Proposed Changes to Rules For Courts-Martial 804, 914A and Military Rule of Evidence 611(d)(2): A Partial Step Towards Compliance with the Child Victims' and Child Witnesses' Rights Statute

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Introduction

Imagine a five-year-old little girl named Mary. She is cute, precocious, and has above average intelligence. Mary lives near a large military installation but her parents are not in the military. Unfortunately, you meet Mary as she enters the criminal justice system. Mary alleges that a military member sexually assaulted her. The assault occurred in a day-care center located in a federal office building. Mary's treatment by the court and the parties will vary greatly depending upon which criminal justice system she enters–the federal system or the military justice system.

If you met Mary as she entered the federal system, she would likely have a guardian *ad litem* whose sole concern is Mary's best interest. Additionally, an adult attendant would be with Mary in court. The role of the adult attendant is to offer Mary emotional support during court proceedings. Mary has the statutory right to testify remotely by closed circuit television or through a videotaped deposition. Mary's right to testify remotely is predicated upon the prosecutor, Mary's parents, or the guardian showing that testifying in court, in the accused's presence, would emotionally harm Mary. In the federal system, Mary benefits from numerous statutory privacy protections designed to protect her dignity.

In contrast to Mary's status in federal court, if you met Mary as she enters the military justice system she would be in a much different position. Mary would be totally dependent upon the trial counsel to protect her interests. She does not have any statutory protections. Mary does not have a guardian. If she has an adult attendant, it is the result of the military judge's discretion–it is not a right. Mary does not have the statutory right to testify remotely nor to offer her testimony through a videotaped deposition. Finally, in contrast to federal court, Mary has far fewer privacy protections.

Although the scenario described above may seem illogical or unfair, it reflects the striking differences in the way the federal courts and the military justice system handle child abuse cases. Child abuse remains a growing national problem and the military is not immune.[1] In fact, courts-martial commonly try cases involving child abuse. Children are frequently forced to testify in military trials.

Recognizing that federal prosecutions involving allegations of child abuse were becoming more frequent, Congress enacted the Child Victims' and Child Witnesses' Rights Act (the Act). Congress passed the Act in response to concerns expressed by advocates for children and the judiciaries regarding the impact normal court procedures have on children.

> Children most often become confused in cases when they are testifying as victims of a crime, and unfortunately, this confusion often hides emotional trauma. The psychological impact on a child from testifying against a defendant can be devastating, and may be debilitating when the defendant is a parent or a family member.[2]

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1. C.T. Wang & D. Daro, National Committee to Prevent Child Abuse, Current Trends in Child Abuse Reporting and Fatalities: The Result of the 1997 Annual Fifty State Survey (1998).

> In 1997, over 3 million (3,195,000) cases that were reported for child abuse and neglect to child protective (CPS) agencies in the United States. This is a 1.7% increase over the number of children reported in 1996. Child abuse reporting has increased 41% between 1988 and 1997. In 1997, CPS confirmed 1,054,000 children as victims of child maltreatment–15 out of every 1000 U.S. children. For 1997, physical abuse represented 22% of confirmed cases, sexual abuse 8%, neglect 54%, emotional maltreatment 4% and other forms of maltreatment 12%. In 1996, 1185 child abuse and neglect fatalities were confirmed by CPS agencies. Thus, the data confirms that three children die every day from abuse or neglect. Since 1985, the rate of child abuse fatalities has increased by 34%. Of the children who died, 78% were less than five-years-old at the time of their death, while 38% were under one year of age. Finally, in 1997, 84,320 new cases of child sexual abuse were accepted by CPS agencies for service, accounting for 8% of all confirmed victims.

Id.

2. Hon. Barbara Gilleran-Johnson, *Judicial Conference: Essay: The Criminal Courtroom: Is It Child Proof?*, Loy. U. Chi. L.J. 681, 686 (Summer 1995).

The Act was part of the Omnibus Crime Control Act of 1990, which was codified at 18 U.S.C. § 3509.[3] The purpose of the Act was to establish procedures to protect children from being traumatized by the legal process.[4] Are children who testify in courts-martial protected by the Act? The Court of Appeals for the Armed Forces (the CAAF) has expressly refused to decide whether the Act applies to the military justice system.[5] Therefore, children caught-up in courts-martial have less protection.

This article addresses whether the full range of the Act's statutory protections should apply to courts-martial practice and concludes by arguing that the Act does indeed apply to the military justice system. This article also analyzes the proposed changes to the Rules for Courts-Martial (R.C.M.) 804 and 914A and the Military Rule of Evidence (MRE) 611 that apply selected portions of the Act to courts-martial. Finally, this article suggests additional procedural rules designed to fully implement the Act.

Background

The catalyst for the Act was the Supreme Court's decision in *Maryland v. Craig*.[6] In *Craig*, the Court held that a criminal defendant's Sixth Amendment Confrontation rights were not absolute.[7] The important public policy of protecting children from trauma could override these rights.[8]

The Court held that in child abuse cases, the Confrontation Clause is satisfied when: (1) the proponent makes a case-specific showing of necessity that the child's testimony, in the presence of the accused, would result in serious emotional distress for the child such that the child would not be able to communicate; (2) the child's emotional distress would be more than *de minimis*; and, (3) the accused and the jury have the opportunity to observe the child's demeanor.[9]

In *Craig*, the Court approved the child victim testifying via closed-circuit television. The Court noted that the three important components of the Confrontation Clause were satisfied in *Craig*.[10]

3. 18 U.S.C.A. § 3509 (West 1998).

4. "Summary and Purpose . . . . Title XX [the Act] contains provisions to protect the rights of victims of crime, establish a Federal victims' bill of rights for children, and improve the response of the criminal justice system and related agencies to incidents of child abuse." Crime Control Act of 1990, H.R. 5269, 6478, 101st Cong. (1990).

5. United States v. Longstreath, 45 M.J. 366, 372 (1996).

6. 497 U.S. 836 (1990).

7. *But see* Coy v. Iowa, 487 U.S. 1012, 1020 (1988). Two years before deciding *Craig*, the Court held that placing a screen between a testifying child victim and the defendant violated the defendant's Confrontation Clause rights. The Court rationalized its decision noting "it is a truism that constitutional protections have costs [traumatized children]." *Id.*

8. *See generally* Case Comment, *Maryland v. Craig: The Cost of Closed Circuit Testimony in Child Sexual Abuse Cases*, 25 GA. L. REV. 167, 186 (1990) ("*Maryland v. Craig* represents a liberal v. strict constructionist view of constitutional interpretation. The Sixth Amendment expressly provides for face-to-face confrontation. The Court made a functional interpretation to promote a policy consideration, namely protecting children.").

9. *Craig*, 497 U.S. at 856-57.

10. *Id.* at 836 (noting that the important components of the Sixth Amendment Confrontation Clause are oath, ability to observe the witness's demeanor, and cross-examination).

