D) (similar); 18 U.S.C. § 3559(f)(3) (same); 18 U.S.C. § 3632(d)(4)(D)(xxii) (same).

temporal link; that is surely the most natural reading of the word as used in the statute." *Id.* at 274-275. Indeed, the Court followed the text to that commonsense result, notwithstanding that construing "during" to carry a purely temporal meaning in that federal criminal statute meant that even carrying completely *lawful* explosives (like firecrackers) during the commission of a completely *unrelated* felony (like tax evasion or wire fraud) would result in a mandatory 10-year sentence. *See* Oral Arg. Tr. at 5:7-5:19, 15:9-13, *Ressam*, *supra* (Roberts, C.J., and Scalia, J., discussing the statute's breadth).

This Court has said before that its role is "'to make sense rather than nonsense out of the *corpus juris.*'" *Maslenjak* v. *United States*, 582 U.S. 335, 345 (2017) (quoting *W. Va. Univ. Hosps., Inc.* v. *Casey*, 499 U.S. 83, 101 (1991)); *see* Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 252 (2012) (similar). It would make nonsense of the *corpus juris* to read the word "during" literally where the scope of a criminal prohibition is at issue (as the Court did in *Ressam*) but do the opposite here, where adopting the same reading would deny benefits to reservists.

3. Legislative history confirms that the differential pay statute means just what it says. To be sure, "even the most formidable argument concerning the statute's purposes could not overcome" unambiguous statutory text, *Kloeckner* v. *Solis*, 568 U.S. 41, 55 n.4 (2012), because "the best evidence of Congress's intent *is* the statutory text," *Nat'l Fed'n of Indep. Bus.* v. *Sebelius*, 567 U.S. 519, 544 (2012) (emphasis added). But to the extent the government contends that the Court should embrace what it concedes is an atypical definition of "during" because Congress could not have meant otherwise, all available evidence refutes its position.

The differential pay statute was the product of bipartisan proposals dating back to 2001, and consistent

legislative history shows that Congress intended it to have broad effect. See Reservists Pay Security Act of 2001, S. 1818, 107th Cong. (2001); Reservists Pay Security Act of 2001, H.R. 3337, 107th Cong. (2001). Bill sponsor Senator Mikulski, for example, described the legislation as intended to "ensure that Federal employees who are in the military reserves and are called up for active duty in service to their country will get the same pay as they do in their civilian jobs." 147 Cong. Rec. 26,275 (2001). And the committee report for a 2004 bill with language nearly identical to the language Congress ultimately enacted described the statute's scope in sweeping terms: it would "alleviate the financial burdens created" whenever "federal employees are called to active duty and experience a reduction in pay because their military pay and allowances are less than their basic federal salary." S. Rep. No. 108-409, at 2 (2004).

In estimating the cost of this proposal (whose relevant text is the same as the enacted statute's),[2] the Congressional Budget Office based its calculations on "the total number of reservists on active duty," not solely those who personally performed emergency-related duties. Cong. Budget Off., Cost Estimate, S. 593: Reservist Pay Security Act of 2004, 2-3 (August 4, 2004); cf. *Sutton* v. *United Air Lines*, 527 U.S. 471, 484-487 (1999) (basing scope of provision on congressional estimates of number of people affected). Indeed, when estimating the cost of an identical provision in an early version of the 2004 National Defense Authorization Act, the CBO also based its estimate on "the total number of reservists on active duty." Cong. Budget Off., Cost Estimate, S. 2400: Ronald W. Reagan National Defense

[2] Compare Reservists Pay Security Act of 2004, S. 593, 108th Cong., 2d Sess. (2004) (differential pay available for active-duty service "under a provision of law referred to in section 101(a)(13)(B) of title 10"), with 5 U.S.C. § 5538(a), Add. 1a (same).

Authorization Act for Fiscal Year 2005, 9 (July 21, 2004). That is, the CBO scored the differential pay provision on the assumption that, because an emergency declaration was in effect, it would cover *all* activated reservists. Congress enacted the differential pay statute with that straightforward understanding of its meaning—and cost—in mind.

