

The *Subpoena Duces Tecum* and the Article 32 Investigation: A Military Practitioner's Guide to Navigating the Uncharted Waters of Pre-Referral Compulsory Process

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"No witness—military or civilian—may be allowed to thumb his nose at the lawful process of a court-martial."¹

I. Introduction

Following your appointment as an Article 32 investigating officer, you call a preliminary meeting with the trial and defense counsel in a case involving a sexual assault. The trial counsel informs the parties that the government plans to subpoena the accused's credit card records for the purpose of examining the date- and time-stamped transactions on the day in question and the contents of the accused's personal Yahoo email account. In response, the defense has a request of their own: the defense seeks the government's assistance in obtaining the victim's psychotherapist-patient records from a civilian healthcare provider. The defense proffers that there is reason to believe this evidence will show the victim gave inconsistent accounts of the offense. You agree that the requested information could be relevant to the investigation and three subpoenas are issued.

Before January 2012, this evidence would most likely have been beyond the reach of the Article 32. With the 2012 congressional amendments to Article 47 of the Uniform Code of Military Justice (UCMJ), however, this evidence is now potentially available to an Article 32. Proposed changes to Rules for Court Martial (RCM) 405 and 703 will grant authority to Article 32 officers and the trial counsel to issue subpoenas pre-referral.²

The above hypothetical is a typical situation Article 32 officers are likely to confront, and raises some interesting questions for military justice practitioners as they begin to grapple with issuing subpoenas under their new compulsory process powers. For instance, what are the limits of the

Article 32 subpoena power and how does the military enforce such an order? This article will examine these types of questions with the aid of the above hypothetical and in the context of three types of evidence: banking records, the contents of stored e-mail communications, and psychotherapist records. While most non-military entities will likely recognize and comply with a valid *subpoena duces tecum*, these three common types of evidence represent areas where military practitioners could encounter resistance. This article will discuss the enforcement options for a pre-referral subpoena and provide some navigation aids to help determine when evidence is not reasonably available for purposes of the Article 32.

Part II of this article outlines the legislative background which led Congress to authorize the *subpoena duces tecum* at an Article 32 investigation.³ Part II also discusses the proposed changes to RCMs 405 and 703, which have not yet been approved by the President.⁴ Part III examines a hypothetical fact pattern in terms of the statutes and issues involved when a *subpoena duces tecum* directs the production of bank records, psychotherapist-patient records, and the contents of a personal e-mail account.⁵ Part IV discusses the grounds for challenging a *subpoena duces tecum* and the two remedies available to enforce the subpoena if a party refuses to comply.⁶ Part V highlights some of the concerns with delaying the Article 32 to seek enforcement of the *subpoena duces tecum*, and discusses the three options for finding evidence unavailable for purposes of the Article 32.⁷ Part VI concludes that after the President approves the proposed changes to the RCM, the new Article 32 subpoena power will significantly improve access to evidence during the Article 32 investigation when non-

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¹ United States v. Hinton, 21 M.J. 267, 271 (C.M.A. 1986) (discussing remedies for civilian witness refusal to obey military subpoena).

² See 10 U.S.C. § 847 (2012).

³ See *infra* notes 8–22 and accompanying text (discussing legislative context behind the amendment of Article 47, Uniform Code of Military Justice (UCMJ) (2012)).

⁴ See *infra* notes 23–55 and accompanying text (explaining the Department of Defense's (DoD's) proposed changes to Rules for Courts-Martial (RCM) 405 and 703).

⁵ See *infra* notes 56–90 and the corresponding text (illustrating some of the practical issues which may arise if a *subpoena duces tecum* is issued pre-referral for bank records, internet service provider e-mail content, and psychiatrist-patient records).

⁶ See *infra* notes 91–135 and accompanying text (detailing procedures to content and enforce *subpoena duces tecum*).

⁷ See *infra* notes 136–148 and the corresponding text (explaining factors an Article 32 investigating officer will need to consider before finding evidence is not reasonably available).

military entities are cooperative, but may be a power which, practically speaking, is difficult to enforce pretrial when entities are noncompliant.

II. Background

A. Legislative History

Prior to 1 January 2012, the power to compel witnesses and the production of evidence by subpoena was limited to depositions, courts of inquiry, and post-referral courts-martial.⁸ The convening authority may not refer charges to a court-martial until they conclude there are “reasonable grounds” to believe the accused committed the offense.⁹ In making that determination, the convening authority usually relies on a preliminary inquiry¹⁰ or directs an Article 32 pretrial investigation.¹¹ In many cases, this meant the first opportunity to subpoena evidence occurred after the investigation had already determined reasonable evidence existed to believe the accused committed the charges.

Interest in granting military authorities pre-referral subpoena power grew alongside the congressional focus on sex crimes in the military and the increasing complexity of crimes prosecuted at courts-martial.¹² The Office of the Deputy Assistant Inspector General for Criminal Investigative Policy and Oversight (CIPO) studied the problem for the Department of Defense (DoD). The CIPO surveyed military criminal investigators and judge

advocates. Analyzing the participant’s responses, CIPO concluded that military investigators did not have adequate subpoena authority to compel the production of evidence during crucial stages of the investigative process.¹³ The DoD General Counsel and the service component judge advocate leadership concurred with CIPO’s findings and assigned the matter to the Joint Services Committee (JSC) on Military Justice¹⁴ for review and study.¹⁵

The JSC played a significant role in persuading Congress to change the law to permit the issuance of subpoenas pre-referral.¹⁶ Although there is little in the way of substantive discussion of the legislative intent behind the change, the DoD Office of Legislative Counsel’s (OLC) 2011 legislative proposal provides some useful background.¹⁷ The legislative proposal identified the lack of pre-referral subpoena power within the military system as a problem in cases where investigators needed to collect evidence like “telephone, Internet Service Provider, bank records, and similar records, because these institutions face potential civil liability if they release records without a subpoena.”¹⁸ The proposal recommended amending 10

⁸ See UCMJ art. 47 (2008), amended by 10 U.S.C. § 847 (2012); MANUAL FOR COURTS-MARTIAL, UNITED STATES, R.C.M. 703(e)(2), 703(f)(4)(B) (2012) [hereinafter MCM] (discussing limitations on subpoena of civilian witnesses and evidence).

⁹ See MCM, *supra* note 8, R.C.M. 601(d)(1).

¹⁰ See *id.*, R.C.M. 303.

¹¹ See 10 U.S.C. § 832 (2012); MCM, *supra* note 8, R.C.M. 405.

¹² See NAT’L ACAD. OF PUB. ADMIN. (NAPA), ADAPTING MILITARY SEX CRIME INVESTIGATIONS TO CHANGING TIMES 8 (1999) (summarizing findings of larger published report), available at http://www.dtic.mil/dtfs/doc_research/p18_15.pdf; OFFICE OF INSPECTOR GEN., U.S. DEP’T OF DEF., CRIMINAL INVESTIGATIONS POLICY AND OVERSIGHT, EVALUATION OF SUFFICIENCY OF SUBPOENA AUTHORITY WITHIN THE DEPARTMENT OF DEFENSE IN SUPPORT OF GENERAL CRIMES INVESTIGATIONS 1 (2001) [hereinafter CIPO STUDY] (discussing NAPA report’s findings and recommendations), available at <http://www.dodig.mil/Inspections/IPO/reports/subpoena.pdf>; Major Joseph B. Topinka, *Expanding Subpoena Power in the Military*, ARMY LAW., Sept. 2003, at 15 (discussing NAPA report). According to its website, NAPA is “an independent, non-profit, and non-partisan organization established in 1967 to assist government leaders in building more effective, efficient, accountable, and transparent organizations.” See *Who We Are*, NAT’L ACAD. OF PUB. ADMIN., <http://www.napawash.org/about-us/who-we-are.html> (last visited Feb. 24, 2014). Chartered by Congress, NAPA advertises that it “helps the Federal government address its critical management challenges through in-depth studies and analyses, advisory services and technical assistance, Congressional testimony, forums and conferences, and online stakeholder engagement.” *Id.*

¹³ See CIPO STUDY, *supra* note 12, at 2–10 (scoping problem with lack of access to subpoena during pre-referral military criminal investigative process). To obtain evidence such as bank, telephone, and civilian medical records before the referral of charges, investigators were turning to a variety of ad hoc arrangements such as partnering in joint investigations with state and local police, relying on other federal law enforcement entities to obtain subpoenas through the federal court system, or requesting a DoD Inspector General administrative subpoena. The success of these approaches varied. See *id.* at 5–9. The office of Criminal Investigations Policy and Oversight (CIPO) noted that both investigators and judge advocates surveyed overwhelmingly believed that pre-referral military subpoena authority “would enhance the military justice system.” See *id.*

¹⁴ See U.S. DEP’T OF DEF., DIR. 5500.17, ROLE AND RESPONSIBILITIES OF THE JOINT SERVICE COMMITTEE (JSC) ON MILITARY JUSTICE para. 3 (3 May 2003) [hereinafter DODD 5500.17] (“Under the direction of the General Counsel of the Department of Defense, the JSC is responsible for reviewing [the MCM] and proposing amendments to it and, as necessary, to [the UCMJ].”), available at <http://www.dod.gov/dodgc/images/dodd5500.pdf>.