Congress swiftly responded to the Supreme Court's decision in *Craig* and passed the Act. This swift response was also due to the alarming increase in child sexual abuse cases.[11] Congress drafted the Act using the three-part *Craig* test as a template

The primary statutory protection afforded children under the Act is two alternatives to the child's in-court testimony.[12] The Act provides for (1) remote two-way closed circuit televised (CCTV) testimony[13] or (2) a video deposition conducted under the supervision of the trial judge.[14]

A trial judge may permit CCTV testimony only after a finding on the record that the child is unable to testify in open court in the presence of the accused. The child's inability to testify in the presence of the accused must be the result of fear, a substantial likelihood of emotional trauma, mental or other infirmity, or because of the conduct of the accused or defense counsel.[15] If the judge makes such findings, the CCTV statutory procedure allows the prosecutor, defense counsel, the child's guardian *ad litem*, a judicial officer, and equipment technicians to be present when the child testifies. The child testifies at a location removed from the courtroom, and is subject to direct and cross-examination.[16]

The second alternative to the child's live testimony is a videotaped deposition. The judge must issue a court order authorizing the videotaped deposition,[17] and the order must be based on the same reasons supporting CCTV testimony. The judge may order a videotaped deposition if the child cannot testify in the presence of the accused because of fear, a substantial likelihood of emotional trauma, mental or other infirmity, or because of the conduct of the accused or defense counsel.[18] If the judge orders a videotaped deposition based upon the risk of emotional trauma to the child, or based upon the child's fear of the accused, the judge can exclude the accused from the deposition.[19] Unlike current military practice that provides for deposition officers who cannot rule on objections or motions,[20] the Act requires the trial judge to preside over the deposition, as if at trial.[21]

In addition to the two alternatives to live in-court testimony of children, the Act also provides significant privacy protections for children. The Act directs that all documents submitted to the court which disclose the name or other information concerning the child are to be *automatically* (no need for a court order) placed under seal.[22] The trial court may also close the courtroom during the child's testimony.[23] The judge may exclude anyone, including the press, who do not have a direct

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11. H.R. REP. NO. 101-681(I) at 6571 (1990).

> As the number of child abuse cases continues climbing each year, it has become increasingly urgent that America design special procedures to protect child victims and witnesses in court. A few key figures give an indication of the severity of America's child abuse crises: over 2 million children are reported abused and neglected each year; between 1980 and 1986, the number of sexual abuse cases tripled; over 675,000 children were known by professionals to be abused in 1986 alone.

Id.

12. The Act should not be confused with the Victim and Witness Protection Act of 1982 codified at 18 U.S.C.A. § 1503 (West 1998) and the Victims of Crime Act of 1984 codified at 42 U.S.C.A. §§ 10606-07 (West 1998). The Act is separate and distinct from these statutes. These laws are intended to ensure that victims have some access to decision-makers during the investigation and trial phases of their case. These statutes impose affirmative obligations upon the government to inform victims of certain matters and to consider the victim's wishes before taking action (e.g., a victim must be informed that a pre-trial agreement is being considered and the convening authority should consider the victim's reaction to such an agreement). The various service Victim & Witness Assistance Programs implement these statutes. *See* U.S. DEP'T OF NAVY, SECRETARY OF THE NAVY INSTR. 5800.11A, VICTIM AND WITNESS ASSISTANCE PROGRAM (16 June 1995); U.S. MARINE CORPS, ORDER 5800.15A, VICTIM AND WITNESS ASSISTANCE PROGRAM (3 Sept. 1997); U.S. DEP'T OF ARMY, REG. 27-10, MILITARY JUSTICE, ch. 18 (24 June 1996); U.S. DEP'T OF AIR FORCE, SECRETARY OF THE AIR FORCE INSTR. 51-201, VICTIM AND WITNESS ASSISTANCE, ch. 7 (25 Apr. 1997).

13. 18 U.S.C.A. § 3509 (b)(1).

14. *Id.* § 3509 (b)(2).

15. *Id.* § 3509 (b)(1)(B). *See* Scott M. Smith, Annotation, *Validity, Construction and Application of Child Victims' and Child Witnesses' Rights Statute* (18 U.S.C. § 3509), 121 A.L.R. FED. 631, 637 (1998).

16. 18 U.S.C.A. § 3509 (b)(1)(D); *see* Smith, *supra* note 15, at 638.

17. 18 U.S.C.A. § 3509 (b)(1)(A); *see* Smith, *supra* note 15, at 638.

18. 18 U.S.C.A. § 3509 (b)(1)(B); *see* Smith, *supra* note 15, at 638.

19. 18 U.S.C.A. § 3509 (b)(1)(iv). *But see* United States v. Daulton, 45 M.J. 212 (1996). The CAAF held that the military judge denied the accused his Sixth Amendment right to confrontation when he excluded the accused from the courtroom during the child victim's testimony. The CAAF focused upon the accused's inability to contemporaneously communicate with his defense counsel. The Act's videotape deposition section avoids this problem by mandating the use of CCTV procedures whenever the accused is excluded from the deposition.

20. MANUAL FOR COURTS-MARTIAL, UNITED STATES, R.C.M. 702 (f) (7) (1998) [hereinafter MCM].

21. Smith, *supra* note 15, at 638.

interest in the case.[24] Closure requires a finding of necessity: "substantial psychological harm," or "inability to effectively communicate" in the presence of the accused.[25]

Another of the Act's important statutory protections provides for appointing a guardian *ad litem.* The trial court "may appoint a guardian *ad litem* for a child victim of, or witness to, a crime involving abuse or exploitation to protect the best interests of the child."[26] The primary role of the guardian "is to marshal and coordinate the delivery of resources and special services to the child."[27] The guardian has access to all court documents, except attorney work product, so he or she may effectively advocate on behalf of the child.[28] Neither side may compel the guardian to testify concerning information the guardian received from the child.

In addition to the appointment of a guardian *ad litem,* the Act further provides for an "adult attendant" to accompany the child during court appearances. The role of the adult attendant is different from the role of the guardian. Whereas the guardian is an advocate for the child, the adult attendant's purpose is to provide comfort and emotional support.[29] A child has the right to have an adult attendant when testifying or appearing in court or any other judicial proceeding.[30] The attendant may remain in close proximity to or in physical contact with the child, while the child testifies. If CCTV or videotape alternatives are used, the adult attendant must also appear on the CCTV screen and the videotape.[31]

The Act's final protection is a statutory speedy trial provision. The speedy trial provision permits government counsel or the guardian to file a motion to have the case designated "of special public importance."[32] Such cases must take precedence over all other docketed cases. The trial court must ensure a speedy trial in order to minimize the length of time the child must endure the stress of being involved with the criminal process. The court must consider, in written findings, the child's age and well being when considering any continuance requests.[33] The purpose of this provision is to force the judge to consider, on the record, how a delay will affect the child.

