
**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

UNITED STATES OF AMERICA

v.

**PAUL ALVIN SLOUGH,
NICHOLAS ABRAM SLATTEN,
EVAN SHAWN LIBERTY,
DUSTIN LAURENT HEARD, and
DONALD WAYNE BALL,**
Defendants.

Case No.: 1:08-cr-360-RMU

Hon. Ricardo M. Urbina

**MEMORANDUM OF LAW OF THE CENTER ON THE ADMINISTRATION OF
CRIMINAL LAW, *AMICUS CURIAE*, IN SUPPORT OF THE GOVERNMENT'S
OPPOSITION TO DEFENDANTS' MOTION TO DISMISS
FOR LACK OF JURISDICTION**

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INTEREST OF *AMICUS CURIAE*

The Center on the Administration of Criminal Law (“the Center”) is the first and only organization dedicated to defining good government practices in criminal prosecutions through academic research, litigation, and participation in the formulation of public policy. The Center was founded because, although prosecutorial discretion is the central issue in criminal justice today at all levels of government, there is a dearth of research on how prosecutors exercise their discretion, how they should exercise their discretion and what mechanisms could be employed to improve prosecutorial decisionmaking. The Center aims to fill this gap by dedicating itself to identifying the best prosecutorial practices and suggesting avenues of reform. The Center’s litigation component aims to use its expertise and experience with criminal justice and prosecution to assist in important criminal justice cases at all levels. The Center’s litigation practice concentrates on cases in which the exercise of prosecutorial discretion raises significant substantive legal issues.

This case presents an important issue of first impression regarding the scope of federal prosecutors’ extra-territorial power over private contractors who operate abroad in war zones. The Center submits that Congress intended private contractors who commit crimes while supporting the mission of the Department of Defense to be subject to U.S. criminal jurisdiction. The Center seeks to preserve the government’s ability to exercise its prosecutorial power to the full extent contemplated and permitted by Congress in this context.

INTRODUCTION

The relevant version of the Military Extraterritorial Jurisdiction Act (“MEJA” or “the Act”) confers federal jurisdiction over contractors “of any ... Federal agency” who commit serious crimes overseas “to the extent [their] employment relates to supporting the mission of the Department of Defense overseas[.]” 18 U.S.C. § 3267(1)(A)(ii)(II) and (iii)(II). Defendants argue that they are not covered by this statute – and thus cannot be prosecuted for any crimes they committed when they opened fire on civilians in Nisur Square – because they were not employed by the Department of Defense (“DoD”), but by the Department of State (“DoS”). According to Defendants, their employment did not relate to supporting the mission of the DoD in Iraq, because the DoS has its own distinct mission there. Defendants’ argument is specious.

It is undisputed that the mission of the U.S. military in Iraq is, *inter alia*, to establish and maintain a secure environment and promote relief and reconstruction efforts. It cannot seriously be disputed that Defendants were employed to “support,” *i.e.*, to “aid the cause, policy, or interests of”¹ this mission by protecting U.S. embassy personnel, who themselves play a critical role in furthering the United States’ military mission in Iraq. The very documents cited by Defendants indicate that the presence of private security contractors in Iraq is essential to the DoD, because they perform traditionally military functions that “would otherwise require the deployment of additional military personnel.”² On its face, MEJA applies to Defendants because their employment clearly “relate[s] to supporting the mission of the DoD overseas.”

¹ The American Heritage Dictionary of the English Language (4th ed. 2004), <http://dictionary.reference.com/browse/support>.

² Congressional Budget Office (“CBO”) Report: Contractors’ Support of U.S. Operations in Iraq, at 12 (attached as exhibit 12 to Defendants’ Motion to Dismiss).

If any question remains, the enactment and legislative history confirm that it was Congress's intent to confer jurisdiction over contractors like Defendants. MEJA was amended in 2004 to close a loophole that limited jurisdiction to contractors directly employed by the DoD. As the senatorial sponsors of the amendment emphasized, the statute was expanded "to include all contractors who work abroad[.]" 150 Cong. Rec. S6863-01, at S6863. "[C]ontractors are necessary to rebuilding a healthy Iraq," Senator Schumer remarked, "[but] we cannot allow them to escape justice for crimes they may commit overseas." *Id.*

Defendants cite the principle of lenity to persuade this Court to accept their strained interpretation of the statute. But lenity is a rule of last resort, to be applied only when there is "a grievous ambiguity or uncertainty in the statute." *Muscarello v. United States*, 524 U.S. 125, 138-39 (1998) (citations and quotations omitted). That is not the case here. MEJA's plain text unambiguously confers jurisdiction over non-DoD contractors employed to support the mission of the DoD, a conclusion confirmed by the enactment and legislative history and underlying policy of the statute. This Court therefore need not reach the issue of lenity.

