

SUPREME COURT OF THE UNITED STATES

IN THE SUPREME COURT OF THE UNITED STATES

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

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NICK FELICIANO,)
Petitioner,)

v.) No. 23-861

DEPARTMENT OF TRANSPORTATION,)
Respondent.)

- - - - -

Washington, D.C.

Monday, December 9, 2024

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 11:34 a.m.

APPEARANCES:

ANDREW T. TUTT, ESQUIRE, Washington, D.C.; on behalf of the Petitioner.

NICOLE F. REAVES, Assistant to the Solicitor General, Department of Justice, Washington, D.C.; on behalf of the Respondent.

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P R O C E E D I N G S

(11:34 a.m.)

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

Mr. Tutt.

ORAL ARGUMENT OF ANDREW T. TUTT

ON BEHALF OF THE PETITIONER

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

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

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

The government resists this 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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