Scope of the Act: Does It Apply to the Military?

Does the Act apply to courts-martial? The answer to this question is important to the military justice bar. If the Act does apply, significant procedural changes will be necessary to comply with its requirements. The legislative history of the Act strongly suggests that Congress did intend that the Act would apply in courts-martial. In floor debates, the House sponsors of the Act referred to it as a "federal victims' bill of rights for children."[34] Representative DeWine of Ohio, the drafter of the Act, was clear on the scope of the Act during floor debates. Representative DeWine stated:

> While there are a limited but rising number of child abuse cases tried in the Federal courts, many states have adopted innovative procedures that have far outpaced Federal law, leaving those children who do enter the system through *military bases*, Indian reservations, and other Federal lands and facilities inadequately protected.[35]

22. 18 U.S.C.A. § 3509 (d) (1)-(4).

23. *Id.* § 3509 (b)(2)(iii). Under the Act, videotaped depositions are always closed. The Act expressly states that the only persons who may attend a videotaped deposition are government counsel, defense counsel, the child's attorney or guardian ad litem, video equipment technicians, the accused (but only in limited circumstances), and others deemed necessary by the judge for the child's welfare.

24. *Id.* § 3509 (e).

25. *Id.*

26. *Id.* § 3509 (h).

27. *Id.* § 3509 (h)(2) (duties of guardian *ad litem*).

28. *Id.* § 3509 (h).

29. *Id.* § 3509 (i).

30. *Id.*

31. *Id.*

32. *Id.* § 3509 (j).

33. *Id.*

34. Crime Control Act of 1990, H.R. 5269, 101st Cong. 6478 (1990).

Representative DeWine's floor statements, which expressly refer to military bases, strongly suggest that the Act was intended to apply to all children in any type of federal court. The obvious intent of the legislative drafter was to create procedures designed to protect children. Nowhere in the Act's legislative history is there any suggestion that children who appear at courts-martial are categorically excluded from the Act's protections.

Had Congress expressly stated that "this Act applies to courts-martial," the issue concerning the scope of the Act would have been resolved. If Congress had used such language, military judges would have had the authority to apply the Act. Congress, however, did not expressly state that the Act applies to courts-martial. The issue, therefore, becomes one of incorporation. Has the Act been incorporated into the military criminal justice system?

Article 36(a) of the UCMJ requires the President, so long as he considers it practicable, "to apply the criminal law and rules of evidence generally recognized in United States district courts."[36] The federal courts have recognized the Act.[37] The plain meaning of Article 36(a) again suggests that the Act applies to courts-martial. The Act is clearly a principle of law recognized in the federal courts. Does it follow, however, that if the President fails to promulgate rule changes to incorporate new statutory requirements, he has by virtue of his silence deemed the new requirements impracticable for the military justice system?

The CAAF has developed standards of review to determine whether to incorporate a federal statute. The CAAF has clearly stated that the UCMJ is the primary statutory authority of the military justice system. "The Code establishes an integrated system of investigation, trial, and appeal that is separate from the criminal justice proceedings conducted in U.S. district courts."[38]

The CAAF also notes, however, that the military justice system is similar to civilian criminal procedures, and military appellate courts frequently look to parallel civilian statutes for guidance. The systems, however, are separate as a matter of law.[39] In *United States v. Dowty*,[40] the CAAF held that changes to Title 18 of the Federal Criminal Code do not affect proceedings under the UCMJ "except to the extent that the Code or the Manual for Courts-Martial specifically provides for incorporation of such changes."[41]

In *Dowty*, the CAAF outlined a major exception to the rule that amendments to Title 18 are not incorporated into the military justice system without a specific authorization. This exception is the "valid military purpose test." The CAAF stated the emphasis of the exception is on whether there is a valid military reason not to incorporate.[42] Generally applicable statutes, such as the Act, must "be viewed in the context of the relationship between the purpose of the statute and any potentially contradictory military purpose to determine the extent, if any, that the statute will apply to courts-martial proceedings."[43] Stated more simply, statutes of general applicability also apply to the military justice system unless there is a valid military reason not to incorporate.

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35. 136 Cong. Rec. H13288 (daily ed. Oct. 27, 1990) (statement of Rep. DeWine) (emphasis added).

36. UCMJ art. 36(a) (West 1998):

> Pretrial, trail, and post-trial procedures, including modes of proof, for causes arising under this chapter triable in courts-martial, military commissions and other military tribunals, and procedures for courts of inquiry may be prescribed by the President by regulation which shall, so far as he considers practicable, apply the principles of law and the rules of evidence generally recognized in the trial of criminal cases in the United States district courts, but which may not be contrary or inconsistent with this chapter.

Id.

37. *See, e.g.*, United States v. Quintero, 21 F.3d 885 (9th Cir. 1994); United States v. Carrier, 9 F.3d 867 (10th Cir. 1993); United States v. Garcia, 7 F.3d 885 (9th Cir. 1993); United States v. Grooms, 978 F.2d 425 (8th Cir. 1992); United States v. Rouse, 111 F.3d 561 (8th Cir. 1997); United States v. Broussard, 767 F. Supp. 1545 (D. Or. 1991).

38. United States v. Dowty, 48 M.J. 102, 106 (1998). The CAAF addressed how comprehensive statutes of general application become incorporated into the military justice system. In *Dowty*, the CAAF analyzed the Right to Financial Privacy Act (RFPA), 12 U.S.C. §§ 3401-3422, and determined that the RFPA had been incorporated.

39. *Id.*

40. 48 M.J. 102 (1998).

41. *Id.*

42. *Id.* at 107 (citing United States v. Noce, 19 C.M.R. 11 (C.M.A. 1955)).

43. *Id.*

To illustrate the valid military purpose test, the CAAF has noted that federal wiretap statutes,[44] the All Writs Act,[45] and the Right to Financial Privacy Act,[46] are all comprehensive statutes that have been incorporated into the military justice system.[47] Despite the lack of presidential action or statutory authority to incorporate these statutes, no valid military purpose existed to prevent incorporation.[48] The CAAF cryptically defines the valid military purpose test as a type of balancing test:

> A general applicable statute must be viewed in the context of the relationship between the purposes of the statute and any potentially contradictory military purpose to determine the extent, if any, that the statute will apply to military personnel and court-martial proceedings.[49]

In *dicta*, the CAAF stated that Congress does not have to use specific language or magic words when it enacts new legislation that modifies prior legislation.[50] The CAAF emphasized that the issue "is whether the new legislation can be fairly read to modify a prior statute."[51] The UCMJ is the prior legislation the CAAF refers to; therefore, the question, according to the CAAF, is whether the Act "can be fairly read to modify the Code."[52]

