UNITED STATES OF AMERICA	)	
	)	
v.	)	**Government Response to**
	)	**Defense Motion**
Manning, Bradley E.	)	**for Appropriate Relief**
PFC, U.S. Army,	)	
HHC, U.S. Army Garrison,	)	
Joint Base Myer-Henderson Hall	)	
Fort Myer, Virginia 22211	)	**14 February 2013**

RELIEF SOUGHT

The United States respectfully requests that the Court deny the relief requested in the Defense Response to Government Motion for *in camera* Proceeding Under MRE 505(i)(2) and Defense Motion for Appropriate Relief to Preclude Evidence of Receipt by Enemy During Merits dated 8 February 2013 (hereinafter "Defense Motion"). The United States requests that the Court deny the Defense request to preclude the prosecution from raising or eliciting any evidence of the enemy's receipt of intelligence. The United States also requests the Court deny the Defense request to interview Mr. John Doe prior to the Court's consideration of the Government Motion and issuance of any findings pursuant to the *in camera* proceeding.

BURDEN OF PERSUASION

The burden of proof on any factual issue the resolution of which is necessary to decide a motion shall be by preponderance of the evidence. Rule for Courts-Martial (hereinafter "RCM") 905(c)(1). The burden of persuasion on any factual issue the resolution of which is necessary to decide a motion shall be on the moving party. RCM 905(c)(2).

FACTS

The accused is charged with giving intelligence to the enemy, in violation of Article 104, Uniform Code of Military Justice (hereinafter "Article 104"). The accused is also charged with eight specifications alleging misconduct in violation of 18 U.S.C. § 793(e), five specifications alleging misconduct in violation of 18 U.S.C. § 641, two specifications alleging misconduct in violation of 18 U.S.C. § 1030(a)(1), five specifications alleging misconduct in violation of Article 92 of the UCMJ, and one specification alleging misconduct prejudicial to good order and discipline and service discrediting. *See* Charge Sheet.

WITNESSES/EVIDENCE

The United States does not request any witnesses or evidence be produced for this motion. The United States requests that the Court consider its Motion for *in camera* Proceeding Under MRE 505(i)(2) ("hereinafter Government Motion") and referenced Appellate Exhibits.

LEGAL AUTHORITY AND ARGUMENT

I. RECEIPT OF INTELLIGENCE IS RELEVANT

The Defense requests that the Court preclude the Government from raising or eliciting any discussion, reference, or argument, to include the introduction of any documentary or testimonial evidence, relating to receipt of any of the charged information by al Qaeda, al Qaeda in the Arabian Peninsula, the enemy listed in Bates Number 00410660 through 00410664, or any other enemy from the merits portion of the trial. The Court should deny this Defense request because the evidence is relevant and not unfairly prejudicial.

Relevant evidence is evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more or less probable than it would be without the evidence. MRE 401. Relevant evidence is necessary when it is not cumulative and when it would contribute to a party's presentation of the case in some positive way in a matter at issue. The military judge has the initial responsibility to determine whether evidence is relevant under MRE 401. *United States v. White*, 69 M.J. 236 (C.A.A.F. 2010).

A. Receipt of Intelligence by the Enemy is a Definitional Requirement of Intelligence

Elements of charged offenses are relevant and defined by the specification. *See* RCM 307(c)(3) (defining a specification as a plain, concise, and definite statement of the essential facts constituting the offense charged). The accused is charged with knowingly giving intelligence to the enemy by indirect means in violation of Article 104. *See* Charge Sheet. Article 104(2) provides the following elements for Giving Intelligence to the Enemy:

(a) that the accused, without proper authority, knowingly gave intelligence information to the enemy; and

(b) that the intelligence information was true or implied the truth, at least in part.

See Appellate Exhibit LXXXI at 1-2. "Intelligence" means any helpful information given to <u>and received by the enemy</u>, which is true, at least in part. Appellate Exhibit CDX at 1; *U.S. Department of the Army, Pam. 27-9, Military Judges' Benchbook* ¶ 3-28-4(d) (1 January 2010) (hereinafter "Benchbook"). The foundational treatise, *Military Law and Precedents*, supports this definitional requirement of intelligence, stating, "Of the specific instances of a direct violation of [giving intelligence to the enemy] . . . [i]t is necessary that the enemy shall have been <u>actually informed</u>." William Winthrop, *Military Law and Precedents* 634 (2d ed. 1920 reprint) (hereinafter "Winthrop") (emphasis in original). Therefore, receipt of intelligence by the enemy is relevant as a definitional requirement of the element of intelligence.

