

Expanding Subpoena Power in the Military

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Introduction

National Academy of Public Administration (NAPA) Report

The NAPA¹ published a report in June 1999, which noted that military criminal investigative organizations (MCIOs) lacked direct subpoena authority.² The report described “a growing potential for use of subpoenas in investigations of Internet computer crime,”³ an observation which presumably focused on the expanding use of technology and automation within the military as well as in civilian society. The NAPA made the following recommendation:

With respect to civilian subpoena and arrest authorities, the Panel recognized the impediments to the MCIOs’ performance of a broader law enforcement role that involves civilians. The Panel believes the MCIOs should primarily be focused on enforcement of the UCMJ [Uniform Code of Military Justice] applicable to military personnel. Nonetheless, there are cases where these authorities would be useful for MCIOs. With respect to subpoena authority, *the Panel recommends that DOD [the Department of Defense] consider providing approval authority to the Services’ General Counsels or other appropriate Service official.*⁴

Recent Evaluation of the Adequacy of Subpoena Authority in the Department of Defense (DOD)

As a result of the NAPA report, and at the suggestion of the Air Force Office of Special Investigations,⁵ the Office of the Deputy Assistant Inspector General (IG), Criminal Investigative Policy and Oversight (CIPO), Office of the IG of the DOD, evaluated the adequacy of subpoena authority within the DOD. In 2001, the DOD IG reported its findings and recommendations.⁶ The study concluded that “[n]either the UCMJ [Uniform Code of Military Justice] nor the *MCM* [*Manual for Courts-Martial*] provides authority to issue subpoenas to obtain evidence prior to ‘referral of charges’ except in the case of a court of inquiry or deposition.”⁷ Also, the study noted that there is “a need for additional subpoena authority for investigations of UCMJ offenses.”⁸ Based on the survey results, the study determined “that the subpoena authority within the DOD in support of general crimes investigations, for offenses punishable under the UCMJ, is inadequate.”⁹

The CIPO evaluators interviewed and discussed the sufficiency of subpoena authority with program managers and staff members at the MCIO headquarters and the services’ Offices of The Judge Advocates General and the Staff Judge Advocate to the Commandant, U.S. Marine Corps.¹⁰ In addition, the CIPO conducted two surveys. One survey focused on members of each service MCIO.¹¹ The other survey targeted military attor-

1. The National Academy of Public Administration (NAPA) is an independent, nonpartisan, nonprofit organization comprised of former legislators, jurists, federal and state executives, and scholars that assists government and private agencies and organizations in research and problem solving. It was granted a congressional charter in 1984. OFFICE OF THE INSPECTOR GENERAL, DEP’T OF DEFENSE, CRIMINAL INVESTIGATIVE POLICY & OVERSIGHT, EVALUATION OF SUFFICIENCY OF SUBPOENA AUTHORITY WITHIN THE DEP’T OF DEFENSE IN SUPPORT OF GENERAL CRIMES INVESTIGATIONS 1 n.4 (15 May 2001) [hereinafter CIPO STUDY].

2. NATIONAL ACADEMY OF PUBLIC ADMINISTRATORS, ADAPTING MILITARY SEX CRIME INVESTIGATIONS TO CHANGING TIMES 20 (June 1999). The report states that military criminal investigative organizations (MCIOs) can and do request subpoenas through the Department of Defense Inspector General (DODIG) or appropriate civilian authorities. These subpoenas are primarily for fraud cases. This process creates a check on the MCIOs which can limit wanton uses of subpoenas in civil criminal investigations. It is mostly applicable to civilian and off-post investigations. *Id.*; see MANUAL FOR COURTS-MARTIAL, UNITED STATES, R.C.M. 703(e)(2)(C) (2002) [hereinafter MCM].

3. *Id.*

4. *Id.* at 23 (emphasis added).

5. Memorandum, Air Force Office of Special Investigations, to DOD/IG, subject: FY 2000 DOD/IG Project Plan (19 Apr. 1999).

6. CIPO STUDY, *supra* note 1, at 3.

7. *Id.* at 3.

8. *Id.* at 9.

9. *Id.* at 5.

neys from each service's Judge Advocate General's Corps (JAGC).¹²

Investigator and Military Attorney Survey Results

The CIPO study revealed a need for expanded subpoena authority. The MCIO agents rated the military search authorization; local, state, and federal search warrants; and consent "as the most frequently used and most highly effective mechanisms in supporting general crimes investigations."¹³ Twenty percent of the agents also "indicated that they 'often' or 'seldom' [as opposed to never] encountered instances where they felt unable to use any mechanism to compel production of evidence."¹⁴ The agents responded that although they needed to obtain evidence in larceny, drug, homicide or unattended death, and child maltreatment or mistreatment investigations, "they lacked a mechanism for doing so."¹⁵

Results of the JAGC survey paralleled those of the MCIO survey. Sixty-six percent of the military attorneys surveyed responded that they had "needed evidence prior to referral of charges to support an investigation of a crime cognizable under the UCMJ, but concluded [that] no mechanism was available to compel its production."¹⁶ Forty-one percent answered "often" or "seldom" [as opposed to never] when asked "if they had ever been involved with a general crimes investigation cognizable under the UCMJ [when] they could not successfully prosecute the case because they could not compel the production of cer-

tain evidence."¹⁷ Most importantly, a majority of the sixty-six percent who responded positively to the first query indicated "that the ability to issue or obtain a military trial subpoena prior to referral of charges would have benefited their case or resulted in a referral of charges."¹⁸

Review by the Joint Service Committee

On 16 June 2001, the DOD General Counsel referred the CIPO report to the Joint Service Committee (JSC).¹⁹ The JSC²⁰ reviewed the report and "determined that further review is necessary to consider several additional options considered appropriate for the pretrial stages of a criminal case and in support of the administration of military justice [during the next annual review]."²¹

While the NAPA, CIPO, and JSC indicated some necessity or at least some desire to study subpoena authority in the military, this article addresses the need to further expand it. This article: (1) traces the origins and development of subpoena power, to include its development in the United States and in the U.S. military; (2) describes current subpoena authority in the military, in both its judicial and administrative forms; (3) compares and contrasts this description with the current federal system's subpoena authority; (4) addresses the present military environment, which is conducive to expanding subpoena authority; and (5) evaluates possible proposals for such an expansion.

10. *Id.* at 12.

11. *Id.* at 5. Overall, 70% of the MCIO special agent population responded to the survey through a questionnaire posted on the World Wide Web. Seventy-five percent of agents from the U.S. Army Criminal Investigation Command (USACIDC) responded; 73% of the Air Force Office of Special Investigations (AFOSI) agents responded; and 60% of the Naval Criminal Investigation Service (NCIS) agents responded. *Id.*

12. *Id.* at 7. Seven hundred and fifty-three JAGC personnel participated in the survey. *Id.*

13. *Id.* at 6.

14. *Id.* Two thousand and twenty-three agents responded to the survey. Investigative experience levels of the responding agents were: less than one year, 10%; more than one year but less than three years, 17%; more than three but less than five years, 11%; more than five but less than seven years, 9%; and seven years or more, 52%.

15. *Id.* Types of needed evidence included bank, telephone, financial, and medical records. *Id.*

16. *Id.* at 7-8. Seven hundred and fifty-three military attorneys participated in the Internet survey in September 2000. The CIPO addressed it to JAGC personnel with military justice experience. Of the respondents, 239 had over seven years of military justice experience; 105 had over five but less than seven years; 142 had over three but less than five; and 181 had over one but less than three years of experience. Eighty-three indicated that they had less than one year of military justice experience. *Id.*

17. *Id.* at 8.

18. *Id.* at 7-8. The survey indicated that 408 attorneys gave that answer. *Id.*

19. Memorandum, U.S. Dep't of Defense, to Inspector General, U.S. Dep't of Defense, subject: Review of the Evaluation Report on the Sufficiency of Subpoena Authority within the Dep't of Defense in Support of General Crimes Investigations (Report No. CIPO2001S004) (20 Dec. 2002) [hereinafter DODIG GC Memo on Sufficiency of Subpoena Power].

20. The Joint Service Committee (JSC) on Military Justice, under the direction of the DOD General Counsel, reviews the *Manual for Courts-Martial* annually and proposes any legislative amendments to the UCMJ. U.S. DEP'T OF DEFENSE, DIR. 5500.17, ROLE AND RESPONSIBILITIES OF THE JOINT SERVICE COMMITTEE JSC ON MILITARY JUSTICE (8 May 1996).

