IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

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

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Index of Brief

Table of Authorities

Secondary Resources and Other Authorities

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

Issue Presented

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 Statutory Jurisdiction

This Court exercises jurisdiction over appellant's case pursuant to Article 67(a)(3), Uniform Code of Military Justice, 10 U.S.C. § 867(a)(3) (2018) [UCMJ]. On October 30, 2020, this Court granted appellant's petition for review. (JA001).

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

Appellant committed his crimes in 2018. (JA021–30). Charges were preferred against appellant on May 13, 2019, and the case was referred to a general court-martial on June 26, 2019. (JA004–005). Appellant's guilty plea and sentencing occurred on September 16, 2019, when appellant was sentenced to a reduction to E-1 and a bad-conduct discharge. (JA0011).

Summary of Argument

Section 6(b) of Executive Order 13,825[1] 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[2]. Congress gave the President considerable discretion to determine "whether and to what extent the [MJA 2016] amendments shall apply" when some action has taken place prior to January 1, 2019. MJA 2016, § 5542(c)(1). Chapter 47 of title 10 includes, in part, the punitive articles. 10 U.S.C. §§ 877–934. Here, appellant's criminal conduct is

[1] Executive Order 13,825, 83 Fed. Reg. 9889 (Mar. 8, 2018) [EO 13,825]; (JA042–44).
[2] National Defense Authorization Act for Fiscal Year 2017, Pub. L. No. 114-328, 130 Stat. 2932, 2932 (Dec. 23, 2016) [MJA 2016].

encompassed in Articles 93 and 128, UCMJ (2016), 10 U.S.C. §§ 893 and 928, and he committed his crimes prior to January 1, 2019. Accordingly, it is reasonable to conclude that "action" should not be read to include only government action but also an appellant's criminal actions. Further, Section 6(b) of EO 13,825 eliminated any *ex post facto* concerns related to the convening authority's clemency powers for offenses that occurred before the implementation date of the MJA 2016.

Standard of Review

This Court reviews questions of jurisdiction and statutory interpretation de novo. *United States v. Carter*, 76 M.J. 293, 295 (C.A.A.F. 2017) (citing *EV v. United States*, 75 M.J. 331, 333 (C.A.A.F. 2016); *United States v. Atchak*, 75 M.J. 193, 195 (C.A.A.F. 2016).

Law and Argument

A. The President implemented the Military Justice Act of 2016 in Executive Order 13,825.

Congress made sweeping changes to the Uniform Code of Military Justice in the Military Justice Act of 2016. The changes included, *inter alia*, Article 60a, UCMJ, which replaced the legacy version of Article 60, UCMJ (2018). Article 60a, UCMJ further limited a convening authority's ability to provide clemency.[3]

[3] A convening authority "may not act on the findings of the court-martial" and "may not reduce, commute, or suspend" a sentence of confinement in excess of six months, a punitive discharge or dismissal, or death. Art. 60a(a)(1)(B); Art. 60a(b)(1)(A)–(C).

Rather than thrust the amendments on the executive all at once, "Congress assigned to the President considerable discretion to set the effective date of the amendments to the UCMJ and to prescribe the regulations implementing those regulations." *United States v. Barrick*, ACM S32579, 2020 CCA LEXIS 346, *14–15 (A.F. Ct. Crim. App. 30 Sep. 2020) (Posch, S.J., concurring); MJA 2016 § 5542. The MJA 2016 directed that:

> Except 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 that the first day of the first calendar month that begins two years after the date of the enactment of this Act.[4]

MJA 2016, § 5542(a); (JA058).

The MJA 2016 is clear that, absent some exception, the new provisions are inapplicable to cases that were referred prior to January 1, 2019 and equally clear that the amendments to the punitive articles and sentencing would not apply to offenses committed before the effective date. MJA 2016, § 5542(c)(2)–(4); (JA058–59). However, Congress provided some discretion regarding the implementation of the MJA 2016 in certain cases:

> Subject to the provisions of this division 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

[4] The MJA 2016 was enacted on December 23, 2016, and thereby required an implementation date not later than January 1, 2019.

> which *one or more actions* under chapter 47 of title 10, United States Code (the Uniform Code of Military Justice), have been taken before the effective date of such amendments.

MJA 2016, § 5542 (c)(1) (emphasis added); (JA058).

In response to Congress's delegation of authority, the President executed Executive Order 13,825 to implement the MJA 2016. EO 13,825; (JA042–44). Relevant to this discussion, Section 6(b) provides:

> 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 of which the accused was found guilty, shall apply to the convening authority, in addition to the suspending authority in Article 60a(c) as enacted by the MJA, to the extent that Article 60:
>
> (1) requires action by the convening authority on the sentence;
> (2) permits action by the convening authority on findings;
> (3) authorizes the convening authority to modify the findings and sentence of a court-martial, dismiss any charge or specification by setting aside a finding of guilty thereto, or change a finding of guilty to a charge or specification to a finding of guilty to an offense that is a lesser included offense of the offense stated in the charge or specification;
> (4) authorizes the convening authority to order a proceeding in revision or a rehearing; or
> (5) authorizes the convening authority to approve, disapprove, commute, or suspend a sentence in whole or in part.

