

UNITED STATES OF AMERICA

v.

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**Government Targeted Brief
on Receipt of Intelligence
as a Requirement of
Aiding the Enemy**

29 March 2013

I. INTRODUCTION

COL William Winthrop captured and established military precedent in *Military Law and Precedents* (2d ed. 1920) (hereinafter "Winthrop" and Enclosure 1).¹ Winthrop covers precedent then known regarding giving intelligence to the enemy. In fact, *Military Law and Precedents* refers to *Digest of the Opinions of the Judge Advocates General of the Army* (1895) (hereinafter "1895 Digest" and Enclosure 2), also authored by COL Winthrop. In both works, COL Winthrop observes that the crime of giving intelligence to the enemy cannot be completed unless the intelligence is actually received by the enemy. To support this finding, COL Winthrop cites the Civil War case of *United States v. Ellison*, 14 Reports of Bureau of Military Justice 256 (1865), as documented by BG Holt in a letter, recounting the case and its reasoning, addressed to President Lincoln (hereinafter "*Ellison*" and Enclosure 3). Having commenced his military career in April 1861, COL Winthrop possessed a contemporary understanding of the precedents he cited. COL Winthrop's *Ellison* citation includes language also stating that a charge of giving intelligence to the enemy requires that the intelligence be conveyed to the enemy. As the seminal authority on military law since the late nineteenth century, COL Winthrop's published recitations of precedent should be followed. Therefore, this Court should consider Winthrop as a compelling legal authority for the requirement that the intelligence must actually be received by the enemy to prove aiding the enemy by giving intelligence to the enemy correctly.

II. LEGAL BACKGROUND

The ancient crime of treason by levying war or adhering to the enemy originated in England. See Jabez W. Loane, IV, *Treason and Aiding the Enemy*, 30 Mil. L. Rev. 43, 58 (1965) (hereinafter "Loane" and Enclosure 4 at 17). Aiding the enemy under Article 104, UCMJ (hereinafter "Article 104") functions as the military offense separate but analogous to the civilian offense of treason. See *United States v. Batchelor*, 22 C.M.R. 144, 159 (C.M.A. 1956) (noting that accused's act gave aid and comfort to the enemy although the act did not necessarily rise to the intent required for treason); Loane at 44 (Enclosure 4 at 3). As early as 1691, the crime of aiding the enemy was recognized as an offense separate from treason. *Id.* at 59 (Enclosure 4 at 18). Since treason's inception, defining its elements has proven problematic. See *id.* at 46 (discussing the influence of a monarch on the scope of the crime of treason) (Enclosure 4 at 5). Accordingly, while establishing the constitutional requirements for treason, Benjamin Franklin

¹ The United States has provided as enclosures abbreviated versions of many of the sources cited because they are not available on WestLaw or Lexis. These Enclosures will be additionally referenced parenthetically in the respective citations.

advocated for a higher evidentiary requirement of proof of two witnesses. *See* Farrand, 2 Records of the Federal Convention of 1787 348 (noting that treason prosecutions were “generally virulent” and “perjury too easily made use of against innocence”). The increased evidentiary standard of two witnesses was adopted despite recognition that rendering proof of crimes such as traitorous correspondence with the enemy could be “extremely difficult.” *See id.* (“Treason may sometimes be practiced in such a manner, as to render proof extremely difficult – as in traitorous correspondence with an Enemy.”). The heightened standard corresponds to the seriousness of the crime. *See* Loane at 47 (Enclosure 4 at 6).

In 1775, Congress codified the crime of aiding the enemy in Article 28 of the Articles of War of 1775, providing that “[w]hosoever holds correspondence with, or gives intelligence to, the enemy, either directly or indirectly” shall each “suffer death, or such other punishment as a court-martial may direct.” *See* Tara Lee, *American Courts-Martial for Enemy War Crimes*, 33 U. Balt. L. Rev. 49, 53 (2003) (emphasis added). During the Civil War, relieving and communicating with the enemy were prohibited by two articles similar to those enacted in 1775. *See* Winthrop at 629 (Enclosure 1 at 4).² Article 45 states, “Whoever relieves the enemy with money, victuals, or ammunition, or knowingly harbors or protects an enemy, shall suffer death or such other punishment as a court-martial may direct.” *Id.* Article 46 states, “Whoever holds correspondence with, or gives intelligence to, the enemy, either directly or indirectly, shall suffer death, or such other punishment as a court-martial may direct.” *Id.* (emphasis added).

