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Dogs of War Get a New Lease on Life: Why the Military Extraterritorial Jurisdiction Act Violates the Eighth Amendment in Light of *United States v. Slatten*

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Dogs of War Get a New Lease on Life:
Why the Military Extraterritorial
Jurisdiction Act Violates the Eighth
Amendment in Light of *United States v.*
Slatten

Michael D. Stinnett-Kassoff*

Table of Contents

I. Introduction	362
A. Modern Use of Private Military Firms in Combat Zones by the United States.....	362
B. Nisour Square Massacre Leads to <i>United States</i> <i>v. Slatten</i>	368
C. Background of the 2007 Nisour Square Massacre....	370
II. The United States Has Trouble Gaining Jurisdiction over Civilians Overseas	373
A. <i>Kinsella v. United States</i>	373
B. <i>Al Shimari v. CACI Premier Technology, Inc.</i>	375
C. Military Extraterritorial Jurisdiction Act (MEJA)...	377

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D. Immunity for Contractors Prevented the Prosecution of Blackwater Contractors Under Iraqi Law380

III. The D.C. Circuit Court of Appeals Holds that a Mandatory Minimum Sentence for Contractors in War Zones Violates the Eighth Amendment Prohibition Against Cruel and Unusual Punishment385

A. Procedural Background385

B. Appellate Decision386

IV. The D.C. Circuit Ruling in *United States v. Slatten* Voids MEJA as a Reliable Means to Obtain Jurisdiction over Contractors in War Zones.392

V. Congress Needs to Amend MEJA to Create a More Certain Jurisdictional Framework with Which to Prosecute Private Contractors Overseas.....393

A. Congress Needs to Amend MEJA to Account for the Varied Roles that PMFs Fill394

B. Congress Should Reduce or Eliminate the Application of 924(c) to Private Contractors Supporting DoD Missions.....397

C. Congress Should Coordinate PMF Regulation with the International Community398

VI. Conclusion.....400

I. Introduction

A. Modern Use of Private Military Firms in Combat Zones by the United States

The United States has relied on Private Military Firms (PMFs) extensively to carry out its numerous overseas military missions since the end of the Cold War.¹ Civilians and contractors have always had a place in American wars, even during the American Revolution and beyond.² But the recent American

1. See discussion *infra* Part I.

2. See David Isenberg, *The Founding Contractors*, CATO INST. (July 7, 2008), <https://www.cato.org/publications/commentary/founding-contractors> (last

incursions into Afghanistan and Iraq brought an unprecedented number of private contractors into the forefront of these conflict zones, the discussions surrounding them, and the legal questions arising from their ashes.³ Particularly, private contractors in Iraq seemed to be operating in a legal grey area—they clearly were not soldiers, and they clearly were not civilians; one question loomed over every incident involving a private contractor who accompanied U.S. soldiers: Who has jurisdiction over them and pursuant to which laws?⁴

In 2000, Congress seemed to solve this conundrum when it enacted the Military Extraterritorial Jurisdiction Act.⁵ Federal prosecutors successfully used it multiple times to convict civilians and private contractors for their crimes committed abroad, although these convictions are hardly the norm.⁶ But the United States Court of Appeals for the D.C. Circuit threw a wrench in the wheels of justice in the summer of 2017. The D.C. Circuit ruled in *United States v. Slatten*⁷ that “the application of Section 924(c)—

visited Nov. 4, 2018, 10:50 am) (discussing how private contractors were integral in winning the American Revolution) (on file with the Washington & Lee Journal of Civil Rights & Social Justice); *id.* (“Private contractors are as American as apple pie. In fact, without private contractors there would not have been an America. Or, to paraphrase Genesis: In the beginning, God created private contractors.”).

3. See discussion *infra* Part I.

4. See Stephen P. Cullen, *Out of Reach: Improving the System to Deter and Address Criminal Acts Committed by Contractor Employees Accompanying Armed Forces Overseas*, 38 PUB. CONT. L.J. 509, 511 (2009) (“As so many contractor employees accompany U.S. armed forces in overseas operations, it is inevitable that some contractor employees will commit crimes. An effective system to deter and address crimes committed by contractor employees is notably absent from current military operations. The gap created by this absence is serious.”).

5. See Military Extraterritorial Jurisdiction Act, 18 U.S.C. §§ 3261–67 [hereinafter MEJA] (establishing jurisdiction to prosecute certain civilians abroad when they commit a felony crime).

6. See *U.S. v. Arnt*, 474 F.3d 1159, 1165 (9th Cir. 2007) (ruling that Arnt was properly indicted under MEJA for fatally stabbing her husband, Staff Sergeant Matthias Arnt, III, while on Incirlik Air Base, Turkey); see also CHRISTOPHER KINSEY, PRIVATE CONTRACTORS AND THE RECONSTRUCTION OF IRAQ: TRANSFORMING MILITARY LOGISTICS 137 (2009) (discussing MEJA’s application on two contractors: Aaron Langston who assaulted a fellow contractor with a knife in Iraq and a U.S. contractor who worked at Abu Ghraib Detention Facility who had child pornography on his computer).

7. See *United States v. Slatten*, 865 F.3d 767, 777 (D.C. Cir. 2017), *cert.*

and its accompanying thirty-year mandatory minimum sentences—to three of the defendants, ex-Blackwater contractors responsible for the 2007 Nisour Square massacre in Baghdad, Iraq:

[I]s cruel and unusual punishment. The sentences are cruel in that they impose a 30-year sentence based on the fact that private security contractors in a war zone were armed with government-issued automatic rifles and explosives. They are unusual because they apply Section 924(c) in a manner it has never been applied before to a situation which Congress never contemplated.⁸

This sentence was the result of a conviction under 18 U.S.C. § 924(c) which makes it a felony to use an automatic weapon to further a violent crime and—in the case of the defendants—mandated a minimum sentence of thirty years imprisonment.⁹

This Note argues that this appellate court decision throws MEJA into jeopardy as a workable method with which to gain jurisdiction over private contractors employed in U.S. conflicts

denied sub nom., *Slough v. United States*, 218 U.S. LEXIS 2836 (U.S., May 2018) (holding that mandatory minimum sentence requirement of 18 U.S.C. § 924(c) violates the Eighth Amendment protection against cruel and unusual punishment when applied to contractors who are working overseas in military conflicts in support of U.S. government operations). In *Slatten*, the D.C. Circuit Court considered whether three defendants' thirty-year mandatory minimum sentences under 18 U.S.C. 924(c) violated the Eighth Amendment's prohibition against cruel and unusual punishment. *Id.* at 811. These three defendants were found guilty of various counts including voluntary manslaughter and the use of machine guns in the commission of a violent crime under 924(c). *Id.* These defendants were found guilty of killing 17 Iraqi civilians and injuring others in the 2007 Nisour Square Shooting in Baghdad, Iraq. *Id.* at 777–78. The issue with their sentences was the fact that these three defendants were working in Iraq as private security contractors in support of the Department of State and the Department of Defense. *Id.* The Court reasoned that because 924(c) was meant to combat the deadly combination of drug crimes and violent crimes in the United States, 924(c) was improperly applied to the defendants. *Id.* at 812. The Court held that 924(c)'s mandatory minimum sentences as applied to private contractors performing their duties in a warzone violated the Eighth Amendment's prohibition against cruel and unusual punishment. *Id.* at 820.

8. *Id.* at 820. There are several different ways in which “Nisour” is spelled, including “Nisur” and “Nisoor.” Several of these variations occur throughout this Note depending on the citation, although the “Nisour” spelling is most prevalent in media and is the most used spelling in this Note.

9. See 18 U.S.C. § 924(c)(B)(ii) (2006) (“If the firearm possessed by a person convicted of a violation of this subsection is a machinegun or a destructive device, or is equipped with a firearm silencer or firearm muffler, the person shall be sentenced to a term of imprisonment of not less than 30 years.”).

abroad.¹⁰ This Note argues that the language in MEJA is too broad and too easily invites federal prosecutors to charge defendants with crimes that carry sentences that will likely be ruled to violate the Eighth Amendment just as they were in *United States v. Slatten*.¹¹ This Note offers suggestions for how Congress might address this problem, amend MEJA, and give federal prosecutors a concrete tool with which to prosecute private contractors who violate the laws and norms of both the U.S. and the international community.¹²

The use of PMFs around the world has increased dramatically over the past decade as there has been a “surge of PMF activity around the globe.”¹³ Initially comprising of just a few primary actors—often owned by a single parent company or investment firm—the market for PMFs today has transformed into a billion-dollar industry comprising of several hundred PMFs who provide a wide range of services. Blackwater USA alone earned over two billion dollars providing services for the U.S. government before it changed ownership and its name.¹⁴ As the industry stands today:

10. See discussion *infra* Part IV.

11. See discussion *infra* Part IV; see also *Slatten*, 865 F.3d at 820 (holding that mandatory minimum sentence requirement of 18 U.S.C. § 924(c) violates the Eighth Amendment protection against cruel and unusual punishment when applied to contractors who are working overseas in military conflicts in support of U.S. government operations).

12. See discussion *infra* Part V.

13. Peter W. Singer, *Corporate Warriors: The Rise and Ramifications of the Private Military Industry*, 26 INT'L SECURITY 1, 3 (2002).

14. *Beyond Blackwater: An Industry Reinvents Itself After the Demise of Its Most Controversial Firm*, ECONOMIST (Nov. 23, 2013), <https://www.economist.com/news/business/21590370-industry-reinvents-itself-after-demise-its-most-controversial-firm-beyond-blackwater> (last visited Nov. 4, 2018, 10:52 am) (“Blackwater . . . rose to worldwide prominence as an outsourced branch of the American army during the occupation of Iraq and Afghanistan It earn[ed] a total of around \$2 billion from Uncle Sam for providing armed personnel to the Pentagon, the State Department and, secretly, the CIA.”) (on file with the Washington & Lee Journal of Civil Rights & Social Justice). Erik Prince, the founder of Blackwater, sold Blackwater (now Academi) and is currently the chairman of the Frontier Services Group, “a logistics company focused on Africa and South Asia.” Erik Prince, *U.S. Forces Should Acquire Material and Hire Manpower Support: Opposing View*, USA TODAY (Aug. 7, 2017, 7:02 PM), <https://www.usatoday.com/story/opinion/2017/08/07/erik-prince-restructure-afghanistan-war-editorials-debates/104389448/> (on file with the Washington & Lee Journal of Civil Rights & Social Justice). Erik Prince recently—and

PMFs represent the newest addition to the modern battlefield, and their role in contemporary warfare is becoming increasingly significant. Not since the eighteenth century has there been such reliance on private soldiers to accomplish tasks directly affecting the tactical and strategic success of engagement. With the continued growth and increasing activity of the privatized military industry, the start of the twenty-first century is witnessing the gradual breakdown of the Weberian monopoly over the forms of violence. PMFs may well portend the new business face of war.¹⁵

This modern incarnation of the PMF industry originated at the end of the Cold War, but it was the U.S. occupation of Iraq that transformed the industry into one that continues to grow exponentially—currently, there are nearly 200 active PMFs.¹⁶ The U.S. used more private contractors than soldiers at certain times in this unique conflict, where these contractors were “employed by companies that have entered into contracts with the DoD [Department of Defense], the Department of State, and other U.S. government agencies operating in conflict zones. There are at least as many of them as there are uniformed soldiers: More than 225,000 by mid-2009.”¹⁷

On the surface, none of this is surprising given that the military is just one more area of government which privatized more of its defense functions as Cold War tensions faded in the late

controversially—argued that the U.S. should “restructure” the war in Afghanistan “similar to a bankruptcy reorganization.” *Id.* He argues that this can be accomplished by imbedding private contractors into the Afghan army, giving the U.S. an exit strategy. *Id.* He claims this can be done for twenty percent of the forty-eight billion dollars spent in Afghanistan this year. *Id.* It should be noted that Prince is the brother of Betsy DeVos, the U.S. Secretary of Education and fellow billionaire, and is contemplating a Congressional bid in Wyoming as a Republican. Jeremy W. Peters, Maggie Haberman & Glenn Thrush, *Erik Prince, Blackwater Founder, Weighs Primary Challenge to Wyoming Republican*, N.Y. TIMES (Oct. 8, 2017), https://www.nytimes.com/2017/10/08/us/politics/erik-prince-blackwater-wyoming-senate.html?_r=0 (on file with the Washington & Lee Journal of Civil Rights & Social Justice).