And the differential pay bill's CBO score was no outlier. In scoring other bills providing benefits for reservists who served "during a national emergency," the CBO likewise made no distinction between reservists whose service directly related to the emergency and others. The CBO's score for a bill extending retirement benefits to reservists who served for at least 90 days, for example, assumed that all "retired reservists" would qualify so long as they "were called to active duty as a reservist and served" for the required duration. Cong. Budget Off., Cost Estimate, H.R. 4986: National Defense Authorization Act for Fiscal Year 2008, 6 (Jan. 25, 2008); see 10 U.S.C. § 12731(f)(2)(B)(i) (defining covered service based on similar cross-reference to § 101(a)(13)(B)). And its score for a bill providing pre-deployment medical benefits for reservists and their families calculated cost based on the total "number of activated reserve members." Cong. Budget Off., Cost Estimate, H.R. 2647: National Defense Authorization Act for Fiscal Year 2010, 12 (June 22, 2009); see 10 U.S.C. § 1074(d)(2) (defining covered service based on similar cross-reference to § 101(a)(13)(B)). If the government's reading of "during" is correct, then the CBO has been wrong, repeatedly and consistently, *for years* without anyone on the Hill taking notice. Given the CBO's role—to inform Congress of the costs of the bills it is considering—the far more plausible explanation is that Congress understood that reservists called to active duty while a national emergency is

ongoing serve "during" that emergency, regardless of the specific duties they perform.

The considered views of those most intimately involved in the statute's drafting and enactment bolster that conclusion. Five Members of Congress—including sponsors of the ultimately enacted legislation and its earlier versions—have filed an amicus brief in this case explaining that the Federal Circuit's decision was "contrary to Congress's intent." Members of Cong. Cert. Br. 4. As they explain, "Congress did not intend to limit the application of the law by the kind of service the reservists rendered." *Id.* at 3. Instead, "[t]he relevant statutory text shows that Congress intended for the law to apply broadly to federal employees who are called up to active duty under '*any*' provision of law during a war or during a national emergency declared by the President or Congress." *Ibid.* (quoting 10 U.S.C. § 101(a)(13)(B)). The statute's drafters and proponents thus confirm what both contemporaneous legislative history and the statute's text reflect: it covers all reservists called to active duty while a national emergency declaration is in effect.

4. Even if the government's reading were a plausible one—and all other traditional tools of interpretation say otherwise—the pro-veteran canon would require giving the statute's language its most natural meaning. This Court "ha[s] long applied 'the canon that provisions for benefits to members of the Armed Services are to be construed in the beneficiaries' favor.'" *Henderson* v. *Shinseki*, 562 U.S. 428, 441 (2011) (quoting *King* v. *St. Vincent's Hosp.*, 502 U.S. 215, 220-221 n.9 (1991)). Just last term, this Court confirmed the continuing vitality of that principle, explaining that when a statute is "ambiguous, the pro-veteran canon would favor" the interpretation most solicitous of veterans' interests. *Rudisill* v. *McDonough*, 601 U.S. 294, 314 (2024).

The government's parsimonious reading of the statute hangs on what is, at best, a strained interpretation of "during" and dubious assumptions about congressional intent. Indeed, there can be no dispute that under what even the government calls the word's "most natural reading," during "denotes a temporal link" only. *Ressam*, 553 U.S. at 274. None of the arguments the government advanced below come close to justifying departure from ordinary usage here. But to the extent they create any "interpretive doubt," *Brown* v. *Gardner*, 513 U.S. 115, 118 (1994), the pro-veteran canon requires that the Court construe the differential pay statute in favor of those serving our nation during times of crisis.

II. THE GOVERNMENT'S INTERPRETATION OF THE DIFFERENTIAL PAY STATUTE IS NOT JUST WRONG, BUT HARMFUL

A. The Government's Interpretation Would Have Devastating Consequences For Reservists

The government's interpretation of "during" would obstruct access to differential pay for tens of thousands of reservists. Two of the three most common provisions of law used to activate reservists since September 11th, 2001—10 U.S.C. §§ 12301(d) and 12304b—are not expressly enumerated in § 101(a)(13)(B). See Kurt A. Rorvik, *Ready, Reliable, and Relevant: The Army Reserve Component as an Operational Reserve* 37 (2015). Tens of thousands of reservists have been activated under 12301(d) alone since 2001. *Id.* at 37-38. Because neither 12301(d) nor 12304b are expressly enumerated in § 101(a)(13)(B), if the government prevails here, all activations under these two provisions will now be subject to the government's uncertain fact-intensive *post hoc* test for differential pay.

