

# SUPREME COURT OF THE UNITED STATES

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IN THE SUPREME COURT OF THE UNITED STATES

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NICK FELICIANO, )  
Petitioner, )  
v. ) No. 23-861  
DEPARTMENT OF TRANSPORTATION, )  
Respondent. )  
- - - - -

Pages: 1 through 83

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

2 (11:34 a.m.)

3 CHIEF JUSTICE ROBERTS: We'll hear  
4 argument next today in Case 23-861, Feliciano  
5 versus the Department of Transportation.

6 Mr. Tutt.

7 ORAL ARGUMENT OF ANDREW T. TUTT

8 ON BEHALF OF THE PETITIONER

9 MR. TUTT: Thank you, Mr. Chief  
10 Justice, and may it please the Court:

11 This case turns on the meaning of the  
12 word "during." Under the differential pay  
13 statute, the government must provide  
14 differential pay to its civilian employees who  
15 also serve in the reserves when they are called  
16 to active duty under a provision of law referred  
17 to in Section 101(a)(13)(B) of Title 10.

18 Section 101(a)(13)(B) refers, among  
19 other provisions, to any provision of law during  
20 a war or a declared national emergency. Thus,  
21 during a national emergency, reservists called  
22 to active duty under any provision of law must  
23 receive differential pay.

24 The government resists this  
25 common-sense temporal definition of "during,"

1 the same definition it argued for in Ressam.  
2 Instead, the government says "during" here means  
3 "in the course of," and "in the course of," it  
4 says, requires a substantive connection between  
5 a reservist's military service and a pending  
6 national emergency.

7 That is wrong for at least three  
8 reasons. First, it conflicts with the ordinary  
9 and conventional meaning of the word "during,"  
10 which is virtually always purely temporal.

11 Second, it doesn't work in the  
12 statutory scheme, which asks only whether a  
13 reservist has been called to active duty under a  
14 provision of law referred to in Section  
15 101(a)(13)(B), something that doesn't depend on  
16 the reasons the reservist was called to active  
17 duty.

18 Third, it would create an impossible  
19 line-drawing problem to figure out what it means  
20 to have a sufficiently substantive connection to  
21 qualify for differential pay not just for  
22 courts, not just for agencies, but for private  
23 employers, who will face criminal penalties  
24 under 18 U.S.C. Section 209 if they get the  
25 question wrong.

1           The government has yet to offer any  
2   theory for how to assess whether a reservist's  
3   service is in the course of a national  
4   emergency, other than saying courts should defer  
5   to the government's own characterization in a  
6   reservist's orders.

7           There are more reasons the  
8   government's interpretation is wrong and ours is  
9   right, but I see that I am out of time.

10          I welcome the Court's questions.

11          JUSTICE THOMAS: How do you respond to  
12   the government's argument that your -- that your  
13   approach would be very disruptive in the other  
14   sections of Title 10 that use the term  
15   "contingency operation?"

16          MR. TUTT: Your Honor, this case  
17   doesn't actually turn on the definition of  
18   "contingency operation." Congress picked up  
19   a -- a part of the definition of "contingency  
20   operation" and used it as a reference for the  
21   differential pay statute.

22          But we think that this -- that the  
23   Court's ruling in this case wouldn't alter the  
24   meaning of the word "contingency operation" in  
25   Title 10 in any manner.

1                   Moreover, I'll -- I'll point out  
2     Mr. Feliciano was called to active duty under  
3     Section 12302 orders to do the exact same duties  
4     that he had performed under his 12301(d) orders.  
5     The 12302 orders are enumerated in the statute,  
6     meaning that, under the government's theory, he  
7     was already participating in a contingency  
8     operation, according to them, when he was called  
9     under 12302.

10                  But the government hasn't pointed out  
11     that he was, and I don't think that they think  
12     that he was, because there are other separate  
13     limits on what it means to be a contingency  
14     operation. It must be a military operation and  
15     it must result in a call to active duty under a  
16     provision of law.

17                  Yes, Your Honor?

18                  JUSTICE THOMAS: Has your approach  
19     ever been the prevailing approach?

20                  MR. TUTT: So, Your Honor, we have  
21     canvassed all courts that we can, and,  
22     essentially, this has not been litigated as far  
23     as we can tell in the courts. The MSPB judges  
24     have consistently sided with us until the Adams  
25     opinion. There were a couple of outliers.

1                   But -- and we think that in the  
2           O'Farrell decision, which predates the Adams  
3           decision that is the adverse precedent in the  
4           Federal Circuit, there was a suggestion in that  
5           case that a contingency operation has to be a  
6           military operation that puts American soldiers  
7           at a risk of armed conflict, that the "military  
8           operation" part of the definition is doing a lot  
9           of the work in the "contingency operation"  
10          definition.

11                  We think you don't have to reach any  
12          of that in this case because of the way that the  
13          differential pay statute uses 101(a)(13)(B).  
14          What it says is you are entitled to differential  
15          pay if you are called to active duty under a  
16          provision referred to in 101(a)(13)(B).

17                  And it's the conventional common-sense  
18          reading of what it means to be referred to in  
19          that provision that provides the trigger for  
20          differential pay. During a national emergency,  
21          any provision of law is referred to because it  
22          says any other provision of law during a war or  
23          during a national emergency declared by the  
24          president or Congress.

25                  JUSTICE JACKSON: But isn't the



1 practical effect then of your reading that every  
2 reservist gets differential pay who is called  
3 up?

4 MR. TUTT: Yes, to call -- called to  
5 active duty.

6 JUSTICE JACKSON: Who is called up,  
7 who is called to active duty. And I guess what  
8 I'm confused about is why Congress would have so  
9 carefully amended the statute over time to add  
10 new people, et cetera, if the right reading was  
11 just, if you're called up, you get it.

12 MR. TUTT: Your Honor, shortly after  
13 the statute was enacted in 2009, the Office of  
14 Personnel Management issued guidance that said  
15 that anyone called up under the residual  
16 provision, the "any other provision of law"  
17 provision, could never seek differential pay.  
18 So, if it wasn't enumerated in the statute, you  
19 couldn't get differential pay at all.

20 So Congress had a strong incentive to  
21 ensure that new provisions were added to the  
22 enumerated list --

23 JUSTICE JACKSON: Yeah, but, if you're  
24 right, wouldn't the amendment be no, everyone  
25 who's called up gets it? That's not how the

1 statute reads in terms of either what Congress  
2 did in the successive amendments or how it reads  
3 right now.

4 MR. TUTT: The way we look at this  
5 statute is as very much a creature of Congress  
6 and how Congress actually works. So the issue  
7 is that there were the votes to enact the  
8 original differential pay statute. It took  
9 almost 10 years to enact that statute. It's a  
10 lot easier to add a new enumerated provision to  
11 101(a)(13)(B) than it is to overrule OPM's  
12 guidance on this issue.

13 So, you know, the way that we think  
14 about it is that probably a member of Congress  
15 had a constituent who said, you know, I  
16 actually -- I was serving on compulsory orders  
17 and I didn't get differential pay, and the  
18 member of Congress said, well, we'll -- we'll  
19 get that fixed.

20 A lot of these statutes were enacted  
21 as part of omnibus appropriations bills, so  
22 Congress has seen this as something where people  
23 can get this amended and changed, and it's  
24 easier to do something small than it is to do  
25 something big in Congress, and it's easier to

1 add a new provision to just make sure that your  
2 constituent gets --

3 JUSTICE KAVANAUGH: But -- but --  
4 but --

5 JUSTICE SOTOMAYOR: Wasn't it easy --

6 MR. TUTT: -- differential pay.

7 JUSTICE SOTOMAYOR: I'm sorry. Go  
8 ahead.

9 JUSTICE KAVANAUGH: Go ahead.

10 JUSTICE SOTOMAYOR: If that were the  
11 case, why didn't the various provisions that  
12 were rejected and proposed to Congress just say  
13 differential pay for anybody called up? And  
14 there were quite a few of those that were  
15 rejected. Instead, Congress crafted a very  
16 careful limitation.

17 MR. TUTT: Your Honor, let me give  
18 you -- let me give you three reasons that we  
19 think Congress wrote the statute this way and  
20 not by simply providing differential pay to all  
21 reservists.

22 First, they're not the same --

23 JUSTICE SOTOMAYOR: You're not denying  
24 there were proposals to do that?

25 MR. TUTT: There were proposals to do

1     that.

2                   JUSTICE SOTOMAYOR:   And they -- and  
3     those were rejected?

4                   MR. TUTT:   I don't want to say that  
5     they were rejected.   I want to say they were  
6     not -- they were not enacted.   The -- the text  
7     was changed to this text.

8                   JUSTICE SOTOMAYOR:   Okay.

9                   MR. TUTT:   And the reason why I make  
10    that distinction is that I think there were  
11    members of Congress who supported this language  
12    because they knew it would function exactly this  
13    way.

14                   I think there may have been other  
15    members of Congress who are more optimistic  
16    about the ability of the Congress and the  
17    president to actually end existing national  
18    emergencies and might see this as a -- as a real  
19    limitation, as something that is actually  
20    capable of constraining the availability of  
21    differential pay.   Again --

22                   JUSTICE ALITO:   When -- when was the  
23    last time there was not a declared national  
24    emergency?

25                   MR. TUTT:   My understanding is that

1 the National Emergencies Act ended all pending  
2 national emergencies in 1976.

3 So it -- when Congress -- Congress saw  
4 that there were four pending national  
5 emergencies, that they -- they thought that this  
6 was far too many and that national emergencies  
7 had gotten out of hand, and they -- they --

8 JUSTICE KAVANAUGH: Since '79, there's  
9 been one in effect. Sorry to interrupt.

10 MR. TUTT: Yes, Your Honor. There  
11 has -- there was a national emergency declared  
12 with respect to Iranian sanctions.

13 JUSTICE KAVANAUGH: And that's been  
14 renewed by the president routinely, and it's  
15 been in effect since 1979, I believe.

16 MR. TUTT: Yes, Your Honor. And I --  
17 thank you. I think that that's crucial. Every  
18 single year, these national emergencies are  
19 revisited by the president and renewed. This is  
20 not like there's been one national emergency and  
21 it's been sitting out there.

22 The president revisits it, looks at  
23 whether the basis for the national emergency  
24 continues, and then re-declares the national  
25 emergency or expands it.