15. Singer, *supra* note 13, at 2.

16. See DAVID ISENBERG, SHADOW FORCE: PRIVATE SECURITY CONTRACTORS IN IRAQ 7 (2009) (describing the “at least 200 foreign and domestic private security companies in Iraq, ranging from major firms such as Aegis Defense Services, ArmorGroup, Blackwater USA Group, DynCorp, and Triple Canopy to far smaller ones”).

17. LAURA A. DICKINSON, OUTSOURCING WAR & PEACE 2–3 (2011).

1980s and early 1990s.¹⁸ Under President Bill Clinton, privatization accelerated across all government sectors, including the foreign policy sector.¹⁹

What is new, however, is just how dependent the U.S. has become on the PMF industry to wage any credible intervention overseas, “creat[ing] a dependency syndrome on the private marketplace that not merely creates critical vulnerabilities, but shows all the signs of the last downward spirals of an addiction.”²⁰ Despite the fact that the use of PMFs in Iraq actually harmed the U.S. counterinsurgency effort, “when it comes to private military contractors and counterinsurgency, the U.S. has locked itself into a vicious cycle. It can’t win with them, but can’t go to war without them.”²¹ Peter W. Singer, who is highly regarded generally as an expert in security studies and is an exceptional authority specifically regarding the PMF industry, explained that:

When the history books are written about the Iraq war, they will point to several critical turning points in U.S. efforts to beat back the insurgency that flourished after the 2003 invasion and “Mission Accomplished” victory speeches were the order of the day. Certain to make the list are the battle for Fallujah, the revelation of prisoner abuse at Abu Ghraib, and now the shootout in Baghdad that left as many as 20 civilians dead, the entire country seething and U.S. operations at a standstill. What will distinguish these accounts from histories of past wars is the new common denominator for each of these incidents: [T]he private military industry.²²

18. *See id.* at 30 (discussing the “privatization revolution” that took place during the presidencies of Ronald Reagan and George H. W. Bush in an effort to trim waste from “fattened government bureaucracies” and save taxpayer money on the domestic sphere).

19. *See id.* at 31 (“Caught between escalating price tags for weapons systems and political pressure to cut costs in the post-Cold War era without weakening the military’s capabilities, [Department of Defense] Secretary [William] Cohen turned to the private sector for advice . . .”).

20. Peter W. Singer, *Can’t Win with ‘Em, Can’t Go to War Without ‘Em: Private Military Contractors and Counterinsurgency*, BROOKINGS (Sept. 27, 2007), <https://www.brookings.edu/research/cant-win-with-em-cant-go-to-war-without-em-private-military-contractors-and-counterinsurgency/> (last visited Nov. 4 10:54 am) (on file with the Washington & Lee Journal of Civil Rights & Social Justice).

21. *Id.*

22. Peter W. Singer, *The Dark Truth About Blackwater*, BROOKINGS (Oct. 2, 2007), <https://www.brookings.edu/articles/the-dark-truth-about-blackwater> (on file with the Washington & Lee Journal of Civil Rights & Social Justice).

Fanning the flames of the fledgling debate over the increased privatization of the military is the fact that this massive reliance on PMFs in Iraq failed to end the initial occupation on schedule, created more burdens for the military and policy-makers, and alienated the local civilian population, creating more problems for the U.S. than solving, and tarnishing the reputation of the U.S. military in the Middle East beyond repair.²³

B. Nisour Square Massacre Leads to United States v. Slatten

One of the most prominent cases involving PMFs in Iraq revolves around the 2014 sentencing of four ex-Blackwater contractors to prison terms for their roles in the September 16, 2007 Nisour massacre which left fourteen Iraqi civilians dead and seventeen injured.²⁴ In this rare instance, the U.S. government was able to successfully gain jurisdiction over the contractors and earn convictions for the defendants. The U.S. government had jurisdiction over the defendants pursuant to MEJA.²⁵ Nicholas Slatten, 30, of Sparta Tennessee, was sentenced to life in prison for first-degree murder for firing the first shots.²⁶ Paul Alvin Slough, 35, of Keller Texas, Evan Shawn Liberty, 32, of Rochester, New Hampshire, and Dustin Laurent Heard 33, of Maryville, Tennessee, were all sentenced “to the mandatory term of imprisonment for of thirty years for their convictions under 18 U.S.C. § 924(c), plus one day on all of the remaining counts.”²⁷ These counts included dozens of counts of attempted manslaughter, up to 13 counts of voluntary manslaughter, and a

23. *Id.*

24. *See generally* United States v. Slatten, 865 F.3d 767 (D.C. Cir. 2017); *see also generally* Wesley Bruer & Michael Pearson, *Ex-Blackwater Contractors Sentenced in Nusoor Square Shooting in Iraq*, CNN (Apr. 14, 2015 8:41 PM), <http://www.cnn.com/2015/04/13/us/blackwater-contractors-iraq-sentencing/index.html> (on file with the Washington & Lee Journal of Civil Rights & Social Justice).

25. *See Slatten*, 865 F.3d at 777 (ruling that the Court had proper jurisdiction under MEJA).

26. *Id.* at 776–78.

27. *Id.*

single charge of a firearms offense for each defendant.²⁸ Subsequently,

Slough was found guilty of 13 counts of voluntary manslaughter, 17 counts of attempted manslaughter, and one firearms offense. Liberty was found guilty of eight counts of voluntary manslaughter, 12 counts of attempted manslaughter, and one firearms offense. Heard was found guilty of six counts of voluntary manslaughter, 11 counts of attempted manslaughter, and one firearms offense.²⁹

While these sentences seemed extreme to those who were sympathetic towards the defendants, they signaled to the people of Iraq that the U.S. would seek justice and punish those who perpetrated atrocities in Iraq during the war and occupation, regardless of how long it may take.³⁰ The controversy surrounding this case resulted from the mandatory minimum sentences given to Slough, Liberty, and Heard under Section 924(c), which mandates:

924(c) (1) (A) Except to the extent that a greater minimum sentence is otherwise provided by this subsection or by any other provision of law, *any person who, during and in relation to any crime of violence or drug trafficking crime (including a crime of violence or drug trafficking crime that provides for an enhanced punishment if committed by the use of a deadly or dangerous weapon or device) for which the person may be prosecuted in a court of the United States, uses or carries a firearm, or who, in furtherance of any such crime, possesses a firearm, shall, in addition to the punishment provided for such crime of violence or drug trafficking crime—*

(i) be sentenced to a term of imprisonment of not less than 5 years;

28. See Office of Public Affairs, *Four Former Blackwater Employees Found Guilty of Charges in Fatal Nisur Square Shooting in Iraq*, DEP'T OF JUST. (Oct. 22, 2014), <https://www.justice.gov/opa/pr/four-former-blackwater-employees-found-guilty-charges-fatal-nisur-square-shooting-iraq> (discussing the charges brought against the defendants and the guilty verdicts that were found for most of the charges) (on file with the Washington & Lee Journal of Civil Rights & Social Justice).

29. *Id.*

30. See *id.* (“‘This verdict is a resounding affirmation of the commitment of the American people to the rule of law, even in times of war,’ said U.S. Attorney [for the District of Columbia Ronald C. Machen Jr.]”).

(ii) if the firearm is brandished, be sentenced to a term of imprisonment of not less than 7 years; and

(iii) if the firearm is discharged, be sentenced to a term of imprisonment of not less than 10 years.

(B) If the firearm possessed by a person convicted of a violation of this subsection--

(i) is a short-barreled rifle, short-barreled shotgun, or semiautomatic assault weapon, the person shall be sentenced to a term of imprisonment of not less than 10 years; or

(ii) is a machinegun or a destructive device, or is equipped with a firearm silencer or firearm muffler, the person shall be sentenced to a term of imprisonment of not less than 30 years.³¹

The language of 924(c) is clear, demanding, and, at first glance, poses no real question regarding its application to this case.

C. Background of the 2007 Nisour Square Massacre

On the morning of September 16, 2007, Blackwater security guards were escorting an American envoy in Baghdad, Iraq when a car bomb exploded near the U.S. diplomat.³² The four defendants—Slatten, Slough, Liberty, and Heard—were members of team Raven 23 which was “sent to provide secondary support in the effort to evacuate the diplomat.”³³ A similar car bomb had previously exploded in Nisour Square that same year “in response to which Iraqi security had been dramatically increased, with multiple checkpoints [stationed] at the Square’s entrances [to protect against] potential threats.”³⁴ Instead of directing Raven 23 to meet with the primary team at a pre-arranged checkpoint, “shift leader Jimmy Watson ignored his orders and directed his team to

31. 18 U.S.C. § 924(c) (emphasis added).

32. *See Slatten*, 865 F.3d at 777 (“On September 16, 2007, a car bomb exploded in Baghdad near a United States diplomat who was under the protection of Blackwater, a private security firm under contract with the State Department.”). *See generally Blackwater Incident: What Happened*, BBC (Dec. 8, 2008), <http://news.bbc.co.uk/2/hi/7033332.stm> (telling the story of what happened on September 16, 2007) (on file with the Washington & Lee Journal of Civil Rights & Social Justice).

33. *Slatten*, 865 F.3d at 777.

34. *Id.*

Nisur Square, a traffic circle in downtown Baghdad that Watson intended to 'lock down.'"³⁵

The Raven 23 convoy consisted of four armored vehicles and, with the assistance of with Iraqi police, stopped at the south end of the square and "brought all traffic to a halt."³⁶ Almost as soon as Raven 23 arrived and locked down traffic the chaos that would be known as the Nisour Square Massacre unfolded:

Two or three minutes later, witnesses heard the "pops" of shots being fired, and a woman screaming for her son. The car that had been hit, a white Kia sedan, had been flagged days earlier by a Blackwater intelligence analyst as a type that might be used as a car bomb. According to the government, the Kia then rolled forward and lightly bumped the vehicle in front of it. The driver's side of the Kia windshield had a hole in it and was splattered with blood.³⁷

Two Iraqi police officers readily observed that the driver of the Kia had a bullet dead-center in the middle of his forehead.³⁸ Despite the attempts of both Iraqi police officers to cease Raven 23 from firing on the Kia further,³⁹ the onslaught escalated. As the Kia rolled forward with its driver immobilized,⁴⁰ "heavy gunfire erupted from the Raven 23 convoy into the Kia,"⁴¹ forcing the Iraqi police to scramble for cover.⁴² At this time, "[m]ultiple grenades were fired at the Kia, causing it to catch fire"⁴³ while the "Kia passenger was shot and killed."⁴⁴

35. *Id.*

36. *Id.*

37. *Id.*

38. *See id.* ("Two nearby Iraqi police officers approached the Kia on either side, and they saw the driver's face full of blood, with a bullet wound in the middle of his forehead.")

