SEC. __. LIMITATION ON AUTHORITY OF CONVENING AUTHORITY TO REVIEW FINDINGS OF A COURT-MARTIAL.

(a) LIMITATION OF AUTHORITY TO OFFENSES THAT WOULD NOT NORMALLY WARRANT TRIAL BY COURT-MARTIAL.—Subsection (c) of section 860 of title 10, United States Code (article 60 of the Uniform Code of Military Justice), is amended—

(1) in paragraph (3)—

(A) by inserting "may be taken" after "finding of a court-martial";

(B) by striking "is not required. However," and inserting "only with respect to a qualified offense. With respect to such an offense,";

(C) by striking "may—" and all that follows through "(A) dismiss" and inserting "may dismiss";

(D) by striking "; or" and inserting a period; and

(E) by striking subparagraph (B); and

(2) by adding at the end the following new paragraph:

"(4)(A) In paragraph (3), the term 'qualified offense' means, except as provided in subparagraph (B), an offense under this chapter for which—

"(i) the maximum sentence of confinement that may be adjudged does not exceed two years; and

"(ii) the sentence adjudged does not include dismissal, a dishonorable or bad-conduct discharge, or confinement for more than six months.".

"(B) Such term does not include such offenses as the Secretary of Defense may prescribe by regulation.

(b) REQUIREMENT FOR EXPLANATION IN WRITING.—Such subsection is further amended by adding after paragraph (4), as added by subsection (a)(2), the following new paragraph:

"(5) If the convening authority or other person authorized to act under this section modifies the findings or sentence of a court-martial, such person shall prepare a written explanation for such modification. Such explanation shall be made a part of the record of trial and action thereon.".

(c) CONFORMING AMENDMENT.—Subsection (e)(3) of such section (article) is amended in the first sentence by inserting "(if authorized to do so under subsection (c))" after "findings and sentence".

(d) EFFECTIVE DATE.—The amendments made by subsections (a) and (c) shall apply with respect to offenses committed on or after the date of the enactment of this Act.

Section-by-Section Analysis

This proposal would amend article 60 of the Uniform Code of Military Justice (UCMJ; 10 U.S.C. 860) to limit the authority of a convening authority to modify the findings of a court-martial. Article 60 authorizes, but does not require, a convening authority to take action on the findings of a court-martial. This authority permits a convening authority to set aside a finding of guilty or change a finding of guilty to a finding of guilty for a lesser included offense.

On April 8, 2013, the Secretary of Defense directed that a legislative proposal be drafted limiting the authority of convening authorities to set aside findings only to offenses that ordinarily are not referred to courts-martial but instead are handled by nonjudicial punishment or adverse administrative action. Consistent with the Secretary's direction, this proposal would amend Article 60 to prohibit a convening authority from setting aside the findings of a court-martial except for a narrow group of qualified offenses. Specifically, the convening authority would only be permitted to take action with respect to an offense where the maximum sentence authorized by the President does not exceed two years and where the sentence adjudged by the court-martial in the case does not include dismissal, a dishonorable or bad-conduct discharge, or confinement for more than six months.

In addition, to ensure that the authority to act on findings is limited to those ordinarily addressed through nonjudicial punishment or adverse administrative action, the Secretary of Defense would have the authority to further restrict the list of such qualified offenses by regulation. The Secretary of Defense intends to use this authority to, at a minimum, exclude any

sexual offenses not otherwise excluded under subparagraph (A)—such as the Article 120c offenses of indecent exposure and indecent viewing—from the list of qualified offenses.

This proposal would allow a convening authority to set aside findings when the accused is charged with a very serious offense and a relatively less serious offense (e.g., robbery and underage drinking), and is acquitted of the very serious offense (e.g., robbery) and convicted only of the relatively less serious offense (e.g., underage drinking). Service members do not ordinarily face court-martial for the offense of underage drinking; commanders normally dispose of such offenses through nonjudicial punishment or adverse administrative action. Rather than have the service member in the above example go through life with a federal conviction for underage drinking, this proposal would authorize the convening authority to set aside the court-martial finding of guilty for underage drinking and instead impose nonjudicial punishment or an adverse administrative action, thus treating the service member similarly to other service members charged with the same offense.

This proposal would preclude the convening authority from taking action on the findings in most courts-martial. Convening authorities would retain their authority to execute pre-trial agreements (plea bargains) and safeguard the interests of the command in every case by taking action under Article 60 on the sentence alone. All courts-martial where the convening authority does not set aside findings will continue to be reviewed under the applicable process established in the UCMJ (e.g., appellate review by a Court of Criminal Appeals, review by the Judge Advocate General).

Subsection (b) of this proposal would require the convening authority to explain, in writing, any action to modify the findings or sentence of a court-martial. This explanation would be made a part of the record of trial, enhancing the transparency of post-trial action by the convening authority and engendering greater trust in the military justice process for all interested parties.

Budget Implications: This proposal has no budgetary implications.