21. DODIG GC Memo on Sufficiency of Subpoena Power, *supra* note 19.

History of Subpoena Authority

Origins of Subpoena Authority in England

Subpoena power originated in England, as part of the development from inquisitional to adversarial trial procedure. In the late medieval period, jurors tried criminal cases on their knowledge of the facts without hearing from witnesses.²² By the sixteenth century, it became obvious that juries could not make decisions solely from their own knowledge.²³ Courts, therefore, pursued outside, oral testimony. Oral testimony appeared relatively late in the common law courts, such as the King's Bench, due to the "firmness with which the common law adhered to the view that the jury were as much witnesses as judges of fact."²⁴ Chancery and other courts outside the sphere of common law allowed witnesses to give oral evidence.²⁵

As early as the 1400s, the Chancery used the subpoena process to secure witnesses' attendance and testimony.²⁶ The subpoena became the preferred instrument of the Council and the Chancery. Parliament, however, stated that the subpoena "was repugnant to the common law."²⁷

In the 1500s, the use of a compulsory subpoena writ may have caused a rapid increase in Chancery's activity. This increase in activity encouraged the introduction of compulsory process for witnesses in the common law courts.²⁸ The Statute of Elizabeth officially enacted this process:

If any person or persons upon whom any process out of any of the courts of record within this realm or Wales shall be served to testify or depose concerning any cause or matter depending in any of the same courts, and

having tendered unto him or them, according to his or their countenance or call, such reasonable sums of money for his or their costs or charges as having regard to the distance of the places is necessary to be allowed in that behalf, do not appear according to the tenor of the said process, having not a lawful and a reasonable let or impediment to the contrary, that then the party making default shall forfeit £10 and give further recompense for the harm suffered by the party aggrieved.²⁹

"This statute did for testimony at common law what the subpoena had done for testimony more than one hundred years before,"³⁰ and formally recognized and supported the use of subpoenas in common law courts. Initially, the statute only applied to civil cases, but by 1679, under the Restoration, judges began to grant the criminally accused compulsory process by special order.³¹ At slow intervals, in 1695 and in 1701, general statutes guaranteed an accused this right.³²

Progression of Federal Subpoena Authority in the United States

As early as 1712, American colonial courts used subpoena authority.³³ In the United States after independence, subpoena authority developed further. The insertion of compulsory process into the Constitution secured defendants the rights that had previously existed only in state courts.³⁴ With the enactment of the first Judiciary Act in September of 1789, "the mode of proof by examination of witnesses . . . was regulated, and their [witnesses'] duty to appear and testify was recognized."³⁵ Justice Hughes stated that "the 'all writs' provision of section 14 of the Judiciary Act of 1789 comprehends the authority to issue sub-

22. Peter Western, *The Compulsory Process Clause*, 73 MICH. L. REV. 71, 78 (1974).

23. 9 W. HOLDSWORTH, A HISTORY OF ENGLISH LAW 131 (1966).

24. *Id.*

25. *Id.*

26. *Id.* at 184.

27. I.S. LEADAM & J.F. BALDWIN, SELECT CASES BEFORE THE KING'S COUNCIL, 1243-1482, 36 (1918).

28. 8 JOHN HENRY WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 2191 n.28 (McNaughton rev. 1961).

29. Statute of Eliz., 5 Eliz. I, c. 9, § 12 (1562-63) (Eng.).

30. WIGMORE, *supra* note 28, § 2190, at 65.

31. *Id.* at 67.

32. *Id.*

33. *Id.* at § 2190 n.25. The earliest American colonial compulsory statute was probably that of South Carolina in 1712. *Id.*

34. Lester B. Orfield, *Subpoena in Federal Criminal Procedure*, 13 ALA. L. REV. 1, 11 (1960).

35. *Id.* at 34 (quoting *Blair v. United States*, 250 U.S. 273, 280-281 (1919) (quoting *Amey v. Long*, 9 East, 484, Section 724)).

poena *duces tecum*, for ‘the right to resort to means competent to compel the production of written, as well as oral, testimony.’”³⁶ Justice Hughes reasoned that such testimony “seems essential to the very existence and constitution of a court of common law.”³⁷ In time, case law in the United States extended compulsory process “not only to having witnesses subpoenaed to testify, but also to production of documents.”³⁸ Chief Justice Marshall noted: “[a] subpoena *duces tecum* varies from an ordinary subpoena only in this; that a witness is summoned for the purpose of bringing with him a paper in his custody.”³⁹

Subpoena authority in the United States further expanded during the late nineteenth and twentieth centuries. Case law during this period described subpoenas as instruments “issued for the preliminary examination, grand jury proceedings, deposition, and the trial.”⁴⁰ A court even stated that “[t]he process of subpoena is always at the command of the United States District Attorney without the authorization of this court.”⁴¹ Then, in the 1940s, an advisory committee drafted the *Federal Rules of Criminal Procedure (FRCP)*. The Supreme Court adopted the committee’s ninth draft.⁴² Rule 19, currently Rule 17, addressed subpoena power in the federal courts.⁴³

*Development of Subpoena Authority in the United States Military*⁴⁴

As in the federal courts, subpoena authority in the military also evolved from the English tradition. The Crown and the annual Mutiny Act developed rules and regulations that the British armed forces used to administer legal procedure.⁴⁵ The Continental Congress adopted its military laws based on the laws and customs governing British armed forces.⁴⁶ In 1775, the Continental Congress adopted the American Articles of War⁴⁷ and the Rules for the Regulation of the Navy of the United States Colonies.⁴⁸ Like their British counterparts, the American Articles of War, 1775, and the Articles of War, 1776,⁴⁹ contained no provisions for compelling a witness to attend courts-martial.⁵⁰ The Articles for the Government of the Navy similarly lacked such provisions.⁵¹

The Continental Congress addressed subpoena authority for the U.S. military in 1779 when it adopted this significant language:

Resolved, that it be recommended to the executive authority of their respective states, upon the application of the judge advocate for that purpose, to grant proper writs requiring and compelling the person or persons whose attendance shall be requested by the said judge, to appear and give testimony in any cause depending before a court-martial;

36. Orfield, *supra* note 34, at 42 (citing *In re Storrer*, 63 F. 564, 565 (N.D. Cal. 1894)).

37. *Id.* (quoting *Am. Lithographic Co. v. Werkmeister*, 221 U.S. 603, 609 (1911)).

38. *United States v. Burr*, 25 F. Cas. 30, 33 (C.C.D. Va.) (No. 14,692d).

39. *Id.* at 35.

40. Orfield, *supra* note 34, at 36 (citing *Hale v. Henkel*, 201 U.S. 43 (1906); *Crompton v. United States*, 138 U.S. 361 (1891); *United States v. Hofmann*, 24 F. Supp. 847, 848 (S.D.N.Y. 1938); *United States v. Beavers*, 125 F. 778, 779 (S.D.N.Y. 1903)).

41. *Id.* at 37 (citing *United States v. Barefield*, 23 F. 136, 137 (E.D. Tex. 1885)).

42. *Id.* at 3.

43. *Id.* at 3-10.

44. See Brief for the Dept. of the Army at A1, *United States v. Bennett*, 12 M.J. 463 (C.M.A. 1982) (No. 39914) [hereinafter *Bennett Brief*].

45. *Id.* (citing *MILITARY OF DEFENCE, MANUAL OF MILITARY* pt. II, §1 (12th ed. 1972); Stuart-Smith, *Military Law: Its History, Administration and Practice*, 85 L.Q. REV. 478 (1969); 1 *HOLDSWORTH, supra* note 23; see *WILLIAM WINTHROP, MILITARY LAW AND PRECEDENTS* 23 (2d ed., 1920 reprint)).

46. 3 *DIARY AND AUTOBIOGRAPHY OF JOHN ADAMS* 409-10 (L. Butterfield ed. 1964).

47. Res. of June 30, 1775, 2 J. CONT. CONG. 111 (1905), as amended by Res. of November 7, 1775, 3 J. CONT. CONG. 330 (1905).