1 JUSTICE KAVANAUGH: How does that help  
2 your argument?

3 MR. TUTT: Because it means that  
4 national emergencies are actually national  
5 emergencies.

6 So, I mean, if we focus on the  
7 differential pay statute, it says: "During a  
8 war or during a national emergency."

9 And it is completely legitimate to  
10 believe that Congress thought that national  
11 emergencies are actually national and actually  
12 emergencies, that they are all-of-nation efforts  
13 that don't create -- that they don't want to  
14 create line-drawing problems where you have to  
15 try to figure out whether back-filling for a  
16 reserve -- for an active-duty servicemember who  
17 goes overseas constitutes a connection or  
18 whether being called to training that will  
19 ultimately result in your potential deployment  
20 in a contingency operation counts. They wanted  
21 a clean bright-line rule. Everyone contributes  
22 during a national emergency.

23 JUSTICE ALITO: Now your think --  
24 excuse me. Your -- your thinking is that  
25 Congress said: Well, you know, we realize that

1     there have been national emergencies now for  
2     decades and decades and decades, but, if we look  
3     ahead, we foresee the time when there will be  
4     peace throughout the world and nothing  
5     threatening, and the -- the lion or the wolf is  
6     going to lie down with the lamb, and there isn't  
7     going to be a national emergency, so that's why  
8     we've put in, what is it, eight specific  
9     provisions that would be superfluous if your  
10    interpretation were accepted?

11                 MR. TUTT: Two responses to that.

12                 I -- on the superfluity argument, this  
13    is not superfluity as we understand it typically  
14    in the law. Those provisions are not  
15    superfluous because, if all national emergencies  
16    end, they will be the only basis for  
17    differential pay.

18                 So this is kind of a quasi-superfluity  
19    argument by the government that's more based on  
20    hypotheses about what Congress believes and what  
21    Congress knows about the real world, and so  
22    it -- it -- it calls on the Court to try and  
23    figure out whether Congress really believed that  
24    they were going to end all pending national  
25    emergencies or not, which is just different than

1 traditional textual superfluity, where the  
2 existence --

3 JUSTICE KAGAN: But -- I mean, but, to  
4 that point, really, what does Congress believe?  
5 There are 43 national emergencies now. Every  
6 time we have a sanctions program in place, we  
7 declare a national emergency.

8 I mean, this is just a sort of feature  
9 of modern life?

10 MR. TUTT: There are politicians who  
11 go on morning news programs and say we are going  
12 to, you know, end the authorization for the use  
13 of military force, that we are going to end --  
14 they don't necessarily say pending national  
15 emergencies, but I think that that's a fair  
16 implication.

17 We are always one election away from  
18 ending all pending national emergencies. They  
19 could change the way that --

20 JUSTICE KAGAN: We're not going to  
21 have any sanctions programs? We're not going to  
22 have any hurricanes? We're not going to -- I  
23 mean, it just seems like a -- a world which  
24 couldn't possibly exist.

25 MR. TUTT: I also want to point out,



1 and I think this is crucial, the legislative  
2 history -- and this goes to the legislative  
3 language change. It's always been sold -- the  
4 language of this statute -- this statute has  
5 always been put forward as if it applied to all  
6 reservists.

7 In other words, although this  
8 triggering condition may not have a -- an end in  
9 sight -- I mean, I want to emphasize that this  
10 triggering condition is something Congress does  
11 control. So it's not like they said, you know,  
12 when man again walks on the moon, something they  
13 can't control. They can control when all  
14 national emergencies end or not. So they are  
15 actually sitting in the driver's seat of the  
16 scope of this statute.

17 But I -- I -- they're -- this was  
18 always sold as all reservists. After the  
19 language changed, it was still presented on the  
20 exact same terms.

21 JUSTICE KAVANAUGH: Well, I thought  
22 you said --

23 JUSTICE BARRETT: Can I ask you --

24 JUSTICE KAVANAUGH: -- something  
25 completely different just a minute ago, which it

1     was sold -- it was actually your theory, which I  
2     want to explore, of how Congress operates that  
3     some members kind of sneakily thought just  
4     listing the particular provisions would cover  
5     the waterfront and deceive the other members.

6             And I have no doubt that happens.  
7     That does happen. But I really hesitate to put  
8     that into our statutory interpretation case law.

9             MR. TUTT: No, I think you should read  
10    the statute to say what it says because of the  
11    legislative bargain that was struck.

12            This is less -- this language is less  
13    than all reservists because it does have the --

14            JUSTICE KAVANAUGH: But the theory of  
15    Justice Jackson's question was: Well, they  
16    could have easily said "all."

17            And you said: Well, they, you know,  
18    covered all without advertising it.

19            I think you were saying that.

20            MR. TUTT: I think that what -- what  
21    happened was -- I mean, we don't know what  
22    happened. But the -- we think --

23            JUSTICE KAVANAUGH: That's another  
24    point. We don't know what happened, so why are  
25    we talking --

1 MR. TUTT: Well --

2 JUSTICE KAVANAUGH: -- about -- you  
3 know, speculating about that to such a degree?

4 MR. TUTT: Well, again, we win on the  
5 language of the statute. So, I mean, it's --  
6 it's -- if -- if we aren't speculating and we're  
7 just going to return to ground and go to the  
8 language, there's just no way to read this  
9 statute in the way that this -- that the  
10 government wants to read it.

11 JUSTICE JACKSON: But doesn't "during"  
12 have -- I mean, I appreciate "during" has a  
13 temporal meaning. But, even in your  
14 introduction, you said it virtually always means  
15 temporal.

16 Aren't there circumstances in which it  
17 could be construed reasonably as a substantive  
18 connection?

19 MR. TUTT: So, to be honest, I have  
20 not found a dictionary that says it can have a  
21 substantive connection. I think, in ordinary  
22 usage, we sometimes make a connection.

23 So, you know, if you said the attorney  
24 was arguing, you know, during the argument, that  
25 that would mean that they were standing at the

1 lectern, that they weren't out in the hall  
2 arguing the basis that they allege --

3 JUSTICE JACKSON: Right. So it's  
4 contextual, isn't it? I mean, don't we have to  
5 look at context, especially for a word like  
6 "during" that is so flexible and malleable, to  
7 try to really understand what this statute is  
8 supposed to be covering?

9 MR. TUTT: I don't think "during" is  
10 that flexible. I mean, the Court didn't think  
11 it was very flexible at all in Ressam, where you  
12 said that carrying explosive during the --  
13 during the commission of any felony means you  
14 get a 10-year enhancement.

15 So, as long as it was at the same time  
16 as, even if the explosives were completely  
17 lawful, even if the felony was completely  
18 unrelated, you said "during" means at the same  
19 time as, and the Court was quite clear that  
20 that's because "during" really can only carry  
21 that meaning.

22 But I'll also point out that I -- I  
23 think it's not -- I think it's worth going to  
24 the actual text of this statute and really  
25 looking at it carefully because it actually

1 cannot bear the construction the government  
2 would like to place on it.

3 It -- on page 1a of the blue brief, it  
4 says: A call or order to active duty -- this is  
5 in the first paragraph -- under Section 12304(b)  
6 of Title 10 or a provision of law referred to in  
7 Section 101(a)(13)(B).

8 So you have to be called up under a  
9 provision of law that is referred to in  
10 Section 101(a)(13)(B).

11 So, if you then go to 101(a)(13)(B),  
12 which is on page 4a of the --

13 JUSTICE JACKSON: I mean, can we pause  
14 for a second? Because --

15 MR. TUTT: Yes, Your Honor.

16 JUSTICE JACKSON: -- if you're right  
17 on your theory, I don't understand why we're  
18 doing that.

19 I mean, if your -- if your theory is  
20 called up during a national emergency, why is  
21 Congress cross-referencing another provision  
22 where we have to look to try to figure out  
23 whether you're being called up in a certain way?

24 I -- that's the thing that is  
25 confusing to me about your argument.

1           MR. TUTT:  So we -- we have really  
2   looked into this, and as -- it might be just a  
3   quirk of congressional draftsmanship.

4           So this language was enacted as part  
5   of the bribery statute, 209, about a month  
6   before the language of the federal differential  
7   pay statute changed to match this  
8   cross-referenced language.

9           We've seen this cross-reference in  
10   about nine other provisions of the U.S. Code,  
11   almost all of them relating to benefits for  
12   veterans.

13           And, you know, I don't know why they  
14   are making this reference to this particular  
15   piece of the "contingency operation" definition.  
16   You know, because maybe they think that if they  
17   amend it in that one place they amend  
18   101(a)(13)(B), they can get the benefit of --

19           JUSTICE JACKSON:  All right.  I'm  
20   sorry, I apologize.  So we're referring to --

21           MR. TUTT:  Yeah.  So --

22           JUSTICE JACKSON:  -- 101(a)(13)(B).  
23   So we get over there.

24           MR. TUTT:  So, on page 4a of the blue  
25   brief, it says -- in (B), it says -- it lists a

1 bunch of provisions, and then it says: Or any  
2 other provision of law during a war or during a  
3 national emergency declared by the president or  
4 Congress.

5           So there's no reference to the  
6 reservist's service at all in this look-up  
7 operation that we've just done together. What  
8 it -- if you are looking at 101(a)(13)(B)  
9 because you are trying to figure out if  
10 differential pay is owed and the person has been  
11 called up under a provision of law and it is  
12 during a national emergency, then they are owed  
13 differential pay.

14           So, in other words, whether they were  
15 called up under 12301(d) is -- is not the -- the  
16 question. If you substituted in a national  
17 emergency -- during a -- during a national  
18 emergency for 12301(d), that -- you would get  
19 the same result without looking at whether the  
20 reservist was called to active duty. It would  
21 just be the provision of -- of law that would be  
22 referenced during the national emergency.

23           JUSTICE BARRETT: Going back to  
24 Justice Jackson's questioning to you about  
25 whether "during" can have a substantive

1 component as well as a temporal one, would it  
2 sound natural to you, if you had a reservist who  
3 temporally, during a time of national emergency  
4 or let's say war, was working as a recruiter,  
5 and so he's working as a recruiter and he's  
6 going to high schools and maybe to colleges too  
7 and just trying to recruit people to sign up,  
8 and someone asks that soldier, did you serve  
9 during the war, would it be natural to say yes  
10 if you were totally removed from the  
11 battlefield, you're working as a recruiter?