¹⁵ See CIPO STUDY, *supra* note 12, at 10–11, 15–24 (summarizing findings, making recommendations to improve access to subpoenas during preliminary investigations, and including service component and agency concurrence with recommendations).

¹⁶ CODE COMM., ANNUAL REPORT SUBMITTED TO COMMITTEE ON ARMED SERVICES OF THE U.S. SENATE AND THE U.S. HOUSE OF REPRESENTATIVES AND TO THE SECRETARY OF DEFENSE, SECRETARY OF HOMELAND SECURITY, AND THE SECRETARIES OF THE ARMY, NAVY, AND AIR FORCE PURSUANT TO THE UNIFORM CODE OF MILITARY JUSTICE FOR THE PERIOD OCTOBER 1, 2010 TO SEPTEMBER 30, 2011 § 1 (2011) (summarizing testimony of Colonel Charles Pede, U.S. Army, Exec. Sec. of the JSC), available at <http://www.armfor.uscourts.gov/newcaaf/annual/FY11AnnualReport.pdf>.

¹⁷ See OFFICE OF LEGISLATIVE COUNSEL, U.S. DEP’T OF DEF., SIXTH PACKAGE OF LEGISLATIVE PROPOSALS SENT TO CONGRESS FOR INCLUSION IN THE NATIONAL DEFENSE AUTHORIZATION ACT FOR FISCAL YEAR 2012 § 532 (2011) [hereinafter OLC LEG. PROPOSAL], available at <http://www.dod.gov/dodgc/olc/docs/15April2011LP.pdf>.

¹⁸ See *id.* (referencing section-by-section analysis).

U.S.C. § 847 to permit the issuance of a *subpoena duces tecum* for investigations to bring military practice into conformity with “federal criminal procedure” where prosecutors have access to federal grand jury subpoenas.¹⁹

The DoD’s legislative proposal envisioned expanding 10 U.S.C. § 847 to provide broad authority to issue *subpoenas duces tecum* after referral of charges. The version of the bill approved by the Senate contained the DoD’s proposed text.²⁰ The Conference Report, however, indicates that Congress ultimately opted for a more subdued version of the amendment.²¹ Concern over how recipients could challenge a pre-referral subpoena led Congress to limit the authority to Article 32 investigations, where the convening authority would have cognizance over the case and the power to quash or modify the subpoena.²²

B. Changes to Article 47, UCMJ, in 2012 NDAA

The power of compulsory process in the military court system is contained in Articles 46, 47, and 48 of the UCMJ.²³ Article 46, UCMJ, guarantees that “the trial counsel, the defense counsel, and the court-martial shall have equal opportunity to obtain witnesses and other evidence” and that “[p]rocess issued in court-martial cases . . . shall be similar to that which courts of the United States having criminal jurisdiction may lawfully issue and shall run to any part of the United States or the Commonwealths and possessions.”²⁴ Article 47, UCMJ, addresses the military court system’s power to compel persons not subject to the UCMJ to appear and testify or produce evidence at courts-martial, as well as criminally punishes those who refuse to produce subpoenaed evidence.²⁵ Article 48, UCMJ, gives military judges the power to punish any person for contempt of court.²⁶ Article 48, however, does not apply at an Article

32 because a military judge does not have cognizance over the case at this stage in the military judicial process.²⁷

Congress granted the power to issue *subpoenas duces tecum* at an Article 32 by changing Article 47, UCMJ, the enforcement mechanism of compulsory process in the military.²⁸ Specifically, Congress struck the word “board” in Article 47(a)(1) and replaced it with the words “board, or has been duly issued a *subpoena duces tecum* for an investigation pursuant to section 832(b) of this title (article 32(b)).”²⁹ In addition to making some minor changes to the subsections dealing with fees and mileage, Congress’s only other substantive change was to amend Article 47(c), UCMJ, to add convening authorities to the list of military entities permitted to initiate prosecution with a United States Attorney against a person who refuses to comply with a valid military subpoena.³⁰ Although these changes granted a new and substantial power to the Article 32, the lack of implementing guidance left significant questions unanswered. For instance, who has the power to issue the *subpoena duces tecum* at an Article 32? And, does the *subpoena duces tecum* permit an Article 32 to compel the attendance of a witness, such as a records custodian? Leaving these types of questions open ended for the time being, the amendments to Article 47, UCMJ, became effective on 31 December 2011, when the President signed the 2012 NDAA into law.³¹

C. Proposed Changes to RCMs 405 and 703

The President will implement the changes to Article 47, UCMJ, through his administrative rule making powers.³² Under the supervision of the General Counsel of the DoD, the JSC conducts an annual review of the Manual for Courts-Martial and “propos[es] amendments to it.”³³ As part

¹⁹ See *id.*

²⁰ Compare OLC LEG. PROPOSAL, *supra* note 17, § 532 (detailing “Changes to Existing Law”), with National Defense Authorization Act for Fiscal Year 2012, S. 1867, 112th Cong. § 552 (as passed by the Senate 1 December 2011).

²¹ See H.R. REP. NO. 112-329, at 626–27 (2011) (Conf. Report).

²² Compare S. 1867 § 552, with 10 U.S.C. § 847 (2012); see also OLC LEG. PROPOSAL, *supra* note 17, § 532 (referencing section-by-section analysis); E-mail from Lieutenant Colonel Christopher A. Kennebeck, Deputy, Crim. Law Div., Office of the Judge Advocate Gen., U.S. Dep’t of Army, to author (Dec. 7, 2012, 18:39 EST) (on file with author) (describing legislative compromise which led to authority to issue *subpoena duces tecum* as part of Article 32 investigation).

²³ See generally 10 U.S.C. §§ 846–848 (2012).

²⁴ *Id.* § 846 (“Opportunity to obtain witnesses and other evidence”).

²⁵ *Id.* § 847 (“Refusal to appear or testify”).

²⁶ *Id.* § 848 (providing authority for military judge to punish for contempt).

²⁷ See MCM, *supra* note 8, R.C.M. 503(b), 504, and 601 (discussing rules for convening courts-martial, detailing of military judges, and referral of charges).

²⁸ See National Defense Authorization Act for Fiscal Year 2012, Pub. L. No. 112-81, § 543, 125 Stat. 1298 (2011) (describing changes to 10 U.S.C. § 847); see also National Defense Authorization Act for Fiscal Year 2014, Pub. L. No. , 113-66, § 1702 (2013) (implementing changes to form and function of Article 32). Although the pending changes to the Article 32 will transform the Article 32 into a preliminary hearing, eliminating much of the opportunity for discovery that was available in the traditional Article 32, the changes will not affect the previously granted power to issue *subpoenas duces tecum*, and the defense may find it useful to subpoena evidence to show inconsistencies in the victim’s version of events, given that the victim may not testify at the Article 32.

²⁹ See *id.* (detailing changes to existing law).

³⁰ *Id.*

³¹ See 10 U.S.C. § 847 (2012).

³² See *id.* § 836 (giving President power to regulate procedures of courts-martial).

³³ See DoDD 5500.17 *supra* note 14, para. 3 (describing mission of JSC).

of this process, on 23 October 2012, the JSC published a notice in the Federal Register soliciting public comment on their recommendations to change the 2012 MCM to incorporate the statutory changes to Article 47, among other provisions.³⁴ The DoD then incorporates this feedback into a proposed Executive Order. Once the President signs the Executive Order, the DoD will publish it in the Federal Register.³⁵ Although the proposed changes discussed below have not been approved at this time, barring significant changes during the staffing process, they are likely to be presented to the President for the most part in their proposed form.³⁶ Even though Article 47 has been amended and is in force, until the President signs the Executive Order enacting the proposed changes to the RCM, trial counsel and investigating officers may lack the necessary authority to issue a *subpoena duces tecum* for an Article 32 at this time and could expose their service to civil liability if they issued a subpoena before the changes to the RCM become effective.³⁷

1. Proposed Changes to RCM 405

The JSC is proposing minimal changes to RCM 405 regarding the issuance of *subpoenas duces tecum*. The major substantive change involves subdividing RCM 405(g)(2)(C), the section dealing with evidence, into two sub-sections: (i) evidence under the control of the government; and (ii) evidence not under the control of the government.³⁸ The rules dealing with evidence under government control have not changed. However, RCM 405(g)(2)(C)(ii) will be an entirely new subsection that will read as follows:

Evidence not under the control of the
Government may be obtained through

³⁴ See Notice of Proposed Amendments to the Manual for Courts-Martial, United States (2012 ed.); Notice of Public Meeting, 77 Fed. Reg. 64854 (proposed Oct. 23, 2012) [hereinafter Proposed MCM Amendments].

³⁵ See *What Is the JSC and its Mission?*, JOINT SERVS. COMM. ON MIL. JUST., http://www.dod.gov/dodgc/images/jsc_mission.pdf (last visited Feb. 24, 2014) (“Summary of Review and Executive Order Procedures”).

