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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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."

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[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.

require the deployment of additional military personnel," *id.*, indisputably "relates to supporting the mission of the Department of Defense"; it augments the force that the DoD has available to use in Iraq, freeing the DoD to use military forces elsewhere.

But for the U.S. military presence in Iraq, there would not be heightened violence directed at the American Embassy and its diplomats and employees, who serve a key role in maintaining stability and reconstructing Iraq. By protecting Embassy personnel, the Blackwater guards play an essential part in supporting – or "aiding the cause, policies and interests" – of the DoD in, *inter alia*, "maintain[ing] a secure environment" and facilitating Iraqi relief and reconstruction efforts.

In short, the plain language of the statute supports this Court's assertion of jurisdiction over Defendants.

2. The legislative history unequivocally supports the conclusion that Congress intended MEJA to apply to contractors like Defendants.

If, after examining the language and structure of a statute, a court finds it potentially ambiguous or vague, the Supreme Court directs the court to consider the "'legislative history[] and motivating policies'" of the statute." *Moskal v. United States*, 498 U.S. 103, 108 (1990) (quoting *Bifulco v. United States*, 447 U.S. 381, 387 (1980)); *see also United States v. Villanueva-Sotelo*, 515 F.3d 1234, 1237 (D.C. Cir. 2008) ("if we find the statutory language ambiguous, we look beyond the text for other indicia of congressional intent"); *United States v. Barnes*, 295 F.3d 1354, 1365 (D.C. Cir. 2002) (courts should look to the legislative history to "shed new light on congressional intent") (citation and internal quotations omitted); *United States v. McGoff*, 831

F.2d 1071, 1085 (D.C. Cir. 1987) (turning to legislative history to resolve a statutory ambiguity); *Zaimi v. United States*, 476 F.2d 511, 517 (D.C. Cir. 1973) (same).[6]

Because the statute's language plainly covers Defendants, this Court need not reach further. Should it do so, however, it will find that the legislative history resoundingly confirms that the statute applies to Defendants. It is undisputed that Congress passed the 2004 amendment to extend MEJA's reach to non-DoD contractors. As Defendants themselves observe, MEJA was amended in the wake of the reports of prisoner abuse at the Abu Ghraib prison in Iraq. Defendants' Memorandum of Points and Authorities ("MPA") 29-30. While most of the reports involved abuses by members of the military, reports also described abuses by civilians contractors working as translators and interrogators at the prison. Letter from Hon. Henry Waxman to Hon. Tom Davis dated May 4, 2004 (detailing media reports); MG Antonio M. Taguba, Investigation of the 800th Military Police Brigade at 26, 33, 48 (detailing problems and abuses by civilian contractors); see also *Army Report Finds Worse POW Abuse*, L.A. Times, May 2, 2004; Seymour Hersh, *Torture at Abu Ghraib,* The New Yorker, May 10, 2004.

As discussed above, under the 2000 version of MEJA, a contractor was "employed by the Armed Forces of the United States outside the United States" for purposes of MEJA only if he or she was "an employee of a Department of Defense contractor. . . ." 18 U.S.C. § 3267 (2000). Some of the contractors at Abu Ghraib, however, had contracts with the Department of the Interior. Because these contractors were not directly employed by the DoD, and were immune

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[6] Defendants observe that Justice Scalia has questioned the use of legislative history to interpret criminal statutes. MPA 27, citing *United States v. R.L.C.*, 503 U.S. 291, 307-11 (1992) (Scalia, J., concurring in part and concurring in the judgment). That may be, but as Justice Souter, writing for the majority, stated, *Moskal*'s directive to consult the legislative history and motivating policies, in addition to the text of a criminal statute, remains the law. *R.L.C.*, 503 U.S. at 306, n.6. We discuss the principle of lenity *infra*, in section II.

from prosecution by Iraqi authorities pursuant to an order issued by the Coalition Provisional Authority ("CPA") just before control of Iraq was turned over to the Iraqis,[7] they seemingly could not be prosecuted or punished for their crimes. Granting such persons immunity compromises the ends of justice, both in allowing perpetrators to avoid prosecution, and in meting out unequal treatment to members of the military and DoD contractors on the one hand and non-DoD contractors guilty of the same crimes on the other. As noted by one of the original drafters of MEJA, such unjust results are likely to affect morale within the military and expose contractors to the risk of being tried in foreign jurisdictions lacking the due process protections afforded by American courts. Schmitt, 51 Cath. U. L. Rev. at 78 (explaining that, "[i]f host nations know that American law does not allow the United States to punish its citizens when they commit crimes while accompanying its military in a foreign country, that nation is far less likely to negotiate away its right to prosecute those civilians under its own law.").