B. Section 6(b) of Executive Order 13,825 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.

"Executive agencies 'must always give effect to the unambiguously expressed intent of Congress.'" *Barrick*, 2020 CCA LEXIS 346, at *24–25 (Posch, S.J., concurring) (citing *Util. Air Regulatory Grp. v. EPA*, 573 U.S. 302, 326 (2014) (quoting *National Assn. of Home Builders v. Defenders of Wildlife*, 551 U.S. 644, 665 (2007)). Executive orders and statutes are interpreted in analogous fashion. *See United States v. Marzook*, 412 F. Supp. 2d 913, 922 (N.D. Ill. 2006) ("The court interprets Executive Orders in the same manner that it interprets statutes.") (citing *Bassidji v. Goe*, 413 F.3d 928, 934 (9th Cir. 2005); *United States v. New Orleans Public Serv., Inc.*, 553 F.2d 459, 476 (5th Cir. 1977)); *see also Feliciano v. United States*, 297 F. Supp. 1356, 1358–1359 (D.P.R. 1969) ("Since executive orders have the force and effect of statutes, rules of statutory construction will be applied [].")

When interpreting a statute, courts analyze first, "the language itself [and] the specific context in which it is used." *McNeill v. United States*, 563 U.S. 816, 819 (2011) (citation omitted). When the language is clear, "judicial inquiry is complete." *Garcia v. United States*, 469 U.S. 70, 75 (1984). Further "when deciding whether language is plain [courts] must read the words in their context and with a view to their place in the overall statutory scheme." *King v. Burwell*,

576 U.S. 473, 486 (2015) (quoting *FDA v. Brown & Williamson Tobacco, Corp.*, 529 U.S. 120, 133 (2000)). "In deciphering the meaning of a statute, [the CAAF] normally appl[ies] the common and ordinary understanding of the words in the statute." *United States v. Phillips*, 70 M.J. 161, 165 (C.A.A.F. 2011) (citation omitted).

1. The term "action" as used in the MJA 2016, § 5542(c)(1), is not limited to government action; "action" may include the commission of the offense.

Congress expressly afforded discretion to the President 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 (the Uniform Code of Military Justice)" were taken prior to January 1, 2019. MJA 2016, § 5542(c)(1) (emphasis added). Chapter 47 of title 10 includes, in part, the punitive articles. 10 U.S.C. §§ 877–934. Critically, Section 5542(c)(1) does not further qualify or otherwise define "action." "In deciphering the meaning of a statute, [the CAAF] normally appl[ies] the common and ordinary understanding of the words in the statute." *Phillips*, 70 M.J. at 165 (citation omitted). "Action" is broad and means "a thing done." MERRIAM WEBSTER, https://www.merriam-webster.com/dictionary/action (last visited Apr. 2, 2021). Here, appellant's criminal conduct is encompassed in Articles 93 and 128, UCMJ (2016), 10 U.S.C. §§ 893 and 928, and he committed his crimes prior to January 1, 2019. Thus, the

government disagrees with appellant's assertion that "no actions were taken under the Code prior to January 1, 2019" in this case. (Appellant's Br. 6).

The Government acknowledges that no *government* action (e.g. preferral) took place prior to January 1, 2019. However, to require only "government action" would be to read words into the statute, something the Supreme Court has cautioned against. *See Bates v. United States*, 522 U.S. 23, 29 (1997) ("[W]e ordinarily resist reading words or elements into a statute that do not appear on its face."). Further, if Congress intended to require the President to implement the MJA 2016 in cases that were preferred on or after January 1, 2019, it could have done so in the same manner it prohibited implementation in cases that were referred prior to January 1, 2019. *See* MJA 2016 § 5542(c)(2) (stating "the amendments made by this division shall not apply to any case in which charges are *referred* to trial by court-martial before the effective date of such amendments") (emphasis added); (JA058). "It is generally presumed that Congress acts intentionally and purposely when it includes particular language in one section of a statute but omits it in another." *Chicago v. EDF*, 511 U.S. 328, 338 (1994). (citation omitted).

Historically, Congress has directed convening authorities to use the version of Article 60, UCMJ, in effect on the date of the offense. In the National Defense Authorization Act of 2014, Congress specifically addressed the amendments to

Article 60 and explicitly stated the changes would only apply to "offenses committed under chapter 47 of title 10, United States Code (the Uniform Code of Military Justice), on or after [the] effective date." National Defense Authorization Act for Fiscal Year 2014, Pub. L. No. 113-66, 127 Stat. 958, §1702(d)(2) (Dec. 26, 2013) [NDAA 2014]. That Congress afforded the President the ability to allow convening authorities to exercise their former and broader clemency authority to offenses committed before the effective date is not surprising.