³⁶ See Notice of Response to Public Comments on Proposed Amendments to the Manual for Courts-Martial, United States (2012 ed.) (MCM), 78 Fed. Reg. 14271-2 (Mar. 5, 2013) (discussing Joint Service Committee on Military Justice response to public comments received for proposed changes to Rules for Courts-Martial).

³⁷ See Captain Michael B. Magee, *Article 32 Subpoena Power (or the lack thereof)*, Headquarters Marine Corp, Judge Advocate Division, Trial Counsel Assistance Program, (Dec. 20, 2013) <https://ehqmc.usmc.mil/org/sja/TCAP/Lists/Posts/Post.aspx?ID=17> (last visited Mar. 1, 2014) (taking position that despite changes to Article 47, subpoena cannot be “duly issued” until President grants authority through changes to RCMs) (login required).

³⁸ See Proposed MCM Amendments, *supra* note 34, at 64854–855 (publishing recommended changes to RCM 405(g)(2)(C)).

noncompulsory means or by *subpoena duces tecum* issued pursuant to procedures set forth in RCM 703(f)(4)(B). A determination by the investigating officer that the evidence is not reasonably available is not subject to appeal by the accused, but may be reviewed by the military judge under RCM 906(b)(3).³⁹

The rule serves two functions. First, it provides guidance on the procedural requirements for obtaining a *subpoena duces tecum* by directing counsel to RCM 703. Second, it establishes that the investigating officer’s determination is not immediately appealable and can only be challenged in court if the case is referred to a court-martial.

If an accused disagrees with the investigating officer’s determination of the reasonable availability of evidence, first, the accused must protest to the investigating officer by filing an objection and requesting the objection be noted in the report of investigation.⁴⁰ The Article 32 officer may require that the objection be submitted in writing.⁴¹ If the accused is still dissatisfied with the investigating officer’s determination and intends to preserve the error for the trial court to review, the accused should then raise the issue a second time by filing a written objection to the report of investigation within five days of receiving the Article 32 report.⁴² Provided the case is referred to court-martial, RCM 906(b)(3) provides the avenue for an accused to seek a motion for appropriate relief for a defective Article 32.⁴³ An accused is generally required to raise this matter in the form of a motion before entry of pleas.⁴⁴ If the motion is granted, the discussion to the rule provides that “military judges should ordinarily grant a continuance so the defect may be corrected.”⁴⁵ As the United States Court of Appeals for the Armed Forces (CAAF) explained in *United States v. Davis*, “[t]he time for correction of such an error is when the military judge can fashion an appropriate remedy under RCM 906(b)(3) before it infects the trial.”⁴⁶ Ordinarily, the

³⁹ See *id.* at 64855 (inserting new provision).

⁴⁰ See Major John R. Mahoney, *Litigating Article 32 Errors After United States v. Davis*, ARMY LAW., Sept. 2011, at 9–10 (explaining process for preserving error in Article 32); MCM, *supra* note 8, R.C.M. 405(h)(2) (handling objections).

⁴¹ See MCM, *supra* note 8, R.C.M. 405(h)(2) (Objections).

⁴² See Mahoney, *supra* note 38, at 10 (explaining how to preserve error for trial court); MCM, *supra* note 8, R.C.M. 405(j)(4) (outlining procedure for objecting to report of investigation).

⁴³ See MCM, *supra* note 8, R.C.M. 906(b)(3) (dealing with “[c]orrection of defects in the Article 32 investigation”).

⁴⁴ See *id.* R.C.M. 905(b)(1) (providing for timing of motions).

⁴⁵ See *id.* R.C.M. 906(b)(3) discussion (quoting guidance).

⁴⁶ See *United States v. Davis*, 64 M.J. 445, 449 (C.A.A.F. 2007) (discussing appellate standard of review for allegations of defect at Article 32).

military judge would correct such an error by reopening the investigation or ordering a new investigation.⁴⁷

The proposed discussion to RCM 405 also provides some helpful instruction to military justice practitioners. The discussion recommends investigating officers prepare for the investigation by considering what, if any, evidence they might need to obtain by subpoena. It directs investigating officers to inquire whether the defense requests the production of witnesses or evidence, “including evidence that may be obtained by *subpoena duces tecum*.”⁴⁸ As some commentators have noted, the expansion of Article 47, UCMJ, represents a significant increase in the government’s powers to conduct pretrial investigation, but is equally beneficial to the defense, because it provides them access to evidence that previously was unattainable at an Article 32.⁴⁹

2. Proposed Changes to RCM 703

Rule for Courts-Martial 703 details the procedural requirements for issuing, serving, and enforcing subpoenas. For the most part, the proposed amendments make only minor administrative changes to the rule. For instance, RCM 703(e)(2)(B), dealing with the contents of subpoenas, added “data” and “electronically stored information” to the enumerated list of evidence the government can seek to compel with a subpoena.⁵⁰

The most significant change occurs to RCM 703(f)(4)(B). This section answers the questions: who can issue a subpoena at an Article 32 and what evidence can they compel? The rule states in pertinent part that “following the convening authority’s order directing such pretrial investigation” either “counsel representing the United States” or the “investigating officer” may issue a *subpoena duces tecum*.⁵¹ Thus, the section is a rule of limitation confining the compulsory power to the trial counsel or the Article 32 officer and proscribing that the power does not vest until the convening authority directs an Article 32.

⁴⁷ See Mahoney, *supra* note 38, at 10–11 (explaining remedies for defective Article 32).

⁴⁸ See Proposed MCM Amendments, *supra* note 34, at 64873 (analyzing discussion for RCM 405(g)(1)(B)).

⁴⁹ Andrew Tilghman, *DoD Aims to Better Protect Rights of Rape Defendants*, MARINE TIMES, Nov. 19, 2012, at 12 (quoting Michael Navarre, “former Navy judge advocate who now works in private practice in Washington [D.C.],” and Victor Hansen, “a retired Army judge advocate who is now a professor at New England Law”).

⁵⁰ Compare MCM, *supra* note 8, R.C.M. 703(e)(2)(B), with Proposed MCM Amendments, *supra* note 34, at 64855 (changing section dealing with content of subpoena).

⁵¹ See Proposed MCM Amendments, *supra* note 34, at 64855.

The rule also prevents using an Article 32 *subpoena duces tecum* to compel the attendance of a civilian witness. This is a unique feature of the Article 32 subpoena. Traditionally, a *subpoena duces tecum* commands a person bring the requested evidence before the proceeding.⁵² In contrast, RCM 703(f)(4)(B) permits the government to seek production of “books, papers, documents, data, or other objects or electronic information,” but expressly states that “[a] person in receipt of a *subpoena duces tecum* . . . need not personally appear in order to comply.”⁵³ The discussion to RCM 703(e)(2)(B) similarly states that “a subpoena may not be used to compel a witness to appear . . . before trial,” except in cases of “a deposition or a court of inquiry.”⁵⁴ Read together, these two provisions make clear that the government may only subpoena tangible evidence for an Article 32.⁵⁵ In practical terms, this means the government can order the production of civilian records for an Article 32, but cannot compel the attendance or testimony of the record’s custodian.

III. Analyzing the Hypothetical: Three Potential Issues

Using a subpoena to obtain evidence sometimes implicates other legal requirements such as the law of privileges, federal statutes, and the U.S. Constitution. This hypothetical seeks to answer what is required to obtain three common forms of evidence: bank records, the contents of a personal e-mail account, and psychotherapist-patient records. Practitioners should be aware, though, that there are other types of evidence which may have other unique requirements. For instance, subpoenas to attorneys,⁵⁶ foreign corporations,⁵⁷ consumer credit reporting agencies,⁵⁸ and the media⁵⁹ are a few areas of potential concern which should be examined thoroughly before proceeding.

⁵² See BLACK’S LAW DICTIONARY 1563 (9th ed. 2009) (explaining meaning of *subpoena duces tecum*).

⁵³ See Proposed MCM Amendments, *supra* note 34, at 64855.

⁵⁴ See *id.* at 64873.

⁵⁵ See also MCM, *supra* note 8, R.C.M. 405(g)(2)(B) discussion (stating that there is no subpoena authority to compel a civilian witness “to appear and provide testimony or documents” at Article 32).

⁵⁶ See *id.* MIL. R. EVID. 502 (dealing with lawyer-client privilege).

⁵⁷ See 1 ANTITRUST DIVISION, UNITED STATES DEPARTMENT OF JUSTICE, ANTITRUST DIVISION GRAND JURY PRACTICE MANUAL, at III-12 to III-13 (1991) (explaining scope of Department of Justice grand jury subpoena power and dealing with international agreements requiring notice of judicial process).

⁵⁸ See 15 U.S.C. § 1681(b) (2012) (limiting distribution of consumer credit reports to “court orders” and “federal grand jury subpoenas”).

