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IN THE SUPREME COURT OF THE UNITED STATES

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UNITED STATES, )

Petitioner, )

v. ) No. 19-108

MICHAEL J. D. BRIGGS, )

Respondent. )

- - - - -

UNITED STATES, )

Petitioner, )

v. ) No. 19-184

RICHARD D. COLLINS, )

Respondent. )

- - - - -

Washington, D.C.

Tuesday, October 13, 2020

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 10:00 a.m.

1 APPEARANCES:

2

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4 Department of Justice, Washington, D.C.;

5 on behalf of the Petitioner.

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7 On behalf of the Respondents.

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1 P R O C E E D I N G S

2 (10:00 a.m.)

3 CHIEF JUSTICE ROBERTS: We will hear  
4 argument first this morning in Case 19-108,  
5 United States versus Briggs, and the  
6 consolidated case.

7 General Wall.

8 ORAL ARGUMENT OF JEFFREY B. WALL

9 ON BEHALF OF THE PETITIONER

10 GENERAL WALL: Mr. Chief Justice, and  
11 may it please the Court:

12 When Congress said in Article 43 of  
13 the UCMJ that an offense punishable by death may  
14 be prosecuted at any time, Congress was  
15 referring to the punishment it had provided for  
16 in the very same code.

17 Respondents say that Congress was up  
18 to something far more novel. It was importing  
19 the Eighth Amendment's proportionality standard  
20 into the otherwise simple and predictable  
21 calculation of the time for bringing a  
22 prosecution.

23 In at least three ways, the text says  
24 otherwise.

25 First, the penalty and limitations

1 provisions mirror each other. Article 120 says  
2 rape may be punished by death, and Article 43  
3 then refers to offenses punishable by death.  
4 Congress naturally was referring in the  
5 limitations provision to the punishment it had  
6 fixed in the penalty provision.

7           Second, Congress left no doubt in  
8 Article 18, which is the general jurisdictional  
9 provision for court mart -- courts-martial, it  
10 allows courts-martial to impose death "when  
11 specifically authorized by this chapter." And  
12 this chapter is the UCMJ. So Congress told us  
13 where to look in determining whether an offense  
14 is punishable by death: to the code. Congress  
15 then made death available for rape in Article  
16 120 and made the most serious crimes, those  
17 punishable by death, prosecutable at any time in  
18 Article 43. All of the statutory pieces fit  
19 cleanly together.

20           Third, Congress borrowed the language  
21 of the military limitations provision from the  
22 general capital limitations provision, 18 U.S.C.  
23 3281, where the language dates back to 1939.

24           For the past 80 years, the executive  
25 branch and every Article III court to consider

1 the phrase "punishable by death" in any context  
2 have read it to refer to the statutory  
3 punishment that old soil came with in Article  
4 43.

5 For those reasons, the Court should  
6 reverse on the statutory question without  
7 reaching the constitutional or retroactivity  
8 question.

9 CHIEF JUSTICE ROBERTS: General,  
10 you've been talking about what Congress did,  
11 but, of course, the -- the issue comes from what  
12 the Court did. And I understand that the  
13 reference to "punishable by death" was -- was a  
14 way for Congress as sort of a shorthand for what  
15 we regard as the most serious crimes. Those are  
16 the ones that are not going to have any statute  
17 of limitations.

18 But the Court in -- in Coker seemed to  
19 say that the most serious crimes, that category,  
20 punishable by death, can only include those  
21 crimes that have resulted in death and that rape  
22 can't be classified as among the most serious.

23 Now why doesn't that determination by  
24 the Court affect how we should read the statute  
25 in this case? The reference in Article 43

1 refers to those punishable by death, and -- and  
2 those are the most serious crimes, and the Court  
3 has told us in Coker what that category can be.

4           GENERAL WALL: Well, Mr. Chief  
5 Justice, I agree that you could read "punishable  
6 by death" in either of two ways, but it doesn't  
7 answer punishable under what. Under the code or  
8 under the Constitution?

9           If I'm right that text, history,  
10 precedent all suggest that what Congress meant  
11 when it said "punishable by death" was a  
12 reference to the punishment it had picked out in  
13 the code, then I think everybody agrees that  
14 that controls the meaning of the limitations  
15 provision regardless of what punishment a -- a  
16 court-martial could actually impose consistent  
17 with the Constitution.

18           And -- and so I think, if we're right  
19 about what the statute means and what Congress  
20 was referring to, there's no need to reach the  
21 constitutional question. If the Court does, if  
22 the Court says, well, for the first time ever,  
23 Congress looked outside the code to the  
24 Constitution, then, yes, it's got to tackle the  
25 question of whether Coker applies.

1           But the Court's never applied Coker in  
2 the military setting. It consistently says that  
3 constitutional rights apply differently, and for  
4 reasons that -- that hopefully we'll get into in  
5 the argument, I think there are good reasons  
6 here to believe that Coker does not control in  
7 the military setting.

8           CHIEF JUSTICE ROBERTS: General, when  
9 else has Congress referred to a constitutional  
10 provision and we've interpreted that as applying  
11 only as of the time Congress acted rather than  
12 as the provision developed?

13           GENERAL WALL: I -- I don't have a  
14 ready example in mind, Mr. Chief Justice,  
15 because, of course, our basic submission is that  
16 Congress wasn't looking outside the code to the  
17 Eighth Amendment. It wasn't for the first time  
18 ever saying, well, we'll let the statute of  
19 limitations go back and forth between five years  
20 and life depending on what courts decide.

21           It was, as Article 18 says, looking to  
22 the code: death has to be authorized by the  
23 code. It's authorized in 120. So, when the  
24 limitations provision says "punishable by  
25 death," it's referring only to whether Congress

1 had denominated it a serious offense, not  
2 whether a court could conclude that death was  
3 consistent with the Eighth Amendment.

4 CHIEF JUSTICE ROBERTS: Thank you,  
5 General.

6 Justice Thomas.

7 JUSTICE THOMAS: Yes. General Wall,  
8 the -- the -- are you arguing that even if you  
9 could not -- even if you accepted Coker, for  
10 example, with respect to the punishment that  
11 could be administered, would it still apply to  
12 the statute of limitation?

13 GENERAL WALL: So, Justice Thomas, if  
14 I understand the question, yes, we think even if  
15 the Court thinks, look, Coker means adult rape  
16 in the civilian context could never be punished  
17 with death, there is a different rule in the  
18 military. So even if Article 43 looks outside  
19 the Eighth Amendment, we say for three reasons  
20 Coker doesn't apply here.

21 First, the harms are different.  
22 Military rape can destroy a platoon, it can  
23 undermine forces' readiness, it can even damage  
24 foreign relations. So all rape is heinous, but  
25 we would say particularly so in the military.

1           Second, there's no settled national  
2 consensus against death penalty for rape in the  
3 military, as the Court discerned in Coker and  
4 Kennedy.

5           And, third, this Court defers to  
6 Congress's judgment on matters of military  
7 justice. And that's an overlay that was not  
8 present in the civilian context in Coker and  
9 Kennedy.

10           JUSTICE THOMAS: Would you say the  
11 same thing if there was a firm policy not to  
12 administer the death penalty in the military,  
13 for example, that came directly from the  
14 President?

15           GENERAL WALL: Absolutely, I would,  
16 Justice Thomas, because our -- our whole  
17 submission or our front-line position is that,  
18 when Congress said "punishable by death," it  
19 meant the same thing that phrase has always  
20 meant for the last 80 years. It meant whether  
21 it had picked out that punishment in the code  
22 and made it available. That's what showed that  
23 it thought it was the kind of serious offense  
24 which could be prosecuted any time.

25           One President might not want to punish

1 death, and the President has to sign off on  
2 death sentences in the military, but that  
3 doesn't affect the congressional judgment in the  
4 code about the severity of the offense. It's  
5 just a policy judgment that can change from --  
6 from one President to the next.

7 But that's not the judgment that  
8 Congress was picking out in Article 43. It was  
9 picking out its own judgment about whether a  
10 punishment was appropriate and should be  
11 available.

