Nos. 19-108, 19-184

In the Supreme Court of the United States

UNITED STATES, *Petitioner*,

v.

MICHAEL J. D. BRIGGS, *Respondent.*

UNITED STATES, *Petitioner*,

v.

RICHARD D. COLLINS, *Respondent.*

UNITED STATES, *Petitioner*,

v.

HUMPHREY DANIELS III, *Respondent.*

On Writs of Certiorari to the United States Court of Appeals for the Armed Forces

BRIEF OF HARMONY ALLEN AND PROTECT OUR DEFENDERS AS AMICI CURIAE SUPPORTING PETITIONER

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INTEREST OF AMICI CURIAE[1]

Respondent Richard D. Collins raped amicus curiae Harmony Allen.

Amicus curiae Protect Our Defenders is dedicated to ending rape and sexual assault in the military. It honors, supports, and gives voice to survivors of military sexual assault and sexual harassment – including service members, veterans, and civilians assaulted by members of the military. Protect Our Defenders works for reform to ensure survivors and service members are provided a safe, respectful work environment and have access to a fair, impartially administered system of justice.

SUMMARY OF ARGUMENT

The Court of Appeals for the Armed Forces ("CAAF") overruled as unconstitutional the portion of 10 U.S.C. § 920, Rape and Carnal Knowledge (2000) ("Article 120") that authorized the death penalty. The issue before CAAF was the statute of limitations for rape and not the death sentence because no service member had been sentenced to death. CAAF decided a constitutional issue that did not need to be decided.

CAAF is a tribunal constituted by Congress as an Executive Branch entity. It is not an Article III court. Although its constitutional foundation as a judicial

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[1] All parties have consented to the filing of this brief. Pursuant to Supreme Court Rule 37.6, amici state that no counsel for a party authored this brief in whole or in part, and no person other than amici or their counsel made a monetary contribution to its preparation or submission.

body is firmly established, CAAF cannot rule that laws are unconstitutional. It is emphatically the province and duty of the judicial branch to say what the law is.

CAAF and other military tribunals are without power to judge the constitutionality of validly enacted laws. The resolution of this issue affects the ability of Congress to regulate and govern the armed forces and the ability of the President to command. Military tribunals at all levels – CAAF, the service courts of criminal appeals and courts-martial – are invalidating congressional will and presidential efforts to maintain good order and discipline in the armed forces. Military tribunals have reversed laws and rules intended to prevent and punish military sexual assault. This cannot stand under our Constitution and is a threat to our national security.

Because CAAF had no power to judge the constitutionality of Article 120's death sentence, this Court should hold that CAAF erred when it held that the statute of limitations for rape is five years.

ARGUMENT

A. The Applicable Statutes Provide That Rape May Be Prosecuted at Any Time.

At the time of the respondents' rapes, Article 120 made rape punishable by death and 10 U.S.C. § 843, Statute of Limitations ("Article 43") provided no statute of limitations for offenses punishable by death. The respondents could be prosecuted for rape at any time without limitation.

B. CAAF Overruled Congress by Declaring Article 120 Unconstitutional.

In the cases involving the three respondents in this case (*United States v. Briggs*, 78 M.J. 289 (C.A.A.F. 2019); *United States v. Collins*, 78 M.J. 415 (C.A.A.F. 2019); and *United States v. Daniels*, No. 19-0345/AF, 2019 CAAF LEXIS 541 (July 22, 2019)), CAAF relied upon its decision in *United States v. Mangahas*, 77 M.J. 220 (C.A.A.F. 2018). In *Mangahas*, Article 120's death penalty was not sought against the accused service member and the death penalty was not at issue.

CAAF nevertheless declared that Article 120's death penalty was unconstitutional. "[CAAF's] prior decisions . . . are overruled to the extent they hold that rape is punishable by death." *Mangahas*, 77 M.J. at 222. "[T]here is *no* set of circumstances under which the death penalty could constitutionally be imposed for the rape of an adult woman." *Id.* at 224 (emphasis in original). "We simply hold that where the death penalty could never be imposed for the offense charged, the offense is not punishable by death *for purposes of Article 43*." *Id.* at 225 (emphasis added).