Limiting the availability of differential pay would inflict serious financial harm on servicemembers and their families. "[T]he salary gap between military duty and

civilian work can be considerable." 149 Cong. Rec. 5764 (2003). Surveys indicate that "about half of all activated reservists experience an earnings loss while they are activated and for most of those reservists, the earnings loss is large (more than 10 percent of their earnings before activation)." Francisco Martorell, et al., RAND Nat'l Def. Rsch. Inst., *How do Earnings Change When Reservists are Activated? A Reconciliation of Estimates Derived from Survey and Administrative Data* 1 (2008). "And why is that? Because the Guard and Reserve are citizen soldiers. They work in regular life as truck drivers and architects and doctors and nurses. They might make $60-, $70-, $100-, $150,000. But when they are activated and they go to the front line, they leave their civilian paycheck at home and they pick up their Army, Navy, or Marine paycheck. And it is only $30,000 or $35,000 or $40,000. Some of these families are taking a 50-percent pay cut." 150 Cong. Rec. 128 (2004). This is on top of the increased expenses which reservists frequently incur because of mobilization such as for travel and lodging. See Lawrence Kapp, et al., at 26-27. While some reservists may be entitled to only a few hundred dollars above their military pay, *Kluge* v. *Dep't of Homeland Sec't*, No. DC-4324-20-0246-I-1 (M.S.P.B. Dec. 15, 2020) (awarding $274.37 in differential pay), that can be the difference in making rent that month, or it can pay for a weeks' worth of groceries. For other reservists, the differential might be substantial. Cong. Budget Off., S. 593, *supra* at 3 (estimating losses of "$37,000 to $50,000 annually" for some reservists). But every penny would represent income from a civilian salary that a family had come to depend on.

The government's position also inflicts an additional, hidden hardship. Its fact-intensive, retrospective analysis means that families facing deployment can only guess whether a mother's or father's service will ultimately be

deemed sufficiently connected to a national emergency to ensure against a sudden reduction in the family income. For families planning for deployment, that is no help at all. It means that families facing grocery and utility bills will simply have to make their best guess whether a parent's service will ultimately be deemed sufficiently related to a national emergency to warrant differential pay. That is not how household budgets work.

B. An Adverse Ruling Will Affect Nearly Every Reservist

Any decision by this Court will decide the availability of differential pay to virtually all reservists, not just those who are also federal civilian employees. Under federal law, private employers are permitted to provide differential pay only in circumstances where the federal government must do so. As a consequence, adopting the government's interpretation of the differential pay statute would massively restrict the availability of differential pay to nearly all reservists.

Under 18 U.S.C. § 209, which prohibits private parties from paying any portion of a federal employee's salary, reservists may not receive funds from private entities while also serving on active duty. But there is an exception in § 209(h) that provides:

> This section does not prohibit a member of the reserve components of the armed forces on *active duty pursuant to a call or order to active duty under a provision of law referred to in section 101(a)(13) of title 10* from receiving from any person that employed such member before the call or order to active duty any payment of any part of the salary or wages that such person would have paid the member if the member's employment had not been interrupted by such call or order to active duty.

18 U.S.C. § 209(h), Add. 24a-25a (emphasis added). Thousands of employers outside of the federal government offer differential pay under § 209(h)'s safe harbor to many of the around 800,000 reservists who are not employed by the federal government. A full counting of every private employer offering differential pay would be impossible, but the list includes many of our country's largest employers. *See* U.S. Bureau of Lab. Stat., *National Compensation Survey, Percent of Private Industry Workers with Access to Paid Military Leave in Establishments with 500 Workers or More* (2023), https://bit.ly/3M2DCn9 (showing in 2023, 58% of private industry workers employed by establishments with 500 workers or more had access to differential pay).

Narrowing the availability of differential pay benefits to federal employees will narrow the same to reservists employed elsewhere. The administrability problems of the government's interpretation of "during" would be greatly multiplied for private employers. Like civilian agencies, private employers will have no way of determining *ex ante* whether a reservist's service will bear sufficient relation to an emergency under the government's test. And unlike civilian agencies, private employers will face the risk of felony criminal penalties if they guess wrong. 18 U.S.C. §§ 209, 216. Requiring a crystal ball to determine the legality of differential pay on a case-by-case basis will deter employers from offering differential pay to their employees.