12 JUSTICE THOMAS: On a separate issue,  
13 do you think there's any daylight between the  
14 meaning of the -- the Eighth Amendment cruel and  
15 unusual punishment clause and Article 55's  
16 version?

17 GENERAL WALL: I -- I do as this Court  
18 has understood it. Article 55, when it came  
19 into being, was derived from the -- the Articles  
20 of War, and it was understood the way the Eighth  
21 Amendment was originally understood. And its  
22 text shows this. It picked up barbaric or  
23 torturous punishment.

24 It's even clearer in Article 55  
25 because it says branding, flogging, marking, or

1 any other cruel or unusual punishment. It's  
2 using it as a catch-all for certain types of  
3 torturous punishment, which was what the Eighth  
4 Amendment was understood at the time that  
5 language came into being.

6 Now, subsequently, the Court has  
7 interpreted the Eighth Amendment to incorporate  
8 a proportionality standard in cases like Coker  
9 and Kennedy, as you know. But, no, Article's 55  
10 tech -- text fits a very separate -- a very  
11 different meaning in -- in the UCMJ that does  
12 not look to this Court's proportionality case  
13 law.

14 JUSTICE THOMAS: Thank you.

15 CHIEF JUSTICE ROBERTS: Justice  
16 Breyer.

17 JUSTICE BREYER: I was curious if  
18 there's anything more you want to say -- there  
19 may not be -- about why Coker does not apply in  
20 the military?

21 GENERAL WALL: So I -- I think the --  
22 the main thing I -- I would do, Justice Breyer,  
23 is just highlight what I was talking about  
24 earlier, which was Coker and Kennedy say that  
25 the test is whether there's an evolved standard

1 of -- of decency.

2           And I don't think we could perceive  
3 that in the context of the military for two  
4 reasons: one, Congress has repeatedly  
5 authorized it by statute, and many Presidents  
6 have allowed it, so it's hard to see the sort of  
7 national consensus that the Court perceived in  
8 Coker and Kennedy.

9           And the other is just that I think the  
10 goals of the criminal law, which the Court  
11 talked about in those cases, things like  
12 deterrence and retribution, are served very  
13 differently in the military because of the  
14 military environment, the need to maintain trust  
15 and discipline, the need to achieve  
16 institutional equality, the need not to damage  
17 foreign relations.

18           And the position of the other side,  
19 Justice Breyer, by the way, is that rape can  
20 never be punished in the military. That's what  
21 they need to -- to prevail in this case.

22           And -- and I think to say that rape  
23 could never be a constitutionally-permissible  
24 punishment, even for, let's say, a repeated  
25 brutal rape of a civilian in a war zone, that --

1 that just does not strike me as the kind of  
2 judgment that Coker and Kennedy were talking  
3 about.

4 So even if maybe some peace-time rapes  
5 couldn't be, it seems to me that there is --  
6 there are at least some rapes in the military  
7 where you could punish it consistent with the  
8 Eighth Amendment. And once the Court says that,  
9 then I think even Respondents could see we're  
10 right about the statute.

11 JUSTICE BREYER: In the civil context,  
12 there are lots of numbers gathered by different  
13 groups, and there's a very long waiting period,  
14 18 years, 15 years, between the time of -- of  
15 the conviction and someone actually being  
16 executed.

17 Are there similar statistics for the  
18 military?

19 GENERAL WALL: I -- I don't know that  
20 there are, Justice Breyer, because, of course,  
21 as the briefs show, the military very rarely  
22 pursues the death penalty. The last time the  
23 military executed someone was 1961 for the rape  
24 of a civilian child in occupied Austria in the  
25 wake of World War II. So I think there -- in

1 terms of imposition of the death penalty, that  
2 -- that is very rare.

3           Of course, here, the prosecutions  
4 occurred many years after the offense, and I --  
5 I talked to the prosecutors about that, and what  
6 they say is that their -- that doesn't affect  
7 sort of the quality of the evidence that they  
8 can bring forward, that these were reliable  
9 cases even though they were prosecuted years  
10 after the fact, and that it's critical to be  
11 able to go after these crimes outside of what  
12 would otherwise be the five-year window in order  
13 to make progress on rape and sexual assault in  
14 the military.

15           It's hard to get women to report.  
16 There are pressures inside the military, and  
17 they need to be able to prosecute these crimes  
18 to continue to get the numbers to go down. And  
19 the numbers have been going down, but part of  
20 that is because, until very recently, they --  
21 they didn't face a statute of limitations. So,  
22 even if they found out about it years after the  
23 fact, they could still bring a prosecution as  
24 long as the evidence was reliable.

25           JUSTICE BREYER: Thank you.

1 CHIEF JUSTICE ROBERTS: Justice Alito.

2 JUSTICE ALITO: There are some canons  
3 of interpretation that may work against you in  
4 this situation, such as the principle that  
5 statutes of limitation are to be narrowly  
6 interpreted and the Rule of Lenity.

7 Could you explain why you think the  
8 statutory language is clear enough to overcome  
9 those?

10 GENERAL WALL: Sure, Justice Alito.

11 So, as -- as you say, the first thing  
12 I would say is just we don't see any grievous  
13 ambiguity here, and neither has any Article III  
14 court that ever looked at it. The first court  
15 ever to read it another way was the CAAF in  
16 Mangahas.

17 Everybody has long understood this,  
18 both because of the parallelism between Article  
19 43 and 120, the punished and punishable, the  
20 Article 18 language I've talked about, and the  
21 history, the fact that this phrase had an  
22 understood meaning in the general criminal  
23 context and Congress picked up on it.

24 So those are all textual, contextual  
25 clues, and, of course, also the fact that

1 Article 55 separately deals with limits on what  
2 punishment may be imposed.

3 So it would be very odd for Congress  
4 to have obliquely imported it in Article 43 when  
5 they have a separate article of the code that --  
6 that deals with it.

7 So, for all those reasons, I don't  
8 think it's grievously ambiguous. Even if the  
9 Court disagrees, I think constitutional  
10 avoidance should break the tie. Lenity is not a  
11 great fit because we're not talking about the  
12 scope of a criminal prohibition. Everybody  
13 agrees the conduct here was rape.

14 And repose seems an odd candidate,  
15 too, since the whole point of Article 43 is to  
16 make it prosecutable at any time.

17 I think, if we're looking to break the  
18 tie -- and, obviously, we don't think it's that  
19 close -- the right tiebreaker is to say, if you  
20 read the code our way, you don't have to get  
21 into any of these Eighth Amendment questions  
22 that the Court has long reserved.

23 JUSTICE ALITO: Another question, it's  
24 unrelated. What do you think we should say  
25 about our jurisdiction under 28 U.S.C. 1259?

1           GENERAL WALL: Justice Alito, I -- I  
2 think, in granting the case, the Court  
3 recognized that in all of these cases, the CAAF  
4 reversed convictions. The CAAF held in each  
5 case that, under Mangahas, the statute of  
6 limitations was five years and not unlimited.

7           Now, to be sure, it only revisited  
8 that question in Daniels, it relied on Mangahas,  
9 and -- and Daniels had just relied on Collins,  
10 and Collins relied on Mangahas.

11           So it is true that they didn't decide  
12 the question here. They relied on their earlier  
13 decision in Mangahas. But you grant that -- you  
14 grant those kinds of cases all the time, where  
15 some court relies on a rule that's announced in  
16 an -- in an earlier case.

17           That's still part of the decision that  
18 you're reviewing in each case under 1259. They  
19 had to say that there was a five-year statute of  
20 limitations under Mangahas to -- to reverse the  
21 convictions. And then, obviously, Briggs  
22 additionally decided the retroactivity question,  
23 so that issue was also presented in Briggs.

24           So I think it's clear that you've got  
25 jurisdiction over the issues in -- in all of the

1 cases under 1259.

2 JUSTICE ALITO: Thank you.

3 CHIEF JUSTICE ROBERTS: Justice  
4 Sotomayor.

5 JUSTICE SOTOMAYOR: Mr. Wall, just to  
6 be clear, I -- I wasn't quite sure I understood  
7 your answer to Justice Thomas.

8 The statute of limitations question is  
9 separate from the Coker question, isn't it? You  
10 could have a statute of limitations that is not  
11 fixed even if we were to decide that the Eighth  
12 Amendment applied to the military, correct?