39. *See id.* ("One [Iraqi police officer] turned back to the convoy, waving his hands to indicate the shooting should stop, while the other made similar gestures as he tried to open the driver's door.")

40. *See id.* at 777–78 ("At that point, the vehicle in front of the Kia moved away, causing the Kia to roll forward again.")

41. *Id.* at 778.

42. *See id.* (describing how "the Iraqi officers took cover behind their nearby kiosk").

43. *Id.*

44. *Id.*

Unfortunately, the carnage was far from over. According to the court records,

Indiscriminate shooting from the convoy then continued past the Kia, to the south of the Square. Victims were hit as they sought cover or tried to escape, giving rise to the bulk of casualties that day. At some point a Raven 23 member radioed that they were taking incoming fire, but others could not locate any such threat. When the shooting died down, a radio call indicated one of the Raven 23 vehicles had been disabled and needed to be hooked up to another vehicle to be towed. During the hook-up, a member of the Raven 23 convoy saw an Iraqi shot in the stomach while his hands were up, by an unidentified Blackwater guard who had exited his vehicle. Once the hook-up was complete, the Raven 23 convoy began moving slowly around the circle and north out of the Square, where isolated shootings continued both to the west and north. By the time the convoy finally exited the Square, at least thirty-one Iraqi civilians had been killed or wounded.⁴⁵

Additionally, according to a U.S. embassy “spot report,”⁴⁶ one of the Blackwater teams that had originally escorted the U.S. official back to the Green Zone was re-dispatched to assist Raven 23 in Nisour Square.⁴⁷ This further compounded the day’s tensions as “[t]he re-deployed unit found itself stuck at an intersection in Nisoor Square and was confronted by Iraqi police and army” after which “[a] U.S. forces quick reaction team was sent to help rescue the unit.”⁴⁸ All this set the stage for the trial of Slatten, Slough, Liberty, and Heard who were ultimately prosecuted, convicted, and sentenced under MEJA for carrying out this mayhem.⁴⁹

45. *Id.*

46. *See Blackwater Incident, supra* note 32 (“One of the most detailed accounts of the events according to Blackwater employees comes from an initial report by the US embassy. This was seen by the Washington Post at the end of September 2007. It was described as a ‘spot report’ and not intended to be authoritative.”).

47. *See id.* (“According to those accounts . . . [o]ne of the Blackwater teams that had transported the official back to the Green Zone was re-dispatched to help out in Nisoor Square.”).

48. *Id.*

49. *See generally* MEJA, *supra* note 5.

II. *The United States Has Trouble Gaining Jurisdiction over Civilians Overseas*

The abundant use of private contractors overseas by the United States government is another example of the law failing to adapt to modern times, similar to the legal perplexities that plague the attempt to consistently regulate the use of innovative technology.⁵⁰ Throughout the past few decades as the Supreme Court has slowly recognized that civilians abroad cannot be prosecuted pursuant to the same jurisdictional laws as military servicemembers, Congress has failed to create a reliable replacement jurisdictional framework with which to prosecute civilians abroad whose activities render them seemingly synonymous with their military counterparts.⁵¹

A. *Kinsella v. United States*

In *Kinsella v. United States*,⁵² the Supreme Court held that civilians who committed a non-capital offense could not be tried via

50. See, e.g., Katrina M. Wyman, *Taxi Regulation in the Age of Uber*, 20 N.Y.U. J. LEGIS. & PUB. POL'Y 1, 4 (2017) (highlighting the issues in regulating peer-to-peer ride-sharing).

Today, regulators in New York City and many other places in the U.S. and around the world are struggling to recast taxi regulation, given the ways that Uber and other taxi apps have fundamentally transformed the market for "point-to-point" transportation. U.S. regulators to date have not been nearly as innovative in their responses to the emergence of the taxi apps as the apps have been in changing the taxi business.

Id.

51. See discussion *infra* Part II.

52. See *Kinsella v. United States*, 361 U.S. 234, 249 (1960) (holding that the prosecution of civilians by court-martial was unconstitutional for lack of jurisdiction because civilians are not under the authority of Congress to regulate the military and because courts-martial fail to uphold the Article III protection of civilians, as well as the Fifth and Sixth Amendments). *Kinsella* grappled with the validity of the court-martial of civilian persons during peacetime who accompanied the armed forces outside of the United States and were charged under the Uniform Code of Military Justice ("UCMJ") with noncapital offenses. *Id.* at 235. Joanna S. Dial was the wife of a U.S. soldier and the two of them lived in government housing at Baumholder, Germany with their three children. *Id.* Both the husband and wife were charged with the unpremeditated murder of one of their children under Article 118(2) of the UCMJ. *Id.* at 235–36. Both of them pleaded guilty and were sentenced to the maximum penalty permitted. *Id.* at 236. Because the Court had previously held that the Necessary and Proper Clause

court-martial, as a court-martial deprives non-military civilians of their Constitutional rights under Article III and as guaranteed under the Fifth and Sixth Amendments.⁵³ In this case, Mrs. Joanna S. Dial was living in Germany with her family.⁵⁴ Her husband was a U.S. soldier stationed in Germany.⁵⁵ When one of their children died, both Mrs. Dial and her husband were eventually charged under Article 118 (2) of the Uniform Code of Military Justice.⁵⁶ They both pleaded guilty in exchange for lesser offenses⁵⁷ and, after Mrs. Dial's jurisdictional challenge was denied by the court,⁵⁸ they both received the maximum sentences possible.⁵⁹ After a successful petition of habeas corpus, Mrs. Dial was released by the district court,⁶⁰ which resulted in subsequent appeals by the warden of the Federal Reformatory for Women at

could not be expanded to prosecute civilian dependents under Clause 14 for capital crimes, it was illogical to allow the expansion of Clause 14 to prosecute them for noncapital crimes. *Id.* at 248. Therefore, the Court held that Mrs. Dial could not be prosecuted and convicted by court-martial because of the protections provided by Article III and the Fifth and Sixth Amendments. *Id.* at 249.

53. *Id.* at 249 (“We therefore hold that Mrs. Dial is protected by the specific provisions of Article III and the Fifth and Sixth Amendments and that her prosecution and conviction by court-martial are not constitutionally permissible.”).

54. *See id.* at 235 (discussing the relevant facts of the case, such as the family's residential situation on the military base).

55. *See id.* (“The appellee is the mother of Mrs. Joanna S. Dial, the wife of a soldier who was assigned to a tank battalion of the United States Army. The Dials and their three children lived in government housing quarters at Baumholder, Germany.”).

56. *See id.* at 235–36 (“In consequence of the death of one of their children, both of the Dials were charged with unpremeditated murder, under Article 118 (2) of the Uniform Code of Military Justice.”).

57. *See id.* at 236 (“Upon the Dials' offer to plead guilty to involuntary manslaughter under Article 119 of the Code, both charges were withdrawn and new ones charging them separately with the lesser offense were returned. They were then tried together before a general court-martial at Baumholder.”).

58. *See id.* (“Mrs. Dial challenged the jurisdiction of the court-martial over her but, upon denial of her motion, pleaded guilty, as did her husband.”).

59. *See id.* (discussing how “[e]ach was sentenced to the maximum penalty permitted under the Code”).

60. *See id.* at 235–36 (“Their convictions were upheld by the Court of Military Appeals, and Mrs. Dial was returned to the United States and placed in the Federal Reformatory for Women at Alderson, West Virginia. Thereafter the appellee filed this petition for habeas corpus and obtained Mrs. Dial's discharge from custody.”).

Alderson, West Virginia where Mrs. Dial was previously held.⁶¹ The Supreme Court held that the UCMJ did not have jurisdiction over civilians for noncapital offenses, even when charged with crimes committed on military bases overseas.⁶² This case was one of the last major cases which slowly but surely precluded trying civilians by court-martial.

B. Al Shimari v. CACI Premier Technology, Inc.

*Al Shimari v. CACI Premier Technology, Inc.*⁶³ is a case that is somewhat relevant to the general jurisdictional topic of this Note

61. See *id.* (“From this judgment the warden has appealed.”).

62. See *id.* at 248 (“We are therefore constrained to say that since this Court has said that the Necessary and Proper Clause cannot expand Clause 14 so as to include prosecution of civilian dependents for capital crimes, it cannot expand Clause 14 to include prosecution of them for noncapital offenses.”); see also *Reid v. Covert*, 354 U.S. 1, 75–78 (1957) (holding that civilian respondents, who had been convicted by court-martial for murdering their soldier husbands overseas and sentenced to life imprisonment, could not be tried under the UCMJ for capital offenses for this violated their Constitutional rights under Article III and the Fifth and Sixth Amendments); *United States ex rel. Toth v. Quarles*, 350 U.S. 11, 13, 23 (1955) (holding that an ex-service member could not be tried by court-martial for a crime he committed after he left military service and was officially a civilian); *id.* at 22 (“[t]here are dangers lurking in military trials which were sought to be avoided by the Bill of Rights and Article III of our Constitution. Free countries of the world have tried to restrict military tribunals to the narrowest jurisdiction deemed absolutely essential to maintaining discipline among troops . . .”).

63. See *Al Sharimi v. CACI Premier Tech., Inc.*, 840 F.3d 147, 162 (4th Cir. 2016) (holding that “[t]he political question doctrine does not shield from judicial review intentional acts by government contractors that were unlawful at the time they were committed” when determining whether the Alien Tort Statute may be applied to private contractors who orchestrated the Abu Ghraib detainee abuses). In *Al Sharimi*, the Fourth Circuit Court of Appeals decided whether the district court erred when it dismissed the plaintiffs’ complaint because it presented a non-justiciable political question. *Id.* at 151. The plaintiffs were four Iraqi nationals who alleged that they were abused while in the custody of the U.S. Army at Abu Ghraib prison near Baghdad, Iraq in 2003–04. *Id.* CACI Premier Technology, Inc. (CACI) provided the military with interrogation services at the time and were the recipients of this civil suit. *Id.* The district court made this determination of non-justiciability based on three grounds. *Id.* First, the court determined that interrogation operations at Abu Ghraib were under direct control of the military. *Id.* Second, the questioning of sensitive military judgements by the district court would be improper. *Id.* Finally, the district court did not possess any judicially manageable standards to resolve the claims. *Id.* The Circuit Court concluded that because the district court does in fact have manageable standards

but is only worth discussing for a few moments. This is a tort case stemming from the Abu Ghraib detainee abuses at Abu Ghraib prison near Baghdad, Iraq in 2003 and 2004.⁶⁴ In this case, four Iraqi nationals alleged that they were abused at the prison while being detained;⁶⁵ they were initially detained in 2003 and were eventually released without being charged with a crime.⁶⁶ They filed a civil action against CACI Premier Technology, Inc. which “provided contract interrogation services for the military at the time of the alleged mistreatment.”⁶⁷

This case is relevant because it shows how difficult it is to get jurisdiction over private contractors and PMFs, even in civil cases. The plaintiffs brought suit under the Alien Tort Statute (“ATS”), alleging “that CACI employees committed acts involving torture and war crimes, and cruel, inhuman, or degrading treatment. The plaintiffs also asserted various tort claims under the common law, including assault and battery, sexual assault and battery, and intentional infliction of emotional distress.”⁶⁸ While the Fourth Circuit Court of Appeals eventually held that the district court erred in holding that the plaintiffs’ claims were not justiciable, it remains to be seen whether the plaintiffs will successfully apply the ATS to their case and win a judgment against a well-established PMF.⁶⁹

with which to adjudicate because it can interpret statutory terms and established international norms which are commonly used to interpret Alien Tort Statute claims. *Id.* at 161. The Circuit Court also decided that the political question doctrine does not screen intentional, unlawful acts of a government contractor from judicial review. *Id.* at 162. Thus, the Circuit court held that the plaintiffs’ claims were justiciable by the district court. *Id.*

64. *See id.* at 151 (“Suhail Al Shimari, Taha Rashid, Salah Al-Ejaili, and Asa’ad Al-Zuba’e (the plaintiffs), four Iraqi nationals, alleged that they were abused while detained in the custody of the United States Army at Abu Ghraib prison, located near Baghdad, Iraq, in 2003 and 2004.”).