To address this jurisdictional problem, Senators Sessions and Schumer introduced an amendment extending the scope of MEJA to non-DoD contractors. In support of the amendment, both senators emphasized the need to close the loophole in MEJA that could allow non-DoD contractors to escape prosecution for abuses committed in Iraq. Senator Sessions, the sponsor of the original Act, explained that, "this amendment would give the Justice Department authority to prosecute civilian contractors employed not only by the Department of Defense but by *any* Federal agency that is supporting the American military mission overseas." 150 Cong. Rec. S6863-01, at S6863 (emphasis added). The Act would continue to "deal with what our previous act dealt with – those who were directly related to the Department of Defense," but it

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[7] CPA Order No. 17, June 27, 2004, § 4 (3), available at http://www.cpa-iraq.org/regulations/20040627_CPAORD_17_Status_of_Coalition_Rev with_Annex_A.pdf. The Government can waive immunity at Iraq's request. *Id.* § 5.

would also ensure that contractors whose work supports but is not directly related to the DoD will be brought within the ambit of the statute:

> [T]he abuses in Abu Ghraib involved private contractors who may not have in every instance been directly associated with the Department of Defense, and as such, perhaps those people – or some of them at least – might not be prosecutable under [the 2000 version of MEJA]. So it highlighted our need to clarify and expand the coverage of the Act.

Id.[8]

Senator Sessions concluded that, while "contractors are necessary to rebuilding a healthy Iraq, ... we cannot allow them to escape justice for crimes they may commit overseas." *Id.* The United States' mission in Iraq "should not be tainted by illegal acts by any, particularly a few, who embarrass our country." *Id.*

Senator Schumer likewise emphasized that the amendment was designed to reach "***all*** contractors who work abroad":

> When we discovered all the problems in the prisons in Iraq, it was clear that not all the contractors were contracted to by DoD. Other agencies contracted them. It made sense to me that we prosecute them as well. I believe it made sense to everybody. So I suggest to my colleague from Alabama that we work to together to expand the amendment to include *all contractors who work abroad who commit crimes or potential crimes.*

150 Cong. Rec. S6863-01, at S6863-64 (emphasis added). According to Senator Schumer, the proposed amendment would "close a dangerous loophole in our criminal law that would have allowed civilian contractors who do the crime to escape doing the time." *Id.* at S6864. Closing

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[8] Defendants selectively quote Senator Sessions' statement to suggest that the amendment was not intended to reach persons who are not directly associated with the DoD. MPA 30. This reading misconstrues the Senator's meaning. While he stated that the amendment dealt with the same subject as the original MEJA statute, he expressly added that it was being expanded to apply to those who were *not* "directly associated with the Department of Defense." 150 Cong. Rec. S6863-01, at S6863.

this loophole would, in turn, show the world that, in America, unlike many other parts of the world, crimes are duly prosecuted. *Id.*

These legislative statements demonstrate that the 2004 Amendment was intended to close the very loophole Defendants now urge this Court to keep open. The goal of the 2004 amendment was to ensure that private contractors would be held accountable when they commit serious crimes abroad. Congress recognized that when contractors abuse Iraqi prisoners, their actions sow discord among Iraqis and endanger military personnel who may face increased hostility and reprisals. The same is true when armed security contractors enter a town square and fire upon and kill unarmed civilians. Allowing defendants to escape justice would undermine the United States efforts at reconstruction, heighten the threat of attacks on American soldiers in Iraq and elsewhere, and increase the difficulty of negotiating agreements with foreign states to waive their right to prosecute American civilians who commit crimes within their territory.