13 GENERAL WALL: We absolutely agree,  
14 Justice Sotomayor, those are two separate  
15 judgments. We think that Congress made both of  
16 them here. And even if it's not allowed to  
17 impose the death penalty under the Constitution,  
18 it still said it thought this was the kind of  
19 serious offense that should be prosecutable at  
20 any time.

21 I took Justice Thomas to be saying:  
22 Could you win even if we accept that Coker  
23 applies in the military? I may have  
24 misunderstood the question. Our answer to that  
25 is yes, but I agree with you the Court doesn't

1 need to get there if we're right on the statute.

2 JUSTICE SOTOMAYOR: That's why I -- I  
3 thought I wasn't quite sure. You went straight  
4 into the Coker question, and I wasn't quite sure  
5 whether you meant to answer yes or no to him.

6 Number two, it seems to me that almost  
7 any serious crime, including an assault that  
8 causes serious physical injury, could be --  
9 could be an impediment to -- in combat  
10 situations and create great inter- -- great  
11 international disputes, for example, if one  
12 soldier attacks another in a combat zone.

13 So I -- I don't know why or how you  
14 have justified the explanation why death is  
15 proportionate in that situation when life  
16 without parole -- why life without parole  
17 wouldn't be sufficient?

18 GENERAL WALL: Well, I take the point,  
19 Justice Sotomayor, and I think it's fair that  
20 all crimes in some sense can undermine unit  
21 cohesion and military discipline.

22 But I think rape is especially  
23 different when you talk to the prosecutors,  
24 because it divides up platoons and units  
25 oftentimes in a way that other crimes do not.

1       There are --

2                   JUSTICE SOTOMAYOR:  Mr. Wall, but what  
3       do I make of the fact that it's been decades,  
4       decades, since the death penalty has been  
5       imposed or sought in a rape case in the  
6       military?

7                   GENERAL WALL:  Well, I don't --

8                   JUSTICE SOTOMAYOR:  It can't be --

9                   GENERAL WALL:  Justice Sotomayor, I  
10       don't -- you -- it's been decades since they've  
11       sought it for premeditated murder in the  
12       military, but I don't think anyone, even  
13       Respondents, would say that makes a difference  
14       to the constitutional analysis, that it's  
15       somehow off the table, the death penalty, for  
16       even premeditated murder in the military.

17                   It is true that they rarely impose it,  
18       but none of that matters to Congress's judgment  
19       that the offense is so serious that it should be  
20       prosecutable at any time.

21                   And just to finish my answer to your  
22       earlier question, it's not just the way it  
23       divides platoons.  It's not just the pressures  
24       against reporting, which are true of rape and  
25       sexual assault and less true of other offenses.

1 It's also the effect on foreign relations and  
2 national security.

3 Yes, an attack inside a war zone on  
4 another soldier might, in theory, affect our  
5 foreign relations, but not nearly so much as the  
6 rape of a civilian child. And I go back to the  
7 Austrian example in the wake of World War II.

8 I think, to prevail, they've got to  
9 say that even a rape like that isn't -- can't be  
10 punished with death under -- under the Eighth  
11 Amendment. And I can't see on what objective  
12 measure they would get there.

13 CHIEF JUSTICE ROBERTS: Thank you,  
14 counsel.

15 JUSTICE SOTOMAYOR: Thank you.

16 CHIEF JUSTICE ROBERTS: Justice Kagan.

17 JUSTICE KAGAN: General, if I could  
18 take you back to your statutory interpretation.  
19 You've -- you've pointed to a number of  
20 ancillary provisions, I'll call them, and -- and  
21 said that they provide hints.

22 But the main provision here is Article  
23 43 and its statement that there -- that any  
24 offense punishable by death. And that term is  
25 unqualified. You know, it doesn't say any

1 offense punishable by death under the UCMJ,  
2 which is really how you're reading it, as if  
3 those three words were in the statute.

4 And I'm wondering why we should read  
5 it like that. Usually, we try not to add words  
6 to a statute. So, if we say "any offense  
7 punishable by death," that would suggest any  
8 offense punishable by death under any law, not  
9 just under the UCMJ.

10 GENERAL WALL: Well, Justice Kagan, I  
11 have to say that I have a very different  
12 reaction. I think you have to add words either  
13 way. Saying it's punishable doesn't tell you  
14 whether it's punishable under the code or  
15 punishable under the Constitution.

16 And it seems to me that --

17 JUSTICE KAGAN: Well, it's punishable  
18 just under anything. It -- it's punishable or  
19 it's not punishable. And we don't look to the  
20 source of law that tells you whether it's  
21 punishable or not. We just look to the  
22 question, can you put somebody to death for  
23 this?

24 GENERAL WALL: So I have to say,  
25 Justice -- I think that assumes away the

1 problem, right, which is there are two different  
2 ways to read "punishable," and I think it's a  
3 bit much for the other side to say theirs is a  
4 plain-meaning understanding since no Article III  
5 court had ever read it that way in the 80 years  
6 up to Mangahas.

7 I mean, there are six circuit court  
8 decisions from four different circuits both  
9 before and after 1986. There's not a whiff of  
10 another interpretation of this. Nobody even  
11 makes the claim.

12 JUSTICE KAGAN: Well, suppose --

13 GENERAL WALL: Everybody --

14 JUSTICE KAGAN: -- suppose this,  
15 General. Suppose that Congress passed a law  
16 tomorrow and it was not a law that was put in  
17 the UCMJ. It was in some entirely different  
18 part of the federal code, and it just said rape  
19 shall not be punished by death under any federal  
20 law.

21 So would that change the outcome?

22 GENERAL WALL: Justice, potentially,  
23 it might. I mean, if Congress itself put in a  
24 provision saying military rape could not be  
25 punished by death, then you would have a

1 straight-up conflict between that provision and  
2 Article 120, and it'd be hard to figure out  
3 exactly what judgment Congress is making about  
4 the severity of the offense for --

5 JUSTICE KAGAN: Well, I guess --

6 GENERAL WALL: -- the provision's  
7 purpose.

8 JUSTICE KAGAN: -- I guess the -- the  
9 point of the question is, if we're going to look  
10 outside the UCMJ, as in that hypothetical, you  
11 know, why stop at other parts of the U.S. Code?  
12 Why not also go to the Constitution?

13 GENERAL WALL: Because --

14 JUSTICE KAGAN: Why not consider just  
15 whether the punishment is available under the  
16 law as -- under all the law as it's given to us?

17 GENERAL WALL: Because the relevant  
18 decisionmaker is Congress. So, when Congress  
19 says "punishable by death," which punishment is  
20 it talking about? Its own judgment or the  
21 constitutional judgment?

22 Statutorily, it's its own judgment,  
23 but, if we introduced another provision where it  
24 said, on the one hand, you could punish it with  
25 death, and on the other, you couldn't, there

1 would be a question about what Congress's own  
2 judgment was. That would be raised under the  
3 statute.

4 But none of this gets us to saying  
5 that Congress somehow looks outside the statute.  
6 I mean, on their basic theory, the same Congress  
7 that said rape is so serious it should be  
8 punished by death in Article 120, in the  
9 limitations provision said, well, we're just  
10 going to tie it to judicial judgment and let it  
11 go back and forth between five years and life  
12 depending on what courts say.

13 That isn't normally the way we read  
14 limitations provisions, and as I tried to say at  
15 the top of the hour, there's a lot of textual,  
16 contextual, and historical evidence here that  
17 that's not what Congress was doing in Article  
18 43.

19 JUSTICE KAGAN: Thank you, General.

20 CHIEF JUSTICE ROBERTS: Justice  
21 Gorsuch.

22 JUSTICE GORSUCH: Good morning,  
23 General. Let's suppose that this Court had  
24 clearly, definitively, unambiguously, absolutely  
25 held that rape -- punishing rape by death would

1 -- would violate the Constitution in the  
2 military context, and it would not be lawfully  
3 punishable -- that crime would not be lawfully  
4 punishable by death.