65. *See id.* (discussing the abuse allegations of the four Iraqi nationals which are claimed to have been performed by CACI private contractors).

66. *See id.* (“They were detained beginning in the fall of 2003, and ultimately were released without being charged with a crime.”).

67. *Id.*

68. *Id.* (citing the Alien Tort Statute, 28 U.S.C. § 1350 [hereinafter ATS]).

69. *See id.* at 158–59 (concluding that any unlawful acts of the CACI employees are subject to judicial review “to the extent that the challenged conduct violated settled international law or the criminal law to which the CACI employees were subject at the time the conduct occurred”).

C. Military Extraterritorial Jurisdiction Act (MEJA)⁷⁰

MEJA was enacted in 2000 in order to “establish Federal criminal jurisdiction over offenses committed outside the United States by persons employed by or accompanying the United States Armed Forces.”⁷¹ It gives federal prosecutors jurisdiction in order to prosecute those civilians whom are normally barred under the UCMJ,⁷² specifically allowing prosecutors to charge contractors of PMFs when they commit crimes abroad while working in tandem with or under contract for the United States.⁷³ The relevant provision of MEJA at issue in this Note, Section 3261(a), is the provision which makes a felony committed abroad able to be prosecuted at home in the U.S. This Section states:

(a) Whoever engages in conduct outside the United States that would constitute an offense punishable by imprisonment for more than 1 year if the conduct had been engaged in within the special maritime and territorial jurisdiction of the United States—

(1) while employed by or accompanying the Armed Forces outside the United States.⁷⁴

This broad language gave federal prosecutors a wide array of laws from which to choose when they charged the four Blackwater contractors who fired indiscriminately at Iraqi civilians at Nisour Square—and this broad language is the Achilles’ heel of MEJA.⁷⁵ It allows prosecutors to essentially charge the defendants with

70. MEJA, *supra* note 5.

71. H.R. Rep. No. 106-778, at 4 (2000).

72. See discussion *supra* Part II.

73. See Christopher D. Belen, *Reining in Rambo: Prosecuting Crimes Committed by American Contractors in Iraq*, 27 PENN ST. INT’L L. REV. 169, 176 (2008) (“MEJA is the primary statutory vehicle for criminal prosecution of private military contractors. When the MEJA was originally passed . . . Congress believed it closed an accountability gap What emerged, however, was a well-intended law too ambiguous to apply to those who contracted with non-DoD agencies.”).

74. MEJA, *supra* note 5.

75. See *Achilles’ heel*, MARRIAM-WEBSTER DICTIONARY (online ed.) (last visited February 18, 2017, 4:10 pm) (“A fault or weakness that causes or could cause someone or something to fail.”) (on file with the Washington & Lee Journal of Civil Rights & Social Justice).

every possible felony action in order to maximize their odds at reaching any conviction at all, on any charge.⁷⁶

Unfortunately, many of these laws—and their subsequent sentences— were not meant to be applied to contractors in a war zone. In the case of *Slatten*, prosecutors charged all four defendants with violating Section 924(c) because they used machine guns when they committed their crimes.⁷⁷ But 924(c) was enacted to combat violent crimes and drug trafficking in American neighborhoods, not regulate those individuals fighting in combat zones on behalf of the U.S, as the “Supreme Court has described Section 924(c)’s basic purpose as an effort to combat the ‘dangerous combination’ of ‘drugs and guns.’”⁷⁸ The majority in *Slatten* further explained that 924(c) was meant to dissuade those criminals who set out to commit a felony from also using an automatic weapon to facilitate that felony.⁷⁹ Thus, instead of finally achieving justice for the victims’ families after a decade of litigation, we are left with more uncertainty after the D.C. Circuit Court held that the mandatory minimum sentences issued in *Slatten* violated the defendants’ Eighth Amendment protections against cruel and unusual punishment and remanded the case to the district court for more litigation.⁸⁰

Prior to the enactment of MEJA, the obligation to prosecute crimes committed by U.S. civilians fell upon the host nation.⁸¹ If

76. See Belen, *supra* note 73, at 174 (“MEJA extended federal court jurisdiction to include U.S. civilians who commit felonies while employed by or accompanying the military overseas.”).

77. See *United States v. Slatten*, 865 F.3d 767, 778 (D.C. Cir. 2017), *cert. denied sub nom.*, *Slough v. United States*, 218 U.S. LEXIS 2836 (U.S., May 2018) (“On remand, the government used a new prosecutorial team and convened a new grand jury, which returned indictments against the defendants for voluntary manslaughter, attempted manslaughter and *using and discharging a firearm in relation to a crime of violence.*” (emphasis added)).

78. *Id.* at 813.

79. See *id.* at 812 (“[T]he Supreme Court has recognized Section 924(c) was created ‘to persuade the man who is tempted to commit a Federal felony to leave his gun at home.’ Thus, precedent clarifies Section 924(c) applies against those who intentionally bring dangerous guns with them to facilitate the commission of a crime.” (quoting *Muscarello v. United States*, 524 U.S. 125, 132 (1998)) (citing *Busic v. United States*, 446 U.S. 398, 405 (1980))).

80. See *id.* at 820 (concluding that 924(c) was not meant to apply to warzones and that the mandatory 30-year sentences are cruel and unusual).

81. See Joseph R. Perlek, *The Military Extraterritorial Jurisdiction Act of 2000: Implications for Contractor Personnel*, 169 MIL. L. REV. 92, 101 (2001)

the host nation was not willing or not able to exert its jurisdiction to prosecute, “then the offense would go unpunished.”⁸² The intent of Congress to use MEJA to fill these jurisdictional gaps is evident in its statutory construction, particularly section 3261(b) which deals with concurrent jurisdiction:

No prosecution may be commenced against a person under this section if a foreign government, in accordance with jurisdiction recognized by the United States, has prosecuted or is prosecuting such person for the conduct constituting such offense, except upon the approval of the Attorney General or the Deputy Attorney General (or person acting in either such capacity), which function or approval may not be delegated.⁸³

This section serves two purposes. First, Congress intended for MEJA to be used only in those few cases where an existing scheme of criminal law was not an option for addressing crimes committed by U.S. civilians overseas.⁸⁴ Second, while the American notion of double jeopardy does not apply to situations where two separate sovereigns wish to prosecute a crime, Congress intended to use MEJA to prosecute crimes which no other sovereign would prosecute.⁸⁵ MEJA is not meant to pursue duplicate and redundant prosecutions.⁸⁶

(describing how host nations had the sole authority to prosecute many criminal offenses committed by civilians accompanying the armed forces).

82. *Id.* at 101–02.

83. 18 U.S.C. § 3261(b).

84. *See* Perlek, *supra* note 81, at 102 (“Where international agreements recognized by the United States already provide for foreign criminal jurisdiction, and that jurisdiction is exercised, then Congress is content to allow that existing scheme of law, namely foreign law, to be applied.”); *id.* (“In a recently publicized case involving . . . American service members in Germany, German law was applied, yielding sentences between seven years and eight-and-a-half years for the three defendants.”).

85. *See id.* 103 (discussing the roles of the Attorney General and Deputy Attorney General in ensuring that the U.S. “will not pursue concurrent or parallel prosecutions except in the most extraordinary of circumstances, and with the very highest level of authorization”).

86. *See id.* (“Although the American legal doctrine of ‘double jeopardy’ does not apply where there are two separate sovereigns (for example, the United States and Germany), Congress wants to avoid redundancy.”).

*D. Immunity for Contractors Prevented the Prosecution of
Blackwater Contractors Under Iraqi Law*

Charging contractors under Iraqi law is difficult for two reasons.⁸⁷ First, the new Iraqi government is not capable of trying cases of this magnitude, especially when many of the contractors have more advanced weaponry than the host nation.⁸⁸ Second, the Coalition Provisional Authority (CPA) granted immunity to contractors, with the successive Iraqi government failing to repeal this immunity.⁸⁹ The legal system in post-Saddam Iraq while the CPA was taking root was murky at best.⁹⁰ The CPA issued Order No. 7, which preserved the Iraqi Penal Code of 1969 as long as the CPA did not issue a conflicting law.⁹¹ CPA's inaugural regulation reads:

Unless suspended or replaced by the CPA or superseded by legislation issued by democratic institutions of Iraq, laws in force in Iraq as of April 16, 2003 shall continue to apply in Iraq insofar as the laws do not prevent the CPA from exercising its rights and fulfilling its obligations, or conflict with the present or any other Regulation or Order by the CPA.⁹²

87. See Belen, *supra* note 73, at 187 (discussing the legal challenges that arise when attempting to prosecute contractors under Iraqi law).

88. See *id.* at 187 (discussing the legal vacuum in post-Sadam Iraq and the complications that arose from that situation); see also PETER W. SINGER, CORPORATE WARRIORS: THE RISE OF THE PRIVATIZED MILITARY INDUSTRY 93–94 (2008) (discussing how many PMFs can provide small armies with state-of-the-art weaponry to clients who possess a weak military or lack one altogether).

89. See Belen, *supra* note 73, at 175 (discussing the legal immunity that foreign contractors received while they were working in Iraq while supporting United States Department of Defense operations).

90. See *id.* at 188–89 (discussing the confusion that plagued the Iraqi legal system after the Coalition Provisional Authority replaced Saddam Hussein as the sole source of legal policy and the direct and indirect consequences that followed as a result of the CPA's decisions, regardless of how detailed or improvised they were).

91. See *id.* (“Although the CPA further amended the Penal Code's applicability, the Penal Code's relevant provisions remained in effect at the time of the Blackwater incident and, therefore, would form the basis for any criminal prosecution in an Iraqi court.”).

92. *Id.* at 188.

This Order No. 7 amended the Iraqi Penal Code, which was still in force at the time of the Blackwater incident in 2007.⁹³

The CPA later issued Order No. 17, however, which provided immunity for contractors in Iraq, regardless of the condition of the Iraqi Penal Code.⁹⁴ The CPA issued Order No. 17 in June 2004 under the title “Status of the Coalition Provisional Authority, [Multi-National Force]-Iraq, Certain Missions and Personnel in Iraq.”⁹⁵ This Order “granted immunity from legal liability to a wide swath of contractors operating in Iraq.”⁹⁶ This Order specifically addressed personnel working to reconstruct Iraq once the U.S. military offensive ended.⁹⁷ This Order was issued pursuant to several United Nations Security Council Resolutions.⁹⁸

Section 4 of Order 17 fulfilled three goals. First, it described the process for registering with a centralized governmental body.⁹⁹ Second, it established choice of law.¹⁰⁰ Third, and most importantly, it granted legal immunity to contractors.¹⁰¹ Section 4 stated:

93. *See id.* at 189 (“In June 2004, the CPA released an Order under the innocuous title ‘Status of the Coalition Provisional Authority, [Multi-National Force]-Iraq, Certain Missions and Personnel in Iraq.’ Although unnoticed at the time, this Order granted immunity from legal liability to a wide swath of contractors operating in Iraq.”).

94. *See id.* at 189 (discussing immunity from prosecution under the Iraqi criminal law system for foreign contractors in Iraq which included Blackwater USA).

95. *Id.* at 189.

96. *See id.* (“The Order specifically sought to ‘clarify the status’ of personnel assisting in the reconstruction of Iraq after the end of the U.S. military offensive.”).

97. *See id.* (“In light of its purpose to clarify the status of personnel associated with the occupation, rebuilding, and transitional period in post-Saddam Iraq, the broad definition of persons covered by the Order is reasonable.”).

98. *See id.* (“The Order specifically cited United Nations Security Council Resolutions 1483 (2003), 1511 (2003), and 1546 (2004).”).

99. *See id.* at 190 (“Section 4 of CPA Order 17 accomplishes three primary goals: [P]roviding requirements for registration with a centralized governmental body, establishing particularized choice of law, and granting partial legal immunity to contractors.”).

100. *See id.* (describing one of the goals of Section 4 of CPA Order 17 as “establishing particularized choice of law . . .”).

101. *See id.* (describing one of the goals of Section 4 of CPA Order 17 as “granting partial legal immunity to contractors”).

Contractors shall be immune from Iraqi legal process with respect to acts performed by them pursuant to the terms and conditions of a Contract or any sub-contract thereto. Nothing in this provision shall prohibit [Multi-National Force] Personnel from preventing acts of serious misconduct by Contractors, or otherwise temporarily detaining any Contractors who pose a risk of injury to themselves or others, pending expeditious turnover to the appropriate authorities of the Sending State. In all such circumstances, the appropriate senior representative of the Contractor's Sending State in Iraq shall be notified.¹⁰²

Contractors in general and the Blackwater defendants specifically were not accountable to the Iraqi government for any crime committed in Iraq and were only subject to the control of the Sending State, unless this immunity was waived.¹⁰³

Order 17 was still in force when the Nisur Square incident occurred. Section 20 of Order 17 states:

[T]his Order shall enter into force on the date of signature . . . [and] shall remain in force for the duration of the mandate authorizing the [Multi-National Force ("MNF")] under U.N. Security Council Resolutions 1511 and 1546 and any subsequent relevant resolutions and shall not terminate until the departure of the final element of the MNF from Iraq, unless rescinded or amended by legislation duly enacted and having the force of law.¹⁰⁴

Order 17 came into force under this provision on June 27, 2004.¹⁰⁵ It would terminate when rescinded or when the final MNF element departed Iraq.¹⁰⁶ This differs from other CPA Orders which did not address the order's termination.¹⁰⁷ This unique termination language was inserted to ensure the Iraqi people that contractors in Iraq were not being given limitless immunity.¹⁰⁸ On the day of

102. *Id.* at 190–91.

103. *See id.* at 191 (discussing immunity for private contractors in Iraq, such as those contractors working for Blackwater).

104. *Id.* at 194.

105. *Id.*

106. *See id.* at 194 (“Under this provision, Order 17 became effective June 27, 2004, and would terminate upon its rescission or the ‘departure of the final element of the MNF from Iraq.’”).

107. *See id.* (“This provision distinguishes Order 17 from other orders issued by the CPA.”).

108. *See id.* at 197 (“This language is unique: no other public notice included similar language regarding the limited duration of an order's effectiveness . . . the

the Nisour Square incident, however, this Order authorizing immunity was still in effect.¹⁰⁹

On June 28, 2004, power was transferred from the CPA to the Iraqi government.¹¹⁰ On that day, CPA Administrator Bremer signed Order 100.¹¹¹ This new Order stated that unless the Iraqi government acted, all previous CPA Orders were to remain in effect.¹¹² While Order 100 modified or rescinded some previous Orders, Order 17 was not changed, as Order 100 “expressly provides that Order 17 is unaffected by Order 100.”¹¹³

With prosecution under Iraqi law extremely doubtful, there was still a valid argument against applying MEJA to the Nisour Square incident. The main argument against applying MEJA was that “[t]he fundamental obstacle lies in the necessary legal argument that the Blackwater contractors acted while ‘supporting the mission’ of the Armed Forces.”¹¹⁴ Prosecution under MEJA prior to the 2004 amendment would have been impossible because the Blackwater contractors were working for the State Department, not the Defense Department.¹¹⁵ However, even after 2004, it would still need to be proven that the State Department’s mission was in fact supporting the larger DoD mission.¹¹⁶

This is extremely complicated because while contractors may not have been fulfilling offensive military missions, they were completing jobs that previously been carried out by the military,

language likely was intended to assure the public that the blanket immunity granted to contractors would not be limitless in duration.”).

109. *See id.* at 198–99 (“Therefore, Order 17 remained in force beyond the CPA dissolution and, according to its terms, is enforceable until rescinded or superseded by the Iraqi government which assumed responsibility for all powers held by the CPA.”).

110. *See id.* (discussing the transfer of power in Iraq).

111. *See id.* (“On the same day, CPA Administrator Bremer signed Order 100, providing for the effective transfer of power from the CPA to the new Iraqi government.”).

112. *See id.* (“Order 100 states that all CPA Orders will remain in effect unless and until rescinded by the Iraqi government.”).

113. *Id.*

114. *Id.* at 201.

115. *See id.* (discussing the evolution of MEJA to include non-DoD contractors).

116. *See id.* (“[T]he expansion of the definition of ‘employed by the Armed Forces’ to include non-DoD contractors removes a prohibitive barrier and replaced it with a high hurdle.”).

especially in Iraq where there is no clear safe zone separate from the fighting.¹¹⁷ However, the Blackwater contracts were explicit in detailing their diplomatic duties and obligations to protect State Department personnel.¹¹⁸

The argument in favor of applying MEJA in 2007 was context specific.¹¹⁹ Iraq was a war zone, and most State Department contracts can be assumed to be in support of this larger DoD mission.¹²⁰ In fact, “[p]erhaps the only link between Blackwater’s contract and the military mission in Iraq arises from the often-lawless nature of the environment.”¹²¹ Blackwater contractors, like any other person in Iraq, were operating in a grey zone, both legally and operationally.¹²² Blackwater contractors protected key personnel in warzones and were subjected to daily violence and attacks.¹²³ For every contractor employed in Iraq, a US soldier was free to join offensive missions to combat insurgents.¹²⁴ Clearly the Blackwater contractors involved in the Nisour Square shooting were in Iraq supporting the DoD mission through their work with the State Department.¹²⁵ Summed up,

117. *See id.* at 201–02 (describing how Blackwater contractors performed different functions than their military counterparts, such as providing VIP escort services for the State Department instead of tracking terrorists or acting as military police).

118. *See id.* (“Rather than acting in support of the mission of the military, Blackwater’s role was explicitly limited to supporting the mission of the diplomatic corps and within that mission Blackwater’s support was limited to providing personal protection services.”).

119. *See id.* at 202 (discussing the counter-argument in favor of applying MEJA to the Nisour Square incident because Iraq was essentially a giant war zone in 2007).

120. *See id.* (discussing the State Department’s role in supporting the DoD in Iraq in 2007 when the Nisour Square incident happened).

121. *Id.*

122. *See id.* (“The daily violence and the nature of counter-insurgency conflict blurred the traditional lines between military, law enforcement, and the defense-oriented protection services provided by contractors like Blackwater.”).

123. *See id.* at 202 (same).

124. *See id.* (“Taking this reasoning one step further, without Blackwater’s protective services, American military personnel would have to protect the Embassy and diplomatic corps; this alleviation of responsibility is a form of ‘support’ for the military mission.”).

125. *See id.* at 169 (“The heavily armed Americans were not tourists or ordinary criminals; they were employed by Blackwater USA, a State Department contractor, and paid to protect the United States Embassy and diplomatic corps

“[a]t its essence, therefore, an argument in favor of applicability must rest on, first, the heightened violence in Iraq as justification for Blackwater’s contract and, second, a link between the military mission in Iraq and that heightened violence.”¹²⁶

III. The D.C. Circuit Court of Appeals Holds that a Mandatory Minimum Sentence for Contractors in War Zones Violates the Eighth Amendment Prohibition Against Cruel and Unusual Punishment.

A. Procedural Background

After the shootings, the State Department held “mandatory de-briefing interviews” of Raven 23.¹²⁷ These interviews proved to be a source of contention, as various grand jury witnesses relied on these statements to give their testimony.¹²⁸ The district court subsequently “dismissed the case as tainted as to all defendants.”¹²⁹ The United States Court of Appeals for the D.C. Circuit “agreed that the oral and written statements that resulted from the de-briefings were compelled, and thus could not be used directly or indirectly by the government against the defendants who made them.”¹³⁰ The D.C. Circuit Court, however, remanded the case so that the district court could analyze the magnitude of the taint in question.¹³¹

Once remanded, a new prosecutorial team was used by the government and a new grand jury was convened which “returned indictments against the defendants for voluntary manslaughter, attempted manslaughter and using and discharging a firearm in

in Baghdad.”).

126. *Id.* at 202.

127. *United States v. Slatten*, 865 F.3d 767, 778 (D.C. Cir. 2017), *cert. denied sub nom.*, *Slough v. United States*, 218 U.S. LEXIS 2836 (U.S., May 2018).

128. *See id.* (discussing the reliance of “certain” grand jury witnesses on the mandatory de-briefing interviews).

129. *Id.* (citing *United States v. Slough*, 677 F. Supp. 2d 112, 166 (D.D.C. 2009); *Kastigar v. United States*, 406 U.S. 441 (1972)).

130. *Id.*

131. *See id.* (“The Court . . . remanded the case for a more individualized analysis of the effect of the taint.”) (citing *United States v. Slough*, 641 F.3d 544, 548, 554–55 (D.C. Cir. 2011)).

relation to a crime of violence.”¹³² Then, Slatten “moved to dismiss the charges against him” because he argued they were “time-barred.”¹³³ The D.C. Circuit Court granted this motion by writ of mandamus.¹³⁴ The government, however, then successfully obtained an indictment for Slatten which charged him with first-degree murder.¹³⁵ Finally, in mid-2014 all four defendants were tried jointly.¹³⁶ The jury deliberated for seven weeks.¹³⁷ The defendants were found guilty on all but three charges.¹³⁸ Slatten, who was found to have instigated the shootings when he fired the first shot, was sentenced to life imprisonment by the district court,¹³⁹ while the district court “sentenced Slough, Liberty and Heard to the mandatory term of imprisonment of thirty years for their convictions under 18 U.S.C. § 924(c), plus one day on all of the remaining counts.”¹⁴⁰

B. Appellate Decision

Defendants Slough and Heard were found guilty under § 924(c) for discharging their machine guns and “destructive devices” during the Nisur Square attack, while Liberty was found guilty for the same offense but without the added “destructive device” element.¹⁴¹ They were each sentenced to the mandatory minimum of 30 years, plus one day for the remaining voluntary

132. *Id.*

133. *Id.*

134. *See id.* (discussing the Slatten’s successful motion to dismiss and the writ of mandamus) (citing *In re Slatten*, No. 14-3007, 2014 U.S. App. LEXIS 7385 (D.C. Cir. Apr. 18, 2014)).

135. *See id.* (discussing the subsequent indictment of Slatten after the D.C. Circuit Court granted his initial motion to dismiss for voluntary manslaughter, attempted manslaughter, and using and discharging a firearm in reaction to a crime of violence).

136. *See id.* (discussing the eventual joint prosecution of the four defendants in the summer of 2014).

137. *See id.* (discussing the jury deliberation).

138. *See id.* (discussing the verdicts reached by the jury which found the defendants guilty for all the counts save for three).

139. *See id.* (discussing the district court’s sentencing of Slatten to life in prison for first-degree murder).

140. *Id.*

141. *Id.* at 811.

manslaughter charges and the attempted voluntary manslaughter charges.¹⁴² They challenged these sentences as “unconstitutionally rigid and grossly disproportionate.”¹⁴³ The D.C. Circuit agreed, concluding that “the mandatory 30-year sentence imposed by § 924(c) based solely on the type of weapons Slough, Heard and Liberty used during the Nisur Square shooting is grossly disproportionate to their culpability for using government-issued weapons in a war zone.”¹⁴⁴

To begin its evaluation, the court addressed the proportionality of the mandatory minimum sentences.¹⁴⁵ The court first addressed the ban on “cruel and unusual punishments” as stated in the Eighth Amendment of the U.S. Constitution.¹⁴⁶ The court further added that a sentence for a crime must “be graduated and proportioned to the offense.”¹⁴⁷ The court conceded that the proportionality principle is narrow and that it concerns only “extreme sentences that are grossly disproportionate to the crime.”¹⁴⁸

There are two types of Eighth Amendment challenges.¹⁴⁹ The first challenge addresses sentences as applied to an individual defendant “based on all the circumstances in a particular case.”¹⁵⁰ The second challenge is categorical and applies to the nature of the

142. *Id.*

143. *Id.* (internal quotations omitted).

144. *Id.* (concluding that the sentences violated the Eighth Amendment and remanding for resentencing).

145. *See id.* (same).

146. *Id.* (internal quotations omitted). *See generally* *Graham v. Florida*, 560 U.S. 48 (2010) (ruling that the Eighth Amendment prohibited the imposition of a life-without-parole sentence on the juvenile offender who committed a non-homicide crime).

147. *Slatten*, 865 F.3d at 811 (citing *Graham*, 560 U.S. at 59) (internal quotations omitted). *See generally* *Harmelin v. Michigan*, 501 U.S. 957 (1991) (ruling that while mandatory sentences are cruel, they are not unusual in the constitutional sense because they have been used throughout U.S. history).

148. *Slatten*, 865 F.3d at 811 (citing *Harmelin*, 501 U.S. at 1001) (internal quotation marks omitted).

149. *See id.* (“There are two types of Eighth Amendment Challenges to sentence: 1) challenges to sentences as applied to an individual defendant based on ‘all the circumstances in a particular case’ and 2) categorical challenges to sentences imposed based on the nature of the offense or the ‘characteristics of the offenders.’” (quoting *Graham*, 560 U.S. at 59–61)).

150. *Id.* (internal quotation marks omitted).

offense itself and the “characteristics of the offender.”¹⁵¹ The three defendants in this case challenged their sentences on both methods, claiming that their individual circumstances, as well as “all defendants who have discharged their government-issued weapons in a war zone,” warranted relief from their sentences.¹⁵²

Although the court recognized that the automatic weapons in question drastically increased the severity of their crimes, it believed that that application of § 924(c) in this case only tangentially related to the Congressional intent for enacting the statute in the first place.¹⁵³ Congress cited prior Supreme Court rulings to explain that the primary purpose of § 924(c) was to combat the violence associated with drug crimes in the United States and to deter would-be felons to leave their guns at home.¹⁵⁴ This case differs from the Congressional intent of § 924(c) because the defendants did not set out to commit a felony, such as selling and trafficking narcotics; they were carrying out their wartime duties.¹⁵⁵ The court also noted that the severity of the defendants’ crimes did not stem from the type of weapons used, but from their “hypervigilance” in a crowded area while simultaneously using poor judgment in responding to misperceived threats;¹⁵⁶ the court elaborated that “[t]he tragedy that unfolded shortly after their arrival in Nisur Square owed more to panic and poor judgment than to any coordinated plan to murder Iraqi civilians.”¹⁵⁷

151. *Id.* (internal quotation marks omitted).

152. *Id.*

153. *See id.* at 812 (“Moreover, under normal circumstances, we would be ‘reluctant to review [Congress’s] legislatively mandated terms of imprisonment.’ However, we do not believe such deference is owed when a statute’s application only tangentially relates to Congress’s purpose for creating the statute in the first place.” (quoting *Hutto v. Davis*, 454 U.S. 370, 374 (1982)) (citing *Gonzalez v. Duncan*, 551 F.3d 875, 884–86 (9th Cir. 2008))).

154. *See id.* (“The Supreme Court has recognized Section 924(c) was created ‘to persuade the man who is tempted to commit a Federal [sic] felony to leave his gun at home.’” (citing *Muscarello v. United States*, 524 U.S. 125, 132 (1998))).

155. *See id.* at 813 (explaining that Section 924(c) was not intended to apply to those whose jobs required them to be armed and dangerous).

156. *See id.* at 813–14 (“While we agree the defendants are responsible for their exaggerated response to perceived threats, the crime’s severity and Defendant’s culpability flow from the harm caused by their hypervigilance, not from the use of weapons which would have been appropriate had they not misperceived the threat.”).

157. *Id.*

It is easy to understand why prosecutors would charge the defendants with violating § 924(c) given that it is “one of the most frequently used mandatory minimum sentencing provisions.”¹⁵⁸ Section 924(c) applies to defendants who commit a drug trafficking crime or crime of violence, knowingly possessed a firearm, and possessed the firearm in furtherance of the underlying crime.¹⁵⁹ A crime of violence for the purposes of § 924(c) is

a felony that (a) has, as an element, the use, attempted use, or threatened use of physical force against the person or property of another; or (b) that by its nature involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense.¹⁶⁰

There is a relatively low bar for charging a defendant with violating § 924(c), so when a defendant is charged with over a dozen counts of voluntary manslaughter, it is safe to assume § 924(c) will be part of the indictment.¹⁶¹

However, the court did not believe that this case rose to the level of criminality required for § 924(c) to be applied. The court discussed the defendants’ job at the time of the Nisur Square attack.¹⁶² They were not attempting to facilitate a crime, but instead were providing diplomatic security for the State Department in Iraq, a war zone.¹⁶³ They did not choose to carry

158. Thomas A. Clare, *Smith v. United States and the Modern Interpretation of 18 U.S.C. 924(c): A Proposal to Amend the Federal Armed Offender Statute*, 69 NOTRE DAME L. REV. 815, 815 (1994).

159. See Darian B. Taylor, *What Constitutes “Possession” of Firearm for purposes of 18 U.S.C.A. § 924(c)(1), Providing Penalty for Possession of Firearm in Furtherance of Drug Trafficking Crime or Crime of Violence*, 89 A.L.R. Fed. 2d 37, Art. 12 (defining the criteria to charge someone with violating § 924(c)).

160. *Id.*

161. See generally *United States v. Grajales*, No. 13–11224, 2014 WL 2186437 (11th Cir. May 27, 2014) (ruling that the defendant possessed a firearm in furtherance of a crime of violence where the defendant told an informant that there were guns “inside the hood,” a gun was hidden in a car, others were armed, and the need to be armed was discussed with undercover officers).

162. See *United States v. Slatten*, 865 F.3d 767, 813 (D.C. Cir. 2017), *cert. denied sub nom.*, *Slough v. United States*, 218 U.S. LEXIS 2836 (U.S., May 2018) (“None of these concerns are implicated in this case. On the day of the Nisur [sic] Square attack, Slough, Heard, and Liberty were providing diplomatic security for the Department of State in Iraq.”)

163. See *id.* at 813–14 (explaining the court’s findings on the series of events that occurred). The court stated:

their weapons but were required to do so.¹⁶⁴ In fact, they were responding to an explosion near a U.S. diplomat, not haphazardly injecting themselves into dangerous situations in which they should not be.¹⁶⁵

The court also dismissed the government's argument that the defendants could have used less deadly weapons, such as pistols or using the semi-automatic settings on their rifles instead of full automatic.¹⁶⁶ The court explained that "this argument mistakenly applies the '20/20 vision of hindsight,' an approach the Supreme Court has explicitly rejected when evaluating a police officer's use of force."¹⁶⁷ The court gave the defendants the benefit of the doubt just as they would police officers in the United States, stating "this Court applies an analysis that 'allow[s] for the fact that police officers are often forced to make split-second judgments—in circumstances that are tense, uncertain and rapidly evolving—about the amount of force that is necessary in a particular situation.'"¹⁶⁸

The court evaluated the impact of the defendants' criminal history on the appropriateness of the mandatory minimum sentences.¹⁶⁹ The court noted that the government has free reign to impose harsh sentences on first-time offenders, but that this method of rehabilitation is customarily reserved for "hardened

The government argues Slough, Heard and Liberty could have used less deadly weapons, such as pistols or the semi-automatic setting on their rifles, in response to perceived threats. But this argument mistakenly applies the '20/20 vision of hindsight,' an approach the Supreme Court has explicitly rejected when evaluating a police officer's use of force.

Id. (citing *Graham v. Connor*, 490 U.S. 386, 396 (1989)).

164. *See id.* at 813 ("As part of their jobs, they were required to carry the very weapons they have now been sentenced to thirty years of imprisonment for using.").

165. *See id.* (discussing how the contractors responded to an explosion in the course of performing their duties and did not interject themselves into danger haphazardly without reason or justification).

166. *See id.* at 814 ("The government argues Slough, Heard and Liberty could have used less deadly weapons, such as pistols or the semi-automatic setting on their rifles, in response to perceived threats.")

167. *Id.* (citing *Graham v. Connor*, 490 U.S. 386, 396 (1989)).

168. *Id.* (citing *Robinson v. Pezzat*, 818 F.3d 1, 8 (D.C. Cir. 2016)).

169. *See id.* ("We also find it highly significant that none of the defendants sentenced under Section 924(c) have any prior convictions.").

criminals.”¹⁷⁰ Since the defendants had clean records, these particular mandatory minimum sentences were not appropriate.¹⁷¹ In fact, the court addressed the issue of recidivism and the purpose of mandatory sentences as a method of preventing repeat crime, an issue not present in this case.¹⁷²

The court looked at two more factors to determine whether the defendants’ sentences were appropriate. First, the court examined whether the sentences accurately depicted the three defendants’ individual culpability.¹⁷³ The court determined that these sentences failed in this aspect.¹⁷⁴ The three defendants were not charged with the exact same crimes, so allowing the trial judge to examine each defendant independently and give each defendant a sentence custom made for that person would better serve justice, instead of the “one-size-fits-all” method.¹⁷⁵

Second, the court examined the severity of a thirty-year sentence in the context of this case.¹⁷⁶ The court acknowledged the difference between life in prison with or without parole, and then it turned to the severe nature of a thirty-year sentence.¹⁷⁷ The

170. *See id.* (“Although the government is free to impose harsh, mandatory penalties for first-time offenders, a regime of strict liability resulting in draconian punishment is usually reserved for hardened criminals.”).

171. *See id.* (discussing the defendants’ lack of criminal records and how the district court noted “they were ‘good young men who [had] never been in trouble’ and that they had honorably served in the military”).

172. *See id.* (discussing how the Supreme Court usually reserves harsh sentences for minor violent crimes for cases involving recidivism and holding that “the defendants’ clean criminal records weigh against the imposition of a harsh, mandatory sentence”).

173. *See id.* at 815 (“Additionally, the imposition of a mandatory 30-year sentence through section 924(c) fails to truly account for the culpability of Slough, Heard and liberty individually. Because these men were not convicted of the same counts, it makes little sense for the sentences to be identical.”).

174. *See id.* (stating that it would make more sense to try each defendant as an individual because they were not charged with the same exact crimes).

175. *See id.* (discussing how the sentencing judge was bound by Section 924(c)’s mandatory minimum sentence, thus precluding him from taking into account the differences in offenses of the three defendants and other factors such as any diagnoses of post-traumatic stress disorder (PTSD)).

176. *See id.* (“Turning now to the severity of the sentence, we consider the actual severity of the penalty, not the penalty’s name.”).

177. *See id.* (discussing that “the Supreme Court has acknowledged there is an important distinction between a life sentence with the possibility of parole and

court discussed the fact that the defendants would be forced to serve almost the entire sentence, which is drastic for a first offense.¹⁷⁸ In conclusion, the court stated that 924(c)'s harsh mandatory minimum thirty-year sentence in this case was indeed the rare instance of a gross disproportionality in sentencing.¹⁷⁹

*IV. The D.C. Circuit Ruling in United States v. Slatten Voids
MEJA as a Reliable Means to Obtain Jurisdiction over
Contractors in War Zones*

There was already concern about the viability of MEJA as a successful tool to prosecute military contractors overseas, in part due to its ambiguous and outdated definitions of who was covered in the Act.¹⁸⁰ MEJA was intended to cover civilians overseas who were attached to the military or helping facilitate military operations, so there was considerable confusion as to whether contractors could be included in the scope of MEJA whose agency contracts were not specifically a part of military operations.¹⁸¹ MEJA specifically covered civilian Department of Defense employees and contractors, but it was silent regarding other agencies.¹⁸² As other agencies, such as the State Department, increased their presence in Iraq and their reliance on contractors, uncertainty loomed regarding their legal status under MEJA.¹⁸³ In

a life sentence without the possibility of parole” and how this applies to the defendants).

178. *See id.* (explaining that “a 30-year sentence is the harshest mandatory sentence the federal criminal law can impose on a first-time offender” besides the death penalty or life in prison without the possibility of parole).

179. *See id.* at 815–16 (concluding that “Slough, Heard and Liberty’s mandatory 30-year sentences create the ‘rare case’ that ‘leads to an inference of gross disproportionality’” and that their culpability is not on par with the typical culpability of defendants convicted under Section 924(c)).

180. *See Belen, supra* note 73, at 174 (“This opinion reflects a belief that even the statute intended to prevent this loophole—the MEJA—is not up to the task because it suffers from ambiguous and outdated definitions of the persons covered by the Act.”).

181. *See id.* (discussing State Department contractors who were overseas but not a part of military operations).

182. *See id.* at 179 (“One of the MEJA’s drafters, Glenn Schmitt, later explained that Congress ‘simply never considered’ expanding the MEJA’s application beyond DoD-affiliated persons.”).

183. *See id.* at 180 (describing the State Department’s concern that their

2004, Congress eventually expanded “the definition of ‘employed by the Armed Forces’ in 2004, attempting to close this pesky jurisdictional gap.”¹⁸⁴ But this 2004 amendment was not a perfect fix. While the amendment included federal agency employees other than DoD, it only included them if their employment was in support of a DoD mission.¹⁸⁵

After successfully convicting private contractors for a brutal massacre of Iraqi civilians under MEJA, the government is back where it started. The three contractors in *Slatten* will likely still serve prison time under the manslaughter convictions, but not for the automatic weapons convictions. However, prosecutors are once again dealing with an uncertain jurisdictional act when they inevitably attempt to prosecute future crimes committed by private contractors. Not only is section 924(c) now a questionable charge with which to bring against contractors, but charging a contractor with any felony that carries a mandatory minimum sentence under MEJA is now risky. It would be unwise to bring charges under MEJA that have a high chance of being overturned on appeal for violating the Eighth Amendment. Prosecutors must now guess what those charges might be.

*V. Congress Needs to Amend MEJA to Create a More Certain
Jurisdictional Framework with Which to Prosecute Private
Contractors Overseas*

Congress created MEJA as a catch-all jurisdictional act, and that is its underlying problem.¹⁸⁶ Congress needs to spend the appropriate amount of time necessary to diligently create a workable jurisdictional act to guarantee that Americans abroad will be punished for their felonious activity. Congress should create different variations of MEJA, such as one for contractors who are

thousands of employees abroad would not be liable under MEJA for any crimes committed overseas and proposing to expand MEJA).

184. *Id.*

185. *See id.* at 181–82 (discussing the details of the 2004 amendment).

186. *See id.* 176 (“MEJA is the primary statutory vehicle for criminal prosecution of [PMFs] . . . Congress believed it closed an accountability gap, authorizing prosecution of Americans who commit serious crimes while overseas. What emerged . . . was a well-intended law too ambiguous to apply to those who contracted with non-DoD agencies.”).

directly supporting military and DoD missions abroad, and one for other Americans who are not directly supporting DoD missions, such as spouses on American bases or contractors who commit routine felonies while not in the line of duty.¹⁸⁷ Congress needs to account for the middle ground between civilian and military actors in which private contractors in conflicts zones occupy.

A. Congress Needs to Amend MEJA to Account for the Varied Roles that PMFs Fill

This distinction requires Congress to engage with security experts in order to avoid the perilous temptation to characterize all civilians abroad in bimodal terms as either supporting DoD operations or not. This is especially crucial when addressing civilians who are employed as private contractors as the missions executed by these contractors fall on a spectrum ranging from base-support operations to actual enemy engagement.¹⁸⁸ This spectrum is better known as the “Tip of the Spear” typology.¹⁸⁹ According to this typology,

[U]nits within the armed forces are distinguished by their closeness to the actual fighting (the “front line”) that result in implications in their training levels, unit prestige, roles in the battle field, directness of impact, and so on. For example, an individual serving in a front-line infantry unit (that is, the “tip”) possesses completely different training experiences and even career prospects than one serving in a command or a logistics support team.¹⁹⁰

Organizations sorted along this Tip of the Spear typology are “broke[n] down into three broad types of units linked to their location in the battle space.”¹⁹¹ These units are characterized as those that operate “in the general theater, those in the theater of

187. See discussion *supra* Part II. (discussing the various roles civilians play while overseas and the difficulties that has created for prosecution teams when attempting to gain jurisdiction).

188. See Singer, *supra* note 13, at 91 (“In the military context, the best way to structure the industry is by the range of services and level of force that a firm is able to offer the industry.”).

189. *Id.*

190. *Id.*

191. *Id.*

war, and those in the actual area of operations, that is, the tactical battlefield.”¹⁹²

PMFs also fall along various points of the Tip of the Spear typology just as their military colleagues do. The PMF industry is divided into “three broad sectors: *Military Provider Firms*, *Military Consultant Firms*, and *Military Support Firms*.”¹⁹³ While many firms fall neatly into one category,¹⁹⁴ this is not always the case as “similar to other industries and equivalent military functions, other firms lie at the borders or offer a range of services within various sectors.”¹⁹⁵ More and more firms cross sectors as the industry in general grows and, as such, more and more firms are consolidating globally.¹⁹⁶

Examples of typical Military Provider Firms are Executive Outcomes and Sandline International, “having run active combat operations in Angola, Sierra Leone, Papua New Guinea, Indonesia, and elsewhere.”¹⁹⁷ Executive Outcomes is a model firm in this category as it easily flexed its military might in counterinsurgencies.¹⁹⁸ In Sierra Leone alone, Executive Outcomes “deployed a battalion-sized unit on the ground, supplemented by artillery, transport and combat helicopters, fixed wing combat and

192. *Id.*

193. *Id.*

194. *See id.* at 92 (“The proviso of any such typology, however, is that it is a conceptual framework rather than a fixed definition of each and every firm. Some firms are clearly placed within one sector.”).

195. *Id.* Academi, the PMF that succeeded Blackwater, offers various services including client-based training, scenario-based training, supply chain logistics, construction, life support, unmanned aerial systems, and complex program management. *See Managed Support Services*, ACADEMI, <https://www.academi.com/pages/managed-support-services> (last visited Sept. 28, 2018) (on file with the Washington & Lee Journal of Civil Rights & Social Justice). Additionally, the parent company of Academi, Constellis, also owns the PMFs Triple Canopy, Olive Group, Edinburgh International, Strategic Social, AMK9, and OMNIPLEX, solidifying it as a player across multiple sectors within the industry. *See About Us*, ACADEMI, <https://www.academi.com/pages/about-us> (last visited Sept. 28, 2018) (on file with the Washington & Lee Journal of Civil Rights & Social Justice).

196. *See* Singer, *supra* note 13, at 92 (“Moreover, with ongoing global consolidation into ever larger PMFs, there is a potential growth in the numbers of these firms, such as Armorgroup, that cross sectors.”).

197. *Id.* at 93.

198. *See id.* (discussing the military capabilities of Executive Outcomes and similar PMFs in frontline combat operations).

transport aircraft, a transport ship, and all types of ancillary specialists (such as first aid and civil affairs).¹⁹⁹

The middle of the Tip of the Spear typology is occupied by the Military Consulting Firms.²⁰⁰ These PMFs primarily “provide advisory and training services integral to the operation and restructuring of a client’s armed forces”²⁰¹ These firms “offer strategic, operational, and/or organizational analysis” while also “engag[ing] with the client at all levels, except at what businessmen would describe as ‘customer contact.’”²⁰² This means that they do not engage the enemy on the battlefield, but they provide the knowledge and training necessary for the client to successfully wage a military campaign.²⁰³ The civilian counterpart to this type of firm is the “management consultant.”²⁰⁴

The final category of PMF is the Military Support Firm which “provide[s] supplementary military services” encompassing “nonlethal aid and assistance, including logistics, intelligence, technical support, supply, and transportation.”²⁰⁵ As is the case with the civilian supply-chain management industry, “the benefit of this type of military outsourcing is that these firms specialize in secondary tasks not part of the overall core mission of the client.”²⁰⁶ Thus, these PMFs can “build capabilities and efficiencies” which are unsustainable by the client.²⁰⁷ This frees the military of the client to focus the bulk of its resources on the actual fighting.²⁰⁸ Including Military Support Firms in the general conversation about PMF regulation is critical because they are often overlooked, yet they are operating in the same legal uncertainty as other PMFs

199. *Id.* at 93–94.

200. *See id.* at 95 (discussing the various roles occupied by Military Consulting Firms and how they are just as important as those firms who primarily occupy the battlefield).

201. *Id.*

202. *Id.*

203. *See id.* (explaining that “they do not operate on the battlefield itself” but provide the client with the capabilities necessary to ‘re-engineer’ the local force which will “bear the final risks on the battlefield”).

204. *Id.*

205. *Id.* at 97.

206. *Id.*

207. *Id.*

208. *See id.* (discussing the benefits of contracting support tasks to PMFs which allow the client military to focus solely on fighting).

who interact with insurgents and are just as liable to commit crimes overseas, especially while on military bases.²⁰⁹

B. Congress Should Reduce or Eliminate the Application of 924(c) to Private Contractors Supporting DoD Missions

Not everyone agrees that applying mandatory minimum sentences are de facto unconstitutional when used in a warzone context, as the dissenting opinion of Judge Rogers in *Slatten* illustrates.²¹⁰ As Judge Rogers noted, the Supreme Court has held that “nothing in Section 924(c) prevents a district court from, as here, mitigating the harshness of a mandatory thirty-year minimum by imposing a one-day sentence for the predicate convictions.”²¹¹ The defendants were facing over 100 years in prison each—over 200 years for one defendant—due to the severity of their crimes, so while the D.C. Circuit has barred the use of mandatory minimum sentences in this context, it remains to be seen whether other circuit courts will agree or, for that matter, if the Supreme Court will weigh in on this issue.²¹²

But operating under the assumption that the majority’s decision will remain the law of the land for the near future, Congress should enact legislation to restrict the ability of prosecutors to use 924(c) as a charging option when prosecuting PMFs who are supporting DoD missions as its application has already been ruled unconstitutional. This is especially important when prosecuting private contractors who fill the roles of military providers or military consultants. These contractors are more

209. *See id.* (“[M]ilitary support sector firms are typically not included in the analysis of the privatized military industry . . . their often mundane operations appear less ‘mercenary.’ However . . . although they do not participate in the execution or planning of combat action, they fill functional needs critical to overall combat operations.”).

210. *See* *United States v. Slatten*, 865 F.3d 767, 830–31 (D.C. Cir. 2017), *cert. denied sub nom.*, *Slough v. United States*, 218 U.S. LEXIS 2836 (U.S. May 2018) (Rogers, J., dissenting in part) (arguing that because the defendants were facing sentences ranging from 137 to 249 years in prison for the voluntary manslaughter and attempted manslaughter charges, the mandatory minimum sentences of thirty years in prison stemming from the weapons charges were not “unconstitutionally ‘grossly disproportionate to the crime[s]’”).

211. *Id.* at 831 (citing *Graham v. Florida*, 560 U.S. 48, 60 (2010)).

212. *See id.* (discussing mandatory sentences).

likely to be required to carry firearms as a part of their day-to-day jobs, just as the defendants in *Slatten* were required. These contractors are far more likely than other civilians to find themselves in the position of the defendants in *Slatten*, increasing the likelihood that Eighth Amendment issues and violations will occur as their cases progress.

In contrast, civilians in combat theaters who are not directly supporting DoD operations, such as military spouses or contractors attached to Military Support Firms, are less likely to possess firearms in the course of their jobs, thus decreasing the likelihood that they would they would find themselves in the same position as the *Slatten* defendants. For these civilians, restricting the application of 924(c) is not as imperative, but should be carefully studied.

C. Congress Should Coordinate PMF Regulation with the International Community

Congress should also coordinate with international organizations in an effort to standardize a framework for holding contractors accountable for war crimes. The U.S. participated in the creation of the Montreux Document, which is the product of a “joint initiative of the Swiss government and the International Committee of the Red Cross (ICRC).”²¹³ This initiative sets out best practices for countries to follow when they contract with PMFs and operates as an “intergovernmental statement clearly [that] clearly articulates the most pertinent international legal obligations with regard to [Private Military Security Companies (PMSCs)] and debunks the prevailing misconception that private contractors operate in a legal vacuum.”²¹⁴

However, this initiative is not legally binding and “does not affect existing obligations of States under customary international law or under international agreements to which they are parties.”²¹⁵ Instead, this initiative “recalls existing legal

213. ICRC, *The Montreux Document*, ICRC 5 (Aug. 2009), https://www.icrc.org/eng/assets/files/other/icrc_002_0996.pdf (on file with the Washington & Lee Journal of Civil Rights & Social Justice).

214. *Id.*

215. *Id.* at 9.

obligations of States and PMSCs and their personnel, and provides States with good practices to promote compliance with international humanitarian law and human rights law during armed conflict.”²¹⁶ While this may have signaled a willingness to establish an international legal framework under which PMFs could operate a decade ago, more substantial agreements must be crafted today, especially agreements which carry with them legally binding obligations.

One entity working to lay the international legal foundations for PMF regulations is the United Nations Working Group on the use of mercenaries as a means of violating human rights and impeding the exercise of the rights of peoples to self-determination (UNWG).²¹⁷ In fact, the *Slatten* case has been referred to as “an ‘excellent case in point’ for the need for more international regulation of the private security industry, perhaps through an international treaty that the U.S. government has opposed.”²¹⁸

In a recent report, the UNWG described its activities as focusing “extensively on, inter alia, the need for robust regulation of private military and security companies, with particular emphasis on ensuring accountability for human rights violations

216. *Id.*

217. See generally United Nations Working Group on the Use of Mercenaries As a Means of Violating Human Rights and Impeding the Exercise of the Rights of Peoples to Self-Determination, U.N. HUM. RTS. OFF. OF THE HIGH COMM’R, <http://www.ohchr.org/EN/Issues/Mercenaries/WGMercenaries/Pages/WGMercenariesIndex.aspx> (last visited Sept. 28, 2018, 3:20 pm) (illustrating the seriousness with which the international community is addressing the private contractor industry) (on file with the Washington & Lee Journal of Civil Rights & Social Justice).

218. Spencer S. Hsu, *Murder Convictions in Blackwater Case Thrown out, Other Sentences Overturned*, WASH. POST (Aug. 4, 2017), https://www.washingtonpost.com/local/public-safety/murder-conviction-in-blackwater-case-thrown-out-other-sentences-overturned/2017/08/04/a14f275c-792e-11e7-9eac-d56bd5568db8_story.html?utm_term=.f0498d0e8b2a (“This is exactly the wrong way to pursue foreign policy. Creating private armies to fight war for states is medieval, and contrary to any reasonable interpretation of what’s good for the United States and what is good for human rights.”) (quoting Cardoza School of Law at Yeshiva University in New York visiting professor Gabor Rona, who is also the chairman of the UN working group on mercenaries) (last visited Nov. 4, 2018, 10:48 am) (on file with the Washington & Lee Journal of Civil Rights & Social Justice). See generally International Convention Against the Recruitment, Use, Financing and Training of Mercenaries, Dec. 4, 1989, 2163 U.N.T.S. 75 (demonstrating yet another international effort to curtail the negative effects of the private contractor industry).

committed by company personnel.”²¹⁹ That report illustrates just how massive and complex the private contracting industry is, as this report from UN working group on mercenaries focused not on PMFs or combat operations, but the increasing privatization of prisons around the world.²²⁰ Particularly, much of the report focused on “the situation in the United States, given the high rate of incarceration and the tremendous growth of private contractors on the prison industry in that country in the past 30 years.”²²¹ According to the UNWG report, the U.S. private prison industry is dominated by just three companies: The Corrections Corporations of America, now known as CoreCivic; the Geo Group; and Management and Training Corporation.²²² This echoes the domination of the PMF industry by a few massive firms. This also highlights the speed with which traditionally public domains are being privatized around the world and how difficult it is for legislation to keep pace.

VI. Conclusion

The U.S. is not abandoning the use of private contractors to supplement or fully replace its military any time soon, so it is imperative that Congress not only creates a working jurisdictional framework with which to prosecute its own contractors abroad, but one that helps standardize the legal framework internationally so that international law catches up with twenty-first century warfare.

Private contractors in warfare have been reliable as force multipliers around the world for decades.²²³ They may be efficient ad hoc alternatives to expanding State militaries, but the legal framework with which to regulate these contractors has either

219. U.N. General Assembly, *Report of the Working Group on the use of mercenaries as a means of violating human rights and impeding the exercise of the right of peoples to self-determination*, 3, U.N. Doc. A/72286 (Aug. 4, 2017).

220. See *id.* at 6 (discussing the privatization of prisons around the world).

221. *Id.*

222. *Id.*

223. See Singer, *supra* note 13, at 93 (discussing the role of firms in the provider sector as force multipliers for clients “with comparatively low military capabilities, faced with immediate, high threat situations”).

been unreliable or plainly nonexistent. Private contractors continue to frustrate lawmakers and human rights activists alike. MEJA seemed to finally offer U.S. prosecutors a jurisdictional tool with which to prosecute contractors who would otherwise not be punished for their crimes committed abroad.

MEJA has worked in some cases, but *U.S. v. Slatten* demonstrates that there is much room for improvement. MEJA has been used successfully to prosecute individuals acting outside of a DoD-supporting role. MEJA was successfully used to prosecute the Blackwater contractors who committed the 2007 Nisur Square massacre, but the D.C. Circuit has created doubt regarding MEJA's long-term reliability. In holding that section 924(c)'s mandatory minimum sentence provision violated the Eighth Amendment's protection against cruel and unusual punishment, prosecutors are left to wonder if other circuits will reach this conclusion. Additionally, it remains to be seen whether other mandatory minimum sentence provisions will also violate the Eighth Amendment when applied to private contractors who are working in support of DoD missions in conflict zones.

The easiest way for Congress to address the consequences of *Slatten* is to address the use of 924(c) under MEJA specifically and limit its application to private contractors or eliminate its use altogether. This would likely take the least amount of time and effort and would be the least controversial remedy. This solution, however, is only one small step towards properly regulating PMFs both by the U.S. and the international community. Congress needs to treat PMF contractors differently than other civilians abroad and should differentiate between contractors operating in direct support of DoD operations and those indirectly supporting from the rear.

Instead of waiting for private contractors to commit crimes abroad and having prosecutors test the limits of MEJA through trial and error, Congress should be proactive and amend MEJA by addressing the concerns raised by the D.C. Circuit in *United States v. Slatten*. As the wars in Afghanistan and Iraq themselves demonstrate, ad hoc solutions and knee-jerk reactions are doomed to fail in the long run. *United States v. Slatten* and MEJA show that this shortsightedness can have the same disastrous effect in the courtroom as it does on the battlefield.