* * * * *

In mandating differential pay for reservists called to active duty "during" a national emergency, the differential pay statute furthers a simple goal: it ensures that those who serve our country in times of greatest need suffer no financial hardship for their service. Neither text, context, structure, history, nor the pro-veteran

canon permit the government to skirt the statute's plain meaning and deny reservists this vital lifeline.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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AUGUST 2024

STATUTORY ADDENDUM

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5 U.S.C. § 5538. Nonreduction in pay while serving in the uniformed services or National Guard

(a) An employee who is absent from a position of employment with the Federal Government in order to perform active duty in the uniformed services pursuant to a call or order to active duty under section 12304b of title 10 or a provision of law referred to in section 101(a)(13)(B) of title 10 shall be entitled, while serving on active duty, to receive, for each pay period described in subsection (b), an amount equal to the amount by which—

(1) the amount of basic pay which would otherwise have been payable to such employee for such pay period if such employee's civilian employment with the Government had not been interrupted by that service, exceeds (if at all)

(2) the amount of pay and allowances which (as determined under subsection (d))—

(A) is payable to such employee for that service; and

(B) is allocable to such pay period.

(b) Amounts under this section shall be payable with respect to each pay period (which would otherwise apply if the employee's civilian employment had not been interrupted)—

(1) during which such employee is entitled to re-employment rights under chapter 43 of title 38 with respect to the position from which such employee is absent (as referred to in subsection (a)); and

(2) for which such employee does not otherwise receive basic pay (including by taking any annual, military, or other paid leave) to which such employee

is entitled by virtue of such employee's civilian employment with the Government.

(c) Any amount payable under this section to an employee shall be paid—

(1) by such employee's employing agency;

(2) from the appropriation or fund which would be used to pay the employee if such employee were in a pay status; and

(3) to the extent practicable, at the same time and in the same manner as would basic pay if such employee's civilian employment had not been interrupted.

(d) The Office of Personnel Management shall, in consultation with Secretary of Defense, prescribe any regulations necessary to carry out the preceding provisions of this section.

(e)

(1) The head of each agency referred to in section 2302(a)(2)(C)(ii) shall, in consultation with the Office, prescribe procedures to ensure that the rights under this section apply to the employees of such agency.

(2) The Administrator of the Federal Aviation Administration shall, in consultation with the Office, prescribe procedures to ensure that the rights under this section apply to the employees of that agency.

(f) For purposes of this section—

(1) the terms "employee", "Federal Government", and "uniformed services" have the same respective meanings as given those terms in section 4303 of title 38;

(2) the term "employing agency", as used with respect to an employee entitled to any payments under this section, means the agency or other entity of the Government (including an agency referred to in section 2302(a)(2)(C)(ii)) with respect to which such employee has reemployment rights under chapter 43 of title 38; and

(3) the term "basic pay" includes any amount payable under section 5304.

10 U.S.C. § 101(a)(13). Definitions

(13) The term "contingency operation" means a military operation that—

(A) is designated by the Secretary of Defense as an operation in which members of the armed forces are or may become involved in military actions, operations, or hostilities against an enemy of the United States or against an opposing military force; or

(B) results in the call or order to, or retention on, active duty of members of the uniformed services under section 688, 12301(a), 12302, 12304, 12304a, 12305, or 12406 of this title, chapter 13 of this title, section 3713 of title 14, or any other provision of law during a war or during a national emergency declared by the President or Congress.

Title X, Ch. 13. Insurrection (10 U.S.C. §§ 251-255).

10 U.S.C. § 251. Federal aid for State governments

Whenever there is an insurrection in any State against its government, the President may, upon the request of its legislature or of its governor if the legislature cannot be convened, call into Federal service such of the militia of the other States, in the number requested by that State, and use such of the armed forces, as he considers necessary to suppress the insurrection.

* * *

10 U.S.C. § 252. Use of militia and armed forces to enforce Federal authority

Whenever the President considers that unlawful obstructions, combinations, or assemblages, or rebellion against the authority of the United States, make it impracticable to enforce the laws of the United States in any State by the ordinary course of judicial proceedings, he may call into Federal service such of the militia of any State, and use such of the armed forces, as he considers necessary to enforce those laws or to suppress the rebellion.

* * *

10 U.S.C. § 253. Interference with State and Federal law

The President, by using the militia or the armed forces, or both, or by any other means, shall take such measures as he considers necessary to suppress, in a State, any insurrection, domestic violence, unlawful combination, or conspiracy, if it—

—

(1) so hinders the execution of the laws of that State, and of the United States within the State, that any part or class of its people is deprived of a right, privilege, immunity, or protection named in the Constitution and secured by law, and the constituted authorities of that State are unable, fail, or refuse to protect that right, privilege, or immunity, or to give that protection; or

(2) opposes or obstructs the execution of the laws of the United States or impedes the course of justice under those laws.