5           Would -- would -- would the position  
6 of the government be any different?

7           GENERAL WALL: It would matter to our  
8 backup argument but not our front-line statutory  
9 position, Justice Gorsuch. Our front-line  
10 statutory position is Congress was referring to  
11 the punishment it had chosen, and even if the  
12 courts decide that that punishment is taken off  
13 the table by the Constitution, that's just a  
14 matter of what you can do in an actual  
15 court-martial. It does not affect the judgment  
16 that Congress made for limitations purposes.

17           JUSTICE GORSUCH: Separately but  
18 relatedly, the government in its brief makes a  
19 -- a -- a rather lengthy and -- and -- and --  
20 and interestingly persuasive argument that  
21 Congress did not intend for the limitations  
22 period to turn on the courts' or anybody else's  
23 judgment. But I'm not sure I understand whether  
24 the -- the government thinks that, without  
25 reference to such inferences about congressional

1 intent, it might prevail.

2 Can you help me on that?

3 GENERAL WALL: Sure, Justice Gorsuch.

4 I mean, I -- I -- I haven't said a word or I --  
5 I have tried not to, so far, about congressional  
6 intent or the Senate report or any of the rest.  
7 I think it's clear what Congress was doing, but  
8 --

9 JUSTICE GORSUCH: I did notice a  
10 distinct difference between the argument today  
11 and the argument in the brief.

12 GENERAL WALL: I -- I -- I -- I am  
13 perfectly happy to have the Court proceed only  
14 on the text and structure of the code itself. I  
15 think the parallelism between 43 and 120, the --  
16 the plain text of Article 18, which tells you  
17 death has to be authorized by this chapter, so  
18 where you're looking for the requisite  
19 authorization for punishment is the code.

20 I think the history under 3281, I  
21 mean, they try to distinguish the cases, I don't  
22 think persuasively, but, importantly, there's  
23 nothing on the other side of the ledger.

24 If you add all that up in just  
25 interpreting statutes the way we normally do, I

1 -- I think we've clearly got the better  
2 interpretation of the language of Article 43.

3 JUSTICE GORSUCH: Thank you, General.

4 CHIEF JUSTICE ROBERTS: Justice  
5 Kavanaugh.

6 JUSTICE KAVANAUGH: Thank you.

7 And good morning, General Wall. I  
8 want to follow up on your answers to Justice  
9 Kagan. I'm confused whether you think that the  
10 relevant interpretation of the statute is  
11 punishable by death under the UCMJ or punishable  
12 by death under federal statutory law.

13 I understood you originally to be  
14 saying under the UCMJ, but then, in response to  
15 Justice Kagan, it sounded like you were  
16 broadening that out and saying punishable by  
17 death under federal statutory law.

18 GENERAL WALL: No, I mean under the --  
19 under the code, Justice Kavanaugh. And, you  
20 know, I -- I may have been a little unclear --

21 JUSTICE KAVANAUGH: But, when you say  
22 the code, can you be specific?

23 GENERAL WALL: I think the UCMJ, and  
24 that's what the plain text of Article 18 says,  
25 and -- and I -- you know, I may have been a

1 little unclear with Justice Kagan.

2 JUSTICE KAVANAUGH: So let me --

3 GENERAL WALL: I mean, I -- I think --

4 JUSTICE KAVANAUGH: -- let me just be  
5 specific then. If Congress passed a statute  
6 outside the UCMJ that outlawed the death penalty  
7 for all federal crimes, including in the  
8 military, you would still say that that -- that  
9 this offense and other offenses are punishable  
10 by death under Article 43?

11 GENERAL WALL: I think I would. It  
12 would be a harder case. But, as -- as -- as I  
13 think about it more, Justice Kavanaugh, I think  
14 that what Article 18 indicates and what the  
15 history indicates is that it was a judgment they  
16 were picking out in the code. And as long as  
17 that judgment in Article 120 remains unchanged,  
18 I think the limitations period would still be  
19 the same. It would be un -- unlimited.

20 It would be a harder case, but I -- I  
21 -- I do think that putting it outside the code  
22 could potentially make a difference. If they  
23 put it inside the code, then I think it could --  
24 it could unsettle our -- our statutory argument.

25 Importantly, there's nothing like that

1 here. There's nothing even outside the code  
2 that indicates as a statutory matter that --  
3 that the death penalty was off the table at the  
4 time of these offenses.

5 JUSTICE KAVANAUGH: That -- I just am  
6 curious that it doesn't say "punishable by death  
7 under this chapter," and so that raises an  
8 ordinary meaning question. But I think you've  
9 answered that previously.

10 I wanted to turn to the constitutional  
11 issue then. Do you think there's any Eighth  
12 Amendment limit on Congress's power to make  
13 offenses in the military punishable by death?

14 GENERAL WALL: Justice Kavanaugh, we  
15 haven't tried to make -- I think there you could  
16 make arguments that the Eighth Amendment doesn't  
17 apply at all. That's what Congress seemed to  
18 think when it enacted Article 55.

19 And you could argue that, even if it  
20 applies, it only applies to torturous and  
21 barbarous punishment, consistent with Article  
22 55. It doesn't go further.

23 We haven't tried to make those  
24 arguments here because, frankly, we don't need  
25 them to prevail. All we need the Court to say

1 is that, even if the proportionality analysis of  
2 Coker and Kennedy applies, the balance is just  
3 different.

4 And one -- one thing, just to go back  
5 to the statutory question, Justice Kavanaugh --

6 JUSTICE KAVANAUGH: Don't we have to  
7 say -- don't we have to say a little more than  
8 that? The balance is different and the test in  
9 the military is less restrictive?

10 GENERAL WALL: I think you could say  
11 just two things that follow naturally from the  
12 Court's cases. You could say the balance is  
13 different because the needs are different,  
14 there's no national consensus, and the goals of  
15 the criminal law are served differently, and, in  
16 the military context, you defer to Congress's  
17 judgments about military matters, including  
18 military justice.

19 I think those are the only --

20 JUSTICE KAVANAUGH: Thank you.

21 GENERAL WALL: -- clear propositions

22 --

23 JUSTICE KAVANAUGH: Thank you.

24 GENERAL WALL: -- you would need.

25 JUSTICE KAVANAUGH: Thank you, General

1 Wall.

2 CHIEF JUSTICE ROBERTS: A minute to  
3 wrap up, General.

4 GENERAL WALL: Sure. Thank you, Mr.  
5 Chief Justice.

6 So, just to sum up, Respondents ask  
7 this Court to say not one but two implausible  
8 things: first, that when Congress used the  
9 phrase "punishable by death" in 1986, it ignored  
10 both its own judgment about punishment, of what  
11 punishable was appropriate, and the phrase's  
12 settled meaning in operation and other  
13 limitations provisions. No Article III court's  
14 ever read the phrase that way, and Congress was  
15 not upending how limitations provisions normally  
16 work.

17 Second, Respondents then need this  
18 Court to say that rape in the military is never  
19 punishable by death, no matter how vulnerable  
20 the victim, no matter how many rapes or victims,  
21 no matter how sadistic the crime, no matter how  
22 the crime affects the military or foreign  
23 relations, and no matter that the death penalty  
24 for military rape dates to the mid-1800s.

25 If the Court reaches that

1 constitutional question, it should not undo a  
2 long history of deference to Congress's  
3 judgments about military justice.

4 CHIEF JUSTICE ROBERTS: Thank you,  
5 General.

6 Mr. Vladeck.

7 ORAL ARGUMENT OF STEPHEN I. VLADECK  
8 ON BEHALF OF THE RESPONDENTS

9 MR. VLADECK: Mr. Chief Justice, and  
10 may it please the Court:

11 Since 1953, every court to consider  
12 it, including CAAF, has correctly understood  
13 Article 55 of the UCMJ to reflect Congress's  
14 specific judgment that service members should  
15 receive the same protection against cruel and  
16 unusual punishment that civilians enjoy under  
17 the Eighth Amendment.

18 Thus, after this Court held in Coker  
19 that the Eighth Amendment forecloses the death  
20 penalty for rape, every military court to reach  
21 the issue held that the same result applied  
22 automatically to courts-martial, including  
23 CAAF's predecessor in June 1986.

