

UNITED STATES

)  
) **RULING: DEFENSE**  
) **MOTION TO PRECLUDE**  
) **EVIDENCE OF RECEIPT**  
) **BY ENEMY ON MERITS**

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The Defense moves to 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 by al Qaeda, al Qaeda in the Arabian Peninsula, the enemy listed in Bates Number 00410660 – 00410664 or any other enemy during the merits portion of the trial. The Defense argues that the evidence is not relevant to any of the charged offenses, and even if relevant, the probative value of receipt by the enemy is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the members or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence under MRE 403. The Government opposes, arguing that this evidence is relevant to the specification of Charge I (Giving Intelligence to the Enemy, Article 104, UCMJ) and specification 1 of Charge II (Wanton Publication of Intelligence, Article 92, UCMJ). At oral argument, the Government also argued that the evidence was relevant to the “caused to be published” element of specification 1 of Charge II. The Government has not proffered this evidence for any other purpose. During the Article 39(a) session from 26 February – 1 March 2013, the Court invited the parties to file targeted briefs on receipt of intelligence as a requirement for the offense of Giving Intelligence to the Enemy. On 29 March 2013, the Government filed a targeted brief. On 1 April 2013, the Defense advised the Court that the Defense would not be filing a targeted brief. After considering the pleadings, evidence presented, and argument of counsel, the Court finds and concludes the following:

### Findings of Fact:

1. The Court's instructions for the charge of Knowingly Giving Intelligence to the Enemy as charged in the specification of Charge I are:

### CHARGE I: Aiding the Enemy

In the specification of Charge I, the accused is charged with the offense of Aiding the Enemy by Giving Intelligence to the Enemy, in violation of Article 104, UCMJ. In order to find the accused guilty of this offense, you must be convinced by legal and competent evidence beyond reasonable doubt:

(1) That at or near Contingency Operating Station Hammer, Iraq, between on or about 1 November 2009 and on or about 27 May 2010, the accused, without proper authority, knowingly gave intelligence information to certain persons, namely: al Qaeda, al Qaeda in the Arabian Peninsula, and an entity specified in Bates Number 00410660 through 00410664 (classified entity);

(2) That the accused did so by indirect means, to wit: transmitting certain intelligence, specified in a separate classified document to the enemy through the WikiLeaks website;

(3) That al Qaeda, al Qaeda in the Arabian Peninsula, and Bates Number 00410660 through 00410664 (classified entity) was an enemy; and

(4) That this intelligence information was true, at least in part.

“Intelligence” means any helpful information, given to and received by the enemy, which is true, at least in part.

“Enemy” includes (not only) organized opposing forces in time of war, (but also any other hostile body that our forces may be opposing) (such as a rebellious mob or a band of renegades) (and includes civilians as well as members of military organizations). (“Enemy” is not restricted to the enemy government or its armed forces. All the citizens of one belligerent are enemies of the government and the citizens of the other.)

“Indirect means” means that the accused knowingly gave the intelligence to the enemy through a 3<sup>rd</sup> party, an intermediary, or in some other indirect way.

“Knowingly” requires actual knowledge by the accused that by giving the intelligence to the 3<sup>rd</sup> party or intermediary or in some other indirect way, that he was actually giving intelligence to the enemy through this indirect means. This offense requires that the accused had a general evil intent in that the accused had to know he was dealing, directly or indirectly, with an enemy of the United States. “Knowingly” means to act voluntarily or deliberately. A person cannot violate Article 104 by committing an act inadvertently, accidentally, or negligently that has the effect of aiding the enemy.

2. The definition of “intelligence” in this instruction is taken from the Military Judge’s Benchbook, U.S. Department of the Army, Pam. 27-9 at 3-28-4(d) (1 January 2010) (hereinafter referred to as Benchbook).