⁵⁹ Although the military courts have rejected incorporating a reporter’s privilege into the Military Rules of Evidence (MREs), the recognition of such a privilege by various district and circuit courts and the media interests involved could result in protracted litigation which might unnecessarily

Another problem practitioners should be aware of is that the DoD has not updated Department of Defense Form 453 (DD Form 453) for subpoenas since 2000.⁶⁰ It currently does not reflect the new power of the Article 32 to issue process, nor does it account for some of the nuances particular to the Article 32 subpoena. For instance, DD Form 453 commands a person “to testify as a witness” and to bring specified evidence “with them” to the proceeding. This language contradicts RCM 703(f)(4)(B), which permits a person to comply with the Article 32 subpoena without having to personally appear. This conflicting language could result in confusion if practitioners opt to use this form in its present state.⁶¹

A. Bank Records

Once the President enacts the changes to the RCMs, an Article 32’s power to subpoena the accused’s bank records pre-referral will be unquestioned. The Right to Financial Privacy Act of 1978 (RFPA) governs the release of this information.⁶² Under the Act, a financial institution will turn over financial records in response to a “judicial subpoena.” Before obtaining the records, RFPA and implementing service regulations require the government serve a copy of the subpoena on the customer, notify them of “the nature of the law enforcement inquiry,” and inform them of their right to challenge the subpoena.⁶³ The customer has between ten and fourteen days to raise an objection by filing a motion with the appropriate tribunal.⁶⁴ Failure to comply with the notice requirement can expose the bank and the military service to financial liability.⁶⁵

burden the Article 32 process. *See* United States v. Wuterich, 68 M.J. 511, 516–24 (N-M. Ct. Crim. App. 2009).

⁶⁰ *See* Appendix A (displaying U.S. Dep’t of Def., DD Form 453, Subpoena (May 2000)).

⁶¹ *Compare* Appendix A, with Proposed MCM Amendments, *supra* note 34, at 64855.

⁶² *See* Right to Financial Privacy Act of 1978, Pub. L. No. 95-630, §§ 1100–1122, 92 Stat. 3641 (1978) [hereinafter RFPA]; Major Scott A. McDonald, *Follow the Money: Obtaining and Using Financial Information in Military Criminal Investigations and Prosecutions*, ARMY LAW., Feb. 2012, at 12 (detailing five methods for obtaining financial data under RFPA).

⁶³ *See* 12 U.S.C. § 3407 (2012); U.S. DEP’T OF DEF., INSTR 5400.15, GUIDANCE ON OBTAINING INFORMATION FROM FINANCIAL INSTITUTIONS (2 Dec. 2004) [hereinafter DODI 5400.15]; U.S. DEP’T OF ARMY, REG. 190-6, OBTAINING INFORMATION FROM FINANCIAL INSTITUTIONS (9 Feb. 2006) [hereinafter AR 190-6].

⁶⁴ *See* 12 U.S.C. § 3407 (2012).

⁶⁵ *See* Litigation Division, Legal Service Agency, U.S. Dep’t of Army, Note, *Trial Counsel’s Pre-Referral Subpoena Puts Bank at Risk*, ARMY LAW., Mar. 2003, at 35, 38 [hereinafter Lit. Div. Note] (referencing 12 U.S.C. § 3417 (2012)).

Although one can make an argument that an Article 32 subpoena *duces tecum* is not a “judicial subpoena” within the meaning of RFPA, there is persuasive authority to the contrary. Relying in part on the power of compulsory process contained in Article 46 of the UCMJ, the CAAF previously held in *United States v. Curtin* that a post-referral subpoena issued by a trial counsel qualifies as a “judicial subpoena” under RFPA.⁶⁶ While the courts have not specifically addressed RFPA’s application to pre-referral subpoenas, it stands to reason that the *Curtin* ruling is still good law and equally applicable to Article 32 subpoenas, since Congress affirmatively extended the power of compulsory process contained in Article 46, UCMJ, to the pretrial investigation. Although the military judge is absent from the Article 32 stage, military law recognizes that Article 32 officers and convening authorities, while not labeled as judges, perform judicial functions.⁶⁷ This principle, in conjunction with the change to Article 47, UCMJ, demonstrates congressional intent to bring Article 32 subpoenas within the meaning of RFPA’s “judicial subpoenas.”⁶⁸

B. Personal E-mail

Another unresolved issue revolves around whether or not an Article 32 officer can subpoena the contents of an accused’s personal e-mail account. The answer depends on the application of the Stored Communications Act (SCA).⁶⁹ The SCA governs the disclosure of personal information held by internet service providers, telephone companies, and electronic e-mail providers.⁷⁰ The SCA requires law enforcement to use specific procedures to gain access to

⁶⁶ *See* McDonald, *supra* note 60, at 16 (citing United States v. Curtin, 44 M.J. 439, 441 (C.A.A.F. 1996)).

⁶⁷ *See* United States v. Payne, 3 M.J. 354, 355 (C.M.A. 1977) (recognizing an Article 32 officer has judicial role); United States v. Ellsey, 37 C.M.R. 75, 77 (C.M.A. 1966) (“The convening authority’s function in military justice is judicial in nature.”); United States v. Nix, 36 C.M.R. 76, 78–80 (C.M.A. 1965) (discussing judicial role and function of convening authority).

⁶⁸ *See* Lit. Div. Note, *supra* note 63, at 38 n. 47 (stating that Army contemplating recommending changes “that would give trial counsel limited subpoena power to obtain evidence for presentation at Article 32 investigations” in response to U.S. Ninth Circuit Court of Appeals ruling in *Flower v. First Hawaiian Bank*, 295 F.3d 966 (9th Cir. 2002)). In *Flowers*, the Ninth Circuit found an Army trial counsel had violated the RFPA by issuing a pre-referral subpoena during the Article 32 investigation, because the trial counsel lacked statutory authority to subpoena the records. *See Flowers*, 295 F.3d at 974.

⁶⁹ *See* 18 U.S.C. § 2701–2712 (2012).

⁷⁰ Lieutenant Colonel Thomas Dukes, Jr. & Lieutenant Colonel Albert C. Rees, Jr., *Military Criminal Investigations and the Stored Communications Act*, 64 A.F. L. REV. 103, 106 (2009) (discussing scope of SCA). The article provides a detailed description of the SCA’s application to military investigations and its implications for military subpoenas. It is extremely helpful to the military practitioner’s understanding of the SCA.

certain stored wire and electronic data, communications, and content.⁷¹

The SCA divides the content of e-mail and other stored files into three categories:

- (1) retrieved communications and the content of other stored files;
- (2) un-retrieved communications that have been in electronic storage for one hundred eighty one days or more;
- and (3) un-retrieved communications that have been in electronic storage for one hundred eighty days or less.⁷²

The SCA treats each category differently. Law enforcement can obtain categories (1) and (2) by providing notice to the customer and sending an administrative, grand jury, or trial subpoena to the service provider.⁷³ The SCA treats category (3) as a special protected class of communication. Obtaining category (3) evidence requires a search warrant issued by a federal or state court.⁷⁴ The SCA is also controversial. The United States Sixth Circuit Court of Appeals recently held in *United States v. Warshak* that, irrespective of the SCA, the government's use of a subpoena to obtain the contents of e-mail stored with a service provider violates the Fourth Amendment.⁷⁵ *Warshak* prompted the DoD Inspector General's Office to temporarily suspend using administrative subpoenas to obtain private e-mail content and to require its agents to pursue search warrants instead.⁷⁶

Obtaining the victim's e-mails in the hypothetical case would depend upon the service provider's interpretation of a subpoena under the SCA and its position on *Warshak*. The SCA permits the government to obtain category (1) and (2) evidence with an administrative, grand jury, or trial subpoena and notice to the customer.⁷⁷ The pre-referral subpoena does not fit neatly into any one of these definitions, although it is probably closest to the trial subpoena. A service provider, though, might argue that a strict reading of the SCA does not permit disclosure for an

Article 32 subpoena, since it is issued pre-referral and therefore is not the equivalent of a trial subpoena. In addition, some providers might take the position that *Warshak* controls and requires a valid search warrant to disclose any e-mail content. Either way, the best an Article 32 could hope to obtain is a portion of the stored e-mail content. Any recent, un-retrieved e-mails under the SCA would be beyond the Article 32's compulsory power.

C. Psychotherapist-Patient Records

Subpoenaing records that are protected by the psychotherapist-patient privilege also poses some challenges at the Article 32 stage. Defense attorneys are likely to request these records in cases where victims have received counseling related to the charged offense. Now that Article 32s have the power to obtain these records pre-referral from civilian providers, defense attorneys are likely to ask for them earlier in litigation. The problem lies in how to respect and handle the patient's privilege pre-trial. Military Rule of Evidence (MRE) 513 details a procedure for handling claims of psychotherapist-patient privilege at trial, but does not give any attention to the procedures to use at an Article 32.⁷⁸

The proposed framework for handling MRE 412 issues at an Article 32 provides one possible roadmap for handling issues of privilege.⁷⁹ While not addressed in case law or officially sanctioned, the following are some general ideas based on RCM 405's proposed approach to accommodating MRE 412 at an Article 32.

