SEC. 532. AUTHORITY TO COMPEL PRODUCTION OF DOCUMENTARY EVIDENCE PRIOR TO TRIAL IN MILITARY JUSTICE CASES.

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

(1) in subsection (a)(1), by striking "board;" and inserting "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"; and

(2) in subsection (c), by striking "or board," and inserting "board, trial counsel, or convening authority,".

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

(1) in subsection (a)—

(A) by striking paragraph (2); and

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

(2) by striking subsection (d).

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

(d) EFFECTIVE DATE.—The amendments made by subsection (a) shall apply with respect 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 a formal investigation under

Article 32, UCMJ. This is problematic in many cases involving telephone, Internet Service Provider, bank records, 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 in the course of an investigation.

Under 10 U.S.C. 836(a) (Article 36(a) of the UCMJ), military practice is to conform to Federal criminal procedure when the President finds it practicable. Both Federal prosecutors and grand juries have subpoena powers even before charges are filed. 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 (DoD) 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.

Discussions with congressional staffers of this proposal as submitted for the Fiscal Year (FY) 2011 National Defense Authorization Act (NDAA) raised the question of how the proposed amendment would allow subpoena duces tecum recipients to challenge the propriety of a subpoena when there would be no military judge with responsibility for the case. The answer is that the military subpoena power before referral of charges is subject to the supervision of the court-martial convening authority, an official vested with quasi-judicial responsibilities by Congress. "In the court-martial hierarchy we have three bodies, the court-martial, the convening authority and the [military appellate court], which the law requires to consider matters which in civilian criminal jurisdictions are within the exclusive province of the trial court." *United States v. Blackmon*, 27 CMR 783, 787 (ACMR, 1959).

Court-martial convening authorities exercise judicial functions established by statute and recognized by the courts. Congress has, through the UCMJ, established that a convening authority is "an official who has a legitimate claim to vast power and who can be held accountable for its exercise." Note, *Prosecutorial Power and the Legitimacy of the Military Justice System*, 123 Harvard Law Review 937, 957 (2010). Oversight of pretrial subpoena duces

tecum authority would be consistent with the well-established role of convening authorities in the military justice system.

The existing court-martial subpoena power under 10 USC §847 is implemented by Rule for Courts-Martial 703, which provides in pertinent part that "[i]f a person subpoenaed requests relief on the grounds that compliance is unreasonable or oppressive, the convening authority or, after referral, the military judge may direct that the subpoena be modified or withdrawn if appropriate." Rule for Courts-Martial 703(e)(2)(F). Thus if 10 USC §847 were amended to provide for subpoenas duces tecum before referral, the existing Rule for Courts-Martial would provide for convening authority oversight. The current oversight rule is so constructed because Rule for Courts-Martial 703(3)(2)(C) enables deposition officers to subpoena civilians, and Rule for Courts-Martial 702(a) provides that a deposition may be ordered to secure evidence for an Article 32 pretrial investigation.

A civilian's failure to comply with a subpoena is a criminal offense punishable in the federal civilian courts, not military courts. A military subpoena creates a legal duty on the recipient, but that duty is enforced by the civil authority. Rule for Courts-Martial 703(e)(2)(G) provides that a convening authority or a military judge can address noncompliance by issuing a warrant of attachment to be executed by a United States marshal. Article 47, UCMJ, 10 USC §847, although part of the Uniform Code of Military Justice, defines a criminal offense applicable (only) to persons not subject to military jurisdiction under Article 2, UCMJ, 10 USC §802. Prosecution for noncompliance therefore occurs in the civilian courts. 10 USC §847(b).

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.

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.~~