In *Briggs*, CAAF confirmed *Mangahas*'s holding that the death penalty provision in Article 120 was unconstitutional. *Briggs*, 78 M.J.at 292 ("In *Mangahas* [CAAF reconsidered its prior decisions] because there is, in fact, no set of circumstances under which anyone could constitutionally be punished by death for the rape of an adult woman.").

CAAF overruled Article 120's punishment by death for rape.

C. CAAF Ruled Upon A Constitutional Issue That Was Not Presented.

CAAF violated the constitutional avoidance canon when it ruled that Article 120's death punishment was unconstitutional. *Crowell v. Benson*, 285 U.S. 22, 62 (1932) (When a serious doubt is raised about the constitutionality of an act of Congress, it is a cardinal principle that the Supreme Court will first ascertain whether a construction of the statute is fairly possible by which the question may be avoided.); *Nielsen v. Preap*, 139 S. Ct. 954, 971 (2019).

Lt. Col. Mangahas and respondents Briggs, Collins and Daniels were not sentenced to death. There was no need to reach the constitutionality of Article 120's death sentence.

The constitutional avoidance canon required interpreting Article 43 so that the constitutional question would be avoided. Since an unlimited statute of limitations for rape does not present a constitutional question, Article 43 should have been interpreted to give constitutional respect to Article 120 and to find that rape is "punishable by death" *for purposes of*

Article 43. CAAF erred by ruling upon the constitutionality of the death sentence for rape *for purposes* of a statute that does not raise a constitutional issue.

D. No Article III Court Has Ever Held Article 120's Death Sentence Unconstitutional.

CAAF held that Article 120's death penalty was unconstitutional without any analysis or precedent. CAAF stated that it was bound by this Court's precedent in *Coker v. Georgia*, 433 U.S. 584 (1977), but *Coker* did not hold that Article 120's punishment for rape was unconstitutional.[2] Amici curiae agree with the Solicitor General's analysis of this point in the brief of petitioner United States. Pet. Br. 30-31, 35-37.

In a footnote, CAAF concluded that a constitutional distinction between the civilian and military spheres on the issue of the death penalty for rape was "unfounded." *Mangahas*, 77 M.J. at 223 n.3. To support its conclusion, CAAF incompletely quoted and misused this Court's parenthetical statement ("a matter not presented here for our decision") in *Kennedy v. Louisiana*, 554 U.S. 945, 946-47 (2008) (statement of

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[2] CAAF also said it was bound by CAAF's predecessor court's decision in *United States v. Hickson*, 22 M.J. 146, 154 n.10 (C.M.A. 1986). The predecessor Court of Military Appeals ("CMA") did not hold Article 120's death sentence was unconstitutional under *Coker*. No death sentence was involved in *Hickson*. The CMA was simply making the point that within the hierarchy of sex offenses, rape is the most serious. *Id.* The CMA included a footnote that discussed *Coker*. Dictum in a footnote is not a holding and is not binding on any court.

Kennedy, J., respecting the denial of rehearing) (reserving the question).

CAAF ignored the context of the parenthetical. The applicable paragraph in *Kennedy* began with this Court's observation that the "authorization of the death penalty in the military sphere does not indicate that the death penalty is constitutional in the civilian context." *Id.* at 947. This Court then explicitly stated that when it surveyed state and federal law in *Coker* it did not mention the military penalty. *Id.* It further stated that other Eighth Amendment cases were considered only in the civilian context. *Id.* The Court then stated, "This case, too, involves the application of the Eighth Amendment to civilian law; and so we need not decide whether certain considerations might justify differences in the application of the Cruel and Unusual Punishments Clause to military cases (*a matter not presented here for our decision*)." *Id.* (emphasis of parenthetical added).

This Court in *Kennedy* was exercising judicial restraint deciding only the civilian Eighth Amendment issue before it and refused to decide whether the military death sentence was constitutional. The Supreme Court did not overrule Article 120's death sentence.

Contrary to CAAF's conclusion in the *Mangahas* footnote, this Court previously made clear that there is a constitutional distinction between the military and civilian spheres. "The special status of the military has required, the Constitution has contemplated, Congress has created, and this Court has long recognized *two systems of justice*, . . . : *one for civilians and one for*

military personnel." *Chappell v. Wallace*, 462 U.S. 296, 303-04 (1983) (emphasis added).