(1) In anticipation of a privilege issue, the subpoena should direct that the requested records be sealed and delivered unopened to the investigating officer personally. If the investigating officer is not a judge advocate, they should "seek legal advice from an impartial source concerning the admissibility, handling, and reporting of any such evidence" before ordering the production of the documents or ruling as to their admissibility.⁸⁰

⁷¹ See *id.* at 105–06 (discussing general purpose and methodology of SCA).

⁷² See *id.* at 107 (citing 18 U.S.C. §§ 2703(a), 2703(b) (2012)).

⁷³ See *id.* at 107–08 (citing 18 U.S.C. §§ 2703(a), 2703(b) (2012)). But see *Theofel v. Farey-Jones*, 359 F.3d 1066 (9th Cir. 2004) (limiting use of subpoena to obtain e-mail content).

⁷⁴ See *id.* at 108, 117–18 (discussing requirement for search warrant).

⁷⁵ See *United States v. Warshak*, 631 F.3d 266, 286 (6th Cir. 2010) (finding subscribers have expectation of privacy in e-mail stored with service provider).

⁷⁶ See OFFICE OF INSP. GEN., DEP'T OF DEF., U.S. V. WARSHAK DECISION MEMO, available at http://www.dodig.mil/programs/subpoena/pdfs/Warshak_AgentMemo.pdf (last visited Feb. 24, 2014).

⁷⁷ See 18 U.S.C. § 2703(b) (2012).

⁷⁸ See MCM, *supra* note 8, MIL. R. EVID. 513 (outlining psychotherapist-patient privilege).

⁷⁹ See Proposed MCM Amendments, *supra* note 34, at 64855 (establishing procedures for handling MRE 412 issues at Article 32).

⁸⁰ See *id.* (discussing inadmissibility of certain evidence covered by MRE 412). Article 32 officers must exercise caution in seeking outside legal advice. It is generally legal error for an Article 32 officer to seek advice from anyone serving in a prosecutorial function. See *United States v. Rushatz*, 30 M.J. 525, 532 (A.C.M.R. 1990); *United States v. Grimm*, 6 M.J. 890, 893 (A.C.M.R. 1979). It is also error to seek substantive legal advice from a non-prosecutor without providing notice to the parties. See *id.* at 893. For guidance on properly seeking legal advice, see U.S. DEP'T OF ARMY, PAM. 27-17, PROCEDURAL GUIDE FOR ARTICLE 32(B) INVESTIGATING OFFICER § 1-2 (16 Sept. 1990); NAVAL JUSTICE SCH., U.S. DEP'T OF NAVY, ARTICLE 32 INVESTIGATOR'S GUIDE 3 (Nov. 2001).

(2) Before examining the documents, the Article 32 officer must hold a hearing at which the patient should be afforded an opportunity to attend and be heard.⁸¹ Since the Article 32 lacks the authority to compel the attendance of civilian witnesses, it may be difficult to obtain the voluntary presence of a civilian witness or medical provider. After hearing the parties' arguments, the Article 32 officer should review the documents, in private if necessary, to decide the matter.

(3) If the investigating officer determines any of the documents are relevant for a purpose under MRE 513(d) and not cumulative, then they should provide the identified documents to the defense and specify "the areas with respect to which the victim or witness may be questioned." The Article 32 report should include any documents that the Article 32 officer determined were admissible under MRE 513. The Article 32 officer should seal and safeguard any evidence deemed inadmissible to preserve the evidence for later judicial review, but the sealed evidence should not be appended to the Article 32 report.⁸²

(4) If the victim or psychotherapist opposes the release of their records, the custodian of the evidence can request relief from the subpoena to the convening authority on the grounds that compliance would be "unreasonable or oppressive."⁸³ A patient would also have standing to request relief since their rights would be affected by the psychotherapist's compliance with the subpoena.⁸⁴ The convening authority has the authority to modify or withdraw a pre-referral subpoena.⁸⁵

D. *United States v. Harding*⁸⁶

Obtaining records from civilian providers might be easier said than done. *United States v. Harding* shows some of the difficulties the military may encounter trying to

⁸¹ See MCM, *supra* note 8, MIL. R. EVID. 513 (discussing procedure for admission of psychotherapist records).

⁸² See Proposed MCM Amendments, *supra* note 34, at 64855 (detailing new procedures for RCM 405(i) and 405(j)(2)(C) for MRE 412 evidence); see also *id.* at 64873 (amending RCM 405(i) discussion to explain procedures for handling private information related to MRE 412).

⁸³ See MCM, *supra* note 8, R.C.M. 703(f)(4)(C) (providing procedure for requesting relief from a subpoena).

⁸⁴ See *United States v. Johnson*, 53 M.J. 459, 461 (C.A.A.F. 2000) ("[F]ederal courts have permitted third parties to move to quash grand jury subpoenas directed to another person where a litigant has sufficiently important, legally-cognizable interests in the materials or testimony sought" and finding "no reason why a third-party challenge . . . to a subpoena *duces tecum* . . . could not be raised during an Article 32 investigation if a sufficient basis were provided to establish standing.").

⁸⁵ See MCM, *supra* note 8, R.C.M. 703(f)(4)(C).

⁸⁶ 63 M.J. 65 (C.A.A.F. 2006).

enforce a subpoena to a civilian psychotherapist. *Harding* dealt with an allegation of rape. The victim sought counseling with a civilian social worker. Based on a defense request, the military judge issued a subpoena ordering the production of the civilian's psychotherapist-patient records for *in camera* review. The civilian provider refused to comply with the request to surrender her records. In response, the military judge issued a warrant of attachment authorizing the United States Marshals to seize the records. The civilian provider attracted a significant amount of media attention to her case.⁸⁷ She also sought unsuccessfully to block the warrant of attachment in the United States District Court and Tenth Circuit Court of Appeals. Describing the sequence of events after the Tenth Circuit ruled in favor of the government, the CAAF wrote:

Despite receiving this green light from the court of appeals, the United States Marshals did not enforce the warrant of attachment. Instead, they simply asked her to produce the documents, and took no further action when she declined to do so.⁸⁸

Based on the government's lack of enforcement of the warrant of attachment, the military judge abated the rape charge, severed the offense, and went forward on an adultery charge, which did not involve the victim.⁸⁹ *Harding* is one of the only examples in case law of the practical problems encountered when enforcing military process over evidence which is in the hands of civilians.⁹⁰

IV. Challenging & Enforcing Article 32 Subpoenas

Rule for Courts-Martial 703 and Article 47, UCMJ, are the primary legal authorities for challenging and enforcing military subpoenas.

A. Challenging an Article 32 Subpoena

As previously discussed, the custodian of the evidence can challenge an Article 32 subpoena by petitioning the

⁸⁷ See Miles Mofeit, *Military, Civilian Law Clash at Trial*, DENV. POST, June 16, 2005, http://www.denverpost.com/news/ci_2804826; Karen Abbott, *Therapist's Backers Gather*, ROCKY MTN. NEWS, June 14, 2005, <http://m.rockymountainnews.com/news/2005/Jun/14/therapists-backers-gather/>.

⁸⁸ See *Harding*, 63 M.J. at 66.

⁸⁹ See *id.*

⁹⁰ See generally, Kathleen A. Duignan & David P. Sheldon, *The Power to Compel: Is the Ability to Subpoena Evidence a Toothless Right in Military Courts-Martial? The Potential Impact of United States v. Harding*, FED. LAW., June 2006, at 40 (discussing *Harding* and its implication for compulsory process).

convening authority “to modify or withdraw” the subpoena.⁹¹ The standard for challenging a subpoena is that compliance would be “unreasonable or oppressive.”⁹² This is the same standard which appears in the Federal Rules of Criminal Procedure for federal subpoenas.⁹³

Subpoenas cannot be used to engage in a “fishing expedition.”⁹⁴ Nor can they be used to harass or intimidate.⁹⁵ A subpoena should describe the evidence sought with reasonable particularity and not be unreasonably broad in scope or time.⁹⁶ A pre-referral *subpoena duces tecum* should be reasonable, provided it seeks unprivileged materials that are “relevant and not cumulative.”⁹⁷ The RCM 405 standard is slightly broader than the “relevant and necessary” standard required for production of evidence at trial.⁹⁸ Applying a broader standard to the production of evidence at an Article 32 is consistent with the Supreme Court’s finding in *United States v. R. Enterprises, Inc.*, in which the Court determined that grand jury subpoenas deserve more latitude than trial subpoenas because of their investigative purpose.⁹⁹

⁹¹ See MCM, *supra* note 8, R.C.M. 703(f)(4)(C). See also *supra* notes 83–85 and accompanying text.

⁹² See MCM, *supra* note 8, R.C.M. 703(f)(4)(C) (outlining standard for challenging subpoena).

⁹³ See FED. R. CRIM. P. 17(c)(2).

⁹⁴ See *Fed. Trade Comm’n v. Am. Tobacco Co.*, 264 U.S. 298, 305–06 (1924) (“Anyone who respects the spirit as well as the letter of the Fourth Amendment would be loath to believe that Congress intended to authorize . . . *fishing expeditions* into private papers on the possibility that they may disclose evidence of crime.”) (emphasis added).