In any situation covered by clause (1), the State shall be considered to have denied the equal protection of the laws secured by the Constitution.

* * *

10 U.S.C. § 254. Proclamation to disperse

Whenever the President considers it necessary to use the militia or the armed forces under this chapter, he shall, by proclamation, immediately order the insurgents to disperse and retire peaceably to their abodes within a limited time.

* * *

10 U.S.C. § 255. Guam and Virgin Islands included as "State"

For purposes of this chapter, the term "State" includes Guam and the Virgin Islands.

10 U.S.C. § 688. Retired members: authority to order to active duty; duties

(a) AUTHORITY.—Under regulations prescribed by the Secretary of Defense, a member described in subsection (b) may be ordered to active duty by the Secretary of the military department concerned at any time.

(b) COVERED MEMBERS.—Except as provided in subsection (d), subsection (a) applies to the following members of the armed forces:

(1) A retired member of the Regular Army, Regular Navy, Regular Air Force, or Regular Marine Corps.

(2) A member of the Retired Reserve who was retired under section 1293, 7311, 7314, 8323, 9311, or 9314 of this title.

(3) A member of the Fleet Reserve or Fleet Marine Corps Reserve.

(4) A retired member of the Space Force.

(c) DUTIES OF MEMBER ORDERED TO ACTIVE DUTY.—The Secretary concerned may, to the extent consistent with other provisions of law, assign a member ordered to active duty under this section to such duties as the Secretary considers necessary in the interests of national defense.

(d) EXCLUSION OF OFFICERS RETIRED ON SELECTIVE EARLY RETIREMENT BASIS.—The following officers may not be ordered to active duty under this section:

(1) An officer who retired under section 638 of this title.

(2) An officer who—

(A) after having been notified that the officer was to be considered for early retirement under section 638 of this title by a board convened under section 611(b) of this title and before being considered by that board, requested retirement under section 7311, 8323, or 9311 of this title; and

(B) was retired pursuant to that request.

(e) LIMITATION OF PERIOD OF RECALL SERVICE.—

(1) A member ordered to active duty under subsection (a) may not serve on active duty pursuant to orders under that subsection for more than 12 months within the 24 months following the first day of the active duty to which ordered under that subsection.

(2) Paragraph (1) does not apply to the following officers:

(A) A chaplain who is assigned to duty as a chaplain for the period of active duty to which ordered.

(B) A health care professional (as characterized by the Secretary concerned) who is assigned to duty as a health care professional for the period of active duty to which ordered.

(C) An officer assigned to duty with the American Battle Monuments Commission for the period of active duty to which ordered.

(D) An officer who is assigned to duty as a defense attaché or service attaché for the period of active duty to which ordered.

(f) Waiver for Periods of War or National Emergency.—Subsections (d) and (e) do not apply in time of war or of national emergency declared by Congress or the President.

10 U.S.C. § 12301(a). Reserve components generally

(a) In time of war or of national emergency declared by Congress, or when otherwise authorized by law, an authority designated by the Secretary concerned may, without the consent of the persons affected, order any unit, and any member not assigned to a unit organized to serve as a unit, of a reserve component under the jurisdiction of that Secretary to active duty for the duration of the war or emergency and for six months thereafter. However a member on an inactive status list or in a retired status may not be ordered to active duty under this subsection unless the Secretary concerned, with the approval of the Secretary of Defense in the case of the Secretary of a military department, determines that there are not enough qualified Reserves in an active status or in the inactive National Guard in the required category who are readily available.

10 U.S.C. § 12302. Ready Reserve

(a) In time of national emergency declared by the President after January 1, 1953, or when otherwise authorized by law, an authority designated by the Secretary concerned may, without the consent of the persons concerned, order any unit, and any member not assigned to a unit organized to serve as a unit, in the Ready Reserve under the jurisdiction of that Secretary to active duty for not more than 24 consecutive months.

(b) To achieve fair treatment as between members in the Ready Reserve who are being considered for recall to duty without their consent, consideration shall be given to—

(1) the length and nature of previous service, to assure such sharing of exposure to hazards as the national security and military requirements will reasonably allow;

(2) family responsibilities; and

(3) employment necessary to maintain the national health, safety, or interest.

The Secretary of Defense shall prescribe such policies and procedures as he considers necessary to carry out this subsection.

(c) Not more than 1,000,000 members of the Ready Reserve may be on active duty, without their consent, under this section at any one time.