48. Res. of November 28, 1775, 3 J. CONT. CONG. 378 (1905).

49. Res. of September 20, 1776, 5 J. CONT. CONG. 788 (1906).

50. See *Bennett Brief*, *supra* note 44, at 8.

51. *Id.* at 10.

and that it be recommended to the legislatures of the several states to vest the necessary powers for the purposes aforesaid in their executive authorities, if the same be not already done.⁵²

This resolution fell into disuse⁵³ and by the mid-nineteenth century, the consensus opinion was that the American Articles of War did not permit the compulsion of civilian witnesses to attend courts-martial.⁵⁴

In 1863, Congress created the power to subpoena nonmilitary witnesses that most resembles its current form:

That every judge-advocate of a court-martial or court of inquiry hereafter to be constituted, shall have the power to issue the like process to compel witnesses to appear and testify, which courts of criminal jurisdiction within state, territory, or district where such military courts shall be ordered to sit may lawfully issue.⁵⁵

This empowered judge advocates to issue subpoenas to civilian witnesses. The attorney general, however, did not interpret this provision to apply to Navy courts-martial because of the words “military courts.”⁵⁶ Congress remedied this in 1909 with legislation containing language mirroring the 1863 statute:

Sec. 11. That a naval court-martial or court of inquiry shall have power to issue like process to compel witnesses to appear and testify which United States courts of criminal jurisdiction within the State, Territory, or

District where such naval court shall be ordered to sit may lawfully issue.⁵⁷

Compulsory process in the Navy did not change until Congress enacted the UCMJ.⁵⁸

The Articles of War underwent revisions concerning compulsory process before the enactment of the UCMJ in 1916 and then in 1920.⁵⁹ The 1928 *Manual for Courts-Martial* reflects these revisions:

Article 22. Process to Obtain Witnesses. Every trial judge advocate of a general or special court-martial and every summary court-martial shall have the power to issue like process to compel witnesses to appear and testify which courts of the United States having criminal jurisdiction may lawfully issue; but such process shall run to any part of the United States, its territories, and possessions.⁶⁰

Congress intended these changes “to give courts-martial subpoena power co-extensive with federal courts.”⁶¹ In addition, the 1928 *MCM* described the issuance of process regarding compelling a witness to appear for preliminary examination and it specified a subpoena’s need to address items in detail when it required a witness to bring documents.⁶²

Current Military Subpoena Authority versus Federal Subpoena Authority

When Congress adopted the UCMJ, it “restated it[s] compulsory process and deposition policies”⁶³ in the form of Article

52. Res. of November 16, 1779, 15 J. CONT. CONG. 1272, 1277-78 (1909).

53. Bennett Brief, *supra* note 44, at 9 n.9.

54. *Id.* at 10.

55. United States v. Bennett, 12 M.J. 463, 467 (C.M.A. 1982) (citing Act of Mar. 3, 1863 § 25, 12 Stat. 754).

56. 19 Op. Att’y Gen. 501 (1890) (concluding that “military courts” apply “exclusively to the Army or land service” and not the naval service and “that naval courts-martial or their judge advocates have not the power to compel civilians not subject to the articles for the government of the Navy to appear and testify before such courts”).

57. Bennett Brief, *supra* note 44, at 12 (citing Act of Feb. 16, 1909, ch. 131, § 11, 35 Stat. 621).

58. See UCMJ, 1951.

59. See Bennett Brief, *supra* note 44, at 14 n.16 (“[The] Articles of War, 1916, ch. 418, §3, 39 Stat. 650, and the Articles of War, 1920, ch. 227, C.II, 41 Stat. 787, entirely recodified American military law governing the Army.”).

60. MANUAL FOR COURTS-MARTIAL, UNITED STATES app. 1, art. 22 (1928) [hereinafter 1928 MCM].

61. Bennett Brief, *supra* note 44, at 16.

62. 1928 MCM, *supra* note 60, at 16.

63. Bennett Brief, *supra* note 44, at 19.

46.⁶⁴ Although it is now common for most military practitioners to obtain civilian evidence through the voluntary cooperation of the individuals or entities concerned,⁶⁵ Congress provided Article 46 for cases in which military practitioners needed compulsory process:

Art. 46. Opportunity to obtain witnesses and other evidence. The trial counsel, the defense counsel, and the court-martial shall have equal opportunity to obtain witnesses and other evidence in accordance with such regulations as the President may prescribe. Process issued in court-martial cases to compel witnesses to appear and testify and to compel the production of other evidence 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 Territories, Commonwealth, and possessions.⁶⁶

Article 46's authority results from the legislative branch's power to enact laws under Article I of the Constitution. Its authority is based on the Sixth Amendment right of a criminal accused to compel the attendance of witnesses.⁶⁷ Case law has affirmed the Sixth Amendment's application to courts-martial.⁶⁸ While its origins lie with Congress, the authority of Article 46 is similar to that possessed by "those courts created pursuant to Article III of the Constitution,"⁶⁹ in which federal subpoena authority under Rule 17, *FRCP*, applies.⁷⁰ While Article 46 and Rule 17 are from two different sources, they have similar objectives. However, the federal courts have much

more flexibility in their application of subpoena authority, especially before the formal initiation of a case or indictment.⁷¹

RCM 703(e)(2)

Rules for Courts-Martial (RCM) 701 and 703 both implement Article 46. Specifically, RCM 703(e)(2) addresses three elements: (1) the presence of witnesses who are not on active duty;⁷² (2) the contents of a subpoena, to include a directive to produce books, papers, documents, or other objects for inspection by the parties;⁷³ and (3) the subpoena issuing authority. Rule for Courts-Martial 703(e)(2)(C) states:

Who May Issue. A subpoena may be issued by the summary court-martial or trial counsel of a special or general court-martial to secure witnesses or evidence for that court-martial. A subpoena may also be issued by the president of a court of inquiry or by an officer detailed to take a deposition to secure witnesses or evidence for those proceedings respectively.⁷⁴

Military practitioners often misunderstand this third provision. Like a federal subpoena that a prosecutor usually initiates and a court clerk then issues, a trial counsel issues a military subpoena. While considered to be a judicial subpoena⁷⁵ like a federal judicial subpoena, a subpoena issued under this rule cannot compel a witness to appear at a pre-trial examination or interview until after the referral of charges.⁷⁶ Referral is the order of a convening authority sending charges against an

64. See UCMJ art. 46 (2002).

65. FRANCIS A. GILLIGAN & FREDRIC I. LEDERER, COURT MARTIAL PROCEDURE 2149 (3d ed. 1999).

66. UCMJ art. 46.

67. *Comparative Analysis, Federal Rules of Criminal Procedure and Military Practice and Procedure*, Committee on Criminal Justice and the Military, Section of Criminal Justice, A.B.A 48 (1982) [hereinafter *ABA Analysis*]; see U.S. CONST. amend. VI.

68. *Id.* (citing *United States v. Manos*, 37 C.M.R. 274 (C.M.A. 1967); *United States v. Sweeney*, 34 C.M.R. 379 (C.M.A. 1964); *United States v. Thornton*, 24 C.M.R. 256 (C.M.A. 1957)).

69. Bennett Brief, *supra* note 44, at 20 (citing *United States v. Frischolz*, 36 C.M.R. 306 (C.M.A. 1966)); see U.S. CONST. art. III.

70. FED R. CRIM. P. 17.

71. E-mail from Gregg Nivala, Assistant U.S. Attorney, Eastern District of Va. (Dec. 11, 2002) (on file with the author). Mr. Nivala stated that ninety-nine percent of subpoenas are used for pre-indictment purposes other than for attendance of witnesses at trial. *Id.*

72. MCM, *supra* note 2, R.C.M. 703(e)(2)(A).

73. *Id.* R.C.M. 703(e)(2)(B).

74. *Id.* R.C.M. 703(e)(2)(C).

75. *United States v. Curtin*, 44 M.J. 439, 441 (1996). A trial counsel's subpoena is a judicial subpoena within the meaning of the Right to Financial Privacy Act, 12 U.S.C. § 2407 (2000). *Id.*

76. CIPO STUDY, *supra* note 1, at 4.

Depositions

accused to a specific court-martial.⁷⁷ It requires: “a convening authority who is authorized to convene the court-martial and is not disqualified . . . ; preferred charges which have been received by the convening authority for disposition . . . ; and a court-martial convened by that convening authority or a predecessor.”⁷⁸ There is no trial counsel or court-martial within the meaning of RCM 703(e)(2)(C) until a convening authority has referred a case to trial and counsel is detailed to the court-martial.⁷⁹ By implication, there is no trial counsel subpoena authority in a military case until after referral of the charges.

This limitation may cause great frustration for both military investigators and lawyers. Investigators do not have critical subpoena authority during the principal and formative parts of investigations.⁸⁰ A number of factors constrain trial counsel, who lack subpoena authority before referral, including impediments to timeliness, evidence gathering, case integrity, and case perfection.⁸¹ Unlike the federal system, in which prosecutors have access to pre-indictment and post-indictment subpoena authority; military prosecutors cannot utilize the judicial subpoena until after referral. By then, the authorization power is often insufficient and untimely; either the trial is imminent, “or worse yet, justice might never be served because evidence could not be compelled and charges are not preferred and the case is not referred for trial.”⁸² Therefore, military practitioners, unlike federal prosecutors, must often consider alternative approaches.