In *Mangahas*, CAAF did not discuss or acknowledge the deference and respect that this Court has traditionally afforded Congress in military justice matters. *Weiss v. United States*, 510 U.S. 163, 176-78 (1994); *Rostker v. Goldberg*, 453 U.S. 57, 67 (1981) (judicial deference to Congress "is at its apogee" when reviewing congressional decision-making in military matters); *Solorio v. United States*, 483 U.S. 435, 447-48 (1987); *Chappell*, 462 U.S. at 301; *Loving v. United States*, 517 U.S. 748, 768 (1996) ("we give Congress the highest deference in ordering military affairs").

Where this Supreme Court hesitated out of respect and deference, CAAF rushed in without concern and overruled Article 120's death sentence.

E. CAAF and Other Military Tribunals Cannot Exercise the Judicial Power to Declare Laws Unconstitutional.

Military tribunals are constituted by Congress under Article I. These tribunals are Executive Branch entities. *Edmond v. United States*, 520 U.S. 651, 664 (1997). Military commanders convene courts-martial superintended by military judges (midlevel officers) who are assigned to military units and supervised by each service's Judge Advocate General. *Id.* Each military service court of criminal appeals is supervised by the service's Judge Advocate General and CAAF. *Id*. CAAF is also an Executive Branch entity. *Id.* at 664 n.2.

Military tribunals are not ordained and established under Article III of the Constitution. Their judges do not enjoy constitutional protection of their salary and tenure.

Although military tribunals are incapable of exercising "the judicial Power" vested in Article III courts, this Court recognizes the "judicial character" of military tribunals. *Ortiz v. United States*, 138 S. Ct. 2165, 2174 (2018). The judicial character of military tribunals gives them significant powers, including the power to adjudicate core private rights to life, liberty, and property. *Id.* at 2186 (Thomas, J., concurring) (distinguishing between "a judicial power" and "the judicial Power").

This Court has not drawn the line between "a judicial power" and "the judicial Power," but certainly "a judicial power" cannot extend to invalidating an act passed by Congress and signed into law by the President. The Constitution assigns resolution of constitutional issues to the Judiciary. *Stern v. Marshall*, 564 U.S. 462, 484 (2011).

"It is emphatically the province and duty of the judicial department to say what the law is." *Marbury v. Madison*, 5 U.S. 137, 177 (1803). If a law conflicts with the Constitution, then Article III courts must determine which governs the case. "This is of the *very essence of judicial duty*." *Id.* at 178 (emphasis added).

Judging the constitutionality of an Act of Congress is the "gravest and most delicate duty" the Supreme

Court[3] is called on to perform. *Northwest Austin Mun. Util. Dist. No. One v. Holder*, 557 U.S. 193, 204 (2009); *Rostker v. Goldberg*, 453 U.S. 57, 64 (1981). Congress is a branch of government that is equal to this Court, and its elected members take the same oath to uphold the Constitution as the members of this Court. *Id.* This Court accords more than the customary deference accorded the judgments of Congress where the case arises in the context of national defense and military affairs. *Rostker*, 453 U.S. at 486.

A basic principle of our constitutional scheme is that "one branch of the Government may not intrude upon the central prerogatives of another." *Loving*, 517 U.S. at 757. Article III is "an inseparable element of the constitutional system of checks and balances" that "both defines the power and protects the independence of the Judicial Branch." *Northern Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 58 (1982) (plurality opinion). The judicial Power cannot be shared with another branch of the government. *Stern v. Marshall*, 564 U.S. at 483. "There is no liberty if the power of judging be not separated from the legislative and executive powers." *Id.* (quoting The Federalist No. 78, at 466 (Alexander Hamilton) (Clinton Rossiter ed., 1961)).

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[3] Although this Court referred to this gravest and most delicate duty as a Supreme Court duty, federal appellate courts (*Rex v. Cia. Pervana de Vapores, S. A.,* 660 F.2d 61, 65 (3d Cir. 1981); *cert. denied*, 456 U.S. 926 (1982)) and district courts (*Ahjam v. Obama*, 37 F. Supp. 3d 273, 278 (D.D.C. 2014)) have held that they too have such duty. No Article I tribunal has this duty.