10 U.S.C. § 12304. Selected Reserve and certain Individual Ready Reserve members; order to active duty other than during war or national emergency

(a) AUTHORITY.—Notwithstanding the provisions of section 12302(a) or any other provision of law, when the President determines that it is necessary to augment the active forces or that it is necessary to provide assistance referred to in subsection (b), he may authorize the Secretary of Defense and the Secretary of Homeland Security with respect to the Coast Guard when it is not operating as a service in the Navy, without the consent of the members concerned, to order any unit, and any member not assigned to a unit organized to serve as a unit of the Selected Reserve (as defined in section 10143(a) of this title), or any member in the Individual Ready Reserve mobilization category and designated as essential under regulations prescribed by the Secretary concerned, under their respective jurisdictions, to active duty for not more than 365 consecutive days.

(b) SUPPORT FOR RESPONSES TO CERTAIN EMERGENCIES.—The authority under subsection (a) includes authority to order a unit or member to active duty to provide assistance in responding to an emergency involving—

(1) a use or threatened use of a weapon of mass destruction; or

(2) a terrorist attack or threatened terrorist attack in the United States that results, or could result, in significant loss of life or property.

(c) AUTHORITY RELATING TO SIGNIFICANT CYBER INCIDENTS.—When the Secretary of Defense or the Secretary of the department in which the Coast Guard is operating determines that it is necessary to augment the

active armed forces for the response of the Department of Defense or other department under which the Coast Guard is operating, respectively, to a covered incident, such Secretary may, without the consent of the member affected, order any unit, and any member not assigned to a unit organized to serve as a unit of the Selected Reserve (as defined in section 10143(a) of this title), under the respective jurisdiction of such Secretary, to active duty for not more than 365 consecutive days.

(d) LIMITATIONS.—(1) No unit or member of a reserve component may be ordered to active duty under this section to perform any of the functions authorized by chapter 13 or section 12406 of this title or, except as provided in subsection (b) or subsection (c), to provide assistance to either the Federal Government or a State in time of a serious natural or manmade disaster, accident, or catastrophe.

(2) Not more than 200,000 members of the Selected Reserve and the Individual Ready Reserve may be on active duty under this section at any one time, of whom not more than 30,000 may be members of the Individual Ready Reserve.

(3) No unit or member of a reserve component may be ordered to active duty under this section to provide assistance referred to in subsection (b) unless the President determines that the requirements for responding to an emergency referred to in that subsection have exceeded, or will exceed, the response capabilities of local, State, and Federal civilian agencies.

(e) EXCLUSION FROM STRENGTH LIMITATIONS.—Members ordered to active duty under this section shall not be counted in computing authorized strength in

members on active duty or members in grade under this title or any other law.

(f) POLICIES AND PROCEDURES.—The Secretary of Defense and the Secretary of Homeland Security shall prescribe such policies and procedures for the armed forces under their respective jurisdictions as they consider necessary to carry out this section.

(g) NOTIFICATION OF CONGRESS.—Whenever the President authorizes the Secretary of Defense or the Secretary of Homeland Security to order any unit or member of the Selected Reserve or Individual Ready Reserve to active duty, under the authority of subsection (a) or subsection (c), he shall, within 24 hours after exercising such authority, submit to Congress a report, in writing, setting forth the circumstances necessitating the action taken under this section and describing the anticipated use of these units or members.

(h) TERMINATION OF DUTY.—

(1) Whenever any unit of the Selected Reserve or any member of the Selected Reserve not assigned to a unit organized to serve as a unit, or any member of the Individual Ready Reserve, is ordered to active duty under authority of subsection (a), the service of all units or members so ordered to active duty may be terminated by—

(A) order of the President; or

(B) law.

(2) Whenever any unit of the Selected Reserve or any member of the Selected Reserve not assigned to a unit organized to serve as a unit is ordered to active duty under authority of subsection (c), the service of

all units or members so ordered to active duty may be terminated by—

(A) order of the Secretary of Defense or, with respect to the Coast Guard, the Secretary of the Department in which the Coast Guard is operating; or

(B) law.

(i) Relationship to War Powers Resolution.—Nothing contained in this section shall be construed as amending or limiting the application of the provisions of the War Powers Resolution (50 U.S.C. 1541 et seq.).

(j) CONSIDERATIONS FOR INVOLUNTARY ORDER TO ACTIVE DUTY.—

(1) In determining which members of the Selected Reserve and Individual Ready Reserve will be ordered to duty without their consent under this section, appropriate consideration shall be given to—

(A) the length and nature of previous service, to assure such sharing of exposure to hazards as the national security and military requirements will reasonably allow;

(B) the frequency of assignments during service career;

(C) family responsibilities; and

(D) employment necessary to maintain the national health, safety, or interest.