By the middle of the twentieth century, Article 104 had been codified, continuing the definition of aiding the enemy. *Manual for Courts-Martial, United States* ch. XXVIII ¶ 183 (1951) (hereinafter “1951 MCM” and Enclosure 5 at 2-3). Under Article 104, the 1951 MCM treated giving intelligence to the enemy separately from communicating with the enemy. *See* 1951 MCM ch. XXVIII ¶ 183(c)-(d) (Enclosure 5 at 3). In particular, proof of giving intelligence to the enemy required a demonstration that the accused “knowingly conveyed to the enemy certain information.” 1951 MCM ch. XXVIII ¶ 183(c), proof (emphasis added) (Enclosure 5 at 3). By its plain language of the past tense and preposition “to”, the 1951 MCM required that the intelligence be actually received. Additionally, the 1951 MCM explicitly rejected this approach for communication by stating that crime is complete the moment the communication is issued. *See* 1951 MCM ch. XXVIII ¶ 183(d) (“Communication, correspondence, or holding intercourse with the enemy does not necessarily import a mutual exchange of communication. . . . The prohibition lies against any method of intercourse or communication whatsoever, and the offense is complete at the moment the communication issues from the accused, whether it reaches its destination or not.”) (Enclosure 5 at 3). In fact, that distinction that communication does not require actual receipt, as highlighted by the Defense, continues today. *See Manual for Courts-Martial, United States* pt. IV ¶ 28(a); ¶ 28(b)(4)-(5) (2012) (hereinafter “2012 MCM”). COL Winthrop highlighted this distinction in the nineteenth century. *See* William Winthrop, *Digest of the Opinions of the Judge Advocates General of the Army* 21 (1880) (hereinafter “1880 Digest” and Enclosure 6 at 4) 1895 Digest at 41-42 (Enclosure 2 at 4-5).

III. WINTHROP’S TREATISE IS THE QUINTESSENTIAL AUTHORITY ON MILITARY LAW

² Winthrop traces the Civil War articles back to the Articles of War of 1775. Winthrop at 629 (Enclosure 1 at 5).

A. Precedent for Requiring Actual Receipt for Charge of Giving Intelligence to the Enemy

COL Winthrop completed *Military Law and Precedents* to constitute “a comprehensive treatise on the science of Military Law.” See Winthrop at 5 (Enclosure 1 at 3). COL Winthrop drafted his comprehensive treatise based on precedents of the “more important trials and acts of military government” of his era. See *id.* Moreover, COL Winthrop drew on his own views, which were informed by his service in the Army, which began in April 1861 during the beginning of the Civil War. See *id.* Additionally, COL Winthrop drafted 1880 Digest and 1895 Digest. In both the 1880 Digest and the 1895 Digest, COL Winthrop also states that it is “essential” to the offense of giving intelligence to the enemy “that material information should actually be communicated to [the enemy]; the communication may be verbal, in writing, or by signals.” 1880 Digest at 21 (emphasis added) (Enclosure 6 at 4); 1895 Digest at 42 (emphasis added) (Enclosure 2 at 5). COL Winthrop cites *Ellison* in the 1880 Digest and 1895 Digest as authority for the principle that intelligence must actually be received to complete the act of giving intelligence to the enemy. 1880 Digest at 21 (citing 14 Reports of Bureau of Military Justice 273) (Enclosure 6 at 4); 1895 Digest at 42 (citing 14 Reports of Bureau of Military Justice 273) (Enclosure 2 at 5).