12 MR. TUTT: Well, I think it would, but  
13 you don't -- you don't have to agree with me on  
14 that. I actually think it -- it very much  
15 would. Like, I served in the armed forces  
16 during the war. Oh, well, you were a recruiter.  
17 I mean, they might think that you're overstating  
18 what you did, but it certainly would be  
19 completely natural. And if the person was  
20 instead serving to back-fill base security so  
21 that someone could serve overseas or otherwise  
22 doing something that contributed to the war  
23 effort, we usually think that everyone, when a  
24 war is declared, is doing something to  
25 contribute to the -- to the war.



1 JUSTICE BARRETT: What about national  
2 emergency? I mean, because that's -- that's  
3 what's odd. I mean, it's very odd, I agree with  
4 you, it's weird to have a superfluity argument  
5 when the superfluous -- the superfluity is  
6 created by a background historical fact rather  
7 than the text itself. I agree with you that's  
8 odd.

9 So let's talk about national  
10 emergency. If we're looking at "during" in  
11 context, putting aside war, if we think national  
12 emergencies are always ongoing, you know, would  
13 we say yes, I served during a national emergency  
14 as a recruiter, when other people were, say,  
15 like, you know, down helping people who had been  
16 caught in the hurricane?

17 MR. TUTT: So I don't -- I don't think  
18 you would actually, but I will say that this is  
19 not a -- this statute isn't a conversation  
20 between two people. It's -- it's sort of a  
21 statutory command and a hyper-technical one. I  
22 mean, Congress wrote it in a technical manner.

23 And so the question would be, are we  
24 going to import that kind of understanding of  
25 "during" into the way that this statute is

1     written, which asks you to look at whether  
2     someone has been called up under a provision of  
3     law, and it then has you look at a bunch of  
4     provisions.

5                 So it just doesn't -- I mean, I guess  
6     the better question under this statute would be  
7     is the statute being used during a national  
8     emergency, which it's hard to say that that  
9     imports any kind of real-world facts.

10                JUSTICE BARRETT:  So it says the  
11     statute being used, not is the soldier being  
12     used --

13                MR. TUTT:  Exactly.

14                JUSTICE BARRETT:  -- or not as the  
15     order -- kind of like the Texas amicus brief for  
16     the states?

17                MR. TUTT:  Exactly.  Yes.  I think  
18     that they put it extremely well.  I think, if  
19     you want to see this argument made very well,  
20     it's in the brief of Texas and the states.

21                I -- I also actually want to point out  
22     some things that I think are critical.  Congress  
23     actually drafts with respect to national  
24     emergencies in the very way that this  
25     Congress -- that this statute is drafted all

1 throughout the United States Code.

2           The -- it's on pages 7 to 9 of our  
3 reply brief, are just -- this was just like  
4 throwing -- throwing a penny, like, a yard.  
5 Like, this was just the ones that came up first  
6 in the search. These are all statutory  
7 authorities for the executive branch that are  
8 activated whenever we are in a time of national  
9 emergency. So it does not matter that it's the  
10 Iranian sanctions regime. It does not matter.  
11 The president just gets these authorities and  
12 has them.

13           And the government conceded that one  
14 of the more extraordinary authorities in the  
15 U.S. Code, Public Law 85-804, which uses the  
16 word "during" just like this statute, uses  
17 "during" in a purely temporal manner. And that  
18 gives the -- the president extraordinary  
19 contracting authorities to sort of disregard  
20 ordinary contracting rules.

21           So this is how Congress typically  
22 drafts statutes with respect to national  
23 emergencies, perhaps because they make  
24 assumptions about the nationalness and  
25 emergenciness of emergencies that are not

1     founded for -- for -- I'm not going to  
2     hypothesize, but there -- this is how these  
3     statutes are written throughout the United  
4     States Code.

5                 JUSTICE SOTOMAYOR:   So do you think  
6     those provisions permit the president to do away  
7     with all contracting rules for every contract  
8     that's totally unrelated to the national  
9     emergency?

10                MR. TUTT:   That --

11                JUSTICE SOTOMAYOR:   Because that seems  
12     to be your argument.

13                MR. TUTT:   That is -- that is the --  
14     the position of both parties in -- in this case,  
15     yes, is that -- that that is the scope of that  
16     provision.

17                JUSTICE SOTOMAYOR:   Well, I thought  
18     the government had changed its mind.  It's going  
19     to tell me that because it's going to have to  
20     explain why that's true in one set of provisions  
21     and not another so that contracting for paint  
22     for the Department of -- I don't know --  
23     Education that has nothing to do with the  
24     military, the government could --

25                MR. TUTT:   I will say that there is a

1     separate limitation then built in the statute.  
2     So the statute turns on in time of national  
3     emergency. There has to be a determination that  
4     it's essential to the national emergency.  
5     That's written separately in that statute, is --  
6     is, I think, my understanding.

7                 JUSTICE SOTOMAYOR: Thank you.

8                 JUSTICE KAVANAUGH: Can I go back to  
9     how Congress understood this? Because I think a  
10    helpful point for you is the CBO score because  
11    Congress does pay attention to that, and that,  
12    you say, was based on an understanding that that  
13    would apply to everyone called to active duty.  
14    So that's a good point in your favor, I think,  
15    in my understanding of CBO scores.

16                But the government comes back on that  
17    in its brief and, you know, basically says the  
18    CBO didn't explain the basis for its assumption  
19    and it was based on prior versions of the  
20    legislation, so this is not -- you know, not  
21    your usual CBO score, which, you know, again, I  
22    think is pretty central to how Congress  
23    understands legislation.

24                MR. TUTT: Well, CBO didn't make this  
25    mistake -- if it's a mistake, CBO didn't make it

1     just one time or just two times. It made it  
2     over and over again.

3             And I want to emphasize the degree of  
4     error that would be involved here. I've -- I've  
5     looked at data from the Defense Manpower Data  
6     Center, and 90 percent of call-ups are under  
7     unenumerated statutes. So they were off by a  
8     factor of 10 if they were estimating this based  
9     on -- based only on just the prior language of  
10    the statute.

11            But we look -- in our Petitioner's  
12    brief, we go through and look at other statutes  
13    that had the same cross-reference because, like  
14    I said, it's been used in around nine other  
15    places for veterans' benefits cases or veterans'  
16    benefits, and -- and they always got it -- they  
17    always scored it this way. So thank you.

18            CHIEF JUSTICE ROBERTS: Thank you,  
19    counsel.

20            Justice Thomas, anything further?

21            Justice Alito?

22            JUSTICE ALITO: What was the CBO  
23    score?

24            MR. TUTT: So the CBO said that it  
25    would cost roughly \$40 million a year but that

1 for the average reservist, it would be around  
2 \$3,000.

3 JUSTICE ALITO: So the total bill was  
4 estimated at 40 million per year?

5 MR. TUTT: Per year, yes, at that  
6 time.

7 JUSTICE ALITO: What is your response  
8 to the government's argument that your client is  
9 doomed to lose because he did not present the  
10 materials that were required by regulation to  
11 the FAA?

12 MR. TUTT: So I have three responses.  
13 It's not a barrier to this Court deciding this  
14 case because it's not jurisdictional, so it  
15 would just be an issue for remand. And I'll say  
16 it's not passed on by the court below or the  
17 MSPB.

18 We have good arguments he was not  
19 required to exhaust. Here are two. One, the  
20 statute does not require it. So, you know, the  
21 agency in some sense got a benefit here. They  
22 didn't have to pay him differential pay in real  
23 time. He had to go to the MSPB and get the  
24 differential pay. So they can just make the  
25 payment then. It's money that was budgeted to

1 be paid to him and should have been paid.

2 The other is that it would have been  
3 futile at the time. So, you know, exhaustion  
4 can be excused if it's futile. Here, OPM  
5 guidance was against him. The consistent  
6 practice of the agency was against him. And the  
7 person he asked at the agency told him he  
8 wouldn't get it. So that was why he didn't make  
9 the request.

10 JUSTICE ALITO: Do I remember  
11 correctly that what he did during the time when  
12 he was called up was to serve as the captain of  
13 a Coast Guard vessel that was escorting military  
14 vessels in and out of the harbor?

15 MR. TUTT: Yes. I don't -- I don't  
16 know -- I don't think he was the captain, but he  
17 was a petty officer.

18 JUSTICE ALITO: He was a petty officer  
19 on that. Why wouldn't that meet even the Adams  
20 standard?

21 MR. TUTT: I actually think it -- it  
22 does meet the Adams standard. There -- this --  
23 this case, for various reasons, the court ruled  
24 against us and said there was no evidence he was  
25 directly serving in a contingency operation.



1 Adams hadn't been decided when the record closed  
2 in this case, so we didn't develop those  
3 arguments.

4 And the way this was presented to the  
5 Federal Circuit was you should overrule Adams.  
6 He's just entitled to the differential pay. And  
7 that's how it was litigated below.

8 JUSTICE ALITO: At what point do you  
9 think the veterans canon, if it is a proper  
10 canon of interpretation, should come into play  
11 in this case? Would it come into play only if  
12 we thought that the arguments were in equipoise?

13 MR. TUTT: I have a -- I have a -- I  
14 have a strong view of the veterans canon. I  
15 think that it is something that's sort of more  
16 powerful than that. I think that it is evidence  
17 of how Congress thinks about how veterans should  
18 be treated based on their service to the  
19 country. But, certainly, if you get to  
20 equipoise, it should be a thumb on the scale in  
21 our favor.

22 JUSTICE ALITO: The canon is based on  
23 the thought that Congress wants any ambiguity  
24 that it leaves in the statute that could provide  
25 a benefit for veterans under all circumstances,

1 no matter the cost, to be resolved in favor of  
2 the veteran. That is a -- a -- a guess about  
3 the way Congress thinks?

4 MR. TUTT: I think it's -- you might  
5 even elevate it to the level of, like, a  
6 structural constitutional principle. I mean,  
7 you know, just as the Court has the federalism  
8 clear statement canon, I think, you know, when  
9 it comes to veterans and servicemembers, since  
10 the very first Congress, there has been an  
11 effort to ensure that those who put their lives  
12 on the line for us receive compensation.