Under RCM 702, depositions are one alternative to trial counsel subpoena authority. While “an officer detailed to take a deposition to secure witnesses or evidence”⁸³ may also issue subpoenas pursuant to RCM 703(e)(2)(C), the provisions of RCM 702 apply only after the preferral of charges and before the referral of charges. In addition, the rule does not permit a deposition unless there are “exceptional circumstances . . . [and] it is in the interest of justice that the testimony of a prospective witness be taken and preserved for use at an investigation under Article 32 or a court-martial.”⁸⁴ Although they are not very common, depositions are an effective method to secure testimony, especially from witnesses who are located outside the military jurisdiction.⁸⁵ The requisite “exceptional circumstances” and “interest[s] of justice,” however, do not make depositions practical for ordinary courts-martial.

DOD IG Subpoenas

Another alternative to traditional subpoenas are administrative subpoenas. Under the Inspector General Act of 1978,⁸⁶ the IG has the authority to issue administrative subpoenas also known as DOD IG subpoenas. A DOD IG subpoena provides a significant tool for obtaining “the production of all information, documents, reports, answers, records, accounts, papers, and other data and documentary evidence necessary in the performance of the functions assigned.”⁸⁷

77. MCM, *supra* note 2, R.C.M. 601(a).

78. *Id.*

79. *See* UCMJ art. 27 (2002); MCM, *supra* note 2, R.C.M. 501(b).

80. CIPO STUDY, *supra* note 1, at 4.

81. *Id.* For further input from JAGC attorneys, see responses from individual attorneys surveyed by CIPO. *Id.*

82. E-mail from Special Agent (SA) Scott D. Russell, CIPO, DOD IG (Feb. 19, 2003) [hereinafter Russell E-mail] (on file with author).

83. MCM, *supra* note 2, R.C.M. 703(e)(2)(C).

84. *Id.* R.C.M. 702(a).

85. Interview with Major John T. Hyatt, 51st Graduate Course Student at the Judge Advocate General School (Dec. 19, 2002) (on file with author). Major Hyatt described how he organized a deposition for securing the testimony of a U.S. witness for a court-martial in Europe. He also described the organization and execution as requiring great effort and coordination with his office and another installation legal office in the United States. *Id.*

86. 5 U.S.C. app. 3, § 6(a)(4) (2000).

87. *Id.*

The DOD IG subpoenas have several advantages. Unlike a federal judicial or military justice subpoena, the DOD IG subpoena is administrative and does not “require a showing of ‘probable cause.’”⁸⁸ The standard for issuing a DOD IG subpoena “has been described as ‘mere suspicion’ or ‘official curiosity.’”⁸⁹ A DOD IG subpoena “may be issued in support of criminal, civil, and administrative investigations or audits.”⁹⁰ Consequently, the DOD IG subpoena may be useful for acquiring such items as checking account records, bank records covered by the Right to Financial Privacy Act (RFPA),⁹¹ brokerage records, and various records of government contractors.⁹²

There are some disadvantages to the DOD IG subpoena system, however. The DOD IG subpoena is limited in scope because its focus is fulfilling the IG’s functions, especially those relating to the detection, prevention, and investigation of fraud, waste, and abuse.⁹³ Criminal investigations generally do not fit within these parameters. As a result, investigators cannot use a DOD IG subpoena to produce non-documentary phys-

ical evidence (such as a weapon) or to compel testimony.⁹⁴ Moreover, investigators who must also follow their own regulations,⁹⁵ believe that these MCIO regulations and the IG documentary requirements⁹⁶ are too lengthy, cumbersome, and difficult to handle.⁹⁷

The RFPA⁹⁸ provides privacy protection for customers’ financial records, which are often the same records that military practitioners must acquire during an investigation or in preparation for a court-martial. Unfortunately, the RFPA prohibits unfettered access by the government⁹⁹ by requiring government authorities to follow five notice and challenge procedures for customers.¹⁰⁰ A government authority may obtain access to financial records after obtaining one of the following: (1) customer consent;¹⁰¹ (2) an administrative subpoena;¹⁰² (3) a search warrant;¹⁰³ (4) a judicial subpoena;¹⁰⁴ or (5) a formal written request.¹⁰⁵

88. Major Stephen Nypaver III, *Department of Defense Inspector General Subpoena*, ARMY LAW., Mar. 1989, at 17 (citing *United States v. Westinghouse Elec. Corp.*, 615 F. Supp. 1163, 1182 (W.D. Pa. 1985)).

89. *Id.* (citing *United States v. Morton Salt Co.*, 338 U.S. 632, 642, 652 (1950)).

90. *Id.* at 18 (citing *United States v. Westinghouse Elec. Corp.*, 615 F. Supp. 1163, 1182 (W.D. Pa. 1985)).

91. 12 U.S.C. §§ 3401-3422 (2000).

92. Nypaver, *supra* note 88, at 18.

93. *Id.*

94. CIPO STUDY, *supra* note 1, at 4.

95. See CRIMINAL INVESTIGATION COMMAND REG. 195-1, CRIMINAL INVESTIGATION OPERATIONAL PROCEDURES ch. 5 (1 Oct. 1994) (providing detailed guidance on the procedures to obtain subpoenas) [hereinafter CIDR 195-1]; U.S. DEP’T OF NAVY, SEC’Y OF THE NAVY INSTR. 5520.3B, CRIMINAL AND SECURITY INVESTIGATIONS AND RELATED ACTIVITIES WITHIN THE DEP’T OF THE NAVY para. 3 (4 Jan 1993) [hereinafter SECNAV INSTR. 5520.3B]; U.S. DEP’T OF AIR FORCE OFFICE OF SPECIAL INVESTIGATIONS (AFOSI) INSTR. 71-106, GENERAL INVESTIGATIVE METHODS ch. 14 (21 Dec. 1998) (pending revision) [hereinafter AFI 71-106]. Military practitioners may not understand how to acquire or even use the DOD IG subpoena properly—the U.S. Army CID Group Judge Advocate, located in each of the major worldwide regions, can provide significant assistance in preparing and coordinating a request for a DOD IG subpoena. He or she can also provide training in its preparation and use.

96. Lieutenant Colonel Frank Albright & Special Agent Thomas Gribben, DOD IG Subpoena Process PowerPoint Presentation (31 Jan. 2001) (on file with author) (explaining the requirements for subpoena consideration: request memorandum; Privacy Act notice; certificate of compliance; draft subpoena; and letter from investigator to recipient).

97. See CIPO STUDY, *supra* note 1 (illustrating this viewpoint with responses from individual investigators that CIPO surveyed) (on file with author and CIPO).

98. 12 U.S.C. §§ 3401-3422; see U.S. DEP’T OF DEFENSE, DIR. 5400.12, OBTAINING INFORMATION FROM FINANCIAL INSTITUTIONS FOR USE BY DOD ENTITIES (6 Feb. 1980) [hereinafter DOD DIR. 5400.12] (implementing the RFPA); U.S. DEP’T OF ARMY, REG. 190-6, OBTAINING INFORMATION FROM FINANCIAL INSTITUTIONS (Jan. 1982) (setting forth the Army’s regulatory implementation of RFPA). The RFPA and DOD DIR. 5400.12 specify procedures, which a DOD government authority must follow to obtain individuals’ financial records in an investigation or court-martial. A judge advocate or trial counsel is a government authority under the definition in the RFPA. Likewise, an OSI agent, security police officer, or a first sergeant is a government authority under the RFPA. *Id.*

99. 12 U.S.C. § 3401-3422 (2000); Major Jane M.E. Peterson, *Right to Financial Privacy*, SPECIAL EDITION AIR FORCE ADVOCACY CONTINUATION EDUC. (ACE) NEWSLETTER (USAF/ACE PROGRAM), 31 May 2000, at 8-9 (outlining exceptions for the military practitioner).

100. Peterson, *supra* note 99, at 4.

101. *Id.* at 8-9. It is DOD policy to request consent before using the other access procedures unless doing so would compromise or harmfully delay a legitimate law enforcement inquiry. In order to comply with the RFPA, the government authority must request consent in writing, specifically describe the records sought, specify the purpose of the request, and fully explain the individual’s rights under the RFPA. DoD DIR. 5400.12, *supra* note 98, para. 4.1.