3. The Defense argues that the Benchbook instruction is an inaccurate statement of the law and points to the language of Article 104, UCMJ and the elements and definition. The Defense posits that “giving intelligence to the enemy” is a subset of “communicating” or “corresponding” with the enemy under Article 104(2). The Defense relies on Article 104 c(5)(a) that “giving intelligence to the enemy is a particular case of corresponding with the enemy made more serious by the fact the communication contains intelligence”. It focuses on the explanation in Article 104 c(6)(a), that “no response or receipt by the enemy is required,” and relies on *U.S. v. Olson*, 7 U.S.C.M.A. 460 (C.M.A. 1957), and its discussion of a previous version of the Manual for Courts-Martial (MCM) that “the prohibition lies against any method of communication whatsoever, and the offense is complete the moment the communication issues from the accused, whether it reaches its destination or not.” *Olson* at 467-68. The Defense further contends that allowing evidence of actual receipt by the enemy will sidetrack and unnecessarily delay the trial.

4. The Defense describes “intelligence” as a noun, such that the Court’s proposed instruction defining intelligence conflates defining “intelligence” with “knowingly giving”. The Government agrees.

5. The Government contends the evidence is relevant and neither cumulative nor unfairly prejudicial. It further contends receipt of intelligence by the enemy is a definitional requirement of intelligence, citing R.C.M. 307(c)(3), defining a specification as a plain, concise, and definite statement of the essential facts

constituting the offense charged. The Government cites the Benchbook for the definition of intelligence and asserts William Winthrop, *Military Law and Precedents* 634, (2d ed. 1920 reprint) as compelling legal authority that “[o]f the specific instances of a direct violation of [giving intelligence to the enemy]...[i]t is necessary that the enemy shall have been actually informed.” The Government notes the Supreme Court and the Court of Military Appeals have relied on Winthrop as an authority on UCMJ history. *Hamdan v. Rumsfeld*, 548 U.S. 557, 597 (2006); *U.S. v. Batchelor*, 7 U.S.C.M.A. 354, 368 (1956). The Government contends giving intelligence to the enemy is a separate and distinct crime from communicating with the enemy, citing *U.S. v. Anderson*, 68 M.J. 378, 385 (C.A.A.F. 2010) and *U.S. v. Dickenson*, 6 U.S.C.M.A. 438 (C.M.A. 1955).

6. Specification 1 of Charge II alleges wrongful and wanton causing to be published on the internet intelligence belonging to the United States government; having knowledge that intelligence published on the internet is accessible to the enemy, in violation of Article 134. The Government asserts that evidence that the enemy received and downloaded the intelligence is relevant to prove that the accused “caused to be published” the intelligence.

#### **The Law.**

1. Military Rule of Evidence (MRE) 401 defines “Relevant Evidence”. Relevant evidence means 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. The military judge has the initial responsibility to determine whether evidence is relevant under RCM 401. *U.S. v. White*, 69 M.J. 236 (C.A.A.F. 2010).

2. MRE 402 provides that all relevant evidence is admissible, except as otherwise provided by the constitution of the United States as applied to members of the armed forces, the code, these rules, this Manual, or any Act of Congress applicable to members of the armed forces. Evidence which is not relevant is not admissible.

3. 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. A matter is not at issue when it is stipulated as fact (discussion to RCM 703(b)(1)).

4. MRE 403 provides that relevant evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the members, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

5. Article 104, UCMJ penalizes in pertinent part: “Any person who without proper authority, knowingly harbors or protects or gives intelligence to or communicates or corresponds with or holds any intercourse with the enemy, either directly or indirectly.”

6. In the MCM, page IV-21, paragraph 28 the President has delineated separate elements and definitions for the offenses of “Giving Intelligence to the Enemy” and “Communicating with the Enemy”.

7. In Paragraph 28(c)(5) the nature of the offense “Giving Intelligence to the Enemy” is explained as “a particular case of corresponding with the enemy made more serious by the fact that the communication contains intelligence that may be useful to the enemy for any of the many reasons that make the information valuable to belligerents.”

8. In Paragraph 28(c)(6) the nature of the offense “Communicating with the Enemy” is explained as “[n]o authorized communication, correspondence, or intercourse with the enemy is permissible. The intent, content, and method of the communication, correspondence, or intercourse are immaterial. No response or receipt by the enemy is required. The offense is complete the moment the communication, correspondence, or intercourse issues from the accused.”