13 JUSTICE ALITO: Is it constitutional?  
14 It's constitutionally based? On what provision  
15 of the Constitution is it based?

16 MR. TUTT: Well, I think it's based on  
17 the structure of the -- the Constitution, I  
18 guess is the -- the point.

19 JUSTICE ALITO: Well, what is the --  
20 what is it about the structure of the  
21 Constitution that supports it?

22 MR. TUTT: Well, there are -- there's  
23 the fact that most of Article I, Section 8 is  
24 devoted to military provisions. I -- I don't  
25 think that we have to get into high theory of --

1 of the veterans canon, but, you know, it is --  
2 if you look at the original Constitution, it's  
3 primarily a war machine. It's designed to  
4 ensure that the country can remain one going  
5 forward, and a crucial part of that is ensuring  
6 that veterans and reservists receive the  
7 benefits that they are --

8 JUSTICE ALITO: All right. Thank --  
9 thank you.

10 CHIEF JUSTICE ROBERTS: Justice  
11 Sotomayor?

12 JUSTICE SOTOMAYOR: Just a point of  
13 clarification. The orders here were a call-up  
14 for a military contingency. So, assuming that  
15 your responses to Justice Alito why your failure  
16 to act earlier should have been excused, one of  
17 his call-ups were for a medical treatment.

18 Under your theory, that plus, I think,  
19 regular service, the two weeks that reservists  
20 have to train, all of that would be paid the  
21 differential pay, correct?

22 MR. TUTT: Your Honor, his injuries  
23 were in the line of duty, and then he was called  
24 under 12301(h) to convalesce, but, you know, he  
25 was injured for -- while doing the contingency

1 operation and/or, yes, he would receive  
2 differential pay for that.

3 JUSTICE SOTOMAYOR: And so would he  
4 for the two -- every reservist for the two weeks  
5 of service they render in just basic training?

6 MR. TUTT: I think the Court -- I  
7 think that there may be arguments about whether  
8 that constitutes a call to active duty under a  
9 provision of law, but, assuming that it is,  
10 yeah, you would receive the -- the pay, just as  
11 you would receive your ordinary pay.

12 CHIEF JUSTICE ROBERTS: Justice Kagan?  
13 Justice Gorsuch?

14 JUSTICE GORSUCH: You haven't  
15 mentioned your argument about the unexpected  
16 criminal liability that employers might face,  
17 and I just wanted to give you an opportunity to  
18 offer that in light of the government's response  
19 in its reply brief.

20 MR. TUTT: Thank you, Your Honor, yes.

21 So, obviously, Section 209(h) is a  
22 carveout to a criminal prohibition that says  
23 that if you pay differential pay under the exact  
24 same terms as this statute, so they have the  
25 exact same words, that you are exempt from this

1 criminal statute.

2           So private employers relying on that  
3 language for decades have been paying those who  
4 were activated who work for them differential  
5 pay. And the implications of this case are that  
6 there are differential pay policies. We did not  
7 identify them for obvious reasons that do not  
8 match the government's vision of what the --  
9 this statute says. And so they would be out of  
10 compliance and have been out of compliance with  
11 what the government's version of the scope of  
12 this provision is.

13           And so relatively large companies  
14 would receive -- would be retroactively  
15 potentially criminally liable as a result of  
16 a -- of a ruling against us in this case.

17           JUSTICE GORSUCH: Just another quick  
18 question. The Adams opinion suggested that  
19 somebody called up had to be directly involved  
20 in a contingency operation. I don't see either  
21 side defending that rule. So should we just  
22 vacate and remand on that basis? What would be  
23 wrong with that?

24           MR. TUTT: We -- we welcome the  
25 government's decision to sort of abandon the --

1 the Adam -- Adams rule, and we do think that no  
2 matter what happens, the Court would have to  
3 vacate.

4 But we think that the -- we're here to  
5 get the statute right. We think that Congress  
6 enacted a bright-line rule that wasn't designed  
7 to create a bunch of line-drawing problems. And  
8 we would be down in the Federal Circuit  
9 litigating forever.

10 JUSTICE GORSUCH: No, I understand  
11 that, but, normally, we don't decide issues in  
12 the first instance. And, here, both sides have  
13 presented a raft of arguments that no lower  
14 court has passed upon.

15 And, normally, we wait for circuit  
16 splits. Here, of course, we can't get that, but  
17 we could at least get the Federal Circuit's  
18 considered judgment on your theory and the  
19 government's present theory having rejected the  
20 one that nobody seems to be willing to defend.

21 MR. TUTT: Your Honor, it would be  
22 kind of a boon to the government for having kind  
23 of moved their position, right, they have  
24 procured the --

25 JUSTICE GORSUCH: Hey, you don't win

1 everything, but, you know, it's better than a  
2 loss, isn't it, counsel?

3 MR. TUTT: I -- yes, Your Honor. Yes.  
4 And we would, of course, accept a vacate -- a  
5 vacate and remand if the Court is of the mind  
6 that this should be passed on by the Federal  
7 Circuit first.

8 CHIEF JUSTICE ROBERTS: Justice  
9 Kavanaugh?

10 JUSTICE KAVANAUGH: On the criminal  
11 liability point, obviously, there would be a  
12 good mens rea defense, so I'll just point that  
13 out, right? At least for those, yeah?

14 MR. TUTT: Yes, and -- but, again,  
15 you --

16 JUSTICE KAVANAUGH: It doesn't defeat  
17 your point. I'm just saying retroactive,  
18 unknowing liability is something that would be  
19 doubly frowned upon.

20 MR. TUTT: Yes. So, if the Court is  
21 ruling against us, you should say that,  
22 absolutely, I think. That would be a welcome  
23 thing. But I would say it is going to be, under  
24 the government's theory, very difficult for  
25 employers to figure out whether or not their

1 differential pay policies are compliant.

2 The government says just look at their  
3 orders, but the orders are written by members of  
4 the person's unit. They're written by --

5 JUSTICE KAVANAUGH: Well, the  
6 government then adds that -- and I think this  
7 goes to your line-drawing point too in your  
8 opening -- that if in a particular instance a  
9 servicemember's orders are not clear, he or she  
10 can seek to have the orders clarified.

11 MR. TUTT: And then I guess we would  
12 be litigating the very argument that the  
13 government has declined to make, which is  
14 whether the person's service is going to be  
15 sufficiently connected --

16 JUSTICE KAVANAUGH: Right.

17 MR. TUTT: -- in substance. And,  
18 again, that gets you to back-filling security  
19 operations. That gets you to training to go be  
20 deployed. That gets you to all of the  
21 line-drawing problems.

22 JUSTICE KAVANAUGH: Thank you.

23 MR. TUTT: Thank you, Your Honor.

24 CHIEF JUSTICE ROBERTS: Justice  
25 Barrett?



1 Justice Jackson?

2 JUSTICE JACKSON: Can I just clarify?

3 I'm sorry. So the -- the orders cite to a  
4 particular contingency or they don't?

5 MR. TUTT: They -- they sometimes do  
6 and they sometimes don't. They are supposed to,  
7 I think. I think the government will come up  
8 and say that they are supposed to. It is --  
9 they usually just say what provision of law  
10 you're being called up under.

11 And --

12 JUSTICE JACKSON: And if they're  
13 silent on that and we were to hold that a  
14 substantial connection is required, what --  
15 what's your view on the process then?

16 MR. TUTT: So my understanding is that  
17 the government is saying that orders will then  
18 be consistently written in a manner that ensures  
19 that a reservist knows whether they are going to  
20 get differential pay by looking at the face of  
21 their orders. And if they -- and if it doesn't  
22 say and the reservist --

23 JUSTICE JACKSON: And if that  
24 happens --

25 MR. TUTT: -- thinks it will --

1 JUSTICE JACKSON: -- does that -- does  
2 that defeat your argument about  
3 administrability?

4 MR. TUTT: It -- it does if you think  
5 that this will be consistently carried out and  
6 that it complies with the statute.

7 The big problem for the government's  
8 position is obviously that it doesn't really  
9 match up with the statute. There's nothing in  
10 the statute's use of "during" that implies that  
11 there's going to be.

12 JUSTICE JACKSON: No, I understand  
13 your point. Thank you.

14 MR. TUTT: But -- but -- yeah. Thank  
15 you, Your Honor.

16 CHIEF JUSTICE ROBERTS: Thank you,  
17 counsel.

18 MR. TUTT: Thank you.

19 CHIEF JUSTICE ROBERTS: Ms. Reaves.

20 ORAL ARGUMENT BY NICOLE F. REAVES

21 ON BEHALF OF THE RESPONDENT

22 MS. REAVES: Mr. Chief Justice, and  
23 may it please the Court:

24 The word "during" has multiple  
25 meanings, and as with many words, the meaning of

1 "during" in any particular sentence will depend  
2 on context. I want to highlight three pieces of  
3 context that make clear that "during a national  
4 emergency" means in the course of a national  
5 emergency, not at the same time as one.

6 First, the phrase "during a national  
7 emergency" is part of a broadly applicable  
8 definition of "contingency operation."  
9 Petitioner's reading fails to account for the  
10 fact that the term generally connotes an  
11 operation taken in response to a particular  
12 contingency. And national emergencies are often  
13 declared for non-military purposes.

14 One that Justice Kavanaugh referred  
15 to, for example, is called blocking Iranian  
16 government property. It's a prerequisite for  
17 certain economic sanctions, and it's been in  
18 effect for over 45 years.

19 As a matter of plain language, we  
20 would not think that voluntary active-duty  
21 training falls under the umbrella of a  
22 contingency operation so long as there is a  
23 declared economic emergency.

24 Second, reading "during" to merely  
25 require temporal overlap would make most of

1     Section 101(a)(13)(B) unnecessary. Because  
2     multiple national emergencies are ongoing at all  
3     times, Petitioner's reading renders the list of  
4     expressly cross-referenced provisions and  
5     Congress's multiple additions to that list  
6     entirely superfluous. And the Court has applied  
7     superfluity in cases like this, where  
8     superfluity is a result of language in the  
9     statute and practical effects of the way the  
10    world works. I'd point the Court to TWA v. --  
11    v. Anders -- Andrews as an example of that.