Did the Act modify the Code? The CAAF had an opportunity to decide whether the Act applies to courts-martial proceedings in *United States v. Longstreath*.[53] The case involved allegations of child sexual abuse.[54] Trial counsel unsuccessfully, in a pretrial motion *in limine*, requested CCTV procedures for the victims. The military judge denied the motion so the trial counsel was forced to call the sixteen-year-old stepdaughter during the government's case-in-chief.[55] After three days of on-again and off-again testimony, the teenage stepdaughter was eventually able to complete her direct testimony. The stepdaughter, however, was unable to testify during the defense's cross-examination. The military judge eventually held that the stepdaughter's inability to communicate was the result of fear caused by the presence of the accused.[56] Defense counsel moved to strike the stepdaughter's entire direct testimony. The military judge *sua sponte* reconsidered and granted the CCTV motion. The stepdaughter was allowed to complete her cross-examination using one-way CCTV.[57]

In its opinion, the CAAF noted that the Act authorizes federal courts to order two-way CCTV in child sexual abuse cases. The CAAF acknowledged that the legislative history of the Act reflects Congress' intent that the Act apply to all children who enter the federal system. The CAAF stated that it was unclear whether the Act applies to courts-martial; however, it noted that the Navy court held that the statute was applicable and provided "guidance."[58] Without explanation, the CAAF expressly refused to decide whether the Act applies to courts-martial.[59]

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44. *Id.* (citing United States v. Noce, 19 C.M.R. 11 (C.M.A. 1955); Chandler v. United States Army, 125 F.3d 1269, 1299 (9th Cir. 1997); 18 U.S.C.A. §§ 2510-2522 (West 1998)).

45. *Id.* at 106 (citing United States v. Frishholz, 36 C.M.R. 306 (C.M.A. 1966); 28 U.S.C.A. § 1651(a) (West 1998)).

46. *Id.* at 109 (citing United States v. Curtin, 44 M.J. 439 (1996); 12 U.S.C.A. § 3419 (West 1998)).

47. *Id.* at 106-07.

48. *See* United States v. Simoy, 50 M.J. 1 (1998) (Sullivan, J., concurring) (discussing an accused's right to present mitigation evidence in a capital case is controlled by 18 U.S.C.A. § 3592(a)(4) (West 1998) and 21 U.S.C.A. § 848(m)(8) (West 1998)–federal statutes incorporated into substantive military law).

49. United States v. Dowty, 48 M.J. 102, 107 (1998).

50. *Id.*

51. *Id.*

52. *Id.*

53. 45 M.J. 366 (1996).

54. *Id.* at 367. In a judge alone trial at Naval Station San Diego, California, Gunner's Mate Second Class Longstreath, U.S. Navy, was charged with rape, carnal knowledge, sodomy, committing indecent acts on his stepdaughter, and committing indecent acts on his two natural daughters. He was convicted of two specifications of indecent acts–an indecent act with his stepdaughter and a single indecent act with one of his natural daughters.

55. *Id.* at 370-71.

56. *Id.* at 371.

57. *See* Maryland v. Craig, 497 U.S. 836 (1990) (permitting the use of one-way CCTV). *But see* 18 U.S.C.A. § 3509 (b) (West 1998) (requiring two-way CCTV).

58. United States v. Longstreath, 45 M.J. 366, 372 (1996).

The CAAF's refusal to hold that the Act applies to courts-martial leaves children caught up in the military justice system less protected. The result is that a child sexually abused in government quarters located on a military base does not have the same statutory protections as a child who is abused in a national park, on an Indian reservation, or in a federal office building. Surely, limiting the protections afforded to a child forced to appear in a court-martial is not the result Congress intended. "The military is not the fifty-first state. Our military is governed by the law of the land."[60]

Proposed Changes to the *Manual for Courts-Martial* and the Military Rules of Evidence

Despite the CAAF's refusal to directly rule on the applicability of the Act to courts-martial, the service appellate courts are appropriately following *Craig* and upholding the proper use of alternatives to traditional in-court testimony.[61] In an apparent attempt to bring military practice into closer compliance with the Act, the Joint Services Committee on Military Justice has proposed rule changes that will soon go into effect.[62] The Joint Services Committee anticipates that the new rules will become effective sometime in the year 2000.[63]

The Joint Services Committee has proposed three major rule changes. First, an amendment to R.C.M. 804(c) will allow an accused to elect to remove himself from the courtroom when CCTV procedures are used.[64] Second, a new rule, R.C.M. 914A, will authorize military judges to use CCTV testimony in child abuse cases.[65] Finally, MRE 611(d) will establish an evidentiary rule that recognizes CCTV procedures.[66]

The amended R.C.M. 804(c) will permit an accused, in a child abuse case, to elect to remove himself from the courtroom if the military judge grants a CCTV motion. If the accused makes such an election, the child's testimony may not be taken remotely by CCTV–she must testify from the stand.

The analysis to R.C.M. 804(c) asserts that the Supreme Court in *Maryland v. Craig*[67] approved the use of CCTV to further the important public policy of preventing trauma to children.[68] The intent of the new R.C.M. 804(c) is to give the accused a greater role in determining how the CCTV issue will be resolved.[69] Now the accused and defense counsel will have the tactical choice of the accused removing himself and forcing the child to testify on the stand, or remaining in the courtroom alone with all of the CCTV equipment while the child testifies remotely.[70]

The Joint Services Committee also approved the creation of a new rule–R.C.M. 914A.[71] This new rule outlines the procedures to be used if the trial court orders an alternative to live in-court testimony. Under R.C.M. 914A, the military judge is to determine the procedures to be used based on the exigencies of the situation; however, such testimony should normally be taken via two-way CCTV.[72]

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59. *Id*. ("We need not and do not decide if 18 U.S.C. § 3509 applies to courts-martial.").

60. United States v. Dowty, 48 M.J. 102, 113 (1998).

61. *See, e.g.*, United States v. Anderson, 1997 CCA LEXIS 186, No. 31996 (A.F. Ct. Crim. App. 1997) (permitting a child to testify from behind a screen in the courtroom); United States v. Williams, 37 M.J. 289 (C.M.A. 1993) (permitting child to testify from a specially positioned chair in the courtroom); United States v. Thompson, 31 M.J. 168 (C.M.A. 1990) (allowing child to testify with back facing the accused).

62. Memorandum, Department of Defense, Office of the Secretary, Joint Services Committee on Military Justice, subject: Notice of Proposed Amendments (8 May 1996) [hereinafter Proposed Rules]. These proposed rules are attached *infra* at Appendix.

63. Telephone Interview with Lieutenant Colonel Thomas C. Jaster, Judge Advocate, United States Air Force, Executive Secretary, Joint Services Committee on Military Justice, at the Military Justice Division, Air Force Legal Services Agency, Bolling Air Force Base, Washington, D.C. (Feb. 9, 1999). The Joint Services Committee voted five to zero to approve the 1997 proposed rules on 1 February 1999. The Joint Services Committee forwarded the proposed rules to the Department of Justice (DOJ) and (OMB) for comment. Once the DOJ and OMB have completed their comments, the Committee will either modify or forward the proposed rules to the office of White House Counsel recommending enactment.