Mr. Joseph Ellison was charged with relieving the enemy with money and holding correspondence with the enemy under the 56th and 57th Articles of War. *Ellison* at 256 (Enclosure 3 at 3). Then Brigadier General Holt, Judge Advocate General of the Army, recounted the case and provided a thorough legal analysis in a letter to President Lincoln. *Id.* (Enclosure 3). Mr. Ellison, a civilian, was prosecuted because he purchased approximately 15,000 bales of cotton from agents of the Confederate States of America. *Id.* The specification stated:

In this; that he, the said Joseph Ellison, a citizen of Louisiana, did, in the months of June, July, and August 1864 at Bayou Sara in the Parish of West Feliciana, Louisiana and did then and there hold correspondence [with several Confederate agents, to include one John Irving], all enemies of the United States and officers or agents of the so-called Confederate States Government relative to the purchase of a large quantity of cotton, the property of the so-called Confederate States Government, and the payment therefor in money, for [] exchange, merchandise, and supplies for the use of said Government and its armies.

Mr. Ellison was prosecuted under the 56th and 57th Articles of War³:

56th Article. Whoever shall relieve the enemy with money, victuals, or ammunition, or shall knowingly harbor or protect an enemy, shall suffer death or such other punishment as shall be ordered by the sentence of a court-martial.

³ Although Mr. Ellison was charged under the 56th and 57th Articles of War, not the 45th and 46th Articles examined by COL Winthrop, the language of the respective articles tracks closely.

57th Article. Whoever shall be convicted of holding correspondence with, or giving intelligence to, the enemy, either directly or indirectly, shall suffer death, or such other punishment as shall be ordered by the sentence of a court-martial.

In relevant part, BG Holt's letter recounted:

The next question examined is whether the acts shown constituted "holding correspondence with the enemy." No special facts are shown bearing particularly upon the second charge, and the Judge Advocate rested his demand for a conviction upon the incidental communication with rebels attending the commercial transaction.

The Court find [*sic*] him not guilty as to the other allegations of correspondence with [Confederate agents] not known thus restricting the intercourse to [a Confederate agent, Irving] with whom it was word of mouth.

A strict interpretation of the word correspondence would confine its meaning to written communication. But as this construction would defeat the ends of the prohibition the Government has justly announced the correct interpretation to include all communication, verbally or by signals, as well as by writing. But, at the same time the article has been stated to contemplate only such communications as convey intelligence to the enemy and as are carried on without the sanction of the Commanding General. The learned commentators upon the English Article, which is precisely similar, agree in saying that the correspondence therein denounced must be a secret one unknown to and unauthorized by the Commander.

The Act of February 25th 1863, entitled, "An Act to Prevent Correspondence with Rebels" provides for the punishment of any resident of the United States or citizen resident abroad holding correspondence or intercourse written or verbal with the pretended rebel government on any agent or sympathizer thereof without the permission of the Government of the United States and with intent to defeat the measures thereof. But the accused is not prosecuted under this act.

Ellison at 272-73 (emphasis added; citations omitted) (Enclosure 3 at 19-20). BG Holt repeats the understanding that the rule encompasses communications that convey intelligence to the

enemy—that is, actually transfer possession intelligence to the enemy.⁴ See *id.* at 273 (Enclosure 3 at 20); but see *Cramer v. United States*, 325 U.S. 1, 74 (Douglas, J., dissenting) (analyzing the case of Francis De la Motte, 21 How. St. Tr. 687, and finding that an attempt was sufficient and that aid and comfort need not have been actually received by the enemy to constitute the offense).

It is this rule that intelligence must be received by the enemy to aid the enemy that Winthrop restates in the 1880 Digest, the 1895 Digest, and *Military Law and Precedents*. 1880 Digest at 21 (Enclosure 6 at 4); 1895 Digest at 42 (Enclosure 2 at 5); Winthrop at 634 (Enclosure 1 at 9); see also George Davis, *A Treatise on the Military Law of the United States* 418 (2d ed. 1911) (hereinafter “Davis” and Enclosure 7 at 3). The rule is further restated in Charles Howland, *Digest of Opinions of the Judge Advocates General of the Army* (1912) (hereinafter “1912 Digest” and Enclosure 8 at 3). COL Winthrop began his military career during the Civil War and was a contemporary of BG Holt. See Winthrop at 5 (Enclosure 1 at 3). Accordingly, COL Winthrop possessed extant comprehension of the principles set forth in BG Holt’s letter to President Lincoln. The extant comprehension contributes to COL Winthrop’s status as an authority.