B. Giving Intelligence to the Enemy Is a Separate and Distinct Crime from Communicating with the Enemy

The Defense notes that no response or receipt by the enemy is required to prove a charge of communicating with the enemy; however, the accused is charged with giving intelligence to the enemy, not communicating with the enemy. *See* Charge Sheet. Communicating with the enemy entails "participating in discussions" or "consulting" with the enemy. *United States v. Batchelor*, 19 C.M.R. 452, 474 (A.B.R. 1955). Communicating with the enemy violates the absolute rule of non-intercourse and includes "correspondence of a comparatively harmless character." Winthrop at 633. Giving intelligence to the enemy, however, requires both that the intelligence be received by the enemy and true, at least in part. *See id* at 634. Indeed, communications with the enemy that are neither true nor received by the enemy fail to amount to giving intelligence to the enemy. *Id.* at 633-34 ("And so of the communicating to the enemy of supposed facts, which however are not true and do not therefore amount to the giving of intelligence. . . . If therefore the intelligence fails to reach [the enemy], [the offense of giving intelligence to the enemy] is not completed though the offence of holding correspondence may be."). Thus, giving intelligence to the enemy is distinct and separate from communicating with the enemy and not a subset of communicating or corresponding with the enemy because "Congress has defined aiding the enemy as giving intelligence to the enemy or communicating with the enemy." *United States v. Anderson*, 68 M.J. 378, 386 (C.A.A.F. 2010) (emphasis in original) (citing *United States v. Dickerson*, 20 C.M.R. 154, 166 (C.M.A. 1955) ("As we read Article 104, none of the acts enumerated is conditioned upon, or restricted by, another. Rather, the Article prohibits separate and distinct acts, each of which is sufficient by itself to constitute the offense.")); Winthrop at 633-34; *see also United States v. Olson*, 20 C.M.R. 461, 466 (A.B.R. 1955) (creating two statutory categories of aiding the aiding enemy).[1] Accordingly, the element of intelligence requires a demonstration that the intelligence was actually received by the enemy and therefore must not be precluded.

C. Receipt of Intelligence by the Enemy Is Facially Relevant

Moreover, even were intelligence not defined to require actual receipt, receipt tends to prove the act of giving. The act of giving logically cannot be completed until receipt occurs; otherwise, the act would constitute attempted giving. Receipt is therefore probative in two ways. First, receipt is probative because it is required to complete the act of giving. Second, even if receipt is not required, the fact that intelligence was received makes it more likely that it was given. The Defense avers that evidence of the receipt of intelligence constitutes irrelevant after-the-fact evidence. The Defense conflates evidence resulting from an act that is a definitional requirement of an element with after-the-fact evidence that could not alter a previously formed *mens rea*.[2] Therefore, the Defense request to preclude evidence of a definitional requirement of the element of intelligence must not be denied.

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[1] *Olson* quotes the Uniform Code of Military Justice (1950), which statutorily constructs two categories of aiding the enemy under Article 104(2): 1) harboring the enemy, protecting the enemy, or giving intelligence to the enemy, and 2) communicating with the enemy, corresponding with the enemy, or holding intercourse with the enemy. *See Olson*, 20 C.M.R. at 466. The first category consists of providing a tangible form aid to the enemy whereas the second category describes actions that violate the absolute rule of non-intercourse with the enemy; the two categories are considered to be separate. *See* Winthrop, *supra.*

[2] The Defense acknowledged this concept of relevance, noting that a medical report, ostensibly documenting an injury stemming from an act, would be relevant to a charge of grievous bodily harm. *See* Audio Record, Article