24 When Congress eliminated a statute of  
25 limitations for any offense punishable by death

1 just five months later, it was, therefore, clear  
2 that rape was not such an offense because the  
3 UCMJ itself foreclosed the death penalty.

4           Indeed, that was still clear for over  
5 a decade after the 1986 amendment, as military  
6 courts repeatedly held that rape was subject to  
7 a five-year statute of limitations.

8           And perhaps most importantly, that  
9 conclusion was still clear to Congress in 2003,  
10 when it provided that, where the victim was a  
11 minor, rape by a service member could be  
12 prosecuted until the victim's 25th birthday.

13           If Congress believed that rape was  
14 punishable by death under the 1986 amendment,  
15 the 2003 reform was not just unnecessary, it  
16 would have shortened the statute of limitations.

17           Congress finally eliminated a statute  
18 of limitations for all rape offenses in 2006 so  
19 that the military may today try any such offense  
20 committed since then. But all three of the  
21 offenses at issue here predated that amendment,  
22 which has no language suggesting Congress  
23 intended it to apply retroactively.

24           Mr. Wall spent much of his time  
25 extolling the virtues of constitutional

1 avoidance and deference to Congress's considered  
2 judgments.

3 We agree that this Court can and,  
4 therefore, should avoid the constitutional  
5 question by deferring to Congress's judgment in  
6 1950 to protect service members from cruel and  
7 unusual punishment to the same extent as  
8 civilians and, in 1986, to only eliminate a  
9 statute of limitations for offenses for which  
10 Article 55 allows the death penalty.

11 CHIEF JUSTICE ROBERTS: Counsel, why  
12 would Congress want to make it impossible to  
13 prosecute rape at all after five years, no  
14 matter how heinous, no matter the consequences  
15 to military discipline or international  
16 relations, simply because this Court held that  
17 you couldn't impose the death penalty for it?

18 MR. VLADECK: Mr. Chief Justice --

19 CHIEF JUSTICE ROBERTS: And --

20 MR. VLADECK: I'm sorry.

21 CHIEF JUSTICE ROBERTS: I -- I was  
22 just going to say, the -- the statute refers, of  
23 course, to punishable by death as -- as a  
24 reference. But the -- the two concepts, the  
25 statute of limitations and the constitutionality

1 of capital punishment, are -- are two distinct  
2 concepts.

3 MR. VLADECK: We -- we certainly  
4 agree, Mr. Chief Justice. I think it's worth  
5 putting in context that the 1986 amendment was  
6 almost doubling the statute of limitations for  
7 rape, that adds a civilian offense under the  
8 pre-'86 code. Rape carried only a three-year  
9 statute of limitations. The 1986 amendment  
10 extends that to five.

11 And, again, Mr. Chief Justice, I think  
12 the timing is the key here. Congress changed  
13 the provision in the UCMJ at a time when it was  
14 not just clear that this Court believed rape  
15 could not be punished by death under the Eighth  
16 Amendment but right after the Court of Military  
17 Appeals had held that it couldn't be punished by  
18 death even under the UCMJ.

19 And so, for all that the government  
20 relies upon adding the words "under this  
21 chapter" to Article 55, we end up in the same  
22 place.

23 CHIEF JUSTICE ROBERTS: Well, Coker,  
24 concerning the death penalty itself, and our  
25 statute here on statute of limitations, they

1 seem particularly distinct in that none of the  
2 analysis in Coker applies at least directly to  
3 the military context. There is no societal  
4 evolution with respect to whether or not rape in  
5 the military could be punished by death, no  
6 consensus about it.

7           In other words, the analysis in Coker  
8 seems at least consistent with the notion that  
9 the military context is -- continues to be  
10 distinct. So why should that judgment about the  
11 civilian context be directly applicable on a  
12 question quite different from the punishment  
13 that can be meted out, the statute of  
14 limitations question?

15           MR. VLADECK: I -- I think the answer,  
16 Mr. Chief Justice, is because that's what  
17 Congress provided in Article 55. We don't  
18 dispute that Congress could have provided  
19 different rules. We don't dispute that, after  
20 Coker, Congress could have reaffirmed that it  
21 wanted the death penalty available as a  
22 punishment for rape in the military,  
23 notwithstanding Coker.

24           But against a backdrop where all  
25 Congress had said was that the Eighth Amendment

1 applies to courts-martial by dint of Article 55  
2 and where this Court had interpreted the Eighth  
3 Amendment to bar the death penalty for rape,  
4 Congress's only judgment that we have, the only  
5 clear evidence we have is that Congress  
6 understood that it wanted to tie the statute of  
7 limitations issue to punishment available under  
8 the code.

9 CHIEF JUSTICE ROBERTS: Thank you,  
10 counsel.

11 Justice Thomas.

12 JUSTICE THOMAS: Yes. Counsel, how do  
13 you know that Congress meant to track the  
14 Court's interpretation of -- of the Eighth  
15 Amendment with Article 55?

16 MR. VLADECK: So the -- we have two  
17 different pieces of evidence, Justice Thomas.  
18 Of course, as we note in page -- on page 37 of  
19 the red brief in Footnote 14, when that language  
20 was added to the Articles of War, the precursor  
21 to the UCMJ, in 1920, it was added with the  
22 specific purpose of aligning the military code  
23 then in force to the Constitution.

24 But, Justice Thomas, more importantly,  
25 we have 70 years of unbroken jurisprudence by

1 every military court to consider the question,  
2 starting with the Court of Military Appeals in  
3 Wappler in 1953, holding that that was  
4 Congress's intent.

5 Congress has amended the UCMJ dozens  
6 of times since those rulings and has shown no  
7 disagreement with them. It has never touched  
8 Article 55.

9 JUSTICE THOMAS: On a separate issue,  
10 let's assume that you leave all the language in  
11 place in the -- in the statute, but there is a  
12 uniform policy both at the Pentagon and in the  
13 White House for many years not to call for the  
14 death penalty in the case of rape.

15 Would that policy in some way trump  
16 the language in the statute?

17 MR. VLADECK: Not in our view, Justice  
18 Thomas, because, again, we think that the  
19 natural, plain reading of the statute is whether  
20 the offense is punishable by death, not whether  
21 individual cases are subject to the death  
22 penalty.

23 JUSTICE THOMAS: No, I'm talking about  
24 a universal policy across the administration and  
25 in the military that they would never ask for

1 it. Let's say it's written, it's whatever  
2 formal procedures they use, but it's still on  
3 the books.

4 MR. VLADECK: I -- I take the point,  
5 Justice Thomas. And, again, I think the  
6 critical point is what Congress has decided.

7 And so, in this context, even if the  
8 President were to promulgate such a rule, of  
9 course, a future President could revoke it,  
10 whereas the statute would require an amendment.  
11 And we think that Article 43 incorporates at a  
12 minimum offenses that Congress by statute has  
13 not just authorized the death penalty as a  
14 punishment but has contemplated that death is  
15 available as a punishment. That's a legislative  
16 determination in our view, Justice Thomas, not  
17 an executive one.

18 JUSTICE THOMAS: Thank you.

19 CHIEF JUSTICE ROBERTS: Justice  
20 Breyer.

21 JUSTICE BREYER: Why would Congress  
22 have wanted to adopt your interpretation?

23 MR. VLADECK: Well, I think --

24 JUSTICE BREYER: Prior, there was  
25 first what seemed to be no statute of

1 limitations. Now, suddenly, because of a case  
2 that really didn't have to do with rape -- I  
3 mean, it did with the death penalty in rape, but  
4 it didn't have to do with statute of  
5 limitations.

6 Now, suddenly, the intertwining of the  
7 statutes here produces the five-year statute.  
8 Then, when they work that out, they go back to  
9 no statute of limitations.

10 I mean, why would Congress have wanted  
11 to do that?

12 MR. VLADECK: So, respectfully,  
13 Justice Breyer, I think that mis-appreciates the  
14 history here. Under the UCMJ from 1950 to 1986  
15 -- and the government does not dispute this --  
16 the statute of limitations for rape was only  
17 three years. That was true across the board, no  
18 matter the circumstances of the offense.