12             And third and finally, Petitioner's  
13    reading would result in a number of anomalies,  
14    including requiring differential pay for  
15    reservists who have been court-martialed and  
16    incarcerated.

17             For those and other reasons, the  
18    context makes clear that "during" does not carry  
19    a wholly temporal meaning here. Petitioner has  
20    consistently failed to seriously engage with the  
21    text and context, and neither DoD, nor the Coast  
22    Guard, nor any court has ever adopted  
23    Petitioner's reading of "during" in the  
24    definition of "contingency operation." This  
25    Court should not be the first to do so.

1 I welcome the Court's questions.

2 JUSTICE THOMAS: Has your position  
3 been adopted before by MSPB or by the Fed.  
4 Circuit?

5 MS. REAVES: So it has not been  
6 adopted by the Federal Circuit. It's -- excuse  
7 me, my -- our position has been adopted by the  
8 Federal Circuit. I think the Federal Circuit's  
9 position is probably a bit narrower than our  
10 position. So we are providing a more  
11 benefits-friendly approach.

12 And as far as the MSPB goes, the MSPB  
13 as a whole has never issued a precedential  
14 decision on this. There's a 2016 decision  
15 called Marquiz, where the Board as a whole  
16 divided on this question. ALJs have come out  
17 different ways. So Petitioner in his cert stage  
18 papers cited some examples of individual ALJ  
19 judges coming out his direction. We looked and  
20 there are examples of individual ALJs coming out  
21 our direction as well.

22 JUSTICE THOMAS: So there's some  
23 degree of novelty to your reading also then?

24 MS. REAVES: I don't think there's  
25 novelty. I think there was -- there has been

1 articulations along the lines of what we said by  
2 individual ALJ judges, but I think, at the end  
3 of the day, the kind of main point is that this  
4 reading of wholly temporal meaning of "during"  
5 that Petitioner has laid out is a really unique  
6 reading that, other than a handful of ALJs, just  
7 hasn't been adopted anywhere.

8 CHIEF JUSTICE ROBERTS: Counsel --

9 JUSTICE THOMAS: How do you -- how  
10 do --

11 CHIEF JUSTICE ROBERTS: Counsel -- I'm  
12 sorry. Go ahead.

13 JUSTICE THOMAS: How do you respond to  
14 the Petitioner's point that your reading would  
15 expose private employers to criminal -- more  
16 criminal liability?

17 MS. REAVES: So I have four quick  
18 responses on that.

19 The first is that our reading is no  
20 narrower than the Adams decision. I think it is  
21 broader. So assuming companies have been  
22 following the prevailing law, I think we're not  
23 creating any retroactive liability.

24 Second, the D.C. Circuit has held that  
25 there's an intent requirement. It's a decision

1     called U.S. versus Government Accountability. I  
2     think that would definitely cover the mistaken  
3     employer.

4             And, third, I -- I don't think this is  
5     a situation in which we get into lenity, first  
6     of all, because I don't think there's the sort  
7     of grievous ambiguity that would lead to --  
8     to -- to lenity itself.

9             But my fourth point is I think it  
10    would be an expansion of the lenity doctrine to  
11    apply it to a general definitional statute. The  
12    Court has applied lenity when a statutory  
13    prohibition has both civil and criminal  
14    penalties, and it's applied it in civil cases  
15    for that reason.

16            JUSTICE GORSUCH: Ms. -- Ms. Reaves --

17            CHIEF JUSTICE ROBERTS: Counsel --

18            JUSTICE GORSUCH: I'm sorry, Chief.

19            CHIEF JUSTICE ROBERTS: -- we've had a  
20    lot of discussion with what Congress meant and  
21    rightly -- rightly so. If you were someone  
22    sitting down trying to decide whether to sign up  
23    to be a reservist and you read this provision  
24    saying you get the same pay, you know, if you're  
25    called up during a war or during a national

1     emergency, and you -- and you find out there  
2     were 43 or however many it is national  
3     emergencies and that extra pay is very important  
4     to you, how do you think a normal person would  
5     read that language?

6             MS. REAVES: I do think the best  
7     reading that kind of anyone would have of this  
8     language is, if you look at all these expressly  
9     cross-referenced provisions and then you look at  
10    "during a war or during a national emergency,"  
11    it wouldn't make sense to read that so broadly  
12    as to swallow up those other provisions.

13            And I think a reservist wouldn't  
14    necessarily think that, oh, if I volunteer for  
15    JAG training, that means I'm serving during a  
16    national emergency. I don't think that's sort  
17    of the way an ordinary person would think of  
18    this.

19            CHIEF JUSTICE ROBERTS: Well, you  
20    started -- I think the first thing you said was,  
21    well, if you look at all the cross-referenced  
22    provisions. I -- I don't necessarily think  
23    somebody trying to decide whether to sign up  
24    would do that. I mean, just looking at the  
25    language, "during a war or during a national



1 emergency," it -- it seems to have a pretty  
2 strong temporal aspect.

3 MS. REAVES: I disagree, and I think,  
4 again, I would point the Court back to the fact  
5 that this is part of the definition of  
6 "contingency operation," and it applies over 40  
7 places in Title 10 and over 20 places outside of  
8 Title 10.

9 And when we think of a contingency  
10 operation, we don't normally think of something  
11 like volunteering for training. We think of  
12 something like a, you know, unexpected mission  
13 in response to a contingency. So I think, you  
14 know, if someone read the whole statute and the  
15 whole statutory provision, I don't think they  
16 would think that this just has a temporal  
17 requirement.

18 CHIEF JUSTICE ROBERTS: Well, and you  
19 say it's -- it -- it -- it doesn't mean --  
20 "during" doesn't have a temporal limitation. It  
21 also means in the course of. I've got to say I  
22 must be missing something because I would have  
23 thought "in the course of" means pretty much the  
24 same thing as "during." If -- if "during" has a  
25 temporal limitation, I don't see how "in the

1 course of" wouldn't.

2 MS. REAVES: So I think "in the course  
3 of" does have a temporal limitation. It just  
4 also requires a substantive connection.

5 And I think the plain meaning examples  
6 we provide in our brief -- someone arguing  
7 during a hearing, an obligation to be truthful  
8 during an application process, disclosures  
9 permitted during or in anticipation of  
10 litigation -- all of those are requiring both  
11 temporal overlap, of course, but also a  
12 substantive connection.

13 And that's a very common use of the  
14 term "during." And I think, once you kind of  
15 get past that point, the context just makes  
16 clear that a substantive connection is required  
17 here.

18 CHIEF JUSTICE ROBERTS: Well, I  
19 don't -- I'm not sure I agree with you that it's  
20 a common -- to the extent you're saying it's  
21 different than -- than "in the course of," I'm  
22 not sure I understand how it's a very common  
23 meaning. I think -- will you give me at least  
24 the most common reading is it means at the same  
25 time as?

1 MS. REAVES: I'm not sure it's the  
2 most common reading. But I think, even if you  
3 think it's the most common reading as wholly  
4 temporal, that doesn't excuse the Court from  
5 having to go through this context sort of  
6 analysis. So take the word "cool," for example.  
7 It means both cold temperature-wise and calm and  
8 collected. I think, certainly, cold  
9 temperature-wise is the most common meaning of  
10 that term, but that doesn't mean someone reading  
11 a sentence puts --

12 CHIEF JUSTICE ROBERTS: Well, it could  
13 mean --

14 MS. REAVES: -- the thumb on the scale  
15 in that favor.

16 CHIEF JUSTICE ROBERTS: -- mean a lot  
17 of things. It could also mean, you know, hip.  
18 But, I mean, it doesn't -- it's not the same  
19 kind of word as "during."

20 MS. REAVES: I -- I think it is a  
21 similar word to "during" in that it's a word  
22 that has multiple meanings. And when a word has  
23 multiple mainline meanings, the Court doesn't  
24 kind of put a thumb on the scale. It looks at  
25 the word in context and tries to sort out what

1     it means and what Congress meant by adopting  
2     that word in this context.

3                 JUSTICE GORSUCH:  Ms. Reaves, in  
4     response to Justice Thomas's question about the  
5     criminal liability under Section 209, I -- I --  
6     I take the mens rea point on past liability, but  
7     I -- I -- I think your friend on the other side  
8     had a -- a stronger point that I didn't hear you  
9     address, and that is private employers will have  
10    no way ex ante to know whether they're violating  
11    a federal felony -- committing a federal felony  
12    because they don't have access to orders all the  
13    time.  The orders don't contain the information  
14    that are necessary to determine whether their --  
15    they should be providing differential pay or  
16    whether they're forbidden from doing so.

17                If "during" has a substantive  
18    connection, how is a private employer to figure  
19    out whether this fellow with these orders is --  
20    is engaged in conduct during a national  
21    emergency?  Temporally, he can figure that out?  
22    Very difficult to figure out if there's a  
23    substantive component that's undefined.

24                MS. REAVES:  So a couple of responses  
25    on that, Justice Gorsuch.

1                   So, first of all, I do think,  
2     actually, it will be fairly straightforward for  
3     both agencies and private employers to sort out  
4     who's entitled to differential pay. And I do  
5     think that that is because the call or order to  
6     duty -- and we cite Army and Navy and Coast  
7     Guard guidance explaining that the call or order  
8     to duty is supposed to state the contingency  
9     operation, whether it's in support of one, the  
10    statutory authority for it, and the basis for  
11    the call-up, whether there's an executive order.

12                  Now Petitioner has provided no  
13    evidence for his assertion that that commonly  
14    does not happen and --

15                  JUSTICE GORSUCH: Do -- well, what do  
16    you think? Do you know, does that commonly  
17    happen? You cite regulations, great, but you  
18    also want us to take cognizance of the real  
19    world and how many national emergencies there  
20    are, so may -- perhaps we should ask you how  
21    common is it for the -- the orders not to  
22    contain the information that's required to know  
23    the answer?

24                  MS. REAVES: So DoD has informed me  
25    that it is rare, that this guidance is

1     commonplace and that the orders normally contain  
2     this sort of language. And as we explained, the  
3     way for an individual, whether they're employed  
4     by a federal agency or whether they're employed  
5     by a private employer, if their orders don't say  
6     that, they follow that OPM guidance, they go ask  
7     for clarification on the orders from the Army or  
8     Navy or whoever they're employed by, and when  
9     those are corrected, it is, in fact, clear  
10    whether or not they're entitled to differential  
11    pay.