⁹⁵ See *Branzburg v. Hayes*, 408 U.S. 665, 707–08 (1972) (stating that there is no justification for using grand jury process to harass); *In re Grand Jury Proceedings*, 486 F.2d 85, 91 (3d Cir. 1973) (noting courts will not enforce subpoena if grand jury “is not pursuing an investigation in good faith or is motivated by a desire to harass”).

⁹⁶ See *Application of Certain Chinese Family Benevolent & Dist. Ass’ns*, 19 F.R.D. 97, 101 (N.D. Cal. 1956) (finding *subpoena duces tecum* too broad in application).

⁹⁷ See Proposed MCM Amendments, *supra* note 34, at 64854 (updating RCM 405(g)(1)(B)). The proposed amendment deletes the words “which is under the control of the Government” from the previous RCM, thereby making the provision applicable to all evidence. Relevant evidence is “evidence having a 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.” See MCM, *supra* note 8, MIL. R. EVID. 401.

⁹⁸ See MCM, *supra* note 8, R.C.M. 703(f)(1) discussion. “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 on a matter in issue.” *Id.* See also *United States v. Rodriguez*, 57 M.J. 765, 770 (N-M. Ct. Crim. App. 2002) *aff’d*, 60 M.J. 239 (C.A.A.F. 2004) (using RCM 703 to analyze military judge’s decision to quash trial subpoena).

⁹⁹ See SARA SUN BEALE ET AL., GRAND JURY LAW AND PRACTICE § 6:21 (2d ed.) (discussing *United States v. R. Enterprises, Inc.*, 498 U.S. 292 (1991)).

Before making a determination whether to modify or withdraw a subpoena, the convening authority may need to conduct an *in camera* review of the requested evidence.¹⁰⁰ If the case is ultimately referred to trial, the accused can challenge the convening authority’s decision to quash or modify a subpoena with the military judge.¹⁰¹

Given the legal distinctions and issues involved with a request to quash or modify a subpoena, convening authorities may find the need to consult with an independent legal advisor. Staff Judge Advocates (SJAs) who provide advice to convening authorities about the legal merits of a motion to quash or modify a pretrial subpoena need to be especially wary of the effect that advice may have on their subsequent pretrial and post-trial advice. The SJA could be disqualified from providing the pretrial advice if their pretrial action calls into question their ability “to make an independent and informed appraisal of the charges and evidence” in rendering their advice.¹⁰² Similarly, the SJA may be disqualified from providing post-trial advice if they must review “their own pretrial action . . . when the sufficiency or correctness of the earlier action has been placed in issue” or they have testified about an issue in controversy.¹⁰³ While advising the commander or convening authority of their court-martial responsibilities is normally within the purview of the SJA,¹⁰⁴ a decision to quash or modify a subpoena could become the subject of litigation at a later court-martial if it affects a substantial right of the accused. In such situations, assigning an independent judge advocate to provide legal advice to convening authorities confronted with a motion to quash or modify a subpoena is one way to avoid the issue of an improper referral or an allegation of defective post-trial advice.

B. Enforcing an Article 32 Subpoena

The decision whether or not to enforce an Article 32 subpoena resides with the convening authority or the General Court-Martial Convening Authority (GCMCA) with jurisdiction over the case. Under Article 47, UCMJ, the convening authority can initiate proceedings with the United

¹⁰⁰ See *United States v. Wuterich*, 67 M.J. 63, 78–79 (C.A.A.F. 2008) (finding military judge abused discretion by quashing subpoena without conducting *in camera* review).

¹⁰¹ See MCM, *supra* note 8, R.C.M. 906(b)(3) (providing relief for “defects in the Article 32 investigation”).

¹⁰² See *id.* R.C.M. 406(b) discussion (describing requirement for SJA pretrial advice and grounds for disqualification).

¹⁰³ See *id.* R.C.M. 1106(b) discussion (explaining how SJA disqualified from providing post-trial recommendation).

¹⁰⁴ See *United States v. Willis*, 46 C.M.R. 112, 114 (C.M.A. 1973) (“Whatever one may think of the wisdom of multiple investiture, military law constitutes the staff legal officer the adviser to the convening authority in regard to his court-martial functions.”).

States Attorney's office to prosecute the civilian recipient of a military subpoena who willfully fails to comply.¹⁰⁵ Through RCM 703, the President has also granted the convening authority the power to issue a warrant of attachment "to compel the appearance of a witness or production of documents."¹⁰⁶ Although there is some ambiguity in the rule, in the case of an Article 32 subpoena, the proposed changes to the RCM appear to limit the authority to issue a warrant of attachment to the GCMCA with jurisdiction over the case.¹⁰⁷

1. Warrants of Attachment

The warrant of attachment is designed to secure the cooperation of the subject of a subpoena.¹⁰⁸ Its purpose is to compel the production of the requested evidence, rather than to punish the transgressor.¹⁰⁹ A warrant of attachment is comparable in civilian jurisdictions to a bench warrant, but is broader in scope.¹¹⁰ Not only can a warrant of attachment authorize an official to detain a civilian who has failed to appear and bring them before the tribunal, but they can also command the seizure of evidence that a duly subpoenaed individual has failed to turn over.¹¹¹ The federal courts have recognized the warrant of attachment as a lawful court order which derives its authority from Article 46, UCMJ.¹¹²

In the case of an Article 32, the GCMCA with jurisdiction over the case may issue the warrant of attachment. Before issuing such a warrant, however, the GCMCA must be satisfied there is probable cause to believe: (1) the subject of the subpoena "was duly served with a subpoena"; (2) the "subpoena was issued in accordance with" the RCM; (3) the evidence is material; (4) the subject of the subpoena "refused or willfully neglected to provide the evidence on the time and place specified in the subpoena"; and (5) that "no valid excuse reasonably

appears" for the failure to comply.¹¹³ Evidence should be material if it meets the RCM 405 requirement of being "relevant and not cumulative."¹¹⁴

Unlike the production of witnesses, the requirement that appropriate fees be tendered probably does not apply to the production of evidence. Article 47, UCMJ, states that the witness be "provided a means for reimbursement from the Government for fees and mileage."¹¹⁵ On its face, this provision appears to apply only to witnesses who actually travel to the tribunal and does not include costs incurred when no travel is required. This provision mirrors the Federal Rules of Criminal Procedure, which also provides for travel reimbursement of actual witnesses.¹¹⁶ The recipient of an Article 32 *subpoena duces tecum* is not required to travel to the Article 32 and can satisfy the subpoena by simply producing the evidence. Nevertheless, a witness could claim that expenses for copying and mailing materials to the Article 32 are "unreasonable and oppressive." In the federal courts, generally speaking, the government is not obligated to pay the recipient's costs of complying with a grand jury *subpoena duces tecum*.¹¹⁷ However, in some cases, courts have modified or quashed subpoenas due to the extreme cost of compliance.¹¹⁸

Rule for Courts-Martial 703 indicates that a convening authority should issue a warrant of attachment on a DD Form 454 (Appendix B).¹¹⁹ Similar to the problem previously discussed with using DD Form 453 for subpoenas, DD Form 454 has not been updated to reflect the Article 32 authority to issue subpoenas. Although the form does instruct counsel to line out inapplicable language, the form is designed for use by a military judge at a court-martial. It does not provide options for failing to obey a subpoena issued by an Article 32, deposition, or court of inquiry. It only speaks in terms of apprehending a witness and does not offer contingency language for the seizure of

¹⁰⁵ See 10 U.S.C. § 847(c) (2012) (explaining what is required to initiate federal prosecution for failure to obey military subpoena).

¹⁰⁶ See MCM, *supra* note 8, R.C.M. 703(e)(2)(G)(i) (providing for the issuance of warrants of attachment).

¹⁰⁷ See Proposed MCM Amendments, *supra* note 34, at 64874 (modifying RCM 703(e)(2)(G)(i) discussion).

¹⁰⁸ See *id.* (explaining purpose of warrant of attachment).

¹⁰⁹ See *id.* (explaining purpose of warrant of attachment).

¹¹⁰ See Major Calvin M. Lederer, *Warrants of Attachment-Forcibly Compelling the Attendance of Witnesses*, 98 MIL. L. REV. 1, 4 (1982) (defining a bench warrant and explaining its relevance to warrant of attachment).

¹¹¹ See MCM, *supra* note 8, R.C.M. 703(e)(2)(G)(i) (defining parameters of warrant of attachment).

¹¹² See *id.* R.C.M. 703(e)(2)(G)(i) analysis at A21-38 (citing *United States v. Shibley*, 112 F. Supp. 734 (S. D. Cal. 1953) (court of inquiry); Lederer, *supra* note 110, at 11 (discussing authority for warrant of attachment).

¹¹³ See MCM, *supra* note 9, R.C.M. 703(e)(2)(G)(ii) (enumerating probable cause requirements).