B. Winthrop Operates as Authority for Military Law

Winthrop serves as the foundational treatise on military law. The Supreme Court has twice called Winthrop “the Blackstone of Military Law.” *Hamdan v. Rumsfeld*, 548 U.S. 557, 597 (2006) (equating the “classic treatise” with William Blackstone, *Commentaries on the Laws of England*) (citing *Reid v. Covert*, 354 U.S. 1, 19 n. 38 (1957)); see also *United States ex rel. Toth v. Quarles*, 350 U.S. 11, 15 n. 8 (1955) (calling Colonel Winthrop “a leading authority on military law”). In particular, the Supreme Court has utilized Winthrop as an authority on historical precedent. See *Parker v. Levy*, 417 U.S. 733, 745 n. 11 (1974) (referring to Winthrop as historical authority for content of British Articles of War of 1765). Furthermore, the Court of Military Appeals has relied on Winthrop to interpret Article 104. See *Batchelor* 22 C.M.R. at 157-58. Similarly, Winthrop has been repeatedly acknowledged as the authority on broad swaths of military law in military jurisprudence. See, e.g., *United States v. Stebbins*, 61 M.J. 366, 370 & n. 32 (C.A.A.F. 2005) (discussing circumstances of considering fines as punishment); *United States v. Schuber*, 70 M.J. 181, 187 (C.A.A.F. 2011) (describing the practice of constructive release from arrest where an officer returned to duty at his request to go into an engagement with his regiment, requiring re-arrest at the close of the engagement); *United States v. Ali*, 71 M.J. 256, 262 (C.A.A.F. 2012) (citing Winthrop for the “long-standing principle that civilians serving alongside the military may be subject to courts-martial under the military justice system in some limited circumstances”).

In its previous filing, the United States highlighted Winthrop for the proposition that a conviction for giving intelligence to the accused requires proof that the intelligence was actually received. Winthrop cites the 1895 Digest to support the requirement that intelligence actually be received. The 1880 Digest and 1895 Digest operate as legal authority because the Supreme

⁴ BG Holt agreed with Mr. Ellison’s argument that the Mr. Ellison’s license protected him from a charge of corresponding with the enemy. See *Ellison* at 275-76 (Enclosure 3 at 23-24). BG Holt further noted that the court erred by admitting telegraphic dispatches as evidence because the dispatches were not authenticated. *Id.*

Court has relied on the reasoning presented in the Digests. *See, e.g., United States v. Kelly*, 82 U.S. 34 (1872) (relying on and concurring with the holding of the Judge Advocate General in a similar case); *Mimmack v. United States*, 97 U.S. 426, 430-31 (1878) (quoting William Winthrop, *Opinions of the Judge Advocate General of the Army* (1866)); *Hiatt v. Brown*, 339 U.S. 103, 109 (1950) (giving “great weight” to the interpretation established in authorities, to include the 1912 Digest); *Hamdan v. Rumsfeld*, 548 U.S. at 684 (Thomas, J., dissenting) (citing 1912 Digest); *see also* Davis, *supra*. In addition, COL Winthrop’s recommendation to clarify the scope of aiding the enemy was adopted by Congress. Loane at 75 (noting that Congress inserted the words “or other thing” to the Articles of War of 1916) (Enclosure 4 at 34).