102. Peterson, *supra* note 99, at 8-9. The DOD IG must comply with the RFPA requirements when issuing an administrative subpoena for financial records. *Id.*

Even in cases when military practitioners obtain a DOD IG subpoena, a government authority must provide the bank customer a complete copy and written notice of the subpoena, which explains its purpose and the customer's challenge procedures under the RFPA.¹⁰⁶ Practitioners may find this requirement burdensome, especially if the investigator or trial counsel is trying to prevent the subject of the investigation from knowing about it. The RFPA also mentions other options that are often unavailable to a military investigator or trial counsel, such as a military judicial subpoena, customer consent, or formal written request.¹⁰⁷ There are several problems with these options. First, the military judicial subpoena is only enforceable after referral. Second, customer consent or a formal written request is not enforceable at all. Furthermore, military practitioners' lack of familiarity with RFPA procedures¹⁰⁸ may result in governmental liability.¹⁰⁹ Because the RFPA can be detrimental to an investigation, practitioners should heed its provisions carefully.

Federal Subpoena Authority

Rule 17 of the *FRCP*, like RCM. 703, addresses subpoena authority. Rule 17(a) states as follows:

A subpoena shall be issued by the clerk under the seal of the court. It shall state the name of the court and the title, if any, of the proceeding, and shall command each person to whom it is directed to attend and give testimony at the time and place specified therein. The clerk shall issue a subpoena, signed and

sealed but otherwise in blank to a party requesting it, who shall fill in the blanks before it is served . . .¹¹⁰

Rule 17(c) also addresses the production of documentary evidence and objects:

A subpoena may also command the person to whom it is directed to produce the books, papers, documents or other objects designated therein. The court on motion made promptly may quash or modify the subpoena if compliance would be unreasonable or oppressive. The court may direct that books, papers, documents or objects designated in the subpoena be produced before the court at a time prior to the trial or prior to the time when they are to be offered in evidence and may upon their production permit the books, papers, documents or objects or portions thereof to be inspected by the parties and their attorneys.¹¹¹

Rules 17(c) and 17 (a), respectively, appear similar to RCM 703(e)(2)(C) and RCM 703(e)(2)(B). For example, the trial counsel's RCM 703(e)(2)(B) authority in "the military justice system parallels the functions of the clerk of court of the United States District Court who issues subpoenas for that court as a ministerial act."¹¹² Likewise, there are similarities between Rule 17(c) and Article 46, UCMJ, which states that "[p]rocess issued in court-martial cases to compel . . . the production of other evidence shall be similar to that which courts of the

103. *Id.* A search warrant for financial records is only available if probable cause exists, but a government authority can issue it at any stage in the court-martial proceedings. To comply with the RFPA, a military commander or magistrate cannot issue the subpoena. *Id.*

104. *Id.* A trial counsel subpoena for financial records is available after referral of charges. After referral, the accused's financial records fall under an exception to the RFPA and it does not apply. *Id.*

105. *Id.* A formal written request for financial records is only statutorily available if an administrative subpoena is not available. The government authority must comply with the RFPA. *Id.*

106. *Id.* at 8.

107. 12 U.S.C. §§ 3404, 3407-08, 3413(3).

108. See Captain Donald W. Hitzeman, *Due Diligence in Obtaining Financial Records*, ARMY LAW., July 1990, at 39; Mary C. Hutton, *The Right to Financial Privacy Act: Tool to Investigate Fraud and Discover Fruits of Wrongdoing*, ARMY LAW., Nov. 1983, at 17.

109. See Captain Daryl B. Witherspoon & Jennifer Solomon, *Litigation Division Notes, Trial Counsel's Pre-Referral Subpoena Puts Bank at Risk*, ARMY LAW., Mar. 2003, at 35 (describing potential liability of the Army after *Flowers v. First Hawaiian Bank*, 295 F.3d 966 (9th Cir. 2002)). See also, Russell E-mail, *supra* note 82. According to SA Russell, the notice requirement may be detrimental to an investigation, but not necessarily detrimental to the IG subpoena system. Special Agent Russell noted that the subpoena program manager notifies any MCIO agent who is ignorant of the RFPA requirements and attempts to get an IG subpoena for RFPA records. The manager prepares the proper documents and explains procedures to avoid liability problems. *Id.*

110. FED. R. CRIM. P. 17(a).

111. *Id.* R. 17(c).

112. *United States v. Curtin*, 44 M.J. 439, 441 (1996). In a concurring opinion, Chief Judge Cox held that "[t]he fact that the trial counsel acted as a ministerial or administrative arm of the court-martial (as the clerk of court does for a federal district court) does not deprive the subpoena of its judicial character or make it an 'administrative summons.'" *Id.*

United States having criminal jurisdiction may lawfully issue.”¹¹³

Rule 17’s application, however, is different from its military counterpart in three important respects. First, the military’s equivalent of the federal indictment is less flexible; instead of one step, it contains three: the preferral of charges, the Article 32 hearing or investigation, and the referral of charges.¹¹⁴ Second, and probably most significantly, Rule 17 is used extensively to issue grand jury subpoenas before indictment,¹¹⁵ primarily to acquire documentary information.¹¹⁶ In the military, a trial counsel cannot issue a subpoena before referral. Third, the court-martial convening authority can order an Article 32 investigation, the military’s nearest equivalent to a grand jury, but unlike a federal prosecutor in a grand jury proceeding, an Article 32 investigating officer has no subpoena authority.¹¹⁷

Expanding Military Subpoena Authority

Military Law Enforcement and the Legal Community Desire Expanded Authority

The CIPO study demonstrates the need to expand subpoena authority. This evaluation provides insight into military practitioners’ perspectives. The comments of law enforcement officers and JAGC attorneys regarding subpoena authority are revealing. Their comments reflect views ranging from frustration to ignorance. Agents responded that there is “no adequate mechanism . . . available to compel the production of evidence needed to complete their investigations.”¹¹⁸ Military attorneys overwhelmingly “believed that the availability of military subpoena authority similar to that outlined in [RCM 703] but available prior to referral of charges, *would enhance the military justice system.*”¹¹⁹ This conclusion was not limited to prosecutors. Most of the surveyed JAGC defense counsel also agreed

that “subpoena authority similar to that outlined in [RCM 703] should be available prior to referral of charges.”¹²⁰

Legal Community’s Current Understanding of Available Subpoena Authority

Military practitioners’ frustration over the lack of subpoena authority may stem from several problems. Generally, subpoena authority is either: (1) misunderstood; (2) unwieldy; or (3) circumvented by military attorneys. The following cases are a mandate for change.

United States v. Byard¹²¹

More than seven months after preferral, Lieutenant Colonel Frederick B. Byard moved to dismiss charges because the government did not comply with the 120-day speedy trial rule. The delay resulted, in part, from the government’s failure to obtain evidence. Although the trial counsel had attempted to acquire the accused’s financial records after the preferral of charges in August 1985, the accused had “refused to consent to their release, the United States Attorney had refused to issue subpoenas on the military prosecutor’s behalf, and the financial institution had refused to release the records without either . . . [the accused’s] consent or a court order.”¹²² On 21 March 1986, the trial counsel requested a continuance because neither he nor the court had the power to issue a subpoena until after referral. The trial counsel argued that “[t]he government is aware of no other mechanisms for getting those records.”¹²³ The military judge granted the continuance. The Army Court of Military Review (ACMR) ordered a limited evidentiary hearing. At the hearing, the government conceded that the DOD IG had the power to issue subpoenas. The military judge who conducted the hearing found that the trial counsel actually knew about the DOD IG subpoena power but chose not to use it to obtain records.¹²⁴

113. UCMJ art. 46 (2002); see ABA ANALYSIS, *supra* note 67, at 49.

114. ABA ANALYSIS, *supra* note 67, at 15.

115. See Email from Greg Nivala, *supra* note 71.

116. E-mail from Robert Don Gifford, Assistant U.S. Attorney, District of Nev. (Dec. 12, 2002) (on file with author).

117. See MCM, *supra* note 2, R.C.M. 405.

118. CIPO STUDY, *supra* note 1, at 5-6.

119. *Id.* at 9 (emphasis added). Of 753 JAGC attorneys surveyed, 696 gave this response. *Id.*

120. *Id.* Of 753 JAGC attorneys surveyed, 44 were defense counsel and 37 gave this response. *Id.*

121. 29 M.J. 803 (A.C.M.R. 1989).

122. *Id.* at 805.

