SEC.___. REVISION FROM STATUTORY REQUIREMENT TO DISCRETIONARY AUTHORITY FOR DESIGNATION BY MILITARY JUDGE OF AN INDIVIDUAL TO ASSUME THE RIGHTS OF THE VICTIM OF AN OFFENSE UNDER THE UNIFORM CODE OF MILITARY JUSTICE WHEN THE VICTIM IS A MINOR, INCOMPETENT, INCAPACITATED, OR DECEASED.

Section 806b(c) of title 10, United States Code (article 6b(c) of the Uniform Code of Military Justice), is amended by striking "shall" and inserting "may".

[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 amend the provisions of Article 6b of the Uniform Code of Military Justice (UCMJ) that relate to the designation of a representative for certain victims of offenses under the UCMJ. That article currently requires that a military judge appoint an individual to assume the victim's rights in all cases under the UCMJ in which the victim of an offense is under 18 years of age (unless the victim is a member of the armed forces) or is incompetent, incapacitated, or deceased. The requirement that military judges "shall" appoint a representative provides no discretion to military judges to permit alleged victims who are minors to exercise their rights on their own or through their legal counsel.

This change would bring Article 6b(c) in line with the discretion judges have to appoint an individual to assume the victim's rights under the Crime Victims' Rights Act, 18 U.S.C. 3771. Section 3771(e) provides discretion to the presiding judge to appoint a guardian who may or may not assume the crime victim's rights of a minor, stating in the relevant section:

> "In the case of a crime victim who is under 18 years of age, incompetent, incapacitated, or deceased, the legal guardians of the crime victim or the representatives of the crime victim's estate, family members, or any other persons appointed as suitable by the court, may assume the victim's rights under this chapter…"

This proposal would help protect minors in those situations where they are mature enough to communicate their desires themselves or through counsel. The American Bar Association Model Rules of Professional Conduct, upon which the Service Rules are based, presume the competency of minors to exercise their rights, unless or until they demonstrate they cannot. Special Victims' Counsel (SVC) determine the competency of their clients as well as

prepare representation in accordance with their clients' direction – they voice the choices of a competent client who is a minor. If the victim is able to express his or her desires personally or through counsel, a representative is unnecessary and could be harmful to the interests of the victim. This proposal would allow military judges exercising sound judgment to decide on a case-by-case basis whether it is appropriate to appoint someone to stand in the shoes of the minor or leave the minor to exercise his or her own rights, including when the minor is represented by counsel.

Budget Implications: None. This proposal is cost neutral. The Air Force does not employ or contract with "representatives" who are available to assume a victim's rights in return for compensation. There is no expenditure of monies to appoint a representative and there is no cost-saving in the decision to not appoint a representative. Funds would not be expended or saved with the enactment of the proposal, but military judges would be authorized to exercise their discretion regarding the appointment of a representative.

Changes to Existing Law: This proposal would amend section 806b(c) of title 10, United States Code (article 6b(c) of the Uniform Code of Military Justice), as follows.

§ 806b. Art. 6b. Rights of the victim of an offense under this chapter

(a) RIGHTS OF A VICTIM OF AN OFFENSE UNDER THIS CHAPTER**.—**A victim of an offense under this chapter has the following rights:

(1) The right to be reasonably protected from the accused.

(2) The right to reasonable, accurate, and timely notice of any of the following:

(A) A public hearing concerning the continuation of confinement prior to trial of the accused.

(B) A preliminary hearing under section 832 of this title (article 32) relating to the offense.

(C) A court-martial relating to the offense.

(D) A public proceeding of the service clemency and parole board relating to the offense.

(E) The release or escape of the accused, unless such notice may endanger the safety of any person.

(3) The right not to be excluded from any public hearing or proceeding described in paragraph (2) unless the military judge or investigating officer, as applicable, after receiving clear and convincing evidence, determines that testimony by the victim of an offense under this chapter would be materially altered if the victim heard other testimony at that hearing or proceeding.

(4) The right to be reasonably heard at any of the following:

(A) A public hearing concerning the continuation of confinement prior to trial of the accused.

(B) A sentencing hearing relating to the offense.

(C) A public proceeding of the service clemency and parole board relating to the offense.

(5) The reasonable right to confer with the counsel representing the Government at any proceeding described in paragraph (2).

(6) The right to receive restitution as provided in law.

(7) The right to proceedings free from unreasonable delay.

(8) The right to be treated with fairness and with respect for the dignity and privacy of the victim of an offense under this chapter.

(b) VICTIM OF AN OFFENSE UNDER THIS CHAPTER DEFINED.—In this section, the term "victim of an offense under this chapter" means an individual who has suffered direct physical, emotional, or pecuniary harm as a result of the commission of an offense under this chapter (the Uniform Code of Military Justice).

(c) APPOINTMENT OF INDIVIDUALS TO ASSUME RIGHTS FOR CERTAIN VICTIMS.—In the case of a victim of an offense under this chapter who is under 18 years of age (but who is not a member of the armed forces), incompetent, incapacitated, or deceased, the military judge ~~**shall**~~ **may** designate a representative of the estate of the victim, a family member, or another suitable individual to assume the victim's rights under this section. However, in no event may the individual so designated be the accused.

(d) RULE OF CONSTRUCTION.—Nothing in this section (article) shall be construed—

(1) to authorize a cause of action for damages; or

(2) to create, to enlarge, or to imply any duty or obligation to any victim of an offense under this chapter or other person for the breach of which the United States or any of its officers or employees could be held liable in damages.

(e) ENFORCEMENT BY COURT OF CRIMINAL APPEALS.—(1) If the victim of an offense under this chapter believes that a preliminary hearing ruling under section 832 of this title (article 32) or a court-martial ruling violates the rights of the victim afforded by a section (article) or rule specified in paragraph (4), the victim may petition the Court of Criminal Appeals for a writ of mandamus to require the preliminary hearing officer or the court-martial to comply with the section (article) or rule.

(2) If the victim of an offense under this chapter is subject to an order to submit to a deposition, notwithstanding the availability of the victim to testify at the court-martial trying the accused for the offense, the victim may petition the Court of Criminal Appeals for a writ of mandamus to quash such order.

(3) A petition for a writ of mandamus described in this subsection shall be forwarded directly to the Court of Criminal Appeals, by such means as may be prescribed by the President, and, to the extent practicable, shall have priority over all other proceedings before the court.

(4) Paragraph (1) applies with respect to the protections afforded by the following:

(A) This section (article).

(B) Section 832 (article 32) of this title.

(C) Military Rule of Evidence 412, relating to the admission of evidence regarding a victim's sexual background.

(D) Military Rule of Evidence 513, relating to the psychotherapist-patient privilege.

(E) Military Rule of Evidence 514, relating to the victim advocate-victim privilege.

(F) Military Rule of Evidence 615, relating to the exclusion of witnesses.