

**IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES**

UNITED STATES

Appellee

REPLY BRIEF ON BEHALF OF
APPELLANT ON SPECIFIED
ISSUE

v.

Sergeant (E-5)

JACOB L. BRUBAKER-ESCOBAR,

United States Army

Appellant

Crim. App. Dkt. No. 20190618

USCA Dkt. No. 20-0345/AR

TO THE JUDGES OF THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES:

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Specified Issue

WHETHER SECTION 6(b) OF EXECUTIVE ORDER 13,825 OF MARCH 1, 2018 WAS A LAWFUL EXERCISE OF THE AUTHORITY DLEGATED TO THE PRESIDENT BY SECTION 5542(c)(1) OF THE NATIONAL DEFENSE AUTHORIZATION ACT FOR FISCAL YEAR 2017 OR BY ANY OTHER LAW.

Statement of the Case

In accordance with this Court’s March 15, 2021 interlocutory order for briefing on the specified issue, this Reply Brief on Behalf of Appellant on the Specified Issue is filed within three days of the government’s Supplemental Brief on Behalf of Appellee.

Argument

Section 5542(c)(1) of the National Defense Authorization Act for Fiscal Year 2017 [2017 NDAA], Pub. Law. 114-328, 130 Stat. 2967 (Dec. 23, 2016), provided the President authority to determine “whether, and to what extent, the amendments made by this division shall apply to a case in which one or more actions under chapter 47 of title 10, United States Code” occurred prior to January 1, 2019. The government interprets the phrase “one or more actions under [the Uniform Code of Military Justice (UCMJ)]” to include not just an act by the government, but the act of an accused in violating a punitive article. Under this reading of “action,” Section 5542(c)(1) authorized the President to determine

whether Article 60c, UCMJ (2018) applied, where the only pre-January 1, 2019 action was the accused's act of violating the UCMJ.

Appellant agrees with the government that Congress included no qualifier on "action" that limits that term only to action by the government. Accordingly, the government has advanced an alternative fair reading of Section 5542(c)(1), in which Congress authorized the President to determine Article 60, UCMJ (2012) rather than Article 60c, UCMJ (2018) would apply in cases like this one. Where there are two fair readings of a statute, it is ambiguous. In the face of such an ambiguity, it is preferable to construe the statute and executive order "so as to be in harmony with one another," rather than to find the latter void, inoperative, or ineffective. *See United States v. LaGrange*, 1 C.M.A. 342, 344, 3 C.M.R. 76, 78 (C.M.A. 1952).

In any case, for the reasons set forth in the Brief on Behalf of Appellant on the Specified Issue, Article 36, UCMJ, provided the President additional authority to promulgate Section 6(b) because it grants additional rights to an accused that do not conflict with Article 60c, UCMJ (2018).

Conclusion

Section 6(b) of Executive Order 13,825 was a valid exercise of authority delegated to the President. Accordingly, the convening authority was required to take action on appellant's case.



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CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the forgoing in the case of United States v. Brubakerescobar, Crim. App. Dkt. No. 20190618, USCA Dkt. No. 20-0345/AR, was electronically filed with the Court and Government Appellate Division on April 14, 2021.



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