C. Winthrop’s Precedent Comports with Framework of Distinct Crimes

Giving intelligence to the enemy is distinct from communicating with the enemy because it “requires proof of a fact the other does not.” *United States v. Anderson*, 68 M.J. 378, 385 (C.A.A.F. 2010) (holding that attempting to communicate with the enemy is not multiplicitous attempting to give intelligence to the enemy). In *Anderson*, the specification charging attempting to knowingly communicate with the enemy concerned making statements substantially as “I wish to meet with you; I share your cause; I wish to continue contact through conversations and personal meetings.” *Id.* at 385 n. 7. The attempted communication specification charges the accused with violating the absolute rule of non-intercourse with the enemy. *See* Winthrop at 633 (Enclosure 1 at 8). In contrast, the specification in *Anderson* charged attempting to knowingly give intelligence to the enemy concerned “disclosing true information to U.S. military personnel, whom the accused thought were [members of al Qaida].” *Anderson*, 68 M.J. at 385 n. 5. The attempted giving intelligence specification, however, charges providing the enemy with information pertaining to the conduct of war. *See* Winthrop at 634 (Enclosure 1 at 9). One specification punishes the violation of state of occlusion between all inhabitants of belligerent nations while the other specification punishes the act of providing information, the receipt of which could benefit the belligerent. *See* Winthrop at 776-777 & n. 13 (Enclosure 1 at 11-12). Thus, proving communicating with the enemy requires facts distinct from the facts for giving intelligence to the enemy because the two are distinct crimes. *Anderson, supra*.

The Defense theory that “‘giving intelligence to the enemy’ is a subset of ‘communicating’ or ‘corresponding’ with the enemy” further highlights the distinction between the separate crimes of giving intelligence to the enemy and communicating with the enemy. Appellate Exhibit CDLXXXV ¶ 16. The Defense argues that the crime of giving intelligence to the enemy “is complete the moment the communication, correspondence, or intercourse issues from the accused.” *See id.* (citing 2012 MCM pt. IV ¶ 28(c)(6)(a)) (emphasizing a definition of the absolute bar of non-intercourse that includes any method of communication). Thus, by opining that the giving intelligence to the enemy should be treated as a communication to the enemy, which is complete upon the accused’s issuing the communication, the Defense claims that the act of giving intelligence is a communication.

During oral argument, Defense argued that the only distinction between the two crimes is that giving intelligence requires the communication of intelligence vice any other information. Following this argument, the only difference between these two offenses would be the additional element of the information being intelligence. Under the Defense’s theory equating giving

intelligence to the enemy with communicating with the enemy, communicating with the enemy becomes a lesser-included offense of giving intelligence to the enemy based on the single element different of the information being intelligence.⁵ See *Schmock v. United States*, 489 U.S. 705, 719 (1989) (“[T]o be necessarily included in the greater offense the lesser must be such that it is impossible to commit the greater without first having committed the lesser.”); *United States v. Arriaga*, 70 M.J. 51, 55 (C.A.A.F. 2011). Communicating with the enemy cannot be a lesser-included offense of the separate and distinct offense of giving intelligence to the enemy where both offenses could be charged separately and simultaneously. See *Dickenson*, 20 C.M.R. at 166 (determining that no word of Article 104 “indicates that the act of giving ‘intelligence’ to the enemy qualifies or restricts the act of ‘communicating’ or ‘corresponding’ or ‘holding intercourse’ with the enemy”); *Anderson, supra*; see also *Albrecht, supra*. Therefore, requiring receipt is the factor that offsets these two offenses as being separate and distinct, and not nested as lesser included offenses.

IV. CONCLUSION

In the United States, the distinction between the two crimes has been maintained since 1775 and the Civil War. The distinction between the crimes lies in giving information to the enemy—the information must be transferred to the enemy to complete the crime. The two offenses have punished different acts with different elements. Winthrop simply confirms the disparate nature of the crimes and unique requirements for each. Therefore, the requirement, as set forth repeatedly by COL Winthrop, that intelligence must actually be received by the enemy, comports with the American prohibition of presenting a weak case by requiring strong evidence for treasonous charges. The “more serious” nature of giving intelligence, which could be useful to the enemy, warrants the increased standard of actual receipt.



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⁵ If giving intelligence to the enemy is treated as communicating with the enemy, the element of communication without authorization becomes the same. Additionally, the *mens rea* of knowingly requires proof that the accused knew he was giving or communicating intelligence to the enemy. See Appellate Exhibit CDX at 2. Therefore, under the Defense’s theory, the only additional element for giving intelligence would be proof of the intelligence itself.

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 29 March 2013.

A handwritten signature in black ink, consisting of a stylized capital 'A' followed by a cursive 'V' and 'E'.

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