This Court should decline Defendants' invitation to frustrate Congress's intent by adopting Defendants' strained interpretation of MEJA and declining to exercise jurisdiction in this case. *See Barnes*, 295 F.3d at 1364 (a "statute should ordinarily be read to effectuate its purposes rather than frustrate them."); *cf. United States v. Corey*, 232 F.3d 1166, 1176 (9th Cir. 2000) (observing that "neither congressional intent nor American foreign policy" is served by "hand[ing] a get-out-of jail-free card to American civilians who violate U.S. law while stationed abroad.").

The legislative history of the 2004 amendment unequivocally demonstrates that Congress intended to ensure that federal courts may exercise jurisdiction over civilian contractors who commit serious crimes abroad. No other interpretation of the statute is consistent with that

intent. Because the plain language of the statute is supported by readily ascertainable legislative history, this Court should find that it has jurisdiction over Defendants.

3. Statements by the DoS and DoD likewise compel the conclusion that the statute applies to Defendants.

To the extent that statements outside of the congressional record are relevant to interpretation of the statute, statements by the State Department and the DoD regarding their respective missions in Iraq leave no doubt that the work of the State Department – and by extension, the work of contractors employed by the State Department – relates to supporting the mission of the DoD overseas.

In February 2006, the State Department explained that, "Success in Iraq requires progress on all three tracks – political, security, and economic – of the President's National Strategy for Victory in Iraq":

> The three tracks are fundamental to our counter-insurgency, counterterrorism campaign and our effort to help Iraqis build a democratic, stable and prosperous country that is a partner in the war against terrorism. The Departments of State, Defense, Justice, Homeland Security, Treasury, and USAID coordinate closely to carry out their respective roles in each track.

United States Department of State, Feb. 2006, *Advancing the President's National Strategy for Victory in Iraq: Funding Iraq's Transition to Self-Reliance in 2006 and 2007 and Support for the Counterinsurgency Campaign.*[9]

Secretary of Defense Gates likewise described the "surge" as a coordinated effort to build up troops and increase the numbers of civilian contractors necessary to support them:

> The term "surge" has been used in relation to increasing U.S. troop levels, and an increase certainly will take place. But what is really going on, and what is going to take place, is a surge across all lines of operations – military and non-military,

[9] Available at http://www.state.gov/documents/organization/62352.pdf.

> Iraqi and coalition. The President's plan has Iraqis in the lead and seeks a better balance of U.S. military and non-military efforts than was the case in the past. We cannot succeed in Iraq without the [civilian and diplomatic] elements[.]

Briefing by the Secretary of State, Secretary of Defense, and Chairman of the Joint Chiefs of Staff, Jan. 11, 2007, released by the White House, Office of the Press Secretary (Statement of Secy. Gates).[10]

Last spring, the DoD issued a formal statement in which both Secretary of State Condoleezza Rice and Secretary Gates reiterated that the military's mission in Iraq depends on the support of the DoS:

> "The requirements of developments in Iraq and Afghanistan have, to a considerable measure, had a huge impact on the culture of the Department of Defense in terms of recognition of the need to seek help elsewhere, that we have neither the personnel nor the expertise to be able to do all that is needed in these areas," Gates said.

Gerry J. Gilmore, Leaders Cite Defense, State Department Teamwork in Iraq, Afghanistan, Apr. 15, 2008.[11] "Rice echoed Gates' sentiments, noting that many State Department officers today are often deployed overseas to serve alongside U.S. military members." *Id.*

These statements are unambiguous. As both then-heads of the DoS and the DoD recognized, the military cannot achieve success in Iraq without the support of the diplomatic corps.

None of the extra-record documents cited by Defendants supports an alternative conclusion. The contracts between Blackwater and the DoS do not limit the scope of the State Department's role in Iraq or contradict the above-cited statements of Secretaries Rice and Gates. And, as discussed *infra*, the reports of the GAO and CBO support the conclusion that the roles of

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[10] Available at http://www.defenselink.mil/transcripts/transcript.aspx?transcriptid=3863.