64. Proposed Rules, *supra* note 62. *See infra* Appendix.

65. *Id.*

66. *Id.*

67. 497 U.S. 836 (1990).

68. Proposed Rules, *supra* note 62. *See infra* Appendix.

69. Proposed Rules, *supra* note 62. *See infra* Appendix.

Pursuant to the proposed R.C.M. 914A, the following procedures apply to CCTV: (1) the witness will testify from a closed location outside the courtroom; (2) the only person present at the remote location will be the witness, counsel for each side (not including an accused *pro se*), equipment technicians, and other persons such as the child's adult attendant,[73] whose presence is deemed necessary by the military judge; (3) the military judge, the accused, members, the court reporter, and all other persons viewing or participating in the trial are to remain in the courtroom; (4) sufficient monitors are to be placed in the courtroom to allow the accused and the fact finder to view the testimony; (5) the voice of the military judge will be transmitted to the remote location to allow control of the proceedings; and, (6) the accused shall be permitted audio contact with defense counsel, or the court will recess as necessary to provide the accused an opportunity to confer with counsel.[74]

Finally, the Joint Services Committee also approved an amendment to MRE 611.[75] A new subsection (d) will be added to create an evidentiary rule that recognizes remote CCTV procedures.[76] Under MRE 611(d)(2), the military judge must make a finding on the record, following expert testimony,[77] that either: (a) the child is likely to suffer substantial trauma if made to testify in the presence of the accused; or, (b) the prosecution will be unable to elicit testimony from the child in the presence of the accused.

More Procedural Changes Needed

The proposed rule changes are a good initial step toward full compliance with the Act; however, more procedural changes are necessary to fully comply with the Act. One such needed change is giving military judges the authority to appoint a guardian *ad litem.* Some method must be devised for appointing guardians to protect the interests of children who appear as victims and witnesses in courts-martial. A guardian who has full access to the proceedings and court papers is one of the bedrock protections of the Act.

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70. *See* Gilleran-Johnson, *supra* note 2, at 698:

> Some defense attorneys suggest that the court remove the defendant to a separate room instead of the child, thus allowing the jury to see the child testifying. This suggestion should be seriously considered, because a child testifying in chambers in front of a closed circuit television may not exhibit certain body language that the jury would otherwise observe. The lack of body language may add to the credibil ity of the child's testimony, because the child appears relaxed. On the other hand, the child may exhibit a false sense of confidence, which the jury could misinterpret as a lack of credibility. The presence of the child in front of the jury, outside the presence of the defendant probably provides the most realistic conditions for the fact-finding process.

Id.

71. Proposed Rules, *supra* note 62. *See infra* Appendix.

72. Proposed Rules, *supra* note 62. *See infra* Appendix.

73. The term "adult attendant" was obviously borrowed directly from 18 U.S.C.A. § 3509 (i) (West 1998). A plain reading of R.C.M. 914A (a) (2) shows that the military judge has the discretion to deem an adult attendant unnecessary. MCM, *supra* note 20, R.C.M. 914A(a)(2). Compare the military judge's discretionary authority contained in R.C.M. 914A (a) (2) with the statutory language in Section (i) of the Act: "a child testifying or attending a judicial proceeding shall have the right to be accompanied by an adult attendant to provide emotional support." *Id.*

74. Proposed Rules, *supra* note 62. *See infra* Appendix.

75. Proposed Rules, *supra* note 62. *See infra* Appendix.

76. Proposed Rules, *supra* note 62. *See infra* Appendix.

77. *Compare* proposed MIL. R. EVID. 611(d)(2) (requiring expert testimony) *and* 18 U.S.C.A. § 3509(b)(1)(B)(ii) (supporting expert testimony), *with* United States v. Rouse, 111 F.3d 561, 569 (8th Cir. 1997) (holding expert testimony not required to support a "because of fear" finding. "The court may judge with its own eyes whether the child is suffering the trauma required to grant the requested [CCTV] order.") *and* United States v. Longstreath, 45 M.J. 366, 373 (1996) ("It does not take an expert to conclude that a witness who trembles and cries on the witness stand is 'traumatized.'").

How can guardians be appointed in courts-martial? Who has the authority to make such appointments? Unfortunately, there is very little legislative or judicial guidance on these questions. Military case law is virtually silent on the issue. The military courts have limited these cases to the post-trial representation of incompetent military appellants.[78] The Act fails to provide guidance concerning what procedures should be used to appoint a guardian *ad litem.*

Congress's failure to specify appointment authority for guardians poses little problem for Article III courts. Per Federal Rule of Civil Procedure (FRCP) 17(c), federal district courts have the power to appoint guardians.[79] It is doubtful, however, that military courts, without additional statutory authority, have the power to appoint guardians.[80] Congress must fill the statutory void it has created and amend the Uniform Code of Military Justice (UCMJ). Congress should authorize convening authorities and military judges to appoint a guardian *ad litem* or devise some type of referral procedure to the federal district courts for guardian appointments.

Such statutory authority does not have to be complex. Simply dividing UCMJ, Article 46 into subsections would be sufficient to authorize the appointment of guardians. The new subsection would merely have to tailor the Act's language to make it appropriate for use in courts-martial:

> **§ 846. Art 46. Opportunity to Obtain Witnesses and Other Evidence:**
>
> (b) Guardian ad litem –
>
> (1) In General: The military judge may appoint a [commissioned officer] [judge advocate] as guardian *ad litem* for a child who was a victim of, or a witness to, an offense involving any type of abuse or exploitation to protect the best interests of the child. Prior to referral, the convening authority may appoint a [commissioned officer] [judge advocate] as a guardian to protect the best interests of the child. The guardian *ad litem* shall not be a person who is or may be a witness in the proceeding involving the child for whom the guardian is appointed.
>
> (2) Duties of the Guardian: A guardian *ad litem* may attend all the depositions, hearings and court-martial proceedings in which the child participates, and make recommendations to the military judge concerning the welfare of the child. The guardian *ad litem* may have access to all reports, evaluations and records, except attorney's work product, necessary to effectively advocate for the child. A guardian shall marshal and coordinate the delivery of resources and special services to the child. A guardian shall not be compelled to testify in any proceeding concerning any information or opinion received from the child in the course of serving as a guardian *ad litem*.
>
> (3) Immunities: Guardians appointed under this section shall have the same immunities from civil and criminal liability, and shall enjoy the same presumption of good faith, as guardians appointed under 18 U.S.C. § 3509(h)(3).[81]

Referral to federal district court or a federal magistrate is another possible solution. Since these courts are already vested with the power to appoint a guardian *ad litem*, appointment

78. *See* United States v. Bell, 20 C.M.R. 108 (C.M.A. 1955) (holding that military appellate defense counsel are the functional equivalents of guardians *ad litem* appointed in accordance with Federal Rule of Civil Procedure 17(c) for military appellants that become incompetent after trial) *overruled by* United States v. Korzeniewski, 22 C.M.R. 104, 107 (C.M.A. 1956) ("The opinion in *Bell* established a rule which was unsound and which would work a substantial injustice."). *See also* United States v. Phillips, 13 M.J. 858, 863 (N.M.C.M.R. 1982) (recognizing that a guardian appointed by a state probate court is an equivalent procedure to Federal Rule of Civil Procedure 17(c), thus post-trial actions must be served on the guardian of an incompetent accused).