¹¹⁴ See *supra* notes 97-99 and accompanying text (providing standard for production of evidence at an Article 32).

¹¹⁵ See 10 U.S.C. §847 (2012).

¹¹⁶ See FED. R. CRIM. P. 17(d) ("The server must deliver a copy of the subpoena to the witness and must tender to the witness one day's witness-attendance fee and the legal mileage allowance.").

¹¹⁷ See Andrew D. Leipolda & Peter J. Henning, 2 FED. PRAC. & PROC. CRIM. § 276 (4th ed.); *Hurtado v. United States*, 410 U.S. 578, 588-89 (1973) (finding government not required to reimburse costs associated with litigating unless statute mandates).

¹¹⁸ See Leipolda & Henning, *supra* note 117, § 276.

¹¹⁹ See MCM, *supra* note 8, R.C.M. 703(e)(2)(G)(i) discussion.

evidence, which would be more appropriate to an Article 32 subpoena *duces tecum*.¹²⁰

Service regulations express a preference for using the U.S. Marshals Service to execute a warrant of attachment.¹²¹ According to RCM 703, though, the issuing authority may direct anyone greater “than 18 years of age” to serve the warrant,¹²² and 28 U.S.C. § 566 is the statutory authority for the U.S. Marshals to execute warrants on behalf of the military.¹²³ In addition to the written warrant of attachment, the Air Force Instruction recommends providing the Marshals with: (1) a copy of the subpoena; (2) a copy of the certificate of service or receipt; and (3) an affidavit indicating the reasons the evidence is material; and why it is believed the recipient refuses or willfully neglects to comply. “The U.S. Marshals Service General Counsel’s Office will review the [w]arrant of [a]ttachment and determine the appropriate executing office.”¹²⁴

Service regulations may place other requirements on the issuance of warrants of attachment. In the case of the Navy and Marine Corps, trial counsel or the cognizant Staff Judge Advocate must notify the Judge Advocate of the Navy (Code 20) or the Commandant of the Marine Corps (JAM) of the issuance of a warrant of attachment.¹²⁵ If a higher headquarters directs a subordinate convening authority not to issue a warrant of attachment in response to a defense request for the production of evidence, the risk of failing to produce the evidence falls on the government.¹²⁶ A warrant of attachment also cannot compel a person to leave the United States,¹²⁷ but the court has indicated it could be used

to seize an overseas dependent U.S. citizen and bring them before a military tribunal sitting in the same country.¹²⁸

The real benefit of the warrant of attachment is that the GCMCA can issue it without having to go before a court.¹²⁹ The problem lies in the execution of the warrant. The GCMCA faces a dilemma. If the GCMCA takes the preferred route and authorizes the U.S. Marshals to serve the warrant, then the GCMCA must wait for them to act. If the Marshals refuse to seize the evidence, the GCMCA is powerless to intervene and the failure to act can result in the abatement of the proceedings, as occurred in *Harding*, or dismissal of the charges with prejudice.¹³⁰ On the other hand, if the GCMCA authorizes military members to seize the evidence, there can be significant public relations concerns. Using military members or military law enforcement to serve a warrant of attachment may be an appropriate option in some circumstances. Generally speaking, though, the idea of using the military to detain or seize civilians and their property runs counter to modern notions of the military’s place in civil society.¹³¹

2. Contempt

The convening authority’s other option is to forward the case to the U.S. Attorney for prosecution in the federal courts under 10 U.S.C. § 847. The convening authority does this by providing “a certification of the facts” to the U.S. Attorney. The statute implies the U.S. Attorney does not have discretion to decline to prosecute and must “file an information against and prosecute” the offender if the convening authority properly requests assistance.¹³² Unfortunately, this does not appear to be the case in practice. There are few examples of successful prosecutions in case law.¹³³ The penalty for disobeying a military subpoena is

¹²⁰ See Appendix B (displaying U.S. Dep’t of Def., DD Form 454, Warrant of Attachment (May 2000)).

¹²¹ See U.S. DEP’T OF NAVY, OFFICE OF JUDGE ADVOCATE GEN. INSTR. 5800.7F, MANUAL OF THE JUDGE ADVOCATE GENERAL § 0147 (26 June 2012) [hereinafter JAGMAN]; U.S. DEP’T OF ARMY, REG. 27-10, MILITARY JUSTICE § 5-22(b) (3 Oct. 2011) [hereinafter AR 27-10]; U.S. DEP’T OF AIR FORCE, AIR FORCE INSTR. 51-201, ADMINISTRATION OF MILITARY JUSTICE § 6.4.3 (3 Feb. 2010) [hereinafter AFI 51-201]; see also U.S. COAST GUARD, COMMANDANT INSTR. M5810.1E, MILITARY JUSTICE MANUAL § 3.N.2(d) (13 Apr. 2011).

¹²² See MCM, *supra* note 8, R.C.M. 703(e)(2)(G)(iv) (covering execution of warrants of attachment).

¹²³ See 28 U.S.C. § 566 (2012).

¹²⁴ See AFI 51-201, *supra* note 121, § 6.4.3.

¹²⁵ See JAGMAN, *supra* note 121, § 0147.

¹²⁶ See *United States v. Hinton*, 21 M.J. 267, 271 (C.M.A. 1986) (explaining that earlier version of JAGMAN, which required approval of Judge Advocate General before issuance of warrant of attachment could result in penalties for government at trial).

¹²⁷ See *Lederer*, *supra* note 110, at 12 (citing *United States v. Bennett*, 12 M.J. 463 (C.M.A. 1982) as authority).

¹²⁸ See *United States v. Ortiz*, 35 M.J. 391, 394 (C.M.A. 1992) (holding military judge should have granted continuance and ordered warrant of attachment to bring United States civilian witness before court-martial in Germany).

¹²⁹ See Proposed MCM Amendments, *supra* note 34, at 64874 (modifying RCM 703(e)(2)(G)(i) discussion).

¹³⁰ See, e.g., *United States v. Harding*, 63 M.J. 65, 67 (C.A.A.F. 2006) (affirming military judge’s decision to abate the proceedings with respect to most serious charge due to failure to enforce warrant of attachment).

¹³¹ See *Lederer*, *supra* note 110, at 42–44 (discussing background behind shift from using military to enforce warrants of attachments to U.S. Marshals).

¹³² See 10 U.S.C. § 847 (2012).

¹³³ See *Lederer*, *supra* note 110, at 5 n. 12 (noting reluctance of military to pursue contempt cases once court-martial is concluded); see also *United States v. Praeger*, 149 F. 474, 486 (W.D. Tex. 1907) (ruling civilian defendant not guilty of contempt for refusing to answer questions or provide evidence at court-martial).

left to the discretion of the federal judge and may involve a fine, imprisonment, or both.¹³⁴

The criminal prosecution of a civilian will not necessarily result in their providing the requested evidence or agreeing to testify. The purpose of the warrant of attachment is the production of the requested evidence. It accomplishes this by authorizing an official to seize the relevant evidence or bring the reluctant witness before the tribunal. In contrast, the primary purpose of prosecuting a person for failing to obey a subpoena is the punishment of the offender and the vindication of “the military interest in obtaining compliance with its lawful process.”¹³⁵ Initiating a prosecution against a civilian might encourage them to produce the requested evidence, but they might also be willing to face punishment rather than comply with the subpoena. Prosecuting civilians for failing to obey military subpoenas also relies on the cooperation of the U.S. Attorney and the timely adjudication of the case in the federal courts.

V. Evidence: Reasonably Available or Not?

Under the proposed changes to the RCMs, the Article 32 officer is still responsible for determining the reasonable availability of evidence for purposes of the Article 32. The Article 32 officer may determine evidence is not reasonably available if one of three circumstances exists:

[T]he subpoenaed party refuses to comply with the duly issued *subpoena duces tecum*; the evidence is not subject to compulsory process; or the significance of the evidence is outweighed by the difficulty, expense, delay, and effect on military operations of obtaining the evidence.¹³⁶

Based on this standard, it makes sense for the Article 32 officer to delay making a determination until the custodian of the evidence indicates whether or not they will comply with the subpoena. The military judge may review the Article 32 officer’s decision with respect to the reasonable availability of evidence.¹³⁷ Therefore, it is important for the Article 32 officer to articulate in the Article 32 report the specific reasons for finding evidence not available.

¹³⁴ See 10 U.S.C. § 847 (2012).

¹³⁵ See Proposed MCM Amendments, *supra* note 34, at 64874 (modifying RCM 703(e)(2)(G)(i) discussion).

¹³⁶ See *id.* at 64873 (changing RCM 405(g)(2)(C)(ii) discussion).

¹³⁷ See MCM, *supra* note 8, R.C.M. 906(b)(3); Proposed MCM Amendments, *supra* note 35, at 64855 (adding RCM 405(g)(2)(C)(ii) dealing with evidence not under the control of government).

The Article 32 officer is expressly permitted to treat a party’s refusal to comply with a subpoena as sufficient grounds in and of itself to find the evidence is not available. The Article 32 officer can also exclude evidence that is not subject to compulsory process, such as when a search warrant is required to obtain e-mail. If either of these circumstances exists, the inquiry is likely over, and there will be no need to pursue enforcement of the pre-trial subpoena for purposes of the Article 32.