[11] Available at http://www.defenselink.mil/news/newsarticle.aspx?id=49577.

the DoD and the DoS are not mutually exclusive, as Defendants insist, but closely intertwined, with the State Department playing a key supporting role in the mission of the DoD. The CBO statement on which Defendants rely, opining that DoS security contractors are not subject to MEJA, appears to be based on the 2000 version of the Act, notwithstanding the report's 2008 date: the preceding sentence states, erroneously, that MEJA does not apply to civilians working for any federal agency other than DoD, which may have been the case in 2000, but which was indisputably revised in 2004. 18 U.S.C. § 3267(1)(A)(ii)(II) and (iii)(II) (defining 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[.]").

Defendants also cite a proposed amendment to MEJA sponsored by then-Senator Obama. This subsequent legislative "history" is, however, "entitled to little weight" in divining the intent of Congress when it amended MEJA in 2004. *Cobell v. Norton*, 428 F.3d 1070, 1075 (D.C. Cir. 2005) ("[P]ost-enactment legislative history is not only oxymoronic but inherently entitled to little weight"). Courts have long cautioned against relying on subsequent statements by members of Congress in attempting to divine congressional intent at the time they passed a statute. *E.g., Doe v. Chao,* 540 U.S. 614, 626-27 (2004) ("we have said repeatedly that subsequent legislative history will rarely override a reasonable interpretation of a statute that can be gleaned from its language and legislative history prior to its enactment") (citations and quotations omitted); *see also Massachusetts v. EPA*, 549 U.S. 497 n.27 (2007) ("'the views of a subsequent Congress form a hazardous basis for inferring the intent of an earlier one'") (quoting *United States v. Price*, 361 U.S. 304, 313 (1960)).

Nothing can be inferred from the Senate's decision not to adopt Senator Obama's 2007 proposed amendment to further expand the jurisdictional scope of MEJA. While Defendants argue that the failure of the proposed amendment proves that Congress recognized that the current version of MEJA did not reach all contractors in war zones, Senator Obama's amendment is equally if not more likely to have failed because Congress believed that MEJA already covered all contractors working in countries like Iraq. "Failed legislative proposals are a particularly dangerous ground on which to rest an interpretation of a prior statute." *Solid Waste Agency v. United States Army Corps of Eng'rs*, 531 U.S. 159, 169-170 (2001) (citation and quotations omitted).

The post-incident opinion of the State Department as to the scope of MEJA is entitled to no weight at all, as Defendants implicitly recognize. MPA 23. It is for this Court to interpret the statute in keeping with its language, legislative history, and motivating policies. As set forth above, these leave no doubt that the Act confers jurisdiction upon Defendants.

II. THE PRINCIPLE OF LENITY DOES NOT APPLY AND IN ANY EVENT DOES NOT CHANGE THE RESULT HERE.

Drawing on the principle of lenity, Defendants suggest that this Court should construe the statute strictly to ensure that defendants receive "fair warning" they could be prosecuted for their crimes. MPA 24-25. Defendants misconstrue the lenity doctrine.

A. Lenity Is A Rule of Last Resort that Applies Only When There Is A "Grievous Ambiguity or Uncertainty in the Statute."

As a preliminary matter, this Court should reject Defendants' lenity argument because it does not apply here. It is a principle of last resort, to be applied "only if, 'after seizing everything from which aid can be derived,' ... we can make 'no more than a guess as to what Congress intended.'" *Reno v. Koray*, 515 U.S. 50, 65 (1995) (quoting *Smith v. United States*, 508 U.S. 223, 239 (1993) and *Ladner v. United States*, 358 U.S. 169, 178 (1958)); *accord, Moskal,*

498 U.S. at 108; *Barnes*, 295 F.3d at 1366; *United States v. E-Gold, Ltd.*, 550 F. Supp. 2d 82, 100 (D.D.C. 2008). "The simple existence of some statutory ambiguity ... is not sufficient to warrant application of that rule, for most statutes are ambiguous to some degree.... To invoke the rule, we must conclude that 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).