12                 JUSTICE GORSUCH: It's just that a  
13    well-meaning private employer could find  
14    themselves to be a federal felon for actually  
15    trying to pay money to somebody.

16                 MS. REAVES: I don't think so because  
17    of the mens rea requirement.

18                 JUSTICE GORSUCH: I understand. I  
19    understand that.

20                 JUSTICE KAGAN: Could I ask you --

21                 JUSTICE GORSUCH: Now just --

22                 JUSTICE KAGAN: I'm sorry.

23                 JUSTICE GORSUCH: Sorry. Just one --  
24    one last thing. You -- you've acknowledged that  
25    this "during" argument is -- is different than

1 the Adams precedent, and -- and it is. And  
2 Justice Thomas also asked you would it make  
3 sense to at least get lower courts to pass on  
4 this before we do? We don't -- we're never  
5 going to have a circuit split, but would it be  
6 prudent to at least have the benefit of some  
7 lower court thinking on -- on what is presented  
8 to us for the first time in this Court, a new  
9 theory?

10 MS. REAVES: So I think two points on  
11 that, Justice Gorsuch.

12 First of all, you know, we don't have  
13 a problem with sending this case back. We  
14 obviously opposed certiorari in this case.

15 I think the second point I would point  
16 out is that, in our brief in opposition in  
17 Adams, we made essentially the argument we're  
18 making to the Court now, and we did, in fact,  
19 make that to the Federal Circuit in opposition  
20 to Petitioner's cert petition in this case and I  
21 believe some on the merits of this case as well.

22 JUSTICE GORSUCH: That's interesting,  
23 that even despite the government's concession  
24 that they're wrong, they haven't yet fixed their  
25 precedent, so I wonder whether that augers

1     for -- for doing just -- just that, clarifying  
2     that that's wrong.

3             MS. REAVES:   Again, I mean, I think we  
4     opposed cert --

5             JUSTICE GORSUCH:   You have no --

6             MS. REAVES:   -- because we think this  
7     broad argument that no court has accepted is  
8     wrong.

9             JUSTICE GORSUCH:   You have no  
10    objection to this, to -- to -- to vacating and  
11    remanding because Adams is wrong?

12            MS. REAVES:   So I think we would have  
13    an -- an opposition to vacating here for a  
14    couple of reasons, because Petitioner this whole  
15    way through has presented only one argument.  
16    And -- and my friend on the other side --

17            JUSTICE GORSUCH:   That Adams is wrong.

18            MS. REAVES:   No.   My friend on -- so I  
19    think it's important to keep in mind what is  
20    wrong in Adams here.   What is right in Adams is  
21    its rejection of Petitioner's argument that mere  
22    temporal overlap entitles someone to  
23    differential pay.

24            That is the only argument Petitioner  
25    has presented throughout this case.   He solely



1     took this up to broadly challenge that broad  
2     argument in Adams. And so I think a vacatur in  
3     this case would be inappropriate because that  
4     would essentially be giving Petitioner a benefit  
5     for making a broad argument that this Court was  
6     unwilling to affirm on.

7                 JUSTICE GORSUCH: It's just odd  
8     that -- that we would -- he would lose even if  
9     we all agree Adams is -- is wrong.

10                MS. REAVES: I don't think that's  
11     right. I think some of the dicta in Adams we  
12     aren't embracing here and we've never embraced.  
13     We didn't embrace it in our brief opposition in  
14     Adams. We didn't embrace it in our brief in  
15     opposition here.

16                JUSTICE GORSUCH: Thank you.

17                MS. REAVES: But the main-line holding  
18     he's challenging we do think is wrong.

19                JUSTICE GORSUCH: Thank you.

20                JUSTICE SOTOMAYOR: I have two --

21                JUSTICE KAGAN: Can I ask --

22                JUSTICE SOTOMAYOR: -- I have two  
23     lines of questions following up on this.

24                You showed the FAA policy to me, but  
25     that has no time limit as to when the requests

1     for differential pay could be made. So, if it  
2     has no time limit, why is their failure to have  
3     asked for it earlier fatal?

4             MS. REAVES: So it's not a timing  
5     problem here. And, you know, the FAA will  
6     consider if Petitioner -- if the Court affirms  
7     in this case and Petitioner actually files a  
8     request for differential pay, FAA will consider  
9     that under the standard laid out in our brief,  
10    and we anticipate he will receive differential  
11    pay for the three periods at issue in this case.

12            JUSTICE SOTOMAYOR: All right. So let  
13    me stop and go back to he was fighting the Adams  
14    decision before the Board, which basically made  
15    the orders irrelevant. It required him to prove  
16    that his work had a substantive connection.

17            You admit that that requirement was  
18    not necessary. But why should he be faulted for  
19    failing to anticipate a position that the agency  
20    rejected?

21            MS. REAVES: So I don't think that the  
22    argument that his orders are in support of a  
23    contingency operation or in the course of a  
24    contingency operation was in any way foreclosed  
25    by Adams.

1           The only thing Adams squarely rejected  
2       was that solely temporal overlap alone was not  
3       enough.

4           JUSTICE SOTOMAYOR: That's not how I  
5       read the Federal Circuit's Adams decision. I  
6       read it as saying, even if your order specified  
7       that it was for the Iraqi fight, that you had to  
8       prove that the actual job you did related to  
9       that contingency operation.

10          MS. REAVES: I think maybe there's  
11       some loose language in Adams along that line,  
12       but I wouldn't say it's relevant to the holding  
13       of Adams because the facts of Adams --

14          JUSTICE SOTOMAYOR: We may be read --  
15       we're going to -- then we're going to fight  
16       about a reading. I -- I think it's fairly clear  
17       to me both in Adams and in this case that they  
18       faulted him for not proving the substantive  
19       connection between his work and the Iraqi  
20       operation.

21          MS. REAVES: I do think it's important  
22       to keep in mind, though, the facts in Adams, his  
23       orders said he was called up in support of a  
24       non-contingency operation.

25          JUSTICE SOTOMAYOR: Adams was very

1 different, I agree.

2 Now there is one other area that I  
3 want to -- and I notice, before the Federal  
4 Circuit, you argued that the enumerated  
5 provisions in 10 U.S.C. 101(a)(13)(B) should  
6 inform the Court's understanding of the final  
7 clause we're interpreting here. You seemed to  
8 be making that argument at -- on -- at the bench  
9 before us earlier, but in your briefing, you  
10 gave it up.

11 But, if I look at those  
12 cross-references, all of the enumerated  
13 contingency operations are -- some of them  
14 require a connection, a substantive connection,  
15 some don't. So what's your position?

16 MS. REAVES: So --

17 JUSTICE SOTOMAYOR: Either all of them  
18 require a substantive connection or they don't.  
19 And if they don't, why do we use them to inform  
20 us about whether this requires a substantive  
21 connection or not?

22 MS. REAVES: So we haven't made the  
23 argument here that -- before this Court that all  
24 of those cross-referenced provisions require a  
25 substantive connection. The argument that I was

1 making and that we did make in our brief is that  
2 the Court should consider the fact that it's  
3 defining "contingency operation" and the plain  
4 meaning of that term by itself.

5 JUSTICE SOTOMAYOR: That seems like  
6 having your cake and eating it too.

7 MS. REAVES: I -- I don't --

8 JUSTICE SOTOMAYOR: You want to say,  
9 in this one provision, it requires a substantive  
10 connection, but it doesn't in all those others.  
11 It might not in all those others. And the  
12 reason it might not in all those others is  
13 because all those others don't mention that  
14 connection.

15 MS. REAVES: I don't think that's  
16 right. And, again, we haven't made that  
17 argument for a reason, but I think, if the -- if  
18 you're trying to make a little sense of how  
19 Congress might have been thinking and what it  
20 wanted to accomplish by writing things this way,  
21 all the expressly cross-referenced provisions  
22 provide a basis for involuntary calls to  
23 service.

24 And I think it would be rational for  
25 Congress to say: Well, we want all involuntary

1 service calls of any type to entitle individuals  
2 to differential pay. And volunteering for  
3 service in the course of a national emergency  
4 should entitle them to differential pay.

5 But volunteering for active-duty  
6 training to go to JAG school or something like  
7 that does not automatically entitle someone to  
8 differential pay. I do think that's kind of a  
9 logical way to draw things.

10 JUSTICE SOTOMAYOR: So 10 U.S.C.  
11 1230 -- I'm sorry -- 10 U.S.C. 1230(o)(2) that  
12 provides that in time of national emergency, to  
13 activate a unit of the Ready Reserve without  
14 their consent, does that require there to be a  
15 national emergency, related to a national  
16 emergency?

17 MS. REAVES: No, I don't believe so.

18 JUSTICE SOTOMAYOR: All right. So you  
19 are inconsistent there. Okay. Thank you.

20 MS. REAVES: No, I don't think we're  
21 being inconsistent.

22 JUSTICE SOTOMAYOR: I know you're  
23 saying you're not, but I don't see how I can  
24 do -- I can get to substantive if you say that  
25 Congress intended there to be a substantive

1 connection here but --

2 MS. REAVES: But only as to the other  
3 provisions of law that weren't expressly  
4 enumerated. Congress obviously made different  
5 policy judgments as to all involuntary call-ups  
6 that are covered under those other provisions.

7 JUSTICE KAGAN: Can I ask about the  
8 CBO scoring, because the CBO scoring really does  
9 seem to assume the Petitioner's position here,  
10 and I'm wondering how you think that came to be  
11 or how we should think about the relevance of  
12 that.

13 MS. REAVES: So I have three points on  
14 that, Justice Kagan.

15 First, the language originated in CBO  
16 reports that were analyzing materially different  
17 statutory proposals that suggested that all  
18 active-duty service would be covered.

19 And, second, when that statutory text  
20 changed, the CBO reports didn't analyze that.  
21 They just carried over the analysis from those  
22 prior reports.

23 JUSTICE KAGAN: So my understanding of  
24 the way CBO usually works -- and you tell me if  
25 you think it's different in this situation --

1 but that there's, you know, a back-and-forth and  
2 maybe a continuing dialogue really between CBO  
3 staffers and legislators because it's in  
4 everybody's interest that the scoring actually  
5 reflect the -- the nature of the thing that  
6 Congress wants to do.