In some cases, though, the significance of the requested evidence may justify delaying the proceeding. If more time is needed to try to obtain the evidence, the party seeking production of the evidence should consider requesting the convening authority grant pretrial, excludable delay.¹³⁸ Before acting on such a request, the convening authority should hear arguments from both parties and should fully document the decision to grant excludable delay in writing. Authorized periods of excludable delay do not count against the 120-day time limit established for bringing an accused to trial.¹³⁹

Regardless of whether the convening authority authorizes excludable delay, though, postponing an Article 32 to seek production of evidence could still violate Article 10, UCMJ, if the accused is in pretrial confinement. Satisfying Article 10 does not require “constant motion” on the case, but depends on the government exercising “reasonable diligence” to bring an accused to trial.¹⁴⁰ “While ‘brief periods of inactivity in an otherwise active prosecution are not’” normally fatal, the accused can prevail in an Article 10 motion if they can show, among other factors, that the unreasonable delay was due to the government’s negligence or more sinister motives.¹⁴¹ In examining a potential Article 10 violation, the courts apply the same framework developed to evaluate violations of the Sixth Amendment right to a speedy trial: (1) the length of delay; (2) the reasons for the delay; (3) whether the accused has made a demand for speedy trial; and (4) the prejudice to the accused.¹⁴² None of the factors are dispositive on their own and Article 10, UCMJ, puts a greater burden on the government to show reasonable diligence than does the Sixth Amendment.¹⁴³ The court takes a holistic approach to

¹³⁸ See MCM, *supra* note 8, R.C.M. 707(c) (detailing procedures and authority to grant excludable delay).

¹³⁹ See *id.*

¹⁴⁰ See *United States v. Cooper*, 58 M.J. 54, 58 (C.A.A.F. 2003) (discussing standard for analyzing Article 10 issues) (citing *United States v. Tibbs*, 15 C.M.A. 350, 353 (1965)).

¹⁴¹ See *United States v. Simmons*, ARMY20070486, 2009 WL 6835721, at *7 (A. Ct. Crim. App. Aug. 12, 2009) (quoting *United States v. Kossman*, 38 M.J. 258, 261–62 (C.M.A. 1993) (unpublished opinion)).

¹⁴² See *id.* at *8 (citing *Barker v. Wingo*, 407 U.S. 514, 530 (1972)).

¹⁴³ See *id.*

allegations of Article 10 violations by looking at the issue in context and balancing the government's conduct against the rights of the accused.¹⁴⁴

A case like *United State v. Harding*¹⁴⁵ provides an illustrative example of how delaying a case to seek enforcement of a subpoena could potentially violate Article 10, UCMJ, if the accused had been in pretrial confinement and asserted his right to a speedy trial. In this case, a number of the factors used to analyze an Article 10, UCMJ, violation were present and weighed in favor of the accused. While the exact length of delay is not discussed in the opinion, the delay was due to the government's failure to enforce the warrant of attachment issued by the military judge. The government acknowledged that the U.S. Marshals had the authority to seize the evidence, but the U.S. Marshals refused to enforce the warrant of attachment.¹⁴⁶ The failure to comply with the court order appears, at the very least, to be negligence on the part of the government and was sufficiently egregious for the military judge to abate the proceedings.¹⁴⁷ Additionally, the evidence in question was requested by the accused based on the proffer that it was constitutionally required for his defense.¹⁴⁸ The failure to produce the evidence only prejudiced the accused. Although Article 10, UCMJ, was not actually at issue in *United States v. Harding*, if the accused had been in confinement, the accused would have had a good faith basis to allege that the government's failure to enforce the warrant of attachment resulted in an Article 10, UCMJ, violation.

VI. Conclusion: What are Article 32 Subpoenas Really Good For?

The ability to subpoena evidence pretrial can only make the military justice system better from the standpoint of the government and the accused. The Article 32 subpoena will expand the scope of tangible evidence available to an Article 32. This will obviously improve the government's ability to investigate and prepare for cases pre-trial, but it will also aid the accused by giving them better access to potentially exculpatory evidence earlier in the litigation process.

Some improvements are still needed to effectively implement the Article 32 *subpoena duces tecum*. The DoD should consider updating DD Forms 453 and 454 to reflect the new Article 32 subpoena power. It would also be helpful if RCM 703 definitively addressed when the power to issue an Article 32 subpoena ends. Does the authority to issue a pretrial *subpoena duces tecum* merge into the power to issue trial subpoenas after referral of the charges? Or does the authority terminate when the investigation is complete and the Article 32 report is provided to the convening authority? This is something which is not explicitly spelled out and could cause problems for military justice practitioners seeking to enforce a pretrial subpoena.

As the military justice system trends towards trying more complex cases,¹⁴⁹ there is a corresponding need for access to evidence in the hands of civilians and civilian institutions during the investigative phases of a case. To this end, the pre-referral *subpoena duces tecum* will prove to be a useful instrument for obtaining less controversial evidence, such as bank records and financial data, by insulating civilian institutions from liability. The Article 32 is less suited, but capable of dealing with complex discovery issues such as psychotherapist-patient privilege. Requests for such materials should be approached with caution as well as respect for third party interests. While it may not be practical to delay an Article 32 to seek enforcement of a pretrial subpoena in many cases, the failure of a party to obey an Article 32 subpoena will put both sides on advance notice of potential litigation problems later at trial. This lead time should promote better negotiations with non-military entities and more efficient use of tools, such as the warrant of attachment and prosecutions for contempt, to encourage compliance with the military powers of compulsory process.

¹⁴⁴ *See id.*

¹⁴⁵ 63 M.J. 65 (2006).

¹⁴⁶ *See id.* at 67 (stating that failure to enforce warrant of attachment attributable to "officers of the Executive branch").

¹⁴⁷ *See id.* at 66 (outlining procedural history of case).

¹⁴⁸ *See id.* at 65-66 (explaining accused request for psychotherapist-patient records).

¹⁴⁹ *See* U.S. MARINE CORPS, MARINE CORPS LEGAL SERVICES MILITARY JUSTICE REPORT FISCAL YEAR 2012, Feb. 2013, at 6 (reporting that despite declining numbers of prosecutions, cases are becoming more complicated).

Appendix A

DD Form 453

SUBPOENA

The President of the United States, to _____ .
(Name and Title of Person being Subpoenaed)

You are hereby summoned and required to appear on the _____ day of _____, _____, at _____
o'clock _____ .M., at _____, (before _____
(Place of Proceeding) (Name and Title of Deposition Officer)

designated to take your deposition) (a _____ court-martial of the United States) (a court of inquiry),

appointed by _____, dated _____,
(Identification of Convening Order or Convening Authority)

_____ , to testify as a witness in the matter of _____
(Name of Case)

(and bring with you _____).
(Specific Identification of Documents or Other Evidence)

Failure to appear and testify is punishable by a fine of not more than \$500 or imprisonment for a period not more than six months, or both. (10 U.S.C. s 847). Failure to appear may also result in your being taken into custody and brought before the court-martial (_____) under a Warrant of Attachment (DD Form 454).

Manual for Courts-Martial R.C.M. 703(e)(2)(G).

Bring this subpoena with you and do not depart from the proceeding without proper permission.

Subscribed at _____ this _____ day of _____, _____.

(Signature (See R.C.M. 703 (e)(2)(C))

The witness is requested to sign one copy of this subpoena and to return the signed copy to the person serving the subpoena.

I hereby accept service of the above subpoena.

Signature of Witness

NOTE: If the witness does not sign, complete the following:

Personally appeared before me, the undersigned authority, _____,
who, being first duly sworn according to law, deposes and says that at _____, _____,
_____, he personally delivered to _____ in person a duplicate of this subpoena.

Grade

Signature

Subscribed and sworn to before me at _____, this _____ day of _____.

Grade

Official Status

Signat

Appendix B

DD Form 454

WARRANT OF ATTACHMENT

_____ Court-Martial of the United States

UNITED STATES)
v.)
)
)
)
)
)
_____)

The President of the United States, to _____
(United States, marshal or such other person as may be directed,

_____ :
RCM 703(e)(2)(G)(iv), MCM, 1984

WHEREAS, _____, of _____,
was on the _____ day of _____,
at _____, duly subpoenaed to appear and attend
at _____, on the _____ day of _____,
_____ , _____, at _____ o'clock _____m., before a _____
court-martial duly convened by _____, dated
_____, _____, to testify on the part of the _____
in the above-entitled case; and whereas he/she has willfully neglected or refused (to appear and attend) ¹
(to produce documentary evidence which he/she was legally subpoenaed to produce) before said
_____ court-martial, as by said subpoena required, although sufficient time has elapsed
for that purpose; and whereas he/she has offered no valid excuse for his/her failure to appear; and whereas
he/she is a necessary and material witness in behalf of the
_____ in the above-entitled case:

¹ Line out inappropriate words.