123. *Id.*

124. *Id.*

The ACMR found that the government was not entitled to any exclusion of the delay and that the government violated the accused's right to a speedy trial.¹²⁵ The court found "that the government's decision was premised upon a calculated estimate of the time required for referral balanced against its desire to avoid involving the Office of the Department of Defense Inspector General and its desire to avoid the requirements of the Right to Financial Privacy Act of 1978."¹²⁶ The court found that the government had other available alternatives such as the DOD IG subpoena and the deposition.¹²⁷

Byard exemplifies the difficulty of trying to subpoena records quickly and efficiently before trial. It demonstrates practitioners' lack of knowledge about alternative subpoena authorities, especially after referral. Although the trial counsel initially argued ignorance, he later appeared to avoid any alternative mechanisms, including the DOD IG subpoena and the deposition subpoena. The trial counsel's willful circumvention of the RFPA resulted in a dismissal of charges. The case shows how U.S. attorneys may be unable to provide subpoena assistance for military cases.¹²⁸ If there are no proceedings pending in federal district court or under investigation by a federal grand jury, as presumably was the case in *Byard*, it is unlikely that a U.S. attorney will be able to coordinate the issuance of a federal subpoena.¹²⁹

Flowers v. First Hawaiian Bank¹³⁰

The Army court-martialed Sergeant Major (SGM) Flowers for larceny while he was stationed at Schofield Barracks, Hawaii.¹³¹ During the Article 32 investigation, the government

issued a subpoena to the First Hawaiian Bank "requesting all bank records for an account held jointly by the Flowers. The subpoena stated on its face that it was a subpoena in an Article 32 proceeding."¹³² The bank released his records but did not inform SGM Flowers of his rights under RFPA. The Army ultimately dismissed the court-martial charges.¹³³

Sergeant Major Flowers filed a complaint against the bank, alleging that it violated the RFPA when it released his bank records to trial counsel. The "district court held that the Article 32 proceeding was within the government litigation exemption"¹³⁴ and found in favor of the bank. Sergeant Major Flowers moved for leave to amend the complaint to add the Army as a defendant. The district court denied the motion.¹³⁵ Sergeant Major Flowers then brought a separate action against the Army in the U.S. District Court for the District of Hawaii (District Court). The District Court found that the bank did not violate the RFPA's exemption for information that was disclosed in the course of litigation between the government and private citizen. The District Court found in favor of the bank, in part, because the Article 32 proceeding was a form of litigation and granted its motion for judgment on the pleadings.¹³⁶ Sergeant Major Flowers appealed to the Court of Appeals for the Ninth Circuit (Ninth Circuit).¹³⁷ On appeal, the Army argued that the

[subpoena was] exempt from the Right to Financial Privacy Act ("RFPA") . . . [because] Section 3413(e) of RFPA provides that the statute does not apply when the government seeks financial records *under* court rules comparable to the Federal Rules of Civil or Criminal Procedure in connection

125. *Id.* at 807.

126. *Id.* at 806.

127. *Id.* at 807.

128. The case does not explain the degree of coordination, if any, between the trial counsel and the U.S. attorney. Often, military investigators, especially in joint investigations, will acquire federal subpoenas for their use, but the purpose behind the subpoena issuance is for the further development of a federal, not a military case.

129. E-mail from Gregg Nivala, Assistant U.S. Attorney, Eastern District of Va. (Dec. 13, 2002); E-mail from Robert Don Gifford, Assistant U.S. Attorney, District of Nev. (Feb. 24, 2003) (on file with author).

130. *Flowers v. First Hawaiian Bank*, 295 F.3d 966 (9th Cir. 2002); see Witherspoon & Solomon, *supra* note 108, at 38 (identifying "a need to update the UCMJ and the Rules for Courts-Martial to grant trial counsel or investigating officer subpoena authority at Article 32 proceedings").

131. *Flowers*, 295 F.3d at 969.

132. *Id.* at 970.

133. *Id.* "The administrative record revealed that Sergeant Major Flowers chose to accept adjudication under Article 15 and agreed to retire in lieu of trial by court martial." Witherspoon & Solomon, *supra* note 108, at 36 (citing the administrative record at 157-58, 162-63 in *Flowers*, 295 F.3d 966).

134. *Id.*

135. *Id.*

136. *Flowers*, 295 F.3d at 969.

137. *Id.* at 970.

with litigation between the government and the person whose records are sought.¹³⁸

The following language illustrates this argument:

The fact that the subpoena was not specifically authorized by the UCMJ or the RCM does not mean that the subpoenaed records were not sought “under” those rules. In common legal usage, a suit arises under a statute even if the suit fails to state a valid claim under that statute. *Ardestani v. INS*, 502 U.S. 129, 135 (1991), held that “under” a statute means “subject to” or “governed by” that statute. Here, the records were sought by a subpoena that was “subject to” and “governed by” the UCMJ and the RCM, even though it turned out not to have been authorized by them. Indeed, the very fact that we refer to the UCMJ and the RCM to determine whether or not the subpoena was authorized confirms that the demand for records was made “under” those sources of law. Certainly the officer who issued the subpoena purported to be acting under the authority of the UCMJ and the RCM, and the subpoena appeared to the Bank to have been issued under them.¹³⁹

The Ninth Circuit reversed and remanded the case, holding that “[n]either the Federal Rules of Civil or Criminal Procedure, the UCMJ, the RCM, nor any other rule authorizes the use of a subpoena in such a proceeding.”¹⁴⁰

Flowers demonstrates the need to expand subpoena authority. Like *Byard*, *Flowers* represents the inappropriate exercise of subpoena authority under the current UCMJ and RCM. It also identifies what could be a common misperception held by trial counsel—that they have the authority to issue a subpoena for an Article 32 investigation before referral. *Flowers* also demonstrates the potentially high litigation costs to the Army and may reflect a new receptiveness to rules implementing subpoena authority earlier in criminal prosecutions. An unknown

number of practitioners probably already believe that this authority is implied.

Expanding Military Subpoena Authority

Amend RCM 703(e)(2)(C)

The CIPO study asked, “[i]f a new military investigative subpoena authority was added to the UCMJ, who should issue/approve the subpoena?”¹⁴¹ Over one third of the participants responded, “trial counsel.”¹⁴² Their response suggests the need for a change to RCM 703(e)(2)(C). The current language states:

Who May Issue: A subpoena may be issued by the summary court-martial, or trial counsel of a special or general court-martial to secure witnesses or evidence for that court-martial proceeding. A subpoena may also be issued by the president of a court of inquiry or by an officer detailed to take a deposition to secure witnesses or evidence for those proceedings respectively.¹⁴³

A more effective provision might state:

Who May Issue: A subpoena may be issued by the summary court-martial, or trial counsel *after referral of charges* to secure witnesses or evidence for *possible* court-martial proceeding. A subpoena may also be issued by the president of a court of inquiry or by an officer detailed to take a deposition to secure witnesses or evidence for those proceedings respectively.¹⁴⁴

By not designating a specific level of court-martial, the proposal removes the referral requirement. It also gives trial counsel post-referral subpoena authority.

Such a change does not require congressional action. Arguably, it requires only executive action.¹⁴⁵ This change aligns the military rules with Rule 17 of the *FRCP*, which states that a

138. Brief of Amici Curiae for the United States at 11, *Flowers v. First Hawaiian Bank*, 295 F.3d 966 (9th Cir. 2002) (No. 00-15635) (emphasis added).

139. *Id.* at 12.

140. *Flowers*, 295 F.3d at 974. The District Court has not yet resolved the issues remanded by the Ninth Circuit.

141. CIPO STUDY, *supra* note 1, at 9.

142. *Id.* Over 200 JAGC attorneys gave this response.

143. MCM, *supra* note 2, R.C.M. 703(e)(2)(C).

144. Email from Scott Russell, *supra* note 82. According to SA Russell, some proponents to expand subpoena argue that it should cover the period prior to referral, because Rule 17, FED. R. CRIM. P., is used extensively to issue grand jury subpoenas prior to indictment, primarily to acquire documentary information.

clerk *shall* issue a subpoena.¹⁴⁶ As case law has equated the trial counsel with a district court clerk in terms of subpoena authority, it seems reasonable for a trial counsel to have the same authority as a district court clerk, after the preferral of charges.¹⁴⁷ An amendment also has a strong statutory foundation in Articles 36 and 46, UCMJ. Article 36 “requires the President, when prescribing regulations, to apply the principles of law and the rules of evidence generally recognized in criminal trials in U.S. district courts, which are not contrary or inconsistent with the UCMJ.”¹⁴⁸ Article 46 states that “[p]rocess issued in court-martial cases to compel witnesses to appear and testify and to compel the production of other evidence *shall be similar* to that which courts of the United States having criminal jurisdiction may lawfully issue.”¹⁴⁹ Therefore, any change to RCM 703(e)(2)(C) would rely on principles of law generally recognized by and based on similar practices used by Article III courts. Based on Congress’s predisposition to leave the mechanical details as to the issuance of process to regulation, it would likely be indifferent to an amendment and defer to the President’s judgment.¹⁵⁰ Military practitioners want and need this amendment.