(2) The Secretary of Defense shall prescribe such policies and procedures as the Secretary considers necessary to carry out this subsection.

(k) DEFINITIONS.—In this section:

(1) The term "covered incident" means—

(A) a cyber incident involving a Department of Defense information system, or a breach of a Department of Defense system that involves personally identifiable information, that the Secretary of Defense determines is likely to result in demonstrable harm to the national security interests, foreign relations, or the economy of the United States, or to the public confidence, civil liberties, or public health and safety of the people of the United States;

(B) a cyber incident involving a Department of Homeland Security information system, or a breach of a Department of Homeland Security system that involves personally identifiable information, that the Secretary of Homeland Security determines is likely to result in demonstrable harm to the national security interests, foreign relations, or the economy of the United States or to the public confidence, civil liberties, or public health and safety of the people of the United States;

(C) a cyber incident, or collection of related cyber incidents, that the President determines is likely to result in demonstrable harm to the national security interests, foreign relations, or economy of the United States or to the public confidence, civil liberties, or public health and safety of the people of the United States; or

(D) a significant incident declared pursuant to section 2233 of the Homeland Security Act of 2002 (6 U.S.C. 677b).

(2) The term "Individual Ready Reserve mobilization category" means, in the case of any reserve component, the category of the Individual Ready Reserve described in section 10144(b) of this title.

(3) The term "weapon of mass destruction" has the meaning given that term in section 1403 of the Defense Against Weapons of Mass Destruction Act of 1996 (50 U.S.C. 2302(1)).

10 U.S.C. § 12304a. Army Reserve, Navy Reserve, Marine Corps Reserve, and Air Force Reserve: order to active duty to provide assistance in response to a major disaster or emergency

(a) AUTHORITY.—When a Governor requests Federal assistance in responding to a major disaster or emergency (as those terms are defined in section 102 of the Robert T. Stafford Disaster Relief and Emergency Assistance Act (42 U.S.C. 5122)), the Secretary of Defense may, without the consent of the member affected, order any unit, and any member not assigned to a unit organized to serve as a unit, of the Army Reserve, Navy Reserve, Marine Corps Reserve, and Air Force Reserve to active duty for a continuous period of not more than 120 days to respond to the Governor's request.

(b) EXCLUSION FROM STRENGTH LIMITATIONS.—Members ordered to active duty under this section shall not be counted in computing authorized strength of members on active duty or members in grade under this title or any other law.

(c) TERMINATION OF DUTY.—Whenever any unit or member of the reserve components is ordered to active duty under this section, the service of all units or members so ordered to active duty may be terminated by order of the Secretary of Defense or law.

10 U.S.C. § 12305. Authority of President to suspend certain laws relating to promotion, retirement, and separation

(a) Notwithstanding any other provision of law, during any period members of a reserve component are serving on active duty pursuant to an order to active duty under authority of section 12301, 12302, or 12304 of this title, the President may suspend any provision of law relating to promotion, retirement, or separation applicable to any member of the armed forces who the President determines is essential to the national security of the United States.

(b) A suspension made under the authority of subsection (a) shall terminate (1) upon release from active duty of members of the reserve component ordered to active duty under the authority of section 12301, 12302, or 12304 of this title, as the case may be, or (2) at such time as the President determines the circumstances which required the action of ordering members of the reserve component to active duty no longer exist, whichever is earlier.

(c) Upon the termination of a suspension made under the authority of subsection (a) of a provision of law otherwise requiring the separation or retirement of officers on active duty because of age, length of service or length of service in grade, or failure of selection for promotion, the Secretary concerned shall extend by up to 90 days the otherwise required separation or retirement date of any officer covered by the suspended provision whose separation or retirement date, but for the suspension, would have been before the date of the termination of the suspension or within 90 days after the date of such termination.

10 U.S.C. § 12406. National Guard in Federal Service: call

Whenever—

(1) the United States, or any of the Commonwealths or possessions, is invaded or is in danger of invasion by a foreign nation;

(2) there is a rebellion or danger of a rebellion against the authority of the Government of the United States; or

(3) the President is unable with the regular forces to execute the laws of the United States;

the President may call into Federal service members and units of the National Guard of any State in such numbers as he considers necessary to repel the invasion, suppress the rebellion, or execute those laws. Orders for these purposes shall be issued through the governors of the States or, in the case of the District of Columbia, through the commanding general of the National Guard of the District of Columbia.