Additionally, it is important to distinguish the MJA 2016—which made sweeping changes throughout the UCMJ—from the NDAA 2014—which amended only two Articles (Articles 32 and 60, UCMJ). NDAA 2014 §1702. It stands to reason that Congress provided the President with the discretion necessary to implement the changes to the individual Articles, directed by the MJA 2016, in a way to avoid legal and constitutional concerns.[5]

Accordingly, it is reasonable to conclude that "action" should not be read to include only government action but also an appellant's criminal actions. Consequently, interpreting the legislation with that context in mind, it is evident

[5] For example, this Court has previously held that "when legislation like Article 58b [automatic forfeitures] is adopted, it cannot be applied retroactively to those who already have violated the UCMJ." *United States v. Gorski*, 47 M.J. 370, 374 (C.A.A.F. 1997). In the MJA 2016, Congress's broad language allowed the President to implement other Articles, such as Article 58a, UCMJ (automatic rank reduction) based on offense date. EO 13,825, §6(a).

Congress gave the President considerable discretion to determine "whether and to what extent the [MJA 2016] amendments shall apply" when some action has taken place prior to January 1, 2019. MJA 2016, § 5542(c)(1).

2. The President's implementation of MJA 2016 ensured that none of the amendments violated the *Ex Post Facto* Clause.

Section 6(b) of EO 13,825 eliminated any *ex post facto* concerns related to the convening authority's clemency powers for offenses that occurred before the implementation date of the MJA 2016. "Article I, § 10, of the Constitution forbids the States from passing any 'ex post facto [l]aw.'" *Cal. Dep't of Corr. v. Morales*, 514 U.S. 499, 504 (1995). The Supreme Court has held that "the Clause is aimed at laws that "retroactively alter the definition of crimes or increase the punishment for criminal acts." *Id*. at 504–05 (citing *Collins v. Youngblood*, 497 U.S. 37, 43 (1990) (citations omitted).

The Supreme Court has "declined to articulate a single 'formula' for identifying [] legislative changes that have a sufficient effect on substantive crimes or punishments to fall within the constitutional prohibition []," but it has stated it is "a matter of 'degree.'" *Morales*, 514 U.S. at 509–10; *see, e.g.*, *Lynce v. Mathis*, 519 U.S. 433, 441 (1997) (holding a state statute that canceled provisional prison release credits and was applied retroactively violated the *Ex Post Facto* Clause); *but see Morales*, 514 U.S. 499 (finding no *ex post facto* violation in an amendment

to California's parole procedures that decreased the frequency of parole hearings for certain offenders).

Importantly, because a convening authority's clemency powers are unique to the military, the Supreme Court cases discussing changes in the calculation of prison release credits and parole, although helpful, do not clearly establish how a convening authority's clemency fits within the *ex post facto* analysis. However, military courts have long-recognized that:

> [T]he post-trial review and the action of the convening authority together represent an integral first step in an accused's climb up the appellate ladder. This step is oftentimes the most critical of all for an accused because of the convening authority's broad powers which are not enjoyed by boards of review or even by this Court. It is while the case is at the convening authority level that the accused stands the greatest chance of being relieved from the consequences of a harsh finding or a severe sentence.

United States v. Wilson, 9 U.S.C.M.A. 223, 26 C.M.R. 3, 6 (C.M.A 1958). Historically, a convening authority's power was not circumscribed, and he could not only grant relief from a sentence to confinement but could vacate the conviction entirely. Article 60, UCMJ (2012) (The convening authority "in his sole discretion, may [] dismiss any charge or specification by setting aside a finding of guilty thereto [].") Considered in this context, the scope of a convening authority's power under Article 60 does not entirely align with other clemency procedures discussed in *ex post facto* jurisprudence. Congress has previously

ensured that a soldier's opportunity for clemency was governed by the version of Article 60, in effect on the date of his offense. NDAA 2014 §1702(d)(2).

Removing the once considerable and expansive power of the convening authority could be interpreted as an *ex post facto* violation and thus constitutionally prohibited. Accordingly, the manner in which the President implemented the changes to Article 60, UCMJ, alleviated that concern and eliminated any needless litigation on the matter. A conclusion that Congress so afforded the President the authority to implement rules that would avoid such concerns is evident in the text of the statute.

Conclusion

Wherefore, the United States respectfully requests that this Honorable Court affirm the judgment of the Army Court of Criminal Appeals for all of the reasons set forth in previous briefs.

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CERTIFICATE OF COMPLIANCE WITH RULE 24(d)

1. This brief complies with the type-volume limitation of Rule 24(c) because this brief contains 3,508 words.

2. This brief complies with the typeface and type style requirements of Rule 37. It has been typewritten in 14-point font with proportional, Times New Roman typeface, with one-inch margins.

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CERTIFICATE OF FILING AND SERVICE

I certify that the foregoing was transmitted by electronic means to the court (***efiling@armfor.uscourts.gov***) and contemporaneously served electronically on appellate defense counsel, on April 12, 2021.

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