SEC. ___. EXCLUSION OF MILITARY MEMBERS WHO MAY RECEIVE PRIVILEGED COMMUNICATIONS FROM SERVICE ON COURTS-MARTIAL.

Section 825(c)(3) of title 10, United States Code (Article 25 of the Uniform Code of Military Justice), is amended by adding at the end the following new paragraph (4):

"(4) Under such regulations as the President may prescribe, the convening authority may limit the eligibility of members engaged in duties that involve the receipt of communications subject to privilege under the Military Rules of Evidence from being detailed as court-martial members.".

[Please note: The "Changes to Existing Law" section below sets out in red-line format how the legislative text would amend existing law.]

Section-by-Section Analysis

This proposal would modify section 825 of title 10, United States Code (Article 25, Uniform Code of Military Justice (UCMJ)), to permit the convening authority -- under regulations prescribed by the President -- to limit the eligibility for court-martial service of members who, as a function of their assigned military duties, receive communications subject to privilege as defined by the Military Rules of Evidence. This provision would provide flexibility in its application by permitting the President, through his rule making authority contained in Article 36 (10 U.S.C. 836), to provide the specific guidance regarding which individuals may be excluded. This flexibility is critical as the Military Rules of Evidence are prescribed by the President via Executive Order and this provision would directly implicate the operation of those rules. Authorizing the President to prescribe the regulations will provide due consideration for each privilege recognized by the Rules.

The Court of Appeals for the Armed Forces (CAAF) held in *United States v. Bartlett*, 66 M.J. 426 (July 7, 2008), that the provisions of Article 25, UCMJ, prohibit the exclusion of specific categories of officers, including but not limited to chaplains, from service on court-martial panels. In *Bartlett*, CAAF considered a challenge to Army Regulation 27-10, which exempted from court-martial service officers assigned to the Medical Corps, Medical Specialist Corps, Army Nurse Corps, Dental Corps, Chaplain Corps, and Veterinary Corps, and those assigned Inspector General duties. The court observed that Congress cast eligibility to serve on court-martial panels "in broad and inclusive terms," and included no limitation based on "branch, corps, or occupational specialty." The court noted that Congress prohibited only specific persons from acting as panel members, including accusers, prosecution witnesses, investigating officers, counsel, and warrant officers and enlisted persons in cases involving commissioned officers.

Concluding that Congress intended "to ensure maximum discretion to the convening authority in the selection process," the court held that the Army regulation "directly conflict[s] with the provisions of Article 25." The exemptions at issue in *Bartlett* spanned the medical, nurse, dental, veterinary, inspector general, and chaplain career fields. The court's decision addressed in a broad manner the Army regulations setting forth those exemptions, but it did not specifically focus on or address the exemption of chaplains.

The ability to exempt those who routinely receive confidential communications in the course of their military duties from serving as court-martial members serves several important purposes. First, it reduces the risk that an individual may be called to serve as a court-martial member in a case where that same individual has received a privileged communication from an accused, witness, counsel, or judge. While the existence of such a privilege can be addressed and protected by a military judge, exempting individuals privy to privileged communications removes the risk of disclosure of privileged communications. Finally, the policy preserves the role of specific individuals, such as chaplains, in providing confidential care and counseling to all military members, including members facing potential UCMJ action.

Budget Implications: There are no anticipated budget implications to this proposal.

Changes to Existing Law: This proposal would make the following changes to 10 U.S.C. 825 (Art. 25, UCMJ):

SEC. 825. ART. 25. WHO MAY SERVE ON COURTS-MARTIAL.

(a) Any commissioned officer on active duty is eligible to serve on all courts-martial for the trial of any person who may lawfully be brought before such courts for trial.

(b) Any warrant officer on active duty is eligible to serve on general and special courts-martial for the trial of any person, other than a commissioned officer, who may lawfully be brought before such courts for trial.

(c)(1) Any enlisted member on active duty is eligible to serve on a general or special court-martial for the trial of any other enlisted member.

(2) Before a court-martial with a military judge and members is assembled for trial, an enlisted member who is an accused may personally request, orally on the record or in writing, that—

(A) the membership of the court-martial be comprised entirely of officers; or

(B) enlisted members comprise at least one-third of the membership of the court-martial, regardless of whether enlisted members have been detailed to the court-martial.

(3) Except as provided in paragraph (4), after such a request, the accused may not be tried by a general or special court-martial if the membership of the court-martial is inconsistent with the request.

(4) If, because of physical conditions or military exigencies, a sufficient number of eligible officers or enlisted members, as the case may be, are not available to carry out paragraph (2), the trial may nevertheless be held. In that event, the convening authority shall make a detailed written statement of the reasons for nonavailability. The statement shall be appended to the record.

(d)(1) Except as provided in paragraph (2) for capital offenses, the accused in a court-martial with a military judge and members may, after the findings are announced and before any

matter is presented in the sentencing phase, request, orally on the record or in writing, sentencing by members.

(2) In a capital case, the accused shall be sentenced by the members for all offenses for which the court-martial may sentence the accused to death in accordance with section 853(c) of this title (article 53(c)).

(3) In a capital case, if the accused is convicted of a non-capital offense, the accused shall be sentenced for such non-capital offense in accordance with section 853(b) of this title (article 53(b)), regardless of whether the accused is convicted of an offense for which the court-martial may sentence the accused to death.

(e)(1) When it can be avoided, no member of an armed force may be tried by a court-martial any member of which is junior to him in rank or grade.

(2) When convening a court-martial, the convening authority shall detail as members thereof such members of the armed forces as, in his opinion, are best qualified for the duty by reason of age, education, training, experience, length of service, and judicial temperament. No member of an armed force is eligible to serve as a member of a general or special court-martial when he is the accuser or a witness for the prosecution or has acted as preliminary hearing officer or as counsel in the same case.

(3) The convening authority shall detail not less than the number of members necessary to impanel the court-martial under section 829 of this title (article 29).

<u>(4) Under such regulations as the President may prescribe, the convening authority may limit the eligibility of members engaged in duties that involve the receipt of communications subject to privilege under the Military Rules of Evidence from being detailed as court-martial members.</u>

(f) Before a court-martial is assembled for the trial of a case, the convening authority may excuse a member of the court from participating in the case. Under such regulations as the Secretary concerned may prescribe, the convening authority may delegate his authority under this subsection to his staff judge advocate or legal officer or to any other principal assistant.