19 And so, Justice Breyer, our position  
20 is that there's actually a straight line that  
21 Congress went from three years, from 1950 to  
22 1986, to five years, from 1986 to 2003, to the  
23 victim's 25th birthday in cases of rape of a  
24 minor, to 2006, where it got rid of the statute  
25 of limitations altogether.

1           It's the government, Justice Breyer,  
2       whose position requires you to believe that  
3       Congress went up and down, that Congress, after  
4       eliminating the statute of limitations in 1986,  
5       somehow reimposed one for cases against minors  
6       in 2003. That's the argument that I think is  
7       completely lacking full support.

8           JUSTICE BREYER: Did -- did -- did --  
9       did you -- did you -- I know that this may be  
10      only a very few people, perhaps me, who find  
11      this sometimes helpful, but did you, during all  
12      this period, find anything in legislative  
13      history or in presentation by the military to  
14      Congress or in articles in the military that  
15      said this is a good idea to have the statute of  
16      limitations work this way, to cut it down, in  
17      effect, the law?

18           MR. VLADECK: No, Justice Breyer, and  
19      I think that only reinforces our position that  
20      Congress was not thinking specifically about  
21      rape at all in 1986 and that when it finally is  
22      thinking specifically about rape, as it clearly  
23      was in 2003 and 2006, both of those statutes  
24      proceeded from the assumption that the law on  
25      the books was that the statute of limitations

1 was five years. Otherwise, there would have  
2 been no need for either the 2003 amendment in  
3 cases where the victim was a minor or the 2006  
4 amendment, which added rape to the list of  
5 offenses for which there can never be a statute  
6 of limitations.

7 So, again, I mean, whether we look to  
8 legislative history or not, we end up in the  
9 same place, which is the actual evidence on the  
10 books, the statutes Congress actually wrote work  
11 in a straight, logical line on our view and  
12 don't on the government's.

13 JUSTICE BREYER: So did you find  
14 something -- maybe the other side would be the  
15 ones to have looked for it or been able to find  
16 it -- where a -- where a lawyer in the military  
17 told his bosses, oh, you know, this is rather  
18 interesting; it brings the statute of  
19 limitations for rape back down to five years,  
20 which we've long thought it should be?

21 MR. VLADECK: Well, so, Justice  
22 Breyer, again, I -- I don't think, on our view,  
23 there was any moment where the statute -- where  
24 -- where -- where anything reduced the statute  
25 of limitations for rape. If anything, the 1986

1 amendment extended it from three years to five  
2 years.

3 And you don't have to take my word for  
4 that, Justice Breyer. In the Moore case in  
5 1990, the Navy-Marine Corps Court of Military  
6 Review observed that the 1986 amendment changed  
7 the statute of limitations from three years to  
8 five years. And the Air Force Court reached the  
9 exact same conclusion three years later in the  
10 Bottino case.

11 So, again, I mean, the government has  
12 lots of policy arguments in its favor. We have  
13 statutory text and case law suggesting that, at  
14 the time, everyone understood it the way that we  
15 do.

16 JUSTICE BREYER: Thank you.

17 CHIEF JUSTICE ROBERTS: Justice Alito.

18 JUSTICE ALITO: Suppose someone in the  
19 military commits a murder, but this individual  
20 has diminished mental capacity so that it would  
21 be unconstitutional under Atkins and related  
22 cases to impose the death penalty.

23 Would that crime be an offense that is  
24 "punishable by death"?

25 MR. VLADECK: Yes, it would in our

1 view, Justice Alito, because the offense in that  
2 case is punishable by death even if the offender  
3 is not. And that's where we disagree with the  
4 government about all of the cases it purports to  
5 rely on.

6 In every single case the government  
7 has cited to you, the underlying offense  
8 remained punishable by death. That's what makes  
9 this case different.

10 JUSTICE ALITO: Well, why isn't the  
11 offense what that individual did, the crime with  
12 which that individual would be charged?

13 MR. VLADECK: So it's -- the offense  
14 wouldn't --

15 JUSTICE ALITO: And that offense would  
16 not be punishable by death by virtue of the  
17 characteristics of that particular offender?

18 MR. VLADECK: So, Justice Alito, I --  
19 if -- if you had, for example, a juvenile  
20 offender or a -- or a diminished capacity  
21 offender, in that context, they've still  
22 committed a death-eligible offense. That is to  
23 say, they've still committed an offense that is  
24 defined as capital murder or capital felony  
25 murder, and it's only the circumstances of their

1 particular case that takes the death penalty off  
2 the table.

3 Congress chose the words, Justice  
4 Alito, "offense punishable by death." It's not  
5 a separate offense when you charge capital  
6 murder against a juvenile or a -- a  
7 diminished-capacity offender. It's just a  
8 separate charge based on their capacity.

9 JUSTICE ALITO: Throughout history,  
10 there have unfortunately been many instances in  
11 which occupying armies have gone on rape sprees  
12 and have raped many, many women in the territory  
13 that they are -- they are occupying.

14 Suppose that were to happen again. Do  
15 you think it's settled under our case law that  
16 the death penalty could not be imposed on  
17 members of the military who engaged in that sort  
18 of practice?

19 MR. VLADECK: I think it's settled  
20 under Article 55 that if the charge is rape  
21 simpliciter, Coker, as applied to the military,  
22 forecloses the death penalty.

23 But, Justice Alito, if I may, and this  
24 is where I think --

25 JUSTICE ALITO: You think what's that

1 Congress intended?

2 MR. VLADECK: Well, if -- if I might,  
3 Justice Alito, I -- I think it's worth pointing  
4 to two --

5 JUSTICE ALITO: That's hard to imagine  
6 that it would be -- a member of the American  
7 military doing the sort of things that were  
8 done, for example, in the former Yugoslavia and  
9 many other examples that could be cited through  
10 history. But do you think that Congress had  
11 that in mind, that we are taking the death  
12 penalty off the table for offenses like that?

13 MR. VLADECK: So what I was going to  
14 say, Justice Alito, is there are separate  
15 offenses under the UCMJ that could be charged in  
16 those circumstances. Rape as a war crime,  
17 aggravated rape as a war crime, could be charged  
18 under different provisions of the UCMJ, and so,  
19 when Mr. Wall says our position requires this  
20 Court to take that off the table, frankly, he's  
21 just wrong.

22 The question is whether rape  
23 simpliciter with none of those extenuating  
24 circumstances charged solely under Article 120  
25 is foreclosed by Coker. And, Justice Alito, I

1 think Congress's choice in Article 55 was to  
2 say, yes, service members, you might commit  
3 heinous crimes, but just like defendants in our  
4 criminal civilian justice system, we're going to  
5 protect you to the same extent by the Eighth  
6 Amendment. That was Congress's choice to make.

7 JUSTICE ALITO: Well, what is rape  
8 simpliciter?

9 MR. VLADECK: So this Court -- I mean,  
10 I think we've had examples, Justice Alito, where  
11 the death penalty remains available, for  
12 example, for rape that results in death. We've  
13 had examples -- for example, Mr. Wall had a  
14 hypothetical about rape as a war crime.

15 That is not what was charged here.  
16 The military has the separate capacity to charge  
17 war crimes under different articles of the UCMJ  
18 and, where the laws of war recognize the death  
19 penalty for that charge, to pursue the death  
20 penalty in that case.

21 Justice Alito, we would not suggest  
22 that case was settled by Coker, but where, as  
23 here, there is no charge under those provisions,  
24 where it's simply under Article 120, which I  
25 should say Congress has not -- never sort of

1 reenacted with the death penalty after 1950,  
2 before the Respondents' offenses, we think  
3 Coker, through Article 55, covers the case.

4 CHIEF JUSTICE ROBERTS: Thank you,  
5 counsel.

6 Justice Sotomayor.

7 JUSTICE SOTOMAYOR: I will pass.

8 Thank you.

9 CHIEF JUSTICE ROBERTS: Justice Kagan.

10 JUSTICE KAGAN: Mr. Vladeck, if I  
11 could take you back to the government's textual  
12 argument, and, as I understand it, it goes  
13 something like this: It says, if you look at  
14 Article 43 alone, there is an ambiguity there  
15 because it says "any offense punishable by  
16 death," but it doesn't say punishable under what  
17 law. Is it under the code alone? Is it under  
18 all federal statutory law? Is it under the  
19 Constitution as well? It just doesn't say.