Even if it does, the result is the same. Lenity does not apply simply because someone is able to come up with a narrow construction of statutory language to try and avail himself of a legal loophole. Rather, lenity applies to ensure that individuals are not incarcerated without fair warning that their conduct was proscribed. There is no possibility that Defendants were surprised to learn that firing upon and killing unarmed civilians is potentially criminal, or that they could be prosecuted for doing so by the U.S. courts, when they were immune from prosecution by the Iraqi courts.

Allowing defendants to evade prosecution would gravely compromise our justice system. It would also undermine the mission of the DoD in Iraq, damage America's reputation abroad,

lower military morale, and heighten the threat of attacks on American soldiers and contractors. This Court should deny Defendants' motion to dismiss.

ARGUMENT

I. MEJA APPLIES TO THE CRIMINAL ACTS ALLEGED HERE.

A. **Statutory Background: As Amended in 2004, the Military Extraterritorial Jurisdiction Act Gives this Court Jurisdiction Over Civilian Contractors Whose Work "Support[s] the Mission of the Department of Defense."**

MEJA was enacted in 2000 to fill a jurisdictional gap that shielded civilians from prosecution if they committed criminal acts while accompanying or working with the military overseas. Prior to MEJA, serious crimes often went unpunished because their perpetrators were outside the scope of military justice and beyond the jurisdiction of U.S. courts. This jurisdictional gap had a negative impact on the functioning of the military and the reputation of the United States abroad.

These negative effects became more pronounced during the conflict in Iraq, where civilian contractors outnumber military personnel by a substantial margin.³ As Robert E. Reed, Associate Deputy General Counsel of the Department of Defense (the "DoD"), testified at the congressional hearing on the bill that introduced MEJA, "The inability of the United States to appropriately pursue the interests of justice and hold its citizens criminally accountable for offenses committed overseas has undermined deterrence, lowered morale, and threatened good order and discipline in our military communities overseas." Glenn R. Schmitt, *Closing the Gap in Criminal Jurisdiction Over Civilians Accompanying the Armed Forces Abroad—A First Person Account of the Creation of the Military Extraterritorial Jurisdiction Act of 2000*, 51 *Cath.*

³ According to the Congressional Budget Office, there were at least 190,000 contractors working on U.S.-funded contracts in Iraq as of early 2008, and the ratio of contractors to military personnel is at least 2.5 times higher than the ratio during any other major U.S. conflict. CBO Report at 1 (attached as exhibit 12 to Defendants' Motion to Dismiss).

U. L. Rev. 55, 77 (Fall, 2001) (quoting Hearing Before the Subcomm. on Crime of the House Comm. on the Judiciary on H.R. 3380, 106th Cong. 17 (2000) (statement of Reed)). ““In addition,”” he testified,

“[T]he inability of U.S. authorities to adequately respond to serious misconduct within the civilian component of the U.S. Armed Forces, presents the strong potential for embarrassment in the international community, increases the possibility of hostility in the host nation’s local community where our forces are assigned, and threatens relationships with our allies.”

Id.

To close the jurisdictional gap and address these critical problems, Congress enacted MEJA, which extends U.S. jurisdiction over civilians who are “employed by or accompanying the Armed Forces outside the United States,” and who commit serious crimes that would otherwise be punishable in the special maritime and territorial jurisdiction of the United States. 18 U.S.C. § 3261(a)(1). The 2000 version of MEJA defined the phrase “employed by ... the Armed Forces” to include anyone “employed as a civilian employee of the Department of Defense ..., as a Department of Defense contractor ..., or as an employee of a Department of Defense contractor[.]” 18 U.S.C. § 3267 (2000).