79. FED. R. CIV. P. 17(c) reads as follows:

> Infants or Incompetent Persons:
>
> Whenever an infant or an incompetent person has a representative, such as a general guardian, committee, conservator, or other like fiduciary, the representative may sue or defend on behalf of the infant or incompetent person. An infant or incompetent person who does not have a duly appointed representative may sue by a next friend or by a guardian ad litem. The court shall appoint a guardian ad litem for an infant or incompetent person not otherwise represented in an action or shall make such other order as it deems proper for the protection of the infant or incompetent person.

80. As Article I courts, military courts have very limited subject matter jurisdiction. The UCMJ, Articles 2 and 3, confer criminal jurisdiction over a very narrow class of persons. In UCMJ, Article 47, Congress expressly expanded the reach of military courts to compel civilian witnesses to appear and testify at courts-martial; however, violations of UCMJ, Article 47, are enforced in the federal district courts. Under UCMJ, Article 48, a military judge may exercise contempt power over a civilian. The ability of courts-martial to compel the appearance of civilians and to exercise contempt powers over civilians is expressly authorized by statute. It would be inappropriate to argue by analogy that these provisions give military judges the authority to appoint guardians. *See* UCMJ art. 2-3, 47-48 (West 1998).

81. 18 U.S.C.A. § 3509 (h) (West 1998). The suggested rule is modeled exactly after the language contained in the Act.

authority would not have to be created. It would be naïve, however, to believe that these federal judges will be sympathetic to such issues as deployment requirements and the military's unique speedy trial rules.[82] The potential exists for military cases to be held hostage awaiting a guardian decision from federal district courts. Such a system would necessarily involve surrendering a degree of control over the military justice process. Therefore, the best approach is to amend the UCMJ to give convening authorities and military judges the statutory authority to appoint guardians.

Drafting the language to amend the UCMJ to authorize appointing guardians is relatively simple. The more difficult problem is determining who should be appointed. Is serving as a guardian another Judge Advocate General's (JAG) Corps mission or could line officers adequately serve as guardians? Intuitively, acting as a guardian seems most appropriate for someone with legal training.[83] Arguably, JAG Corps officers would be the most effective advocates for child victims and witnesses entangled in the military justice system. Military attorneys have the training, background, and independence to be the most effective advocates for children involved with the military justice system.

If serving as a guardian is to become a JAG mission, Title 10 of the U.S.C.[84] and the various service regulations[85] will have to be amended. Appointing legal assistance officers as guardians is beyond the scope of the current legal assistance statute. Legal assistance officers appointed as guardians must have the authority to represent the child's interest in court.[86] To comply fully with the Act, Congress must statutorily authorize legal assistance officers to represent children who have no military connection (for example, a child from a civilian family who is molested by a service-member in an off-base neighborhood).

In addition to the statutory and rule changes required to implement the Act's guardian provisions, more procedural changes are necessary to permit videotaped depositions. The proposed rule changes are silent on the issue of video depositions.

The ability of the prosecutor, the guardian, or the child's parent to request a videotaped deposition is one of the most important protections the Act affords. Videotaped depositions minimize the amount of time a child has to remain in the criminal justice system. Military procedures should be changed to accommodate the Act's deposition provisions.

Videotaped depositions are an important protection because an interested party can request the procedure at anytime.[87] Once a party requests a deposition, the trial court conducts a hearing to determine if the child will be unable to testify in open court in the presence of the accused.

A judge may order a videotaped deposition if he finds: (1) the child will be unable to testify because of fear;[88] (2) there is a substantial likelihood, established by expert testimony, that the child will suffer emotional trauma from testifying in open court;[89] (3) the child suffers from a mental or emotional infirmity;[90] or, (4) the conduct of the accused or defense counsel

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82. MCM, *supra* note 20, R.C.M. 707.

83. *See generally* Fong Sik Leung v. Dulles, 226 F.2d 74 (9th Cir. 1955).

> A guardian *ad litem* [in the context of civil litigation] is appointed as a representative of the court to act for a minor in a cause, with the authority to engage counsel, file suit and to prosecute, control and direct litigation, and as an officer of the court a guardian *ad litem* has full responsibility to assist the court to secure the just, speedy and inexpensive determination of the action.

Id. See also 18 U.S.C.A. § 3509 (h) (1) ("In making the [guardian] appointment, the court shall consider a prospective guardian's background in, and familiarity with, the judicial process, social service programs, and child abuse issues.").

84. 10 U.S.C.A. § 1044(a) (West 1998) (providing the statutory authority for military legal assistance). The statute defines who is eligible to receive legal assistance: (1) active duty members, (2) retirees, (3) Public Health Service officers, and (4) dependents of active duty and retired members).

85. *See* U.S. DEP'T OF NAVY, JUDGE ADVOCATE GENERAL'S INSTR. 5801.2 (11 Apr. 1997), NAVY-MARINE CORPS LEGAL ASSISTANCE PROGRAM; U.S. DEP'T OF ARMY, REG. 27-3 (10 Sept. 1995), ARMY LEGAL ASSISTANCE PROGRAM; U.S. DEP'T OF AIR FORCE, SECRETARY OF THE AIR FORCE INSTR. 51-504, LEGAL ASSISTANCE, NOTARY, AND PREVENTATIVE LAW PROGRAM (Nov. 1996).

86. *See* United States v. Rouse, 111 F.3d 561, 567-68 n.4 (8th Cir. 1997). A child sex abuse case in which the defense filed a pretrial motion requesting access to the child for the purpose of conducting defense interviews, psychological and medical testing. The guardian *ad litem* opposed the defense's request for access to the child. In dicta, the 8th Circuit suggests that if testing is required to ensure a fair trial and no alternative can be devised, then the case should be dismissed to protect the best interests of the child. The case underscores the need for an independent guardian whose sole focus is protecting the child.

87. 10 U.S.C.A. § 3509(b)(2)(A) (West 1998).

> In a proceeding involving an alleged offense against a child, the attorney for the Government, the child's attorney, the child's parent or legal guardian or the guardian ad litem . . . may apply for an order that a deposition be taken of the child's testimony and that the deposition be recorded and preserved on videotape.

Id.

