

1 **SEC. ____ . AUTHORITY TO COMPEL PRODUCTION OF DOCUMENTARY**

2 **EVIDENCE PRIOR TO TRIAL IN MILITARY JUSTICE CASES.**

3 (a) SUBPOENA DUCES TECUM.—Section 847 of title 10, United States Code (article 47 of
4 the Uniform Code of Military Justice), is amended—

5 (1) in subsection (a)(1), by striking “board;” and inserting “board or has been duly
6 issued a subpoena duces tecum for an investigation, including an investigation pursuant
7 to section 832(b) of this title (article 32(b)); and”; and

8 (2) in subsection (c), by striking “or board,” and inserting “board, trial counsel, or
9 convening authority,”.

10 (b) REPEAL OF OBSOLETE PROVISIONS RELATING TO FEES AND MILEAGE PAYABLE TO
11 WITNESSES.—Such section is further amended—

12 (1) in subsection (a)—

13 (A) by striking paragraph (2); and

14 (B) by redesignating paragraph (3) as paragraph (2); and

15 (2) by striking subsection (d).

16 (c) TECHNICAL AMENDMENTS.—Subsection (a) of such section is further amended by
17 striking “subpoenaed” in paragraphs (1) and (2) (as redesignated by subsection (b)(1)(B)) and
18 inserting “subpoenaed”.

19 (d) EFFECTIVE DATE.—The amendments made by subsection (a) shall apply with respect
20 to subpoenas issued after the date of the enactment of this Act.

Section-by-Section Analysis

Under current law, there is no mechanism under the Uniform Code of Military Justice (UCMJ) to compel production of documentary evidence prior to trial. This is problematic in

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many cases involving banking and similar records, because these institutions face potential civil liability if they release records without a subpoena. In these cases, an investigation is often delayed or obstructed. This proposal would alleviate this problem by providing military counsel representing the United States and Article 32(b) investigating officers the authority to issue subpoenas duces tecum in order to allow review of documentary evidence prior to trial.

Under 10 U.S.C. 836(a) (Article 36(a) of the UCMJ), military practice is to conform to Federal criminal court practice. Both Federal prosecutors and grand juries have subpoena powers. The Federal Rules of Criminal Procedure permit the prosecutor to obtain a blank subpoena from the clerk of court and use it to order the production of any books, papers, documents, data or other objects designated by the prosecutor before trial or before they are to be offered into evidence. This amendment would better conform military practice to Federal practice by allowing military prosecutors and Article 32 investigating officers to issue subpoenas, while allowing for the difference in the military justice system that there are no standing courts, and therefore no clerk of court, until a charge has been referred. This amendment would increase the availability of documentary evidence during the criminal investigation and Article 32, UCMJ, investigation stages of a case, resulting in more efficient use of investigative and military justice resources, and a more just trial process.

In addition, the Department of Defense proposes deleting the requirement to first tender fees and mileage to witnesses in advance because it is impracticable to project with a degree of accuracy that avoids subsequent adjustments, thereby creating an unnecessary administrative burden. Fees and mileage should instead be tendered when total expenses can be determined. Invitational travel orders are typically issued to help witnesses travel and file travel vouchers for the payment of expenses associated with the travel. Additionally, separate appropriations for the compensation of witnesses are not available and the convening authority's other funds are used.

Budget Implications: This proposal would not result in any appreciable increased costs to the Department of Defense as it relates to the administration of the military justice system.

Unified Legislative Budget (ULB) Proposal Number: N/A

Department of Defense Priority: This proposal enhances the DoD priority to Preserve and Enhance the Force, by promoting Good order and discipline in the Armed Forces. The amendments to Article 47, UCMJ (10 U.S.C. § 847) would strengthen an enforceable legal mechanism by subpoena to enable necessary and appropriate documentary evidence and witnesses to be made available for the pretrial investigation of alleged UCMJ offenses, as well as for trials by courts-martial and other military tribunals.

Resubmission Justification: This proposal is being submitted for the first time.

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Changes to Existing Law: This proposal would make the following changes to section 847 of title 10, United States Code:

§ 847. Art 47. Refusal to appear or testify

(a) Any person not subject to this chapter who—

(1) has been duly ~~subpenaed~~ subpoenaed to appear as a witness before a court-martial, military commission, court of inquiry, or any other military court or board, or before any military or civil officer designated to take a deposition to be read in evidence before such a court, commission, or board or has been duly issued a subpoena duces tecum for an investigation, including an investigation pursuant to section 832(b) of this title (article 32(b)); and

~~(2) has been duly paid or tendered the fees and mileage of a witness at the rates allowed to witnesses attending the courts of the United States; and~~

~~(3) (2) willfully neglects or refuses to appear, or refuses to qualify as a witness or to testify or to produce any evidence which that person may have been legally ~~subpenaed~~ subpoenaed to produce;~~

is guilty of an offense against the United States.

(b) Any person who commits an offense named in subsection (a) shall be tried on indictment or information in a United States district court or in a court of original criminal jurisdiction in any of the Commonwealths or possessions of the United States, and jurisdiction is conferred upon those courts for that purpose. Upon conviction, such a person shall be fined or imprisoned, or both, at the court's discretion.

(c) The United States attorney or the officer prosecuting for the United States in any such court of original criminal jurisdiction shall, upon the certification of the facts to him by the military court, commission, court of inquiry, ~~or board,~~ trial counsel, or convening authority, file an information against and prosecute any person violating this article.

~~(d) The fees and mileage of witnesses shall be advanced or paid out of the appropriations for the compensation of witnesses.~~