

# COMPELLED DECRYPTION IN THE MILITARY JUSTICE SYSTEM

# The MJRG & Military Justice Act of 2016

## Before MJA 2016

- The military lacked a pre-referral investigative subpoena.
- Law enforcement could issue IG subpoenas, but enforcement was in U.S. District Court.
- Unclear if an IG subpoena to Accused fell within the “functions assigned by this [IG] Act”
- Trial counsel subpoenas after referral – too late to be practical

## MJRG Recommendations

- Add a pre-referral investigative subpoena
  - Cites federal civilian practice as a model
- Extend military judge contempt power to pre-referral subpoenas
- Military courts have treated MJA 2016 as informed by the MJRG report.

# Compelled Decryption in U.S. District Courts

Fed. R. Crim. P. 17(c)(1) – subpoena to “order the witness to produce any books, papers, documents, data, or other objects the subpoena designates.”

DoJ Justice Manual – “[a] grand jury may properly subpoena a subject or a target of the investigation and question the target about his or her involvement in the crime under investigation.”

Fed. R. Crim. P. 17(g) – “court (other than a magistrate judge) may hold in contempt a witness who, without adequate excuse, disobeys a subpoena issued by a federal court in that district.”

# MJA 2016, Article 30a, and Article 46

Article 30a(a)(1) – “The President shall prescribe regulations for matters relating to proceedings conducted before referral of charges and specifications to court-martial for trial, including the following:

(A)Pre-referral investigative subpoenas . . .”

Article 46(d)(1)(C) – a subpoena “[m]ay be issued to compel production of evidence for an investigation of an offense under this chapter.”

Article 30 and Article 46 have no language exempting the Accused.

# Rules Implementing Article 30a

RCM 309(b)(1) - A military judge may, upon application by the Government, consider whether to issue a pre-referral investigative subpoena under R.C.M. 703(g)(3)(C). The proceeding may be conducted ex parte and may be conducted in camera.

RCM 703(g)(3)(C) - In the case of a subpoena issued before referral for the production of evidence for use in an investigation, the subpoena shall command each person to whom it is directed to produce the evidence requested for inspection the Government counsel who issued the subpoena or for inspection in accordance with an order issued by the military judge.

RCM 703(g)(3)(C) – Serve by delivering a copy “to the person named.”

No exemptions for the Accused.

# The Subpoena & the Search Authorization

Search Authorization – authorization to search a person or an area for specified property or evidence or for a specific person and to seize such property, evidence, or person.

Subpoena – a tool for obtaining the device in an unencrypted state.

- Must be within the scope of the search authorization.
- Need not necessarily refer to the search authorization.
- Describe the device and a state allowing an effective search. This will depend on the device -- e.g. a phone in an unlocked state with automatic re-locking disabled.
  - Consult with DC3 on necessary subpoena language.
- Maybe describe the evidence expected to be found if taking a conservative approach to the foregone conclusion doctrine.

# Enforcement

Military courts lack civil contempt authority like U.S. District Courts

Military Judge Contempt Power – Article 48 - 30 days & a fine.

## Subsequent Prosecution

- Article 90 & 92(2) – disobeying orders
  - A judge's order probably qualifies, but a commander's order would also be advisable absent specific case-law
- Article 131b – Obstruction of Justice – disobeying a judge's order likely counts
- Article 131e – Preventing Authorized Seizure – a subpoena is not a seizure
- Article 131f(2) – Noncompliance with Procedural Rules by Failing to Comply with the Code – probably applies, but no case-law.
- Article 133 – Conduct unbecoming– likely applies; prosecutor's choice
- Article 135 – Contempt of Court – likely pre-empted by more specific Articles

# The Foregone Conclusion Doctrine

Act of Production Doctrine – an act qualifies for Fifth Amendment protection if the act is “testimonial, incriminating, and compelled.” Hiibel v. Sixth Jud. Dist. Ct. of Nev., 542 U.S. 177, 189 (2004).

Foregone Conclusion Doctrine – if the compelled act “adds little or nothing to the sum total of the Government’s information,” the implied testimony is a “foregone conclusion” and does not violate the Fifth Amendment. United States v. Fisher, 425 U.S. 391, 411 (1976)

Note: the Foregone Conclusion Doctrine applies only to acts of production, not compelled statements, so do not compel the Accused to state the passcode.



# Two Approaches to the Foregone Conclusion

What conclusion must be foregone?

Third Circuit – Government must only show the Accused can decrypt the device. *United States v. Apple Mac Pro Computer*

Eleventh Circuit – Government must show with “reasonable particularity” what evidence will be found on the device. *In re Grand Jury Subpoena Duces Tecum*

Note: Prof Kerr proposes a third option based on the 1807 trial of Aaron Burr. May be an interesting argument in cases where the evidence itself is contraband.

# Alternatives to the Article 30a Subpoena

Alternatives, such as a commander's order, are likely legal.

The Foregone Conclusion doctrine is agnostic as to the means of ordering the Accused to produce the device in an undecrypted state.

Article 30a will usually be the best option for trial counsel. The Article 30a subpoena offers a timely and orderly process with early judicial supervision.

QUESTIONS?