88. 18 U.S.C.A. § 3509 (b)(2)(B)(i)(I).

causes the child to become unable to continue testifying.[91] If the judge makes one of the required findings, then he may order a deposition.[92]

The Act's deposition provision gives substantially more protection than current military deposition practice affords.[93] As previously noted, the Act requires the trial judge to preside over the deposition, *as if at trial*. The requirement that the judge preside over the deposition guarantees control of the proceedings and the proper application of the rules of evidence.[94]

Adhering to the Act's deposition provisions expedites the child's exit out of the military justice system. Why should a child be forced to remain in the system if a showing can be made that the child is too afraid to testify in open court, or if expert testimony will support the likelihood of trauma? Implementing the Act's deposition provisions will place an additional burden upon the time and resources of the military trial judiciary. It may be necessary to provide the military trial judiciary additional resources to fully implement the Act's deposition provisions.

The use of videotaped depositions will also require an amendment to R.C.M. 702. Drafting an amendment to R.C.M. 702 to incorporate the Act's deposition provisions would not be difficult. Again, the language of the Act can be used and tailored to fit the military rule. The following is a suggested military rule modeled exactly on the Act:

> R.C.M. 702(j) *Child Abuse:*
>
> (1) *Generally*: After the referral of charges, in a case involving an alleged offense against a child, trial counsel, the child's attorney, the child's parent or legal guardian, or the guardian *ad litem* may request that the military judge order a deposition be taken of the child's testimony and that the deposition be recorded and preserved on videotape.
>
> (2) *Required Findings*:
>
> (A) The military judge shall make a preliminary finding regarding whether at the time of trial the child is likely to be unable to testify in open court in the physical presence of the accused, the members, the military judge, and the public for any of the following reasons:
>
> (i) The child will be unable to testify because of fear.
>
> (ii) There is a substantial likelihood, established by expert testimony, that the child would suffer emotional trauma from testifying in open court.
>
> (iii) The child suffers from a mental or other infirmity.
>
> (iv) The conduct of the accused or defense counsel causes the child to be unable to continue testifying.
>
> (B) If the military judge finds that the child is likely to be unable to testify in open court for any of the reasons stated above, the military judge shall order that the child's deposition be taken and preserved by videotape.
>
> (C) The military judge shall preside at the videotape deposition of a child and shall rule on all questions as if at trial. The only other persons who may be present during the deposition are:
>
> (i) the trial counsel;
> (ii) defense counsel;
> (iii) the child's attorney or guardian *ad litem;*
> (iv) persons necessary to operate the videotape equipment;
> (v) subject to clause (iv) the accused; and,
> (vi) other persons whose presence the military judge determines is necessary to the welfare and well-being of the child.
>
> (D) If the preliminary finding of inability is based upon evidence that the child is unable to testify in the physical presence of the accused, the military judge may order that the accused, including an accused repre-

89. *Id.* § 3509 (b)(2)(B)(i)(II).

90. *Id.* § 3509 (b)(2)(B)(i)(III).

91. *Id.* § 3509 (b)(2)(B)(i)(IV).

92. *Id.* § 3509 (b)(2)(B)(ii).

93. *See* MCM, *supra* note 20, R.C.M. 702(f)(7) (stating deposition officers note, but do not rule upon objections or motions).

94. It has been the author's experience that in the naval service it is not uncommon to detail junior judge advocates as deposition officers. Frequently, such officers struggle to maintain control over the parties.

sented pro se, be excluded from the room in which the deposition is conducted. If the military judge orders that the accused be excluded from the deposition room, the military judge shall order that two-way closed circuit television equipment be employed to relay the accused's image into the room in which the child is testifying, and the child's testimony into the room in which the accused is viewing the proceeding, and that the accused be provided a means of contemporaneous communication with defense counsel during the deposition.[95]

Modifying the rules will ensure that the military justice system does not harm the child a second time.

Preventing harm to children necessarily entails protecting their privacy. The proposed new rules fail to address the Act's significant privacy protections. The Act requires courts to seal all documents that personally identify the child.[96] The Act's privacy protections insure that only those with a legitimate "need to know" are permitted access to such intimate and embarrassing information.

The Act's privacy safeguards also provide for protective orders. "Any person" can move that the child's name or other personal information be protected from public disclosure. The judge can close the courtroom to protect the child's identity.[97] Protecting the privacy–the dignity–of child victims is essential. A military rule that mandates the Act's privacy protections is necessary to comply with the Act. Using the language of the Act, such a rule could be incorporated into a newly subdivided R.C.M. 108:

(b) *Protective Orders – Child Abuse:*

(1) On motion from the trial counsel, defense counsel, the child's parent or guardian, or the guardian *ad litem*, the military judge may issue an order protecting a child from public disclosure of the name of or any other information concerning the child in the course of the court-martial, if the military judge determines that there is a significant possibility that such disclosure would be detrimental to the child.

(2) A protective order issued under this rule may:

(A) Provide that the testimony of a child witness, and the testimony of any other witness, when the party who calls the witness has reason to anticipate that the name of or any other information concerning the child may be divulged in the testimony, be taken in a closed courtroom; and,

(B) provide for any other measures necessary to protect the privacy of the child.

(3) *Disclosure of Information Subject to a Protective Order:* This rule does not prohibit disclosure of the name or other information concerning the child to the accused, defense counsel, a guardian *ad litem*, an assigned adult attendant, the staff judge advocate, the convening authority, detailed military appellate counsel, appellate review authorities, or to anyone to whom, in the opinion of the military judge, disclosure is necessary to the welfare and well-being of the child.

Conclusion

The CAAF missed an excellent opportunity to improve the military justice practice when it decided *Longstreath*.[98] By refusing to hold that the Act applies to courts-martial, military judges must confront child abuse cases on an ad hoc basis. If the CAAF had applied the doctrine of incorporation that it later established in *Dowty*,[99] it would have ruled that the Act applies. No valid military purpose exists to prevent incorporating the Act into the military justice system. Until the Act is incorporated, trial counsel and victims can never be certain when, or if, the protections of the Act will apply. The CAAF's shortsighted decision in *Longstreath* has resulted in the victims of military offenders having far fewer protections than child victims who appear in federal district courts.

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95. *But see* United States v. Daulton, 45 M.J. 212, 219 (1996). The CAAF held that it was a violation of the accused's Sixth Amendment Confrontation rights to exclude the accused from the courtroom while the child victim testified. The military judge excluded the accused instead of having the victim testify from a remote location. The CAAF also held when remote video testimony is used, the accused must be provided a contemporaneous means of communication with defense counsel. The proposed rule, modeled entirely upon the Act, addresses the concerns expressed by the CAAF in *Daulton*.

96. 18 U.S.C.A. § 3509 (d)(1)-(4) (West 1998).

97. *Id.* § 3509 (d)(3)(B)(i)-(ii).

98. 45 M.J. 366 (1996).

99. 48 M.J. 102 (1998).