In 2004, in the wake of the Abu Ghraib scandal, which implicated non-DoD contractors as well as DoD contractors, Congress amended MEJA to clarify that the statute covered contractors who were not directly employed by the DoD. The statute now defines persons “employed by or accompanying the Armed Forces” to include contractors or the employees of contractors “of *any* ... Federal agency ... to the extent such employment *relates to supporting* the mission of the Department of Defense overseas[.]” 18 U.S.C. § 3267(1)(A)(ii)(II) and (iii)(II) (emphasis added). As amended, the definition includes not only employees of DoD contractors, and not only employees of contractors whose work supports DoD activities, but also, and very broadly, any employee whose work “relates to” supporting the mission of DoD

overseas. In using the term “relates to,” Congress chose one of the broadest terms in general legal use to indicate any kind of relationship at all with the desired object.⁴ Defendants plainly and easily fall within this definition.

B. MEJA Gives this Court Jurisdiction Over Defendants.

1. MEJA applies on its face to contractors like Defendants, whose employment “relates to supporting the mission of the Department of Defense overseas.”

“In determining the scope of a statute, we look first to its language. . . . If the statutory language is unambiguous, in the absence of a clearly expressed legislative intent to the contrary, that language must ordinarily be regarded as conclusive.” *Russello v. United States*, 464 U.S. 16, 20 (1983) (internal quotations and citations omitted); *see also Lamie v. United States Tr.*, 540 U.S. 526, 534 (2004) (“when the statute’s language is plain, the sole function of the courts – at least where the disposition required by the text is not absurd – is to enforce it according to its terms.”) (citation and quotations omitted).

Even beyond the Indictment’s allegation that the defendants “employment related to supporting the mission of the DoD” (Ind. ¶ 2a), which is likely sufficient grounds at this procedural stage to reject Defendants motion, *see Boyce Motor Lines v. United States*, 342 U.S. 337, 343 n.16 (1952), the record establishes that jurisdiction exists because private security contractors like Defendants clearly fall within MEJA’s plain text.

The sole issue here is whether MEJA confers jurisdiction over contractors employed by the State Department to secure the safety of U.S. embassy personnel and facilities in Iraq, *i.e.*, whether the employment of such contractors “relate[s] to supporting the mission of the

⁴ For example, “relates to” or “relating to” is commonly used in discovery under the Federal Rules of Civil Procedure to request documents bearing any relationship to the subject in question.

Department of Defense overseas.” Words in a statute are given their ordinary meaning. *Russello*, 464 U.S. at 20. As relevant here, the verb “to support” means: (1) “To aid the cause, policy, or interests of: supported her in her election campaign”; and (2) “To act in a secondary or subordinate role to (a leading performer).” The American Heritage Dictionary of the English Language (4th ed. 2004), <http://dictionary.reference.com/browse/support>; see *Smith v. United States*, 508 U.S. 223, 228-29 (1993) (consulting dictionary to define the verb “to use” in construing a criminal statute); see also *Financial Planning Ass’n v. S.E.C.*, 482 F.3d 481, 489 (D.C. Cir. 2007) (looking to dictionary definition to determine meaning of words in statute).

The very documents on which Defendants rely demonstrate that MEJA applies to them by its plain language. As set forth in the General Accounting Office (“GAO”) Report attached as exhibit 18 to Defendants’ motion, the mission of the United States military in Iraq is “to establish and maintain a secure environment, allow the continuance of relief and reconstruction efforts, and improve the training and capabilities of the Iraq Security Forces.” GAO Report to Congressional Committees: *Rebuilding Iraq: Actions Needed to Improve Use of Private Security Providers*, at 10. And, as stated in the CBO Report attached as exhibit 12 to Defendants’ motion, the job of private security contractors like Blackwater is to “protect people and property in Iraq for U.S. agencies” – a function “traditionally ... reserved for the military.” CBO Report at 12-13; see also <http://www.embassymarine.org/> (website of the Marine Embassy Guard Association).⁵ “Providing security for all personnel, including contractors, is an inescapable aspect of U.S. operations in Iraq because of the instability and violence in that country.” CBO Report at 12. Thus, Defendants’ provision of security, which “would otherwise

⁵ According to the GAO Report, it was decided that the U.S. military would not perform its traditional function of securing civilian agencies in Iraq, a task turned over to private security contractors. See GAO Report at 10.