While the three branches are not hermetically sealed and (as discussed above) the judicial character of military tribunals gives them significant powers to adjudicate rights to life, liberty, and property; it remains that Article III imposes limits that cannot be transgressed. *Stern*, 564 U.S. at 483. Article III could not preserve the system of checks and balances or the integrity of judicial decision making if entities outside of Article III exercised the judicial Power. *Id.* at 484. The Constitution assigns resolution of constitutional law to the Judiciary. *Id.*

Although military tribunals have developed expertise in military law, they do not have expertise in constitutional law. *O'Callahan v. Parker*, 395 U.S. 258, 265 (1969), *overruled on other grounds by Solorio v. United States*, 483 U.S. 435 (1987) ("courts-martial as an institution are singularly inept in dealing with the nice subtleties of constitutional law"). The "experts" in constitutional law are the Article III courts. Judging the constitutionality of congressional acts is the prototypical exercise of judicial Power, and if this right is given to military tribunals then "Article III would be transformed from the guardian of individual liberty and separation of powers [this Court] has long recognized into mere wishful thinking." *Stern*, 564 U.S. at 495.

CAAF judging the constitutionality of Article 120's death penalty infringes upon this Court's gravest and most delicate duty and violates the separation of powers principle. The Constitution forbids CAAF or any other Article I tribunal from exercising this great judicial Power.

To be clear, the amici curiae do not suggest that CAAF and other Article I tribunals must or should ignore the Constitution. When interpreting statutes and rules, tribunals should interpret any ambiguity or gap in accordance with the Constitution. Where there is no ambiguity, CAAF and other tribunals must apply the laws or rules as written and are forbidden from overruling Congress.

Service members are not without a remedy for constitutional violations. Although military tribunals cannot provide relief, service members may seek redress in civilian courts for constitutional wrongs suffered in the course of military service. *Chappell*, 462 U.S. at 304-05. Service members must appeal to an Article III court that has the judicial Power to judge the constitutionality of laws and rules.

F. The Supreme Court Has Never Upheld Any Decision By CAAF that Declared a Law Unconstitutional.

Although this Court has previously reviewed two cases where CAAF had declared a law to be unconstitutional, the Court did not recognize or rule upon this issue. Of the ten previous petitions for writ of certiorari granted by this Court pursuant to jurisdiction under 28 U.S.C. § 1259, CAAF judged a

statute or rule to be unconstitutional in two cases.[4] This Court reversed CAAF in both cases.

In *United States v. Scheffer*, 523 U.S. 303 (1998), CAAF ruled that Mil. R. Evid. 707 (prohibiting admission of polygraph examinations) was unconstitutional. This Court reversed CAAF on the merits and did not address whether CAAF had authority to overrule rules lawfully promulgated by the President.

In *Clinton v. Goldsmith*, 526 U.S. 529 (1999), CAAF held that discharging a service member in accordance with an administrative law enacted after his conviction

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[4] This Court has reviewed ten cases decided by CAAF since 1983 when it was granted jurisdiction under 28 U.S.C. § 1259 to directly review CAAF decisions under certain circumstances. 28 U.S.C. § 1259. This Court has reviewed CAAF decisions in *Ortiz v. United States*, 138 S. Ct. 2165 (2018); *United States v. Denedo*, 556 U.S. 904 (2009); *Clinton v. Goldsmith*, 526 U.S. 529 (1999); *United States v. Scheffer*, 523 U.S. 303 (1998); *Edmond v. United States*, 520 U.S. 651 (1997); *Loving v. United States*, 517 U.S. 748 (1996); *Ryder v. United States*, 515 U.S. 177 (1995); *Davis v. United States*, 512 U.S. 452 (1994); *Weiss v. United States*, 510 U.S. 163 (1994); *Solorio v. United States*, 483 U.S. 435 (1987).

Seven of these ten cases were filed by convicted service members where CAAF did not overrule any statute or rule. The United States was the petitioner in the remaining three grants. In *United States v. Denedo*, 556 U.S. 904 (2009), CAAF did not overrule any statute, but merely determined that the service court of criminal appeals had jurisdiction to determine whether the service member was denied his 10 U.S.C. § 827 right to effective assistance of counsel. CAAF overruled a statute or rule on constitutional grounds in the remaining two cases, *Clinton v. Goldsmith* and *United States v. Scheffer*. These two cases are briefly discussed.

violated the Constitution's Ex Post Facto Clause. Because the administrative law was not part of the Uniform Code of Military Justice, CAAF did not have jurisdiction. This Court did not address whether CAAF had authority to overrule validly enacted laws.