20 And then General Wall said, so we look  
21 to surrounding context, and -- and we find in  
22 Article 120, in Article 18, that it supports the  
23 idea that it's really the code alone that  
24 Congress was referring to.

25 So what's your response to that?

1 MR. VLADECK: So we have two  
2 responses, Justice Kagan.

3 The first is, even on that reading,  
4 the code alone includes Article 55. And so,  
5 even if we were to read the text to add the  
6 words the government would have us add, we end  
7 up in the same place because Article 55, as it  
8 has been uniformly interpreted for 70 years,  
9 applies Coker to courts-martial.

10 But, Justice Kagan, second and in any  
11 event, even if the Court thinks that the text is  
12 ambiguous, again, the canons Justice Alito  
13 pointed out in his question to Mr. Wall work  
14 against the government here. The government  
15 needs the text to be clearly in its favor to  
16 prevail here.

17 And I think, if the text is ambiguous,  
18 there are compelling reasons to interpret it,  
19 one, in favor of repose; two, to avoid the  
20 Eighth Amendment question; and, three, in favor  
21 of Lenity. And so I think Lenity --

22 JUSTICE KAGAN: Well, why -- it -- it  
23 -- it seems as though you don't have all the  
24 canons on your side. On the opposite side is  
25 the canon of constitutional avoidance, that your

1 interpretation requires courts to decide the  
2 constitutionality of a punishment at the outset  
3 of routine criminal proceedings.

4 I mean, this is a good case where we  
5 -- a good example where we would have to decide  
6 how Coker and Kennedy apply to the military just  
7 to, you know, decide a -- a pretty routine  
8 criminal case.

9 So doesn't that cut against you?

10 MR. VLADECK: I don't believe so,  
11 Justice Kagan, because I actually think Congress  
12 has decided that. That is to say, I don't think  
13 it is a difficult inquiry, as all the military  
14 cases we cite in our brief suggest, for the  
15 military courts to decide whether this Court has  
16 answered, as an Eighth Amendment matter in a  
17 civilian case, whether the death penalty is  
18 available for a particular offense.

19 That is the only question Article 55  
20 requires the courts to ask in this context. And  
21 I think it's an easy question to answer if you  
22 agree with the military courts, which have  
23 uniformly for 43 years interpreted Article 55 to  
24 automatically apply Coker's interpretation of  
25 the Eighth Amendment to our service members.

1 JUSTICE KAGAN: Thank you, Mr.  
2 Vladeck.

3 CHIEF JUSTICE ROBERTS: Justice  
4 Gorsuch.

5 JUSTICE GORSUCH: Good morning, Mr.  
6 Vladeck. As I understand it -- and you can --  
7 please do correct me if I'm mistaken -- both  
8 sides agree that when we're interpreting the  
9 term "punishable by death," it -- we -- it --  
10 nothing turns on and -- and -- and we shouldn't  
11 look to facts outside of the -- the -- the  
12 indictment or the complaint or the statute.

13 So it doesn't matter, for example,  
14 whether the defendant himself is being charged  
15 with or whether the government seeks the death  
16 penalty or obtains it.

17 MR. VLADECK: That's exactly right,  
18 Justice Gorsuch.

19 JUSTICE GORSUCH: Okay. So, if we  
20 don't look outside the -- the four squares of  
21 the -- of -- of the indictment and -- and the  
22 statute for facts that might bear on the  
23 question what's punishable by death, why would  
24 we look outside of it for purposes legally?

25 MR. VLADECK: I -- I think, again,

1 Justice Gorsuch, the answer is because Congress  
2 has instructed us to do so. And, indeed, even  
3 on the government's reading, there would still  
4 be a --

5 JUSTICE GORSUCH: Well, let -- let me  
6 stop you there, because I'm not sure that quite  
7 satisfies me.

8 Why wouldn't Congress have wanted us  
9 -- if you're saying Congress didn't want us to  
10 do the legal, then what -- what -- how do we  
11 know Congress didn't want us to do the factual  
12 examination outside the -- the -- the four  
13 corners of the statute and the indictment?

14 MR. VLADECK: So I think that the best  
15 answer, Justice Gorsuch, is because of the words  
16 Congress chose. That is to say, Congress did  
17 not ask whether this particular offense or this  
18 particular offender can, in fact, be punished by  
19 the death penalty.

20 It only provided whether the offense  
21 is subject to the death penalty. And I think  
22 the natural reading of that text is to ask  
23 whether the underlying statutory charge is one  
24 for which both Congress has authorized capital  
25 punishment and for which that punishment is

1       legally available that comports with the  
2       ordinary meaning of the term "punishable by."

3                 JUSTICE GORSUCH: All right. Well,  
4       let --

5                 MR. VLADECK: And so --

6                 JUSTICE GORSUCH: -- let me try it  
7       another way. If -- if -- if -- if we agree it  
8       doesn't matter whether the individual is  
9       actually going to ever face the death penalty,  
10       let alone whether the government would even  
11       obtain it, why do we look to the constitutional  
12       requirements -- that's just another way of  
13       putting the same question -- but if -- if -- if  
14       you agree it's completely irrelevant in at least  
15       some circumstances whether -- whether the  
16       defendant's ever going to face the death  
17       penalty, why not in all circumstances?

18                MR. VLADECK: So, Justice Gorsuch, I  
19       think Congress could have provided that.  
20       Congress could have said, you know, it doesn't  
21       matter whether the death penalty is possibly on  
22       the table.

23                And if I may, Justice Gorsuch,  
24       Congress has said that with regard to particular  
25       enumerated offenses, the list of offenses that

1 comes before the catch-all term "as punishable  
2 by death." Under Article 43 today, there are  
3 nine such offenses, including rape.

4 I think the -- the tricky part --

5 JUSTICE GORSUCH: Mr. Vladeck, I have  
6 one -- one other question. Let's say we -- we  
7 disagreed with you about Coker and that we don't  
8 read it as expressly addressing the military  
9 context. Justice Kennedy thought it didn't some  
10 time ago. Let's just hypothesize that we agree  
11 with him, that it's an open question.

12 Then -- then where does your argument  
13 stand?

14 MR. VLADECK: Well, then I think this  
15 Court would --

16 JUSTICE GORSUCH: Briefly.

17 MR. VLADECK: -- then I think this  
18 Court would have to decide the question as a  
19 matter of first impression, because these are  
20 criminal defendants on a direct appeal who are  
21 entitled to make any claim based on existing law  
22 that's available to them.

23 But, again, Justice Gorsuch, I don't  
24 think this Court has to reach that question. I  
25 think Congress has done it for us.

1 JUSTICE GORSUCH: Yeah. Thank you.

2 Thank you.

3 CHIEF JUSTICE ROBERTS: Justice

4 Kavanaugh.

5 JUSTICE KAVANAUGH: Thank you, Mr.

6 Chief Justice.

7 Good morning, Mr. Vladeck. On your  
8 Article 55 argument, which you're hanging a lot  
9 on, obviously, the government responds that  
10 Article 55's generalized bar on various  
11 punishments cannot reasonably be interpreted to  
12 forbid a punishment that the UCMJ elsewhere  
13 expressly authorizes.

14 In other words, that reading the two  
15 provisions together, you wouldn't -- it wouldn't  
16 make sense -- at least the government argues  
17 this -- it wouldn't make sense to say: Oh, it's  
18 expressly authorized in -- as a punishment in  
19 one provision, but we're going to interpret the  
20 language in another provision to prohibit what's  
21 expressly authorized in the other provision.

22 Can you respond to that?

23 MR. VLADECK: Yes. I -- I think there  
24 are two responses, Justice Kavanaugh.

25 The first is the government's position

1 requires ignoring the timing here. At the time  
2 Article 55 and Article 120 were originally  
3 enacted, they were perfectly consistent. This  
4 Court was 27 years away from holding in Coker  
5 that the Eighth Amendment forbade the death  
6 penalty for rape. And so I don't think the  
7 government's argument carries the weight it  
8 thinks it does when we go back to 1950, when the  
9 statute was enacted.