Some may oppose this change, especially if they believe that legislative change is necessary. Opponents may argue that the language of Article 46 implicitly requires the formal existence of a “court-martial” before trial counsel may issue subpoenas.¹⁵¹ If so, Congress would need to eliminate or modify the language in Article 46. Legislative action would certainly provide a stronger foundation for amendments to RCM 703(e)(2)(C), but its absence would hardly be a reason to avoid amending the rule. More troubling is the view that the combi-

nation of preferral and referral is the federal equivalent of an indictment or an information.¹⁵²

Amend RCM 405(g)

While not mentioned in the final IG report, some JAGC survey participants provided comments regarding Article 32 investigations. Most of these comments revealed frustration over an inability to acquire necessary evidence without a subpoena.¹⁵³ These responses may favor a proposal to amend RCM 405(g)(2) and recommend the authority that trial counsel sought in *Flowers*. The current language of RCM 405(g)(2)(B) states that: “[t]he investigating officer shall decide whether a civilian witness is reasonably available to appear as a witness.”¹⁵⁴ An amendment to the rule might state that “[t]he presence of witnesses not on active duty may be obtained by subpoena.”¹⁵⁵ Currently, RCM 405(g)(2)(C) states:

Evidence. The investigating officer shall make an initial determination whether evidence is reasonably available. If the investigating officer decides that it is not reasonably available, the investigating officer shall inform the parties. Otherwise, the custodian of the evidence shall be requested to provide evidence. A determination by the custodian 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).¹⁵⁶

145. Colonel William F. Condran, Jr. & Major Michelle Crawford, Information Paper, *The Manual for Courts-Martial (MCM) Changing the Rules* (5 Feb. 2003) [hereinafter Information Paper] (on file with author) (explaining how to change the UCMJ). Article 36 of the UCMJ gives the President authority to prescribe pretrial, trial, and post-trial procedures, including modes of proof, for cases arising under the UCMJ triable in courts-martial. Thus, the President has authority to change the Rules for Court Martial and the Military Rules of Evidence by executive order. *Id.*; see UCMJ art. 136 (2002).

146. FED. R. CRIM. P. 17; E-mail from Robert Don Gifford, Assistant U.S. Attorney, District of Nev. (Feb. 24, 2003) (on file with author). Mr. Gifford noted that short of its use in a grand jury, Rule 17 does not require document disclosure before trial, but rather requires disclosure only on the day of trial. The court can order documents disclosed only upon motion. *Id.*

147. This proposal also eliminates the disparity between trial counsel’s post preferral and post referral subpoena authority.

148. Information Paper, *supra* note 145.

149. UCMJ art. 46 (emphasis added).

150. *Uniform Code of Military Justice: Hearings on H.R. 2498 Before a House Subcomm. of the Comm. on Armed Services*, 81st Cong. 1057 (1949) (commentary); H.R. REP. NO. 491, at 25 (1949); S. REP. NO. 486, at 21 (1949).

151. UCMJ art. 46. “Process issued in court-martial case to compel witnesses to appear and testify and to compel the production of other evidence shall be similar to that which courts of the United States having criminal jurisdiction may lawfully issue.” *Id.*

152. See ABA ANALYSIS, *supra* note 67, at 15.

153. CIPO STUDY, *supra* note 1.

154. MCM, *supra* note 2, R.C.M. 405(g)(2)(B).

155. E-mail from Captain Daryl B. Witherspoon, Attorney, Litigation Division (General Litigation Branch), U.S. Army Legal Services Agency (Feb. 3, 2003) (drafting proposal) (on file with author).

A more effective provision might read as follows: “[E]vidence. The presence of evidence not within military control may be obtained by subpoena.”¹⁵⁷

The President should consider implementing a new RCM 405(g)(2)(E). This rule could state as follows:

Who May Issue a subpoena. The special court-martial or the trial counsel may issue a subpoena after prefferal of charges to secure witnesses or evidence for a court-martial. A subpoena may also be issued by the president of a court of inquiry or by an officer detailed to take a deposition to secure witnesses or evidence for those proceedings respectively. The subpoena shall be issued using procedures set forth in RCM 703(e)(2)(D), (F), and (G).¹⁵⁸

Although “[v]arious authorities have equated the Article 32 investigation to the investigation of charges accomplished in civilian life by a grand jury,”¹⁵⁹ there are major differences between them. In a grand jury, as already noted, the prosecution may issue subpoenas.¹⁶⁰ This is not true in Article 32 investigations.¹⁶¹ These proposals for modification of RCM 703 would provide subpoena authority similar to the authority grand juries currently possess. This change would end the conflict over pre-referral subpoena authority. These proposals also have a statutory foundation in Article 36, because they are based on the principles of law generally recognized in criminal trials in U.S. district courts, and are consistent with the UCMJ. Adopting these amendments would also place Article 32 investigating officers in a better position to collect information to help them make critical decisions.

Unfortunately, these proposals will presumably require an amendment to Article 32, UCMJ, a corresponding change to RCM 703, and possibly an amendment to Article 46, UCMJ.

156. MCM, *supra* note 2, R.C.M. 405(g)(2)(C).

157. Witherspoon, *supra* note 155.

158. *Id.*

159. Lieutenant Colonel William A. Murphy, *The Formal Pretrial Investigation*, 12 MIL. L. REV. 1 (1961) (citing ROBINSON O. EVERETT, *MILITARY JUSTICE IN THE ARMY FORCES OF THE UNITED STATES* 169 (1956)).

160. *See* FED. R. CRIM. P. 17.

161. *See* MCM, *supra* note 2, R.C.M. 703(e)(2)(B).

162. UCMJ art. 32 (2002).

163. CIPO STUDY, *supra* note 1, at 9. Over 200 of the JAGC survey respondents supported this opinion. *Id.*

164. *Id.*; *see* MCM, *supra* note 2, R.C.M. 305(i). Instead of addressing the review of pre-trial confinement, as with RCM 305(i), an amended RCM 703 would contain language describing the responsibilities of a neutral and detached officer appointed in accordance with regulations by the secretary concerned. It would also describe the standards necessary for that officer’s use of subpoena authority after the prefferal of charges.

165. *See* U.S. DEP’T OF ARMY, REG. 27-10, *MILITARY JUSTICE* ch. 9 (6 Sept. 2002).

For example, the first sentence of Article 32 states that an investigation is required before referral to a general court-martial.¹⁶² This language implies that the parties to the investigation have no subpoena authority under the current understanding of RCM 703 and Article 46. Article 32 also lacks implicit or explicit language authorizing the investigating officer or trial counsel to issue subpoenas. As a result, there is a subpoena authority vacuum in Article 32. This vacuum must be filled before the consideration of any applicable rules for court-martial.

Expand or Establish a Military Magistrate Program

Another third of JAGC participants in the CIPO Study responded that if the UCMJ adopts a new investigative subpoena authority, military magistrates should issue or should be permitted to approve subpoenas.¹⁶³ Their response suggests the need for a change to RCM 703, incorporating language similar to that in RCM 305(i).¹⁶⁴ Some may contend that RCM 702 would serve as a foundation for military magistrates to issue subpoenas. An amendment to the rule’s language would give military magistrates subpoena authority beyond that of deposition officers.

This proposal’s most positive aspect is its assurance of oversight by a neutral and detached military magistrate between a case’s prefferal and referral phases. In the Army, there is currently an active, part-time military magistrate program that is supervised by individual military judges.¹⁶⁵ These military judges could continue to supervise the military magistrate program participants and mentor them in the handling of subpoena authorizations. Trial counsel, defense counsel, Article 32 investigating officers, and even law enforcement officers could go to a military magistrate to request a subpoena. The proposal would allow each service the flexibility to establish its own rules and procedures, while also leaving open the option of not adopting a military magistrate program at all. For example, the Army could modify its regulations to reflect the additional sub-

poena authority for a military magistrate, while other services could decide whether to initiate similar programs.

This proposal's most negative aspect is that it may require legislative change to Article 46 to create explicit language allowing for a military magistrate or military judge to issue a subpoena.¹⁶⁶ Military attorneys will have to determine how to best modify the RCM to reflect the subpoena authority of a military magistrate. Amending an Army regulation will take time, and it will take even longer to initiate regulations or procedures for those services without an existing military magistrate program.