7 So I guess I would be surprised if you  
8 were to tell me there was an initial thing that  
9 they based this assumption on and then everybody  
10 just stopped talking to each other.

11 MS. REAVES: Well, I think one thing  
12 to look at is that these reports were very quick  
13 succession and that change occurred, and I  
14 believe the next report came out within a matter  
15 of one or two months. So I'm not sure that  
16 there was sort of the time and analysis that one  
17 might expect for that change to kind of  
18 statutory text.

19 JUSTICE GORSUCH: Well, isn't there  
20 also --

21 MS. REAVES: But the third point I  
22 wanted to make --

23 JUSTICE GORSUCH: Sorry -- sorry to  
24 interrupt, but Justice Kagan suggested that all  
25 sides have an interest in making sure the score



1     is accurate. I wonder whether there's actually  
2     an incentive to make sure the score -- the score  
3     is as low as possible and that if there was a  
4     change during the drafting process that was  
5     material and people thought it would reduce the  
6     score, they would have had every incentive to  
7     note that.

8                 MS. REAVES: I -- I -- I really can't  
9     speculate on what this particular CBO office or  
10    the senators and representatives that were  
11    speaking to them were thinking about, but the  
12    third point I want to make, and I think this is  
13    very important, is that even under Petitioner's  
14    reading, those later CBO reports got it wrong.

15                So one of the other changes that  
16    happened was referencing the definition of  
17    "active-duty service" in Section 101(d), and  
18    that excludes full-time national guard duty.  
19    And if you look at those CBO reports, they all  
20    say that full-time national guard duty will be  
21    covered. And I don't think Petitioner would  
22    dispute that. But it's yet another way.

23                So, you know, if you go with  
24    Petitioner's reading, the CBO reports got one  
25    big thing wrong. If you go with our reading, it

1 got two big things wrong. I just don't think  
2 this is a situation in which the CBO reports  
3 should play any sort of major influence in  
4 overriding the best meaning of the congressional  
5 text.

6 JUSTICE KAVANAUGH: The overall amount  
7 of money at issue here is roughly?

8 MS. REAVES: Unfortunately, I don't  
9 have any numbers on that. Because each civilian  
10 employing agency is responsible for paying  
11 differential pay, we don't have consolidated  
12 data on that.

13 JUSTICE KAVANAUGH: I guess my point,  
14 it's not a huge number in the grand scheme of  
15 the federal budget, correct?

16 MS. REAVES: I think that that's  
17 probably fair, but that doesn't --

18 JUSTICE KAVANAUGH: You don't know?

19 MS. REAVES: I don't -- I don't know.

20 JUSTICE KAVANAUGH: I think you said  
21 something earlier that's important. Just to  
22 make sure I have it right, even if we affirm,  
23 Petitioner could present the orders or go back  
24 to the FAA and make the request and would  
25 likely, I think you said -- I don't want to put

1 words in your mouth -- get the differential pay  
2 for the pay periods in question, correct?

3 MS. REAVES: That's correct. The  
4 FAA -- if he submits his earning and leave  
5 statements, which, again, he's never done --  
6 it's at Pet. App. 32a -- and his orders to the  
7 FAA, they'll adjudicate it under the standard  
8 laid out in our brief.

9 JUSTICE KAVANAUGH: So, even  
10 affirming, absent something unexpected, he's  
11 going to get his pay?

12 MS. REAVES: That's correct, yes.

13 JUSTICE KAVANAUGH: Okay. Let's see.  
14 Footnote 4, you say you're going to change the  
15 OPM -- or not you -- OPM is going to change its  
16 guidance going forward. Can you just clarify  
17 what you mean by that?

18 MS. REAVES: Yes.

19 JUSTICE KAVANAUGH: I think you've  
20 already explained it, but I just want to nail it  
21 down in connection with Footnote 4.

22 MS. REAVES: Of course. So I think,  
23 if the Court were to affirm here and just reject  
24 Petitioner's argument, OPM would update its  
25 guidance to be in line with the standards we've

1     laid out in our brief, so to instruct agencies  
2     to look at the text of the orders.  If there's  
3     confusion about that, to go back to the Navy or  
4     Army or Coast Guard and request clarification  
5     from them.  The guidance will, of course, make  
6     clear that this final clause in Section  
7     101(a)(13)(B), you know, is going to be based on  
8     the text of those orders.

9             And so I think -- I think it will be  
10    very clear from those, from that guidance,  
11    the -- the rule that agencies should apply when  
12    adjudicating differential pay requests.

13            JUSTICE KAVANAUGH:  And the --

14            CHIEF JUSTICE ROBERTS:  What about --

15            JUSTICE KAVANAUGH:  -- last one -- oh.

16            CHIEF JUSTICE ROBERTS:  I'm sorry, go  
17    ahead.

18            JUSTICE KAVANAUGH:  I'm good.

19            CHIEF JUSTICE ROBERTS:  Well, if it's  
20    your last one.

21            (Laughter.)

22            JUSTICE KAVANAUGH:  Pressure.  Can you  
23    explain, and I think you've touched on this, but  
24    explain how adopting Petitioner's interpretation  
25    would cause ripple-effect problems in other

1 areas of the law? Because I want to make sure I  
2 understand how the interlocking pieces work  
3 here.

4 MS. REAVES: So I think our -- our  
5 real point is that the term "contingency  
6 operation" is used in numerous places throughout  
7 the U.S. Code. Over 50 times in Title 10, over  
8 20 times outside of Title 10, either  
9 "contingency operation" or one of the provisions  
10 within that definition are referenced.

11 And our real argument here is that it  
12 wouldn't make any sense to use Petitioner's  
13 definition of "during" in all of those sorts of  
14 contexts. So I think we've pointed out some of  
15 them on our brief on pages 5 and 22. And a lot  
16 of these fall into the categories of exceptions  
17 to various obligations, such as spending limits  
18 and use of certain resources and requirements to  
19 notify Congress.

20 I think, if you accepted Petitioner's  
21 reading, then it would suggest that these  
22 requirements have very little teeth because they  
23 would essentially be excused as long as a  
24 national emergency happens to be ongoing at the  
25 same period of time.

1 CHIEF JUSTICE ROBERTS: I understood  
2 your discussion with Justice Kavanaugh. You  
3 said that the Petitioner here would be entitled  
4 to get the relief he's seeking how?

5 MS. REAVES: So he would need to --  
6 again, because Petitioner has never actually  
7 submitted his earnings and leave statements,  
8 there's no way for the FAA to calculate any  
9 differential pay to which he's entitled. It's  
10 not as if every civilian agency has access to  
11 DoD pay stubs. They're separate pay systems and  
12 they can't acquire it. So there's --

13 CHIEF JUSTICE ROBERTS: Oh. So you  
14 were just talking about him in this particular  
15 case --

16 MS. REAVES: Yes, I was just talking  
17 about that.

18 CHIEF JUSTICE ROBERTS: -- due to that  
19 particular nuance. I thought it was you were  
20 offering broader relief than that.

21 MS. REAVES: No, I was just talking  
22 about Petitioner.

23 CHIEF JUSTICE ROBERTS: Okay.

24 JUSTICE BARRETT: Ms. Reaves --

25 JUSTICE KAGAN: I understand the

1     oddity of having all these statutes enumerated  
2     if Petitioner's position is right as to the  
3     catch-all, but you don't think that it's odd to  
4     have the policy that Petitioner is suggesting,  
5     do you?

6                 MS. REAVES:  No.  I don't think our --  
7     our argument is ultimately a policy argument at  
8     all.  I think it's based on the text and context  
9     here.

10                JUSTICE KAGAN:  Well, I mean, I guess  
11     what I'm suggesting is it would make perfect  
12     sense for Congress to say something like anybody  
13     who's called up in these perilous times ought to  
14     get a pay differential because everybody  
15     contributes in their own way, so regardless, if  
16     you're at the front fighting for a war or you're  
17     the military recruiter or you're anything else,  
18     you know, that everybody contributes to the --  
19     to the efforts that -- the effort that is needed  
20     in these emergency times.

21                That would make perfect sense for  
22     Congress to think, wouldn't it?

23                MS. REAVES:  Yes, I think it would  
24     make sense.  I just want to point out that I  
25     think Petitioner's argument actually goes

1 broader than that because he's arguing that  
2 individuals who volunteer for training are also  
3 entitled to differential pay. I -- I don't  
4 think those sort of individuals would kind of  
5 fall within that logic.

6 JUSTICE KAGAN: I don't really know  
7 why. Like, we need people who get training so  
8 that they can step up, you know, when their turn  
9 comes.

10 MS. REAVES: Maybe that would apply  
11 for involuntary training, but I'm less sure if  
12 it would apply to voluntary training. But I  
13 don't want to fight you that Congress could have  
14 made a very different policy choice here, but  
15 the easy way to do so would have just been to  
16 say all active-duty service and adopt one of the  
17 other provisions it considered before adopting  
18 this cross-reference to "contingency operation."

19 JUSTICE BARRETT: Ms. Reaves, can you  
20 address the states' amicus brief where they say  
21 that you're pegging this to the orders rather  
22 than the statutory authorization when the  
23 statute doesn't say that it depends on the way  
24 that DoD writes the orders?

25 MS. REAVES: So I actually think the



1 orders language is in the statutory text both in  
2 5538 and 101(a)(13)(B). So, obviously, if you  
3 start with 5538, it's someone who's performing  
4 active -- active duty in the uniformed services  
5 pursuant to a call or order to active duty, and  
6 then it goes through the statutory bases for  
7 that. And then, similarly, in 101(a)(13)(B),  
8 it's again "results in a call or order to or  
9 retention on active duty of members."

10 I think another way to think about  
11 this is to try to insert it into the question  
12 presented. So I don't think the -- the question  
13 presented makes sense if you ask whether a call  
14 or order to duty is at the same time as or in  
15 the course of a war or national emergency. I  
16 don't think it makes sense is if you ask whether  
17 a provision of law is at the same time as or in  
18 the course of a national emergency.