9. The analysis to Article 104 in Appendix 23, MCM states that it is based on paragraph 183 of the 1969 MCM and cites *U.S. v. Olson*, 7 U.S.C.M.A. 460 (C.M.A. 1957); *U.S. v. Batchelor*, 7 U.S.C.M.A. 354 (C.M.A. 1956); and *U.S. v. Dickenson*, 6 U.S.C.M.A. 438 (C.M.A. 1955).

10. The MCM lists “attempts” as a lesser included offense (LIO) for both “Giving Intelligence to the Enemy” and for “Communicating with the Enemy”. It does not list either offense as a LIO of the other.

11. In *Batchelor*, the Court of Military Appeals (CMA) acknowledged Colonel William Winthrop as “[p]robably the most respected early writer in the field of military law” and his “learned treatise” cited in support of the holding “that Article 104(2) of the Code does not require a special criminal intent of any sort”. The CMA went on to note that the Government is not prohibited “from over-proving its case in prosecutions under Article 104.” *Id.* at 368. The United States Supreme Court has referred to Winthrop as “the ‘Blackstone of Military Law’” *Hamdan v. Rumsfeld*, 548 U.S. 557, 597 (2006) (quoting *Reid v. Covert* 354 U.S. 1, 19 n.38 (1957)).

12. Winthrop defines the offense of Giving Intelligence to the Enemy as follows:

GIVING INTELLIGENCE TO THE ENEMY, This offence will consist in communicating to the enemy, by personal statement, message, letter, signal or otherwise, information in regard to the number, condition, position, or movement of the troops, amount of supplies, acts or projects of the government in connection with the conduct of war, or any other fact or matter that may instruct or assist him in the prosecution of hostilities.

...

It is necessary that the enemy shall have been *actually informed*. If there-fore the intelligence fails to reach him, this offence is not completed, though the offence of holding correspondence may be. It would seem also that the facts communicated should be in part at least true, since, if they are entirely false, *intelligence* cannot be said to be given.

William Winthrop, *Military Law and Precedents* 634 (2d ed. 1920 reprint)(emphasis in original).

13. “While military judges are encouraged not to significantly deviate from the standard instructions found in the *Military Judges' Benchbook*, the standard instructions are not sacrosanct.” *U.S. v. Staton*, 68 M.J. 569 (A.F. Ct. Crim. App. 2009). (upholding deviations conforming to current case law). “Because the standard Benchbook instructions are based on a careful analysis of current case law and statute, an individual military judge should not deviate significantly from these instructions without explaining his or her reasons on the record.” *U.S. v. Rush*, 51 M.J. 605, 609 (A. Ct. Crim. App. 1999).

#### Conclusions of Law:

1. Article 104 includes elements for five separate offenses: aiding the enemy, attempting to aid the enemy, harboring or protecting the enemy, giving intelligence to the enemy, and communicating with the enemy. Each of these offenses is distinct and separate from the other offenses. *U.S. v. Anderson*, 68 M.J.

378 (C.A.A.F. 2010) quoting *U.S. v. Dickenson*, 6 U.S. C.M.A. 438, 450 (C.M.A. 1955).

2. The statutory language of Article 104, UCMJ is silent with respect to whether response or receipt by the enemy is required for the offenses of “Communicating with the Enemy” and “Giving Intelligence to the Enemy”. In the MCM, the President explained that the offense of “Communicating with the Enemy” is “complete the moment the communication, correspondence, or intercourse issues from the accused.” MCM, IV-41, paragraph 28c(6)(a). The explanation for the offense of “Giving Intelligence to the Enemy” does not state that the giving of intelligence is complete the moment the giving issues from the accused. This distinction is consistent with Winthrop’s explanation of the distinctions between the two offenses and a Judge Advocate General opinion regarding Article 46 of the American Articles of War in 1874, the version of the offense of Aiding the Enemy in effect at that time. William Winthrop, *Military Law and Precedents* 633-634 (2d ed. 1920 reprint); William Winthrop, *Digest of the Opinions of the Judge Advocates General of the Army With Notes* 41-42 (1895).