Delegation of Administrative Subpoena Authority

The CIPO study revealed that a majority of the JAGC respondents were unfamiliar with the DOD IG subpoena.¹⁶⁷ Their unfamiliarity, however, does not discount the value of proposals to amend the administrative subpoena process. For instance, the "Inspector General Act of 1978 authorizes the Inspector General to require by subpoena [sic] the production of all information . . . necessary in the performance of functions assigned by this Act . . . [N]o provision in the Act . . . states that this subpoena authority may be delegated outside the Office of the Inspector General or used for purposes outside the scope of the Act."¹⁶⁸ Congress should consider amending the Inspector General Act of 1978 to permit delegation of the subpoena authority.

This further delegation of subpoena authority has advantages. It would foster efficiency because the authority would be used a level closer to an investigation. The delegation could go down as far as the installation IG, who would have a more practical, firsthand perspective on the case in question. Finally, the delegation would not abrogate the standards of the inspector IG's system.¹⁶⁹

The disadvantages of this proposal outweigh the advantages, however. First, acquiring such delegation through legislative amendment may be difficult if Congress is unwilling to do for one agency what it will not do for others. Second, any dele-

gated subpoena authority would still be limited to the parameters of the act—fraud, waste, and abuse, but not general crimes.¹⁷⁰ Finally, the IG's office would likely have a difficult time monitoring the process if it was spread out around the world. While such a proposal would make the process easier and more accessible to subordinate organizations, it would certainly not change the inherent limitations of the DOD IG subpoena.

The Status Quo

While the CIPO study brought attention to the inadequacy of "subpoena authority within [the] DOD in support of general crimes investigations for offenses punishable under the UCMJ,"¹⁷¹ there is no guarantee that the JCS will make any recommendations for legislative changes or modifications to the current RCM. There is also no guarantee that either Congress (by legislation) or the President (by executive order) will enact the JCS's recommendations.

In the absence of change, military practitioners could take innovative approaches to pending cases. Military practitioners should encourage and foster "effective working relationships with the DOJ in the investigation and prosecution of crimes involving the programs, operations, or personnel of the Department of Defense."¹⁷² Investigators should seize every opportunity to conduct joint investigations and to share information. This can be especially useful during investigations where MCIO agents and federal law enforcement agents can cross jurisdictional boundaries and assist each other by distributing responsibilities and sharing logistical resources. Opportunities for military prosecutors are also available through the special assistant U.S. attorney (SAUSA) program.¹⁷³ As SAUSAs, military prosecutors can pursue cases that the Department of Justice (DOJ) might not have pursued and which are critical to the Army's needs. These opportunities can establish meaningful working relationships between the DOD and DOJ, and could potentially even give military practitioners access to federal subpoena authority.

166. See UCMJ art. 46.

167. CIPO STUDY, *supra* note 1 (outlining JAGC survey results, Question 25).

168. *Id.* at 9.

169. *But see* Lieutenant Colonel Craig Meredith, *The Inspector General System*, ARMY LAW., Jul./Aug. 2003, at 20.

170. Any consideration of amending the Inspector General's Act to allow subpoena authority for general crime investigations is highly unlikely, considering the Act's main purpose to prevent and detect fraud, waste, and abuse.

171. CIPO STUDY, *supra* note 1, at 5.

172. U.S. DEP'T OF DEFENSE, DIR. 5526.7, IMPLEMENTATION OF THE MEMORANDUM OF UNDERSTANDING BETWEEN THE DEPARTMENT OF JUSTICE AND THE DEPARTMENT OF DEFENSE RELATING TO THE INVESTIGATION AND PROSECUTION OF CERTAIN CRIMES 2 (22 Jan. 1985).

173. *Id.* para. C.3.E.1, encl. 1.

This is not a full solution to the problem, however. A civilian jurisdiction's subpoena authority will not always run parallel with military procedure. The *Byard* case exemplifies this point.¹⁷⁴ Military practitioners, especially attorneys, should coordinate with the MCIO legal staffs. These staffs are often divided into regions to better support practitioners in the field.¹⁷⁵

Under the U.S. Army CID, each of its regions has a Group Judge Advocate (GJA) who is responsible for providing advice and assistance to CID commanders and agents within that subordinate command. These GJAs and their service counterparts can be as proactive as necessary to support their agents and the military attorneys who work with them at the unit level, through training, education, and administrative support. For example, they can provide assistance in preparing DOD IG subpoena requests and coordinating their approval through the IG's office. They can also be great resources on issues ranging from internal MCIO procedures to avoiding potential pitfalls under the RFPA. Most importantly, they can be important liaisons between MCIO investigators, military attorneys, and their counterparts in the federal and state judicial systems. It is incumbent upon the GJAs to ensure that trial counsels and investigators know they are available to help when needed.¹⁷⁶

Finally, practitioners need to understand the limitations of the available subpoena authority and be aware of the legal alternatives. From an examination of all the CIPO Survey responses, it is apparent that investigators and attorneys alike frequently used or attempted to use substitute mechanisms to acquire much-needed evidence.¹⁷⁷ Unfortunately, under the current procedures, sometimes no recourse is available.

Conclusion

From its start in England to its birth in the American colonial government, and then in the military, subpoena authority was either non-existent or little-used. Over time, the needs of the

evolving judicial system and its success in limited forums such as the English Chancery fostered expansion of subpoena powers through statutes and rules. Today, the views of military practitioners and the CIPO Study reflect the need to expand subpoena authority in the military.

The interval between prefferal and referral, when no adequate or useful mechanism is available to enforce the production of evidence and witnesses, often leaves practitioners frustrated and in search of ways to acquire evidence. This is a critical period of time, when investigating officers and trial counsel need access to evidence and information in order to decide whether preferred charges have merit. If relevant information is unavailable, then justice cannot be served and the accused must go through a potentially unnecessary and arduous process.

Practitioners have pursued various methods to acquire the evidence needed to investigate and develop a case before referral. Some approaches, as demonstrated by *Byard* and *Flowers*, resulted in negative, costly consequences. An appraisal of other approaches is limited to the recorded, voluntary statements that participants made in the CIPO evaluation. Based on these sources, there is no doubt that there is a need for change—this is the time to consider amending the RCM, the UCMJ or both.

While there are advantages and disadvantages to each proposal to expand subpoena authority, modification of RCM 703 (e)(2)(C) appears to be the most viable. It is not certain whether such a change would require Congress to modify Article 46, UCMJ. Modification to RCM 405(g)(2) is viable both separately and in addition to the RCM 703(e)(2)(C) change. This would make appropriate legislative modification to Article 32, UCMJ necessary, however. Other proposals have merit, but lack the breadth of the first two proposals. Other proposals may also meet resistance from the various services and from the DOD IG, because they would require considerable regulatory guidance and supervision to ensure quality and consistency.

174. See *United States v. Byard*, 29 M.J. 803, 805 (A.C.M.R. 1989).

175. For instance, the USACIDC is composed of:

a command headquarters, forensic laboratories, the U.S. Army Crime Records Center, the U.S. Army Protective Services Activity, and worldwide field investigative units.

In non-tactical situations, each USACIDC unit is normally a tenant activity at an Army installation, providing investigative support to the installation commander as well as to the commanders of all other Army elements located within a USACIDC specified geographic area of responsibility. The commander or special agents in-charge at each unit provides advice and guidance on all CID matters to supported commanders and provost marshals or security officers.

U.S. DEP'T OF ARMY, REG. 195-2, CRIMINAL INVESTIGATION ACTIVITIES para.2-1 (30 Oct. 1985); see U.S. Army Criminal Investigation Command, CID Public Affairs, CID Units (29 Jul. 2003), at <http://www.cid.army.mil/>.

176. It appears that practitioners may not realize that GJAs or their service counterparts exist, or may not use their assistance.

177. CIPO STUDY, *supra* note 1. Survey responses indicate that investigators used many other mechanisms to acquire evidence, such as command-authorized searches based on probable cause, search warrants, written requests such as those under the RFPA, and federal court orders. Interestingly, the majority of investigators found that consent searches were the most effective tool used to gather evidence. *Id.*

Maintaining the status quo is another option, but the common law courts of sixteenth century England have already demonstrated the status quo is not always the most efficient and thorough approach to justice. Just as in the sixteenth century, when “it was becoming obvious that juries could not decide the

questions at issue from their own knowledge,”¹⁷⁸ it is now obvious that the military legal system needs—and its practitioners want—more expansive subpoena authority to pursue the crimes of a modern and technologically complicated world.

178. HOLDSWORTH, *supra* note 23, at 131.