IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES Appellee v. Sergeant (E-5) **JACOB L. BRUBAKER-ESCOBAR** United States Army Appellant	BRIEF ON BEHALF OF APPELLANT ON SPECIFIED ISSUE Crim. App. Dkt. No. 20190618 USCA Dkt. No. 20-0345/AR

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

Specified Issue

WHETHER SECTION 6(b) OF EXECUTIVE ORDER 13,825 OF MARCH 1, 2018 WAS A LAWFUL EXERCISE OF THE AUTHORITY DELEGATED 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

This supplemental brief is filed in accordance with this Court's March 15, 2021 interlocutory order for briefing on the specified issue.

Statement of Facts

All of the misconduct to which appellant pled guilty occurred prior to January 1, 2019. The charges were preferred against appellant on May 13, 2019,

and referred to a general court-martial on June 26, 2019. (JA004-005). Appellant's guilty plea and sentencing occurred on September 16, 2019. (JA011).

Standard of Review

Statutory interpretation is a question of law, which this Court reviews de novo. *United States v. Carter*, 76 M.J. 293, 295 (C.A.A.F. 2017).

Law

1. Interpreting statutes and executive orders.

The military justice system consists of "hierarchical sources of rights." *United States v. Lopez*, 35 M.J. 35, 39 (C.M.A. 1992). Constitutional rights sit at the top, followed in turn by federal statutes, executive orders, Department of Defense directives, service directives, and federal common law. *United States v. Czeschin*, 56 M.J. 346, 348 (C.A.A.F. 2002) (citing *Lopez*, 35 M.J. at 39); *United States v. Davis*, 47 M.J. 484, 485-86 (C.A.A.F. 1998). "Normal rules of statutory construction provide that the highest source of authority will be paramount, unless a lower source creates rules that are constitutional and provide greater rights for the individual." *Lopez*, 35 M.J. at 39.

From the very beginning, this Court has recognized that while an executive order cannot defeat a statute if they are inconsistent, the courts have "the duty to reconcile any conflicting provisions dealing with the same subject matter and to construe them, in so far as reasonably possible, so as to be in harmony with one

another." *United Sates v. LaGrange*, 1 C.M.A. 342, 344, 3 C.M.R. 76, 78 (C.M.A. 1952). "[I]n dealing with each, its provisions should be construed so that no part will be inoperative, superfluous, void or ineffective." *United States v. Lucas*, 1 C.M.R. 19, 22 (C.M.A. 1951).

These holdings mirror the ordinary rules of statutory interpretation. This Court continues to hold that the ordinary rules of statutory interpretation are applied when analyzing rules promulgated by the President. *See United States v. Murphy*, 74 M.J. 302, 305 (C.A.A.F. 2015) (interpreting Rules for Courts-Martial). A "fundamental canon of statutory construction [is] that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme." *United States v. Kelly*, 77 M.J. 404, 407 (C.A.A.F. 2008). When two provisions "initially appear to be in tension," a reading that renders them compatible, rather than contradictory, is preferred because it gives meaning to both. *Id*. at 407. ("[T]his Court seeks to harmonize independent provisions of a statute.").

2. The promulgation of Executive Order 13,825.

In general, the President derives his authority to promulgate rules from a Congressional delegation of authority in Article 36, Uniform Code of Military Justice (UCMJ). Article 36(a), UCMJ, authorizes the President to prescribe

regulations for "[p]retrial, trial, and post-trial procedures," provided that they are not "contrary to or inconsistent with" any statutory provisions of the Code.

In enacting the National Defense Authorization Act for Fiscal Year 2017 [2017 NDAA], Pub. Law. 114-328, 130 Stat. 2967 (Dec. 23, 2016), Congress prescribed the manner in which the Military Justice Act of 2016's amendments would come into effect. Section 5525(a) of the 2017 NDAA provided, "[e]xcept as otherwise provided in this division, the amendments made by this division shall take effect on the date designated by the President, which date shall not be later than [January 1, 2019]." Section 5525(c)(1) of the 2017 NDAA provided, "[s]ubject to the provisions and the amendments made by this division, the President shall prescribe in regulations whether, and to what extent, the amendments made by this division shall apply to a case in which one or more actions under [the UCMJ] have been taken before the effective date of such amendments."

On March 1, 2018, the President issued Executive Order 13,825, which in relevant part orders:

> If the accused is found guilty of a specification alleging the commission of one or more offenses before January 1, 2019, Article 60 of the UCMJ, as in effect on the date of the earliest offense for which the accused was found guilty, shall apply to the convening authority…to the extent that Article 60:
>
> (1) requires action by the convening authority on the sentence;

. . .

(5) authorizes the convening authority to approve, disapprove, commute, or suspend a sentence in whole or in part.

Executive Order 13,825, §6(b); 83 Fed. Reg. 9889, 9890 (Mar. 1, 2018).

Argument

Consistent with this Court's longstanding precedent and the ordinary canons of construction, this Court can and should read Executive Order 13,825 in a manner that gives both it and 2017 NDAA effect. The Executive Order does not mandate that the former Article 60, UCMJ, supplant or displace Article 60a, UCMJ; rather, it creates a greater right for an accused by mandating the convening authority act on the sentence, to the same extent he was required to do so under the former Article 60. In that sense, the Executive Order was a valid exercise of the President's rule-making authority under Article 36, UCMJ.