3. Aiding the Enemy has been an offense in military codes since the American Articles of War in 1775. *U.S. v. Bachelor*, 7 U.S.C.M.A. 354, 368 (C.M.A. 1956) (“This provision [Article 104] is not new or novel, for it was taken, with only minor changes, from Article of War 81, 10 U.S.C. Section 1553.....Indeed, the present enactment bears a striking resemblance to Article 28, American Articles of War of 1775, which provided: ‘Whosoever belonging to the continental army, shall be convicted of holding correspondence with, or giving intelligence to, the enemy, either directly or indirectly, shall suffer such punishment as by a general court-martial shall be ordered.’ And the gist of this penal statute has appeared in every military code since that time. See Article 46, American Articles of War, 1874; Article 81, Articles of War 1916 and 1920.”) *Bachelor* went on to describe Winthrop as “Probably the most respected early writer in the field of military law” and the Court relied on Winthrop’s interpretation of Article 46, the predecessor statute to Article 104, UCMJ as defined in the 1951 MCM. *Id.*

4. The Defense relies upon *U.S. v. Olson*, 7 U.S.C.M.A. 460, 467 (C.M.A. 1957) to show that the offense of “Communicating with the Enemy” “has been interpreted consistently so as to require absolute nonintercourse since early times.” *Olson* does not address the separate offense of “Giving Intelligence to the Enemy” at issue in this case.

5. The 1951 Article 104, UCMJ is nearly identical to the current Article 104, UCMJ. There has been no legislative, executive, or case-law history since *Batchelor* that indicates any intent by Congress, the President, or the Courts to interpret Article 104, UCMJ inconsistently with its history as described by Winthrop and relied upon in *Batchelor* to interpret the statute. The President has retained the distinction between “Communicating Intelligence to the Enemy” (offense complete the moment the communication issues) and “Giving Intelligence to the Enemy” (no provision that the offense is complete when the giving issues). Furthermore, the standard instructions for Article 104 in the Benchbook invoke the same distinction and are consistent with Winthrop with the definition requiring that “Intelligence” means any helpful information, given to and received by, the enemy, which is true, at least in part.”

6. The offense of Article 104 “Giving Intelligence to the Enemy” requires the Government to prove beyond a reasonable doubt that the intelligence was actually received by the enemy.

7. The Court agrees with the parties that “intelligence” is a noun, and that as such, the current Benchbook instruction in the Court’s instructions: “Intelligence means any helpful information, given to and received by the enemy, which is true, at least in part” is awkward. The Court will reword the instruction to read: “Intelligence means any information that is helpful the enemy and which is true, at least in part. To find the accused guilty of this offense, the Government must prove beyond a reasonable doubt that the intelligence was given to and received by, the enemy.”

8. Even if receipt by the enemy was not required, evidence of the circumstances surrounding the receipt by the enemy is relevant to the element of whether the accused knowingly gave intelligence to the enemy for the specification of Charge I (Aiding the Enemy). Evidence of the path of the intelligence from the accused to the enemy is circumstantial evidence relevant to prove whether the accused knew or did not know he was dealing with the enemy.

9. Similarly, evidence of the circumstances surrounding the enemy's receipt of the intelligence is relevant to the "caused to be published" element of specification 1 of Charge II (Wanton Publication). As the evidence is also relevant to another charge, the Court will not decide whether there could be other less prejudicial evidence to establish this element.

10. The evidence at issue is not cumulative. Its probative value is not substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the members, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence. Allowing the evidence at issue will not sidetrack or unnecessarily delay the trial by shifting the focus to whether or not the enemy actually received the charged information. Thus, the Court finds that the probative value of the evidence is not substantially outweighed by the danger of unfair prejudice, confusion of the issues or misleading the members. Presentation of the evidence will not cause undue delay, waste of time or needless presentation of cumulative evidence IAW MRE 403.

**RULING:** The Defense Motion to Preclude the Government from raising or eliciting any discussion, reference, or argument, to include the introduction of any evidence relating to the receipt of charged information by al Qaeda, al Aqaeda in the Arabian Peninsula, the enemy listed in Bates Number 00410660 through 00410664 or any other enemy from the merits portion of the trial is **DENIED**. The court's instructions regarding the specification of Charge I will be amended as stated in this ruling.

So **ORDERED** this 10th day of April 2013.



DENISE R. LIND  
COL, JA  
Chief Judge, 1<sup>st</sup> Judicial Circuit