Because, as set forth above, the statutory language and legislative history leave no room for doubt that the Act applies to Defendants, there is no reason for this Court to resort to the principle of lenity. In any event, lenity does not require this Court to impose the narrow interpretation of the statute that Defendants urge.

B. Lenity Does Not Mandate Strict Construction.

The Supreme Court has instructed that "the mere possibility of articulating a narrower construction ... does not by itself make the rule of lenity applicable." *Smith*, 508 U.S. at 239. Nor does lenity always require "the 'narrowest' construction"; the Court has recognized that "a broader construction may be permissible on the basis of nontextual factors that make clear the legislative intent where it is within the fair meaning of the statutory language." *United States v. R.L.C.*, 503 U.S. 291, 306 n.6 (1992) (citations omitted); *see also Dixson v. United States*, 465 U.S. 482, 500-501, n.19 (1984); *United States v. Turkette*, 452 U.S. 576, 587 (1981).

Indeed, where, as here, a federal criminal statute is "intended to fill a void in local law enforcement," the Court has held it "should be construed broadly.'" *Moskal*, 498 U.S. at 113 (quoting *Bell v. United States*, 462 U.S. 356, 362 (1983) (Stevens, J., dissenting)); *see also Corey*, 232 F.3d at 1183 ("We see no reason to create a jurisdictional vacuum where the better reading of the statute supports jurisdiction").

C. Lenity Does Not Apply Because Defendants Were Well Aware that Their Conduct Was Criminal and that They Could Face Prosecution for Such Conduct in U.S. Courts.

The "touchstone" of the modern rule of lenity is "whether the statue, either standing alone or as construed, made it reasonably clear at the relevant time that the defendant's conduct was criminal." *United States v. Lanier*, 520 U.S. 259, 267 (1997). In other words, no one should "'be held criminally responsible for conduct which he could not reasonably understand to be proscribed.'" *Id.* at 265 (quoting *Bouie v. City of Columbia*, 378 U.S. 347, 351 (1964)). Accordingly, the lenity doctrine is "particularly appropriate" when the underlying conviction is based on conduct that is "innocuous." *Arthur Andersen LLP v. United States*, 544 U.S. 696, 703-04 (2005); *see* Note, *The New Rule of Lenity*, 119 Harv. L. Rev. 2420, 2428-37 (2006) (reviewing recent cases and concluding that the rule of lenity in the modern era operates to prevent criminalization of innocent conduct).[12]

Defendants cannot pretend that the conduct for which they were indicted here – firing upon, wounding, and killing scores of unarmed civilians – was "innocuous," or that they were unaware it was criminal in nature.[13] Defendants' argument is not based on conduct, the

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[12] *See, e.g., United States v. Aguilar*, 515 U.S. 593, 600 (1995) (applying lenity and rejecting government's interpretation of an ambiguous statute where it would sweep in defendants who lacked the "intent to obstruct justice"); *Staples v. United States*, 511 U.S. 600, 619 (1994) (the Court takes "particular care ... to avoid construing a statute to dispense with mens rea where doing so would criminalize a broad range of apparently innocent conduct"); *cf. Villanueva-Sotelo*, 515 F.3d at 1246-49 (if statute were ambiguous – it was not – lenity would apply in favor of defendant because government's interpretation of statute would result in punishing a person guilty of accidental misappropriation to the same degree as one guilty of theft); *Barnes*, 295 F.3d at 1367 (defendant convicted of a violent crime had reason to know the government could regulate his use of firearms, and thus did not have recourse to argument that statute did not give him adequate notice that the particular crime of which he was convicted would limit his right to possess a weapon).

[13] To the extent Defendants suggest they did not have fair warning that they might be crossing a line, MPA 25, this Court should bear in mind the Supreme Court's admonition in *Boyce Motor Lines, Inc. v. United States*, 342 U.S. 337, 340 (1952), that "it [is not] unfair to require that one who deliberately goes perilously close to an area of proscribed conduct shall take the risk that he may cross the line." *See also United States v. Kay*, 513 F.3d 432, 441-42 (5th Cir. 2007) (defendants who bribed foreign officials should have realized their conduct was