The CAAF's refusal to hold that the Act applies to the military has inexcusably delayed extending the full protections of the Act to child victims who appear in courts-martial. If the CAAF had ruled that the Act applies, the services would have quickly drafted uniform rules to incorporate the entire Act into military practice. Instead, the Joint Services Committee on Military Justice now has the task of fashioning rules they deem appropriate.

Is the Joint Services Committee the best body to devise new rules to incorporate the Act? Yes, probably they are; however, they are slow and their work is the product of a committee. One can only assume that, like all committees, consensus is the goal. The need for consensus among the services may explain why so many of the important sections of the Act are conspicuously absent in the proposed rules (for example, guardian *ad litem*, videotaped depositions, and privacy protections). The need for consensus may also explain why it is taking so long to implement the proposed rules. Unfortunately, the delay leaves children who are victims without the protections Congress has extended through the Act.

The proposed changes to R.C.M. 804 and 911A, and MRE 611(d)(2) are a partial step towards compliance with the Act. The proposed changes and the additional rules this article suggests would bring the military justice system into compliance with the Act. The guardian *ad litem* provisions would require new statutory authority. Obtaining such legislative authority is an ideal mission for the Joint Services Committee on Military Justice and the Legislative Affairs Division of each service. The President can use his rule making authority to implement the remaining rules.[100]

In summary, the legislative history of the Act expressly states that the statute is to apply to all children who are victims and witnesses in the federal system.[101] Floor statements of the drafters refer to children on military bases when debating the scope of the Act.[102] Review of the legislative history leaves little doubt that the Act is applicable to courts-martial. To say that the Act does not apply to the military results in the creation of second class victims. Are the children who military members abuse less worthy of protection?

Since the CAAF has refused to hold that the Act applies to courts-martial, Congress and the services must work together to fully apply the Act. The new rules should strive to offer equal protection to the children who appear in military courts. There simply is no good reason not to fully apply the Act. The military's refusal or reluctance to put the Act into practice sends the wrong message. It sends a message to the civilian bar that military justice remains unsophisticated and incapable of adjusting to advances in the law. It also sends a message to children who are victims that they have fewer rights and protections simply because their alleged tormentor is on active duty in the armed forces.

In *Longstreath*,[103] the CAAF had the opportunity to rule that the Act is a comprehensive statute that the military justice system has incorporated. Presumably, the services would have already fully implemented the Act if the CAAF had made such a ruling. Since the CAAF has refused to apply the Act to courts-martial, the services should strive to enact all of the Act's protections. Congress will need to cooperate and prod the services into implementing the Act. The children who appear in our courts are worth the effort.

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100. *See* UCMJ art. 36 (West 1998).

101. *See supra* note 4.

102. *See* 136 Cong. Rec. H13288 (daily ed. Oct. 27, 1990) (statement of Rep. DeWine).

103. 45 M.J. 366 (1996).

Appendix

The rule changes purposed by the Joint Services Committee on Military Justice:

R.C.M. 804 is amended by redesignating the current subsection (c) as subsection (d) and inserting the following as subsection (c):

(c) Absence for the limited purpose of child testimony.

(1) *Election by the accused.* Following a determination by the military judge in a child abuse case that remote testimony of a child is appropriate pursuant to MRE 611(d)(2), the accused may elect to voluntarily absent himself from the courtroom in order to preclude the use of the procedures described in R.C.M. 914A.

(2) *Procedure.* The accused's absence will be conditional upon his being able to view the witness' testimony from a remote location. A two-way closed circuit television system will be used to transmit the child's testimony from the courtroom to the accused's location. The accused will also be provided contemporaneous audio communication with his counsel, or recesses will be granted as necessary in order to allow the accused to confer with counsel. The procedures described herein will be employed unless the accused has made a knowing and affirmative waiver of these procedures.

(3) *Effect on accused's rights generally.* Exercise by the accused of the procedures under subsection (c)(2) will not otherwise affect the accused's right to be present at the remainder of the trial in accordance with this rule.

The analysis accompanying R.C.M. 804 is amended by adding the following:

199_ Amendment: The amendment provides for two-way closed circuit television to transmit the child's testimony from the courtroom to the accused's location. The use of two-way television, to some degree, may defeat the purpose of these alternative procedures, which is to avoid trauma to the victim who must view his or her alleged abuser. In such cases, the judge has discretion to direct one-way television communication. The use of one-way television was approved by the Supreme Court in *Maryland v. Craig,* 497 U.S. 836 (1990). This amendment also gives the accused the election to absent himself from the courtroom to prevent remote testimony. Such a provision gives the accused a greater role in determining how this issue will be resolved.

R.C.M. 914A is created as follows:

Rule 914A. Use of remote live testimony in child abuse cases.

(a) *General procedures.* A child witness in a case involving abuse shall be allowed to testify out of the presence of the accused after appropriate findings have been entered in accordance with MRE 611(d)(2). The procedure used to take such testimony will be determined by the military judge based upon the exigencies of the situation. However, such testimony should normally be taken via a two-way closed circuit television system. When a television system is employed, the following procedures will be observed:

(1) The witness will testify from a closed location outside the courtroom;

(2) The only person present at the remote location will be the witness, counsel for each side (not including an accused *pro se*), equipment operators, and other persons, such as the attendant for the child, whose presence is deemed necessary by the military judge;

(3) The military judge, the accused, members, the court reporter, and all other persons viewing or participating in the trial will remain in the courtroom;

(4) Sufficient monitors will be placed in the courtroom to allow viewing of the testimony by both the accused and the fact finder;

(5) The voice of the military judge will be transmitted into the remote location to allow control of the proceedings;

(6) The accused will be permitted audio contact with his counsel, or the court will recess as necessary to provide the accused an opportunity to confer with counsel.

(b) *Prohibitions.* The procedures described above will not be used where the accused elects to absent himself from the courtroom pursuant to R.C.M. 804(c).

The analysis accompanying R.C.M. 914A is as follows:

199_ Amendment: This rule allows the military judge to determine what procedures to use when taking testimony under MRE 611(d)(2). It states that normally such testimony should be taken via a two-way closed circuit television system. The rule further prescribes the procedure to be used if a television system is employed. The use of two-way television, to some degree, may defeat the purpose of these alternative procedures, which is to avoid trauma to the victim who must view his or her alleged abuser. In such cases, the judge has discretion to direct one-way television communication. The use of one-way television was approved by the Supreme Court in *Maryland v. Craig*, 497 U.S. 836 (1990). This amendment also gives the accused the election to absent himself from the courtroom to prevent remote testimony. Such a provision gives the accused a greater role in determining how this issue will be resolved.

Military Rule of Evidence 611 is amended by adding the following subsection:

(d) ***Remote examination of child witness.***

(1) In a case involving abuse of a child under the age of 16, the military judge shall, subject to the requirements of section (2) of this rule, allow the child to testify from an area outside the courtroom as prescribed in R.C.M. 914A.

(2) Remote examination will be used only where the military judge makes a finding on the record, following expert testimony, