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**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF UTAH
CENTRAL DIVISION**

UNITED STATES OF AMERICA,

Plaintiff,

vs.

DONALD BALL, DUSTIN HEARD,
NICHOLAS SLATTEN, PAUL SLOUGH,
AND EVAN LIBERTY,

Defendants.

**MEMORANDUM IN SUPPORT OF
DEFENDANTS' MOTION FOR
PROBABLE CAUSE HEARING
UNDER FED. R. CRIM. P. 5(c)(3)(C),
5.1 AND 18 U.S.C. § 3265(b)**

Case No.:

Magistrate Judge Paul M. Warner

The above-named Defendants, jointly through counsel, and pursuant to Fed. R. Crim. P. 55(c)(3)(C), 5.1 and 18 U.S.C. § 3265(b), respectfully move this Court for an immediate probable cause hearing.

I. BACKGROUND

Upon information and belief, by way of an indictment issued in the District of Columbia on or about December 4, 2008, the Defendants, who at the time of the alleged offenses were security guards providing armed security to State Department officials in Baghdad, Iraq, were

indicted on multiple charges arising out of a firefight at the Nisour Square in Baghdad on September 16, 2007.

As we understand the indictment, the Government's criminal subject matter jurisdiction against the defendants is based on an alleged violation of the substantive criminal offense set out in the Military Extraterritorial Jurisdiction Act of 2000 ("MEJA"), 18 U.S.C. § 3261 *et seq.* In our companion pleadings, we have moved for a finding of no probable cause on two grounds. First, there is no probable cause for this case to proceed under MEJA since that statute does not confer jurisdiction over these defendants and the alleged offenses. Second, irrespective of the lack of subject matter jurisdiction, the District of Columbia does not have proper venue in which to bring charges against these defendants and there is not probable cause to establish venue in that jurisdiction.

To provide the Court with a brief overview, under MEJA, "[w]hoever 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 . . . while employed by or accompanying the Armed Forces outside the United States . . . shall be punished as provided for that offense." 18 U.S.C. § 3261(a). Thus, the Government may only assert MEJA jurisdiction over these defendants if they were "*employed as . . . a contractor (including a subcontractor at any tier) of—any other Federal agency . . . to the extent such employment relates to supporting the mission of the Department of Defense overseas.*" 18 U.S.C. § 3267(a)(1)(A)(ii) (emphasis added). The defendants in this case were not so employed.

MEJA establishes a substantive criminal offense for which probable cause must be established just as with any other criminal offense. In this case, the application of MEJA to these defendants raises an unprecedented jurisdictional issue of a constitutional magnitude, i.e., whether the defendants are even subject to criminal prosecution for the acts alleged in the indictment. As we explain in our jurisdictional motion, the answer to that question is no. Regardless, the MEJA statute requires this Court to hold a probable cause hearing “to determine whether there is probable cause to believe that an offense under section 3261(a) was committed . . .” 18 U.S.C. § 3265(a)(2). By necessity the probable cause hearing contemplated under section 3265(a)(2) must address the issue of whether the substantive criminal offense under MEJA applies to these particular defendants. If it does not, the Government has failed to establish probable cause that these defendant violated MEJA and the case must be dismissed.

In addition, venue for an offense occurring outside the United States must be determined under 18 U.S.C. § 3238, which covers “offenses not committed in any district.” This statute provides:

The trial of all offenses begun or committed upon the high seas, or elsewhere out of the jurisdiction of any particular State or district, shall be in the district in which the offender, or any one of two or more joint offenders, is arrested or is first brought; but if such offender or offenders are not so arrested or brought into any district, an indictment or information may be filed in the district of the last known residence of the offender or of any one of two or more joint offenders, or if no such residence is known the indictment or information may be filed in the District of Columbia.

None of the defendants resides in the District of Columbia nor have they been arrested or brought to that jurisdiction.

Section 3265 of the MEJA statute sets forth the initial proceedings that are required when any person is arrested for or charged with a violation of Section 3261(a). It provides first that

any person so arrested or charged shall have an initial appearance by a Federal magistrate judge. 18 U.S.C. § 3265(a)(1)(A). Section 3265(a)(2) provides that “in conducting the initial appearance, the Federal magistrate judge shall also determine whether there is probable cause to believe that an offense under section 3261(a) was committed and that the person committed it.”

Both the venue and the jurisdictional issues that we raise in our companion pleadings invoke constitutional protections of the highest magnitude. As we point out in our venue motion, the Tenth Circuit, too, has noted that “[t]he Supreme Court has pointed out that failure to treat venue rights seriously not only may impose unfairness and hardship on the accused, but might also encourage forum-shopping by federal prosecutors.” *United States v. Miller*, 111 F.3d 747, 749 (10th Cir. 1997). “[T]he proper construction of § 3238 is a question of law” *United States v. Layton*, 855 F.2d 1388, 1410 (9th Cir. 1988). This Court must address the venue issue in the course of a probable cause hearing and determine whether there is probable cause for the case to proceed. As we explain below, under 18 U.S.C. § 3265(a)(2) and Fed. R. Crim. P. 5.1, this Court must make a finding of “probable cause” before the defendants can be forced to face further proceedings. Venue is “a constitutional consideration and an element of every crime.” *Kelly*, 535 F.3d at 1233.

With respect to jurisdiction under MEJA, the statute itself provides that a hearing must be held to establish probable cause that the defendants committed an act that violated that statute. In doing so, the statute merely incorporates the fundamental due process rights established by the U.S. Supreme Court in *Gerstein v. Pugh*, 420 U.S. 103 (1975).

II. MEJA ADOPTS THE PROCEDURES SPECIFIED IN FED. R. CRIM. P. 5.1 FOR A PRELIMINARY HEARING, INCLUDING THE DEFENDANTS' RIGHT TO INTRODUCE EVIDENCE.

In calling for the magistrate judge to “determine whether there is probable cause to believe that an offense under section 3261(a) was committed and that the person committed it,” 18 U.S.C. § 3265(a)(2), MEJA obviously envisions that the judge will follow appropriate procedures for making that determination. There can be no doubt that MEJA envisioned that the procedures for this probable cause determination would be found in the Federal Rules of Criminal Procedure, for two reasons. First, MEJA explicitly refers to the Federal Rules. Several sentences before the “probable cause” language, MEJA refers to appearance of a defendant “under the Federal Rules of Criminal Procedure.” 18 U.S.C. § 3265(a)(1). Second, MEJA implicitly refers to the Federal Rules by using identical language regarding the probable cause determination to that found in the Federal Rules. Thus, MEJA requires a magistrate judge to “determine whether there is probable cause to believe that an offense under section 3261(a) was committed and that the person committed it.” 18 U.S.C. § 3265(a)(2). In parallel, virtually identical language, Fed. R. Crim. P. 5.1(e) requires a magistrate judge to determine whether there is “probable cause to believe that an offense has been committed [and] the defendant committed it.” The identical language is telling, because it reveals Congress’ plan not only to have the Federal Rules in general govern the probable cause hearing, but more particularly to have Rule 5.1 establish the procedures. Indeed, any other reading of the statute would make no sense. Rule 5.1 is *the* rule governing probable cause hearings. Therefore, under the plain language of the statute, Rule 5.1 governs probable cause hearings under MEJA.