D. Receipt of Intelligence Is Not Unfairly Prejudicial

Finally, evidence of receipt of intelligence by the enemy is not unfairly prejudicial. The Defense raises several theories for the proposition that evidence of the enemy's receipt of intelligence causes unfair prejudice. First, the defense alleges determining whether the enemy actually received the intelligence would cause unnecessary delay. Defense Motion ¶ 19. The definitional requirement of intelligence as defined by the Benchbook and Winthrop requires evidence of receipt by the enemy. Providing evidence to prove a specification does not cause unnecessary delay nor does it unfairly prejudice the accused. Second, the Defense opines that the prosecution's intention to call six witnesses and relocate and close the Court will also cause undue delay. Defense Motion ¶ 20. Instead, the United States intends to call only those witnesses absolutely necessary to authenticate evidence; each of the six witnesses will testify about a link in the chain of custody for the particular pieces of evidence. Additionally, the prosecution has narrowly tailored its request by asking to conduct a closed session at an alternative location only for a single witness based on the United States' interests in protecting both witness safety and classified information. *See* Government Motion. Third, the Defense argues that "references to receipt of the information by the enemy serves [*sic*] only to prejudice the fact-finder into making a determination on an improper basis." Defense Motion ¶ 20. However, receipt of intelligence by the enemy is relevant to the specification alleging that the accused aided the enemy by knowingly giving intelligence to the enemy by indirect means. Therefore, evidence of receipt of intelligence by the enemy should not be precluded because it is not unfairly prejudicial.

II. Defense's Request to Interview Mr. Doe Is Not Ripe

In the alternative, the Defense requests an interview with Mr. Doe in order to respond to the Government Motion. Article 46 and RCM 701(e) do not create a right to interview a witness for the purposes of preparing for an *in camera* proceeding under MRE 505(i) where the information the Defense seeks to elicit is the same information the United States seeks to protect. *See* MRE 505(i), analysis at A22-42; RCM 701(f). RCM 701(e) implements Article 46's protection of equal opportunity for interviewing witnesses and inspecting evidence. RCM 701(e) ("Each party shall have adequate opportunity to prepare its case and equal opportunity to interview witnesses and inspect evidence."). However, because the classified information privilege has been invoked, RCM 701(f) precludes disclosure of such classified information. *See* Appellate Exhibit XXXVI at 9; RCM 701(f) (stating that RCM 701 does not require disclosure of information protected under the Military Rules of Evidence); Government Motion.

MRE 505 makes privileged classified information if disclosure would be detrimental to national security. MRE 505(a). Moreover, the privilege under MRE 505 applies to "all stages of the proceedings." *Id.* In the instant case, the United States has invoked the classified information privilege and requested an *in camera* proceeding. Government Motion. "Prior to the *in camera* proceeding, the Government shall provide the accused with notice of the information that will be at issue." MRE 505(i)(4)(A). Furthermore, "nothing within [MRE 505] requires that the defense be provided with a copy of the classified material in question when the

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39(a) at 11:25:24-11:25:37 (26 April 2012). For a charge of grievous bodily harm, bodily harm is an element and evidence of that harm would be relevant. *See United States v. Bean*, 62 M.J. 264, 266 (C.A.A.F. 2005).

government submits such information to the military judge pursuant to MRE 505(i)(3) in an effort to obtain an *in camera* proceeding under the Rule." MRE 505(i), analysis at A22-42. The Defense seeks the classified information before a Court determination in contravention of the process created under MRE 505(i).

By its request to interview Mr. Doe prior to the *in camera* proceeding, the Defense seeks to render moot the invocation of the classified information privilege. The Defense requests to conduct an interview before the Court determines the extent of the protection required for the information for which the classified information privilege was invoked. *See Schmidt v. Boone*, 59 M.J. 841, 855-56 (A.F. Ct. Crim. App. 2004), *rev'd on other grounds* (stating that MRE 505 empowers the military judge to control the discovery process). Therefore, the United States requests that the Court deny the defense request to interview Mr. Doe prior to the Court's consideration of the Government Motion and issuance of any findings pursuant to the *in camera* proceeding.

Given the invocation of the classified information privilege and the limitations requested therein, the Defense should not be granted pretrial access to Mr. Doe. The Government Motion presents adequate information to allow the Defense to prepare for trial with respect to Mr. Doe's testimony. The proper forum to litigate the Defense's pretrial access to Mr. Doe is during the *in camera* proceeding but after the Government Motion has been adjudicated or thereafter.

CONCLUSION

For the foregoing reasons, the United States requests that the Court deny the relief requested in the Defense Motion; specifically the request to preclude the prosecution from raising or eliciting any evidence of the enemy's receipt of intelligence and the request to interview Mr. John Doe prior to the Court's consideration of the Government Motion and issuance of any findings pursuant to the *in camera* proceeding.

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Assistant Trial Counsel

I certify that I served or caused to be served a true copy of the above on Mr. David Coombs, Civilian Defense Counsel, via electronic mail on 14 February 2013.

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