This Court has never upheld any CAAF decision that ruled a statute or rule was unconstitutional.

G. Military Tribunals at All Levels Routinely Declare Laws Unconstitutional.

CAAF's decisions in *Mangahas*, *Briggs*, *Collins*, and *Daniels* overruling a validly enacted law are not isolated instances of military tribunals arrogating judicial Power in violation of the Constitution. Unfortunately, military tribunals routinely overrule the laws of Congress and rules of the President. These unconstitutional decisions are impeding Congress's ability to fulfill its duty to govern and regulate the armed forces and the President's ability to command the armed forces.

The amicus curiae Harmony Allen is only one of many victims of military tribunals' hubris exemplified by declarations that laws and rules are unconstitutional. Recently, military tribunals are most likely to invalidate laws passed by Congress and signed into law by the President when the law is related to military sexual assault. Military sexual assault is one of the most destructive factors in our military. Amici curiae agree with the petitioner United States' statement describing the effect of sexual assault in the military. Pet. Br. 5-7.

Military tribunals declaring laws unconstitutional threatens our national security and destroys the accountability of Congress and the President in military affairs. *Chappell*, 462 U.S. at 301-02; *Loving*, 517 U.S. at 757; *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477, 501-02 (2010); *Wellness Int'l Network, Ltd. v. Sharif*, 135 S. Ct. 1932, 1954-55 (2015) (Roberts, C. J., dissenting). "'[I]f there is a principle in our Constitution . . . more sacred than another,' James Madison said on the floor of the First Congress, 'it is that which separates the Legislative, Executive, and Judicial powers.' " *Wellness*, 135 S. Ct. at 1954 (Roberts, C.J. dissenting) (quoting 1 Annals of Cong. 581 (1789)).

Despite the best efforts by Congress and the President to fulfill their respective constitutional duties and end the scourge of military sexual assault, military tribunals are unlawfully impeding congressional will. The following examples are not before the Court but are briefly presented because they demonstrate that military tribunals are comfortably but erroneously ruling laws and rules unconstitutional. Military sexual assault victims are being revictimized by military courts' refusal to follow the law, and they are left with no recourse. *E.V. v. Robinson*, 906 F.3d 1082 (9th Cir. 2018), *cert. denied*, 205 L. Ed. 2d 316 (2019).

CAAF is not the only military tribunal declaring laws unconstitutional. Before CAAF ruled that Article 120's death penalty was unconstitutional in *Mangahas*, the military judge, an Air Force lieutenant colonel, overruled Congress by declaring charges filed in accordance with the Uniform Code of Military Justice

violated Lt. Col. Mangahas's constitutional right to a speedy trial. *Mangahas*, 77 M.J. at 221. The trial court provided no precedent to justify his decision.

In dictum in *United States v. Gaddis*, 70 M.J. 248, 250-51 (C.A.A.F. 2011), CAAF stated that a court-martial's consideration of a victim's privacy in accordance with plain language of the military rape shield rule, Mil. R. Evid. 412, could be unconstitutional under circumstances not then before the court. CAAF stated that the military judge may not consider a victim's privacy even though the entire purpose of a rape shield rule is to protect victim privacy. CAAF's holding that consideration of a victim's privacy is unconstitutional stands alone and in sharp contrast to every federal court that has applied Fed. R. Evid. 412.[5] Since *Gaddis*, military courts have refused to follow the rule's balancing test that weighs the victim's privacy against the probative value of the evidence. In 2018, the President acquiesced to CAAF's *Gaddis* dictum by deleting the requirement that military judges consider a victim's privacy in the balancing test. Exec. Order