10 But, more fundamentally, it was three  
11 years after the statute was enacted in 1953 that  
12 the Court of Military Appeals in Wappler read  
13 Article 55 directly contrary to the government's  
14 position, not as simply prohibiting particularly  
15 barbaric methods but as reflecting that Congress  
16 certainly intended to confer as much protection  
17 as that afforded by the Eighth Amendment.

18 Justice Kavanaugh, if Congress had  
19 come back after Wappler or after Coker and said  
20 we understand that, but we are still reenacting  
21 the death penalty for rape, this would be a very  
22 different case.

23 But it never did. That is to say, the  
24 statute, Article 120, that was at issue in all  
25 three of the Respondents' cases, was unchanged

1 between 1950 and when those offenses took place.

2 JUSTICE KAVANAUGH: I think your  
3 Article 55 argument rests -- but correct me if  
4 I'm wrong -- rests on a premise that Congress,  
5 when enacting Article 55, assumed that all  
6 decisions of this Court in the civilian context,  
7 barring capital punishment for certain offenses,  
8 would automatically apply through Article 55 to  
9 the military context.

10 Do you have any support that Congress  
11 actually thought that, or how would you respond  
12 to that general query?

13 MR. VLADECK: So I -- I -- I don't  
14 think there's any moment where Congress said  
15 particularly that statement, Justice Kavanaugh,  
16 but I do think it comes through both in 1919,  
17 when the "cruel and unusual punishment" language  
18 was added to Article 41, the Articles of War,  
19 and that was just nine years after this Court's  
20 foundational Eighth Amendment decision in Weems,  
21 and in 1950, when the UCMJ was being debated and  
22 everyone understood that the purpose was to  
23 protect service members to the same extent as  
24 civilians.

25 Justice Kavanaugh, there were no

1       caveats. There were no qualifications. And I  
2       think the government's reading of Article 55  
3       requires some evidence that Congress didn't mean  
4       to do that, and, frankly, it has none.

5                   JUSTICE KAVANAUGH: Thank you,  
6       Mr. Vladeck.

7                   CHIEF JUSTICE ROBERTS: Mr. Vladeck,  
8       you can take up to three more minutes.

9                   MR. VLADECK: Thank you, Mr. Chief  
10       Justice.

11                   I -- I'd like to close briefly just by  
12       reflecting on the stakes of these cases. The  
13       government concedes that, at most, its reading  
14       would allow it to try a closed set of crimes  
15       committed before 2006. Indeed, across its six  
16       briefs in these cases, the government has only  
17       been able to identify four cases by name,  
18       including these three.

19                   On the flip side, three different  
20       courts have already rejected efforts by  
21       previously convicted service members to enforce  
22       CAAF's decision in Mangahas retroactively  
23       through habeas, holding that it does not satisfy  
24       either of the exceptions to finality that this  
25       Court identified in Teague versus Lane. And the

1 government hasn't identified any other pending  
2 prosecutions or direct appeals that would turn  
3 on the outcome here.

4           None of that, of course, bears  
5 directly on the answer to the questions  
6 presented. It simply underscores why affirming  
7 CAAF's unanimous decisions below, in addition to  
8 being the correct outcome, won't open any  
9 floodgates.

10           And if I may, I think it is worth  
11 stressing just how much violence the  
12 government's position would do to decades of  
13 settled precedent in the military. The CAAF has  
14 held since 1953 that Congress, in Article 55,  
15 meant to extend the protections of the Eighth  
16 Amendment to service members.

17           There are four other provisions of the  
18 UCMJ that the Army Defense Appellate Division  
19 notes in its amicus brief that likewise extend  
20 by statute these constitutional protections.  
21 The CAAF and its predecessors have held since  
22 1980 that Coker applies to the military.

23           The government does not discuss these  
24 cases. It simply suggests they are no, never  
25 mind.

1           And given the textual arguments in our  
2 favor, given the history of the statutes and  
3 what Congress clearly understood in both 2003,  
4 when it changed the statute of limitations for  
5 rape where the victim was a minor to the  
6 victim's 25th birthday, and in 2006, when it  
7 changed the statute of limitations so that there  
8 would never be a statute of limitations for any  
9 rape, it would seem like a remarkable amount of  
10 hindsight to read into the 1986 statute an  
11 intent to override all of these decades of  
12 settled precedent.

13           For those reasons, we believe the  
14 decisions below should be affirmed. And if  
15 there are no further questions, Mr. Chief  
16 Justice, I thank the Court for its time.

17           CHIEF JUSTICE ROBERTS: Thank you,  
18 counsel.

19           General Wall, you have three minutes  
20 for rebuttal.

21           REBUTTAL ARGUMENT OF JEFFREY B. WALL  
22           ON BEHALF OF THE PETITIONER

23           GENERAL WALL: Three basic points.

24           Justices Kagan and Gorsuch, in  
25 response to your questions pressing at

1 Respondents' so-called plain meaning argument, I  
2 didn't hear Respondents' counsel answer -- give  
3 any answer to the parallelism in the language  
4 between Articles 43 and 120 or the express  
5 language of Article 18 that points to whether  
6 death is authorized by the code, and that's the  
7 UCMJ.

8 Respondents' counsel did say that, on  
9 history, you know, he takes issue with some of  
10 the circuit court decisions, but I'd encourage  
11 the Court to go back and look at decisions like  
12 Coon, Kennedy, Manning, Eli, Haverford, none of  
13 them turned on the reason for the  
14 unconstitutionality of the punishment. They  
15 all, as a matter of the language, looked to the  
16 statutory punishment fixed by Congress.

17 All of that points to the notion that  
18 "punishable by death" means the judgment that  
19 Congress made in the UCMJ. And so, to revise my  
20 answer to Justice Kagan somewhat, I think  
21 Congress would need to make a contrary judgment  
22 in the UCMJ to affect the meaning of Article 43.

23 When pressed, counsel went two places.  
24 The first was the canons, but, as I tried to  
25 explain, I don't think there's any grievous

1 ambiguity when you take into account the text  
2 and the contextual clues that Respondents really  
3 haven't grappled with.

4           And the canons, as I tried to say to  
5 Justice Kagan, point in -- in both directions.  
6 And the most powerful canon, I would say, is  
7 constitutional avoidance and not getting into  
8 these long-reserved and difficult Eighth  
9 Amendment questions.

10           My second point is I don't think it  
11 would do any violence to military law to read  
12 the code that way. Willenbring existed side by  
13 side with Article 55 for quite some time. And  
14 when you -- when Justice Thomas pressed  
15 Respondents' counsel on the meaning of Article  
16 55, you know, he turned to the military courts,  
17 not text and history.

18           But, if the Court looks at those  
19 cases, they don't have any meaningful analysis  
20 of the Eighth Amendment, and, in any event, they  
21 would just return us to the question of what the  
22 Eighth Amendment requires in the military  
23 setting.

24           On that -- finally, on that question,  
25 Justice Alito, Respondents' counsel, I think,

1 correctly acknowledged to you that to prevail,  
2 he needs the Court to endorse the proposition  
3 that the death penalty is never a  
4 constitutionally permissible punishment for --  
5 for rape inside the military.

6           In our view, that doesn't accord with  
7 the consistent congressional judgment. It  
8 doesn't accord with the executive branch  
9 judgment. The needs and the harms are different  
10 in the military. And, of course, this Court has  
11 routinely deferred to the political branches  
12 that are charged under the Constitution with  
13 supervising the military.

14           The last point, just to answer the  
15 stakes of the litigation, I agree with  
16 Respondents' counsel that they're high. The  
17 question here is whether three convicted rapists  
18 will go scot free inside the military. They  
19 should not under a natural meaning of Article  
20 43. And in the process, this Court should not  
21 unsettle how statutes of limitations work, and  
22 it should not take the clearly radical step of  
23 extending Coker and Kennedy into the military  
24 context.

25           Thank you, Mr. Chief Justice.

1                   CHIEF JUSTICE ROBERTS: Thank you,  
2           General, Mr. Vladeck. The case is submitted.

3                   (Whereupon, at 11:01 a.m., the case  
4           was submitted.)

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