Changes to Existing Law: This proposal would make the following changes to section 860 of title 10, United States Code (article 60 of the Uniform Code of Military Justice):

§860. Art. 60. Action by the convening authority

(a) The findings and sentence of a court-martial shall be reported promptly to the convening authority after the announcement of the sentence.

(b)(1) The accused may submit to the convening authority matters for consideration by the convening authority with respect to the findings and the sentence. Any such submission shall be in writing. Except in a summary court-martial case, such a submission shall be made within 10 days after the accused has been given an authenticated record of trial and, if applicable, the recommendation of the staff judge advocate or legal officer under subsection (d). In a summary court-martial case, such a submission shall be made within seven days after the sentence is announced.

(2) If the accused shows that additional time is required for the accused to submit such matters, the convening authority or other person taking action under this section, for good cause, may extend the applicable period under paragraph (1) for not more than an additional 20 days.

(3) In a summary court-martial case, the accused shall be promptly provided a copy of the record of trial for use in preparing a submission authorized by paragraph (1).

(4) The accused may waive his right to make a submission to the convening authority under paragraph (1). Such a waiver must be made in writing and may not be revoked. For the purposes of subsection (c)(2), the time within which the accused may make a submission under this subsection shall be deemed to have expired upon the submission of such a waiver to the convening authority.

(c)(1) The authority under this section to modify the findings and sentence of a court-martial is a matter of command prerogative involving the sole discretion of the convening authority. Under regulations of the Secretary concerned, a commissioned officer commanding for the time being, a successor in command, or any person exercising general court-martial jurisdiction may act under this section in place of the convening authority.

(2) Action on the sentence of a court-martial shall be taken by the convening authority or by another person authorized to act under this section. Subject to regulations of the Secretary concerned, such action may be taken only after consideration of any matters submitted by the accused under subsection (b) or after the time for submitting such matters expires, whichever is earlier. The convening authority or other person taking such action, in his sole discretion, may approve, disapprove, commute, or suspend the sentence in whole or in part.

(3) Action on the findings of a court-martial may be taken by the convening authority or other person acting on the sentence ~~is not required.~~ only with respect to a qualified offense. With respect to such an offense, ~~S~~such person, in his sole discretion, may—

~~(A)~~ dismiss any charge or specification by setting aside a finding of guilty thereto.~~; or~~

~~(B) change a finding of guilty to a charge or specification to a finding of guilty to an offense that is a lesser included offense of the offense stated in the charge or specification.~~

(4)(A) In paragraph (3), the term "qualified offense" means, except as provided in subparagraph (B), an offense under this chapter for which—

(i) the maximum sentence of confinement that may be adjudged does not exceed two years; and

(ii) the sentence adjudged does not include dismissal, a dishonorable or bad-conduct discharge, or confinement for more than six months.

(B) Such term does not include such offenses as the Secretary of Defense may prescribe by regulation.

(5) If the convening authority or other person authorized to act under this section modifies the findings or sentence of a court-martial, such person shall prepare a written explanation for such modification. Such explanation shall be made a part of the record of trial and action thereon.

(d) Before acting under this section on any general court-martial case or any special-court-martial case that includes a bad-conduct discharge, the convening authority or other person taking action under this section shall obtain and consider the written recommendation of his staff judge advocate or legal officer. The convening authority or other person taking action under this section shall refer the record of trial to his staff judge advocate or legal officer, and the staff judge advocate or legal officer shall use such record in the preparation of his recommendation. The recommendation of the staff judge advocate or legal officer shall include such matters as the President may prescribe by regulation and shall be served on the accused, who may submit any matter in response under subsection (b). Failure to object in the response to the recommendation or to any matter attached to the recommendation waives the right to object thereto.

(e)(1) The convening authority or other person taking action under this section, in his sole discretion, may order a proceeding in revision or a rehearing.

(2) A proceeding in revision may be ordered if there is an apparent error or omission in the record or if the record shows improper or inconsistent action by a court-martial with respect to the findings or sentence that can be rectified without material prejudice to the substantial rights of the accused. In no case, however, may a proceeding in revision—

(A) reconsider a finding of not guilty of any specification or a ruling which amounts to a finding of not guilty;

(B) reconsider a finding of not guilty of any charge, unless there has been a finding of guilty under a specification laid under that charge, which sufficiently alleges a violation of some article of this chapter; or

(C) increase the severity of the sentence unless the sentence prescribed for the offense is mandatory.

(3) A rehearing may be ordered by the convening authority or other person taking action under this section if he disapproves the findings and sentence (if authorized to do so under subsection (c)) and states the reasons for disapproval of the findings. If such person disapproves the findings and sentence and does not order a rehearing, he shall dismiss the charges. A rehearing as to the findings may not be ordered where there is a lack of sufficient evidence in the record to support the findings. A rehearing as to the sentence may be ordered if the convening authority or other person taking action under this subsection disapproves the sentence.