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[5] Federal courts determine whether evidence is "constitutionally required" by balancing the probative value of the evidence against the privacy interests of the victim. See *United States v. Pumpkin Seed*, 572 F.3d 552 (8th Cir. 2009); *Gagne v. Booker*, 680 F.3d 493 (6th Cir. 2012); *Barbe v. McBride*, 521 F.3d 443 (4th Cir. 2008); *Dolinger v. Hall*, 302 F.3d 5 (1st Cir. 2002); *Richmond v. Embry*, 122 F.3d 866 (10th Cir. 1997); *United States v. Seibel*, 2011 U.S. Dist. LEXIS 88607 (D. S.D. August 9, 2011); *United States v. Powell*, 226 F.3d 1181 (10th Cir. 2000); *Grant v. Demskie*, 75 F. Supp. 2d 201 (S.D. N.Y.1999); *Petkovic v. Clipper*, 2016 U.S. Dist. LEXIS 94532 (N.D. Oh. 2016); *Buchanan v. Harry*, 2014 U.S. Dist. LEXIS 66665 (E.D. Mich. 2014).

No. 13,825, 83 Fed. Reg. 9,889, 10,097-98 (March 8, 2018).

The military's psychotherapist-patient privilege, Mil. R. Evid. 513, has long been abused by military judges because of a "constitutionally required" exception to the privilege. Although neither CAAF nor any service court of criminal appeals had ever ruled upon the privilege's "constitutionally required" exception, military judges routinely ordered production of privileged communications. *E.V. v. Robinson*, 200 F. Supp. 3d 108, 114 (D.D.C. 2016); *D.B. v. Lippert*, 2016 CCA Lexis 63, at *14-15 (A. Ct. Crim. App. Feb. 1, 2016). Because military judges routinely abused the privilege, Congress removed the "constitutionally required" exception. Carl Levin and Howard P. Buck National Defense Authorization Act for Fiscal Year 2015, 113 P.L. 291, 128 Stat. 3292, 2014 Enacted H.R. 3979, 113 Enacted H.R. 3979; *J.M. v. Payton-O'Brien*, 76 M.J. 782, 787 (N-M. Ct. Crim. App. 2017).

Military tribunals' responses to congressional will and presidential judgment about deleting the "constitutionally required" exception is frightening. In multiple services, midlevel military officers detailed as judges have applied the deleted "constitutionally required" exception, boldly proclaiming that Congress cannot remove the exception. *Payton-O'Brien*, 76 M.J. at 784-85; *Lippert*, 2016 CCA Lexis 63, at *22. In *Lippert*, the Army appellate court noted that the military judge had been previously corrected twice for failing to follow the privilege rules. *Id.* at *12, *23.

In *Payton-O'Brien*, the Navy appellate court reversed the military judge's order to produce the

victim's mental health records, but further instructed that military judges are constitutionally required to dismiss the charges unless the victim agrees to disclose her privileged records. *Payton-O'Brien*, 76 M.J. at 289-92. There is simply no precedent or logic for this ruling. This is a cruel price to ask victims of sexual assault to pay for justice.

More recently, the Navy-Marine Corps Court of Criminal Appeals reversed a military retiree's conviction for attempted sexual assault of a child. *United States v. Begani*, 79 M.J. 620 (N-M. Ct. Crim. App. 2019), *opinion withdrawn, en banc reconsideration granted,* 2019 CCA LEXIS 393 (N-M. Ct. Crim. App., Oct. 1, 2019). The Navy appellate court overruled Congress by declaring 10 U.S.C. § 802 ("Article 2") unconstitutional. This is an unprecedented intrusion into congressional judgment. The three-judge panel, consisting of retirement-eligible military officers who would personally benefit by their ruling, held that military retirees were immune from court-martial jurisdiction because Article 2's different treatment of different retiree classifications violated the Constitution's Equal Protection Clause.

Military tribunals routinely declare laws unconstitutional without any precedent, analysis or respect for the President, Congress or the Constitution. This usurpation of the judicial Power threatens our Constitution. The Congress cannot regulate and govern the armed forces and the President cannot command when Article I tribunals impede their will and judgment in military affairs. Military sexual assault is a cancer that must be stopped. It is the

Congress and President's constitutional duty to address sexual assault, limited only by this Court's duty to ensure the laws and rules comply with the Constitution. Military tribunals can only interpret and apply laws and rules. They are without power to overrule.

CONCLUSION

Because CAAF had no power to judge the constitutionality of Article 120's death sentence, this Court should hold that CAAF erred when it held that the statute of limitations for rape is five years.

Respectfully submitted,

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