14 U.S.C. § 3713. Active duty for emergency augmentation of regular forces

(a) Notwithstanding another law, and for the emergency augmentation of the Regular Coast Guard forces during a, or to aid in prevention of an imminent, serious natural or manmade disaster, accident, catastrophe, act of terrorism (as defined in section 2 of the Homeland Security Act of 2002 (6 U.S.C. 101)), or transportation security incident as defined in section 70101 of title 46, the Secretary may, without the consent of the member affected, order to active duty of not more than 120 days in any 2-year period an organized training unit of the Coast Guard Ready Reserve, a member thereof, or a member not assigned to a unit organized to serve as a unit.

(b) Under the circumstances of the domestic emergency involved, a reasonable time shall be allowed between the date when a Reserve member ordered to active duty under this section is alerted for that duty and the date when the member is required to enter upon that duty. Unless the Secretary determines that the nature of the domestic emergency does not allow it, this period shall be at least two days.

(c) Active duty served under this section—

(1) satisfies on a day-for-day basis all or a part of the annual active duty for training requirement of section 10147 of title 10;

(2) does not satisfy any part of the active duty obligation of a member whose statutory Reserve obligation is not already terminated; and

(3) entitles a member while engaged therein, or while engaged in authorized travel to or from that duty, to all rights and benefits, including pay and

allowances and time creditable for pay and retirement purposes, to which the member would be entitled while performing other active duty.

(d) Reserve members ordered to active duty under this section shall not be counted in computing authorized strength of members on active duty or members in grade under this title or under any other law.

(e) For purposes of calculating the duration of active duty allowed pursuant to subsection (a), each period of active duty shall begin on the first day that a member reports to active duty, including for purposes of training.

18 U.S.C. § 209. Salary of Government officials and employees payable only by United States

(a) Whoever receives any salary, or any contribution to or supplementation of salary, as compensation for his services as an officer or employee of the executive branch of the United States Government, of any independent agency of the United States, or of the District of Columbia, from any source other than the Government of the United States, except as may be contributed out of the treasury of any State, county, or municipality; or

Whoever, whether an individual, partnership, association, corporation, or other organization pays, makes any contribution to, or in any way supplements, the salary of any such officer or employee under circumstances which would make its receipt a violation of this subsection—

Shall be subject to the penalties set forth in section 216 of this title.

(b) Nothing herein prevents an officer or employee of the executive branch of the United States Government, or of any independent agency of the United States, or of the District of Columbia, from continuing to participate in a bona fide pension, retirement, group life, health or accident insurance, profit-sharing, stock bonus, or other employee welfare or benefit plan maintained by a former employer.

(c) This section does not apply to a special Government employee or to an officer or employee of the Government serving without compensation, whether or not he is a special Government employee, or to any person paying, contributing to, or supplementing his salary as such.

(d) This section does not prohibit payment or acceptance of contributions, awards, or other expenses under the terms of chapter 41 of title 5.

(e) This section does not prohibit the payment of actual relocation expenses incident to participation, or the acceptance of same by a participant in an executive exchange or fellowship program in an executive agency: *Provided*, That such program has been established by statute or Executive order of the President, offers appointments not to exceed three hundred and sixty-five days, and permits no extensions in excess of ninety additional days or, in the case of participants in overseas assignments, in excess of three hundred and sixty-five days.

(f) This section does not prohibit acceptance or receipt, by any officer or employee injured during the commission of an offense described in section 351 or 1751 of this title, of contributions or payments from an organization which is described in section 501(c)(3) of the Internal Revenue Code of 1986 and which is exempt from taxation under section 501(a) of such Code.

(g)(1) This section does not prohibit an employee of a private sector organization, while assigned to an agency under chapter 37 of title 5, from continuing to receive pay and benefits from such organization in accordance with such chapter.

(2) For purposes of this subsection, the term "agency" means an agency (as defined by section 3701 of title 5) and the Office of the Chief Technology Officer of the District of Columbia.

(h) This section does not prohibit a member of the reserve components of the armed forces on active duty pursuant to a call or order to active duty under a provision

of law referred to in section 101(a)(13) of title 10 from receiving from any person that employed such member before the call or order to active duty any payment of any part of the salary or wages that such person would have paid the member if the member's employment had not been interrupted by such call or order to active duty.