19 JUSTICE BARRETT: Do orders change in  
20 the midst of service?

21 MS. REAVES: So an individual might  
22 receive a different set of orders. So I think  
23 what usually happens is the orders is for a  
24 particular period of time. And then they  
25 might -- when the orders are set to expire, they

1     might decide to volunteer for more duty in which  
2     the orders would be changed, say if their  
3     initial duty was involuntary, or the agency --  
4     or the -- excuse me -- DoD might decide to  
5     continue them on involuntary service.

6                 But, at the end of the day, you know,  
7     the basis for orders are first the statutory  
8     authority that DoD has and the facts of a  
9     particular mission.

10                JUSTICE BARRETT: But does DoD switch  
11     them? I guess what I'm getting at is, even if  
12     they started out doing something that doesn't  
13     fit your conception of a connection to the  
14     national emergency, does DoD switch what they're  
15     doing midstream? And then how is the -- you  
16     know, how is the agency supposed to know or a  
17     private employer supposed to know, oh, no,  
18     actually, they've shifted and they're doing  
19     something more closely connected?

20                MS. REAVES: So, yes, in that sort of  
21     situation, if someone was not working in support  
22     of a contingency operation and then that  
23     changed, DoD would write them a new set of  
24     orders, and then the individual would, just as  
25     with any other differential pay request, need to

1 submit those orders and his leave and earning  
2 statements to his agency.

3 JUSTICE BARRETT: And that invariably  
4 happens?

5 MS. REAVES: That's my understanding,  
6 that that is what is required to happen. You  
7 know, the reason we cage this a little bit in  
8 our brief is because, occasionally, mistakes do  
9 happen and, you know, DoD does not execute all  
10 orders with perfection.

11 But, again, Petitioner hasn't  
12 identified any situations, let alone any broad  
13 issues, with orders being miswritten. And we do  
14 have this option for individuals to seek  
15 clarification if there is a mistake. And I  
16 think that that guidance would obviously apply  
17 if there's a change in orders such as you've  
18 articulated.

19 CHIEF JUSTICE ROBERTS: There are  
20 going to be difficult line-drawing problems  
21 under your approach, isn't it? I mean, let's  
22 say you're dealing with an air traffic  
23 controller, and it's -- it's not involving --  
24 "in the course of" just doesn't do it for me,  
25 but it's not involving a particular emergency at

1     that time, but in the back of the Army or Air  
2     Force's mind is, you know, we want to have a  
3     trained cadre of reservists who are used to  
4     dealing with the military operations and air  
5     traffic controlling, and as long as he -- he's  
6     here or she's there, it'll help us to have that  
7     background. I mean, would that be in the course  
8     of whatever national emergency would be invoked  
9     later on?

10           MS. REAVES: I think it would depend  
11     on how DoD chose to write the orders in that  
12     situation. You know, again, DoD can't call  
13     someone up without a statutory basis for that,  
14     and it has to abide by limits that Congress has  
15     placed on it. And DoD isn't writing these  
16     orders, you know, focused on what the  
17     differential pay effects is going to be. It's  
18     focused on the needs that it has, whether that's  
19     training needs, whether that's service needs.

20           And so DoD writes the orders  
21     accordingly, and they are going to say whether  
22     or not it's a contingency operation and whether  
23     or not it's in support of an executive order  
24     that's involved in a national emergency. So I  
25     think it is going to be clear generally whether

1 someone's entitled to differential pay.

2 CHIEF JUSTICE ROBERTS: Thank you.

3 Justice Thomas? No?

4 Justice Sotomayor?

5 All right.

6 JUSTICE JACKSON: Can I just ask,  
7 having the differential pay scenario turn on the  
8 order, that doesn't seem so odd to me, but can  
9 you just speak to that? I mean, it seems like  
10 what the statute contemplated, right?

11 I mean, in response to the Chief  
12 Justice's question, you have to look at what the  
13 person is being called up relative to. And if  
14 the order says that, is it the government's  
15 position that that's all that's necessary?

16 MS. REAVES: That is. And I think  
17 you're completely right that there is a textual  
18 hook for that both in Section 5538 and in  
19 Section 101(a)(13)(B). Both refer to the call  
20 or order to active duty. And I do think that  
21 that really gives us a textual basis for looking  
22 at the orders.

23 JUSTICE JACKSON: Was that the  
24 government's position before on this?

25 In -- in other words, I'm wondering

1     whether the OPM scoring debacle could be related  
2     to a lack of clarity as to how we would figure  
3     out, you know, substantive connection without  
4     this kind of clear guidance.

5                 MS. REAVES:   I'm genuinely not sure  
6     what OPM was thinking about.

7                 JUSTICE JACKSON:   Yeah.

8                 MS. REAVES:   You know, I'm not -- I --  
9     I can't say that in the legislative history that  
10    I've looked at for Section 5538 there was  
11    discussion or that much focus on the orders.  
12    But, obviously, the relevant legislative  
13    history, if this Court were to look at it, which  
14    we don't think it should, is Section  
15    101(a)(13)(B).

16                JUSTICE JACKSON:   Thank you.

17                CHIEF JUSTICE ROBERTS:   Rebuttal,  
18    Mr. Tutt?

19                REBUTTAL ARGUMENT OF ANDREW T. TUTT

20                ON BEHALF OF THE PETITIONER

21                MR. TUTT:   Thank you, Mr. Chief  
22    Justice.

23                First, I want to say that the  
24    government has abandoned the Adams rule.   The  
25    Adams rule couldn't be clearer.   It was applied

1 twice in this case. It says you have to be  
2 directly called into a contingency operation in  
3 order to receive differential pay.

4 Our client was not called directly  
5 into a contingency operation. His orders say he  
6 was in support of a contingency operation. So  
7 he was not eligible for differential pay under  
8 Adams.

9 So the government's concession finally  
10 came at the 11th hour at the merits stage in  
11 this Court. So, if you are inclined to rule  
12 against us, you should at least vacate and allow  
13 the Federal Circuit to get it right. But we  
14 think that the correct reading of this statute  
15 is clear.

16 Mr. Chief Justice, you understand our  
17 reading absolutely. If an ordinary person read  
18 this statute, they would think: I get  
19 differential pay as long as I'm called to active  
20 duty under a provision of law during a national  
21 emergency. There are 43 national emergencies.  
22 I get differential pay.

23 Most of them are looking at one  
24 national emergency, one extremely important  
25 national emergency, the 9/11 emergency that

1 continues to this day. That has been the basis  
2 for so many deployments overseas, that triggered  
3 calls to active duty minutes after the planes  
4 struck the towers on September 11th.

5 And individuals were not just called  
6 to go serve in Afghanistan and Iraq. They were  
7 called to protect airports. They were called to  
8 fill in numerous security functions to ensure  
9 that there was not a repeat of the attacks  
10 shortly after they happened.

11 I want to talk about ripple effects  
12 because I feel like it is a real sticking point.

13 The government admits that the  
14 enumerated provisions don't require a  
15 substantive connection between the emergency and  
16 the service. So, in other words, like my  
17 client, you could be called up under 12302  
18 orders. He was called to protect the Port of  
19 Charleston under 12302 orders.

20 Under the -- the government is  
21 claiming that that made protecting the Port of  
22 Charleston a contingency operation. Obviously,  
23 they don't treat it that way. It is not going  
24 to have these ripple effects because lots of  
25 people -- almost all -- throughout the military



1 services, individuals are called to active duty  
2 under enumerated provisions not related to a  
3 pending national emergency. They're not  
4 transforming everything the military does into  
5 contingency operations.

6           So this -- this ripple-effect idea is  
7 something that's in the air, but it doesn't have  
8 practical effects with how the government is  
9 actually treating contingency operations on the  
10 ground.

11           I also want to point out I looked at  
12 all of the contingency operation statutes, and  
13 the parade of horrors is not actually that  
14 horrible. It mostly pertains to benefits for  
15 individuals, and it pertains to procedures that  
16 agencies have to follow and then a few extra  
17 additional powers that the agencies have -- that  
18 they typically have with respect to responding  
19 to important national events.

20           I want -- I want to talk about the  
21 ejusdem generis argument because I think that it  
22 reveals the hollowness of the government's  
23 position.

24           The government contended in Adams that  
25 all of the call-ups have some relationship to

1 the national emergency. They've given that up  
2 because they do not. And then -- so they can't  
3 inform the scope of the catch-all provision.

4 So -- and to Justice Jackson's point,  
5 Justice Jackson pointed out that you think that  
6 it's very simple, you just look at the order,  
7 you look at the provision of law under which the  
8 person is called.

9 But, if you look at the person --  
10 provision of law that a person is called under,  
11 like 12301(d) orders, our reading is that if  
12 it's during a national emergency, that means you  
13 get differential pay.

14 The government is saying you have to  
15 have something additional in that order. You  
16 have to have some reference to the national  
17 emergency. And that reference to the national  
18 emergency is not something that they have to put  
19 in. They're supposed to say whether your  
20 service is connected to a contingency operation  
21 under their regulations.

22 Again, these orders are written by  
23 junior enlisted people. They're not issued by  
24 the Pentagon. They do not typically change  
25 while a person is serving.

1                   So, in other words, if you are  
2                   stationed somewhere and it suddenly becomes a  
3                   combat zone, you are apparently not going to get  
4                   differential pay.

5                   And I want to say that people are  
6                   called to respond to national emergencies all  
7                   the time -- 9/11 was a good example -- that are  
8                   not military or fundamentally military in  
9                   nature, but they should still get differential  
10                  pay because they're serving on active duty,  
11                  sometimes under enumerated provisions.

12                  So, for instance, responding to the  
13                  COVID-19 emergency, reservists were activated to  
14                  respond to that emergency. It's not a  
15                  fundamentally military emergency. So, again, I  
16                  don't think that the government takes the  
17                  position that it was a contingency operation.

18                  So the idea that this creates sweeping  
19                  sort of ripple effects throughout the United  
20                  States Code or that our reading is so  
21                  implausible I don't -- I don't agree with.

22                  And I just want to close by saying  
23                  that it obviously is good policy. It obviously  
24                  is -- is defensible policy. No one at any point  
25                  in the enactment of this statute thought --

1     presented it as anything other than applying to  
2     all reservists. We urge you to reverse.

3             Thank you, Mr. Chief Justice.

4             CHIEF JUSTICE ROBERTS: Thank you,  
5     counsel.

6             The case is submitted.

7             (Whereupon, at 12:47 p.m., the case  
8     was submitted.)

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