1. The President was authorized to promulgate Section 6(b) under Article 36, UCMJ.

The President's authority to prescribe the post-trial procedures laid out in Executive Order 13,825 has two independent sources: Section 5542 of the 2017 NDAA and Article 36, UCMJ. Section 5542(c)(1) of the 2017 NDAA gives the President the authority to regulate to what extent the 2017 NDAA changes apply to cases in which some action was taken before January 1, 2019. In appellant's case, no actions were taken under the UCMJ until May 13, 2019, when charges were

preferred. (JA004). Because no actions were taken under the Code prior to January 1, 2019 in this case, the President did not have authority under Section 5542 to say that the prior Article 60 supplants the newly-enacted Article 60a.[1]

Nonetheless, Article 36's general delegation of authority to the President to prescribe post-trial rules and procedures continues to apply, independent of Section 2252. Article 36 separately provides the President the authority to promulgate rules that grant additional rights to an accused within the military's hierarchical sources of rights, provided that the right does not conflict with another statutory provision. That is precisely what the President did in Section 6(b), for the reasons set forth below.

2. Section 6(b) creates an additional right for an accused that does not conflict with Article 60a, UCMJ.

To begin with, Section 6(b) does not state that Article 60a does *not* apply in "straddling" cases like appellant's. Nor does it state that the former Article 60 supplants or displaces Article 60a. Instead, it provides that the former Article 60 "shall apply to the convening authority *to the extent that* Article 60 . . . requires action by the convening authority on the sentence." (emphasis added). One reasonable interpretation of this section is that the convening authority's

[1] In cases where the preferral occurred prior to January 1, 2019, Section 5542(c)(1) would authorize the President to say the former Article 60 supplants the current Article 60a.

requirement to take action is the same under the new system as it was under the former Article 60. The requirement to take action that was enshrined in the former Article 60, rather than Article 60 itself, applies *in addition to* the newly-enacted Article 60a for limited cases like appellant's. The President's reference to the former Article 60 was a short-hand way to ensure individuals accused of crimes committed before January 1, 2019 whose cases did not proceed until after that date would receive no greater (or no lesser) rights than individuals whose prosecution began before January 1, 2019. Ensuring the uniform treatment of individuals accused of committing crimes before January 1, 2019 is a valid reason for promulgating this rule.

Importantly, this requirement to take action on the sentence does not conflict with Article 60a. A clear contradiction would exist if Congress had removed the convening authority's ability to take action on the sentence, but the President authorized or required action.[2] But Congress did not remove that ability. Instead, Article 60a continues to authorize a convening authority to take action on the sentence. Section 6(b) of the Executive Order merely requires that in certain cases, the convening authority *use* this statutory authorization to take action.

[2] For that reason, Section 6(b)(2) of the Executive Order is invalid—at least for cases where no actions were taken prior to January 1, 2019—because it "permits action by the convening authority on the findings" where Congress has removed all authority to act on the findings in Article 60a.

This continued requirement to take action on a sentence provides an additional right to an accused. Under the new system, the convening authority may, but does not have to make a decision on clemency because he does not have to take action on or approve a sentence. The requirement to take action means the convening authority will make a decision on clemency. Although Congress has limited the convening authority's ability to grant clemency in recent years, it is nevertheless an accused's "last best chance" for sentence relief on those parts of the sentence where the convening authority can grant relief. *See United States v. Key*, 57 M.J. 246, 23 (C.A.A.F. 2002).[3]

[3] Here, the convening authority could have granted relief on the adjudged rank reduction. In Section 5542(c)(4) of the 2017 NDAA, Congress specified the regulations prescribing the authorized punishments "for any offense committed before [January 1, 2019] made by title LVIII shall apply to the authorized punishments for the offense, as in effect at the time the offense is committed." Article 58a, UCMJ, was amended under title LVIII of the 2017 NDAA. *See* Section 5303, NDAA 2017. Thus, the former version of Article 58a, UCMJ, continues to apply to appellant's case since his offenses were committed prior to January 1, 2019. Under that version of Article 58a, UCMJ, an accused's rank was automatically reduced when the convening authority "approved" the adjudged punitive discharge. As a result of the convening authority's inaction, appellant's punitive discharge was not acted on or approved, meaning it is not clear whether appellant's rank reduction is part of the sentence before the Court. Simply put: the adjudged reduction was never approved, and the automatic reduction never occurred.

Conclusion

A preferred reading the Executive Order is one that avoids rendering it void, superfluous, or inoperative. In this case, there is such a reading: Executive Order 13,825 was a valid exercise of the President's authority under Article 36, UCMJ, to create an additional right for an accused—the right to have a decision made on clemency—that does not conflict with Article 60a, UCMJ.

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CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the forgoing in the case of United States v. Brubaker-Escobar, Crim. App. Dkt. No. 20190618, USCA Dkt. No. 20-0345/AR, was electronically filed with the Court and Government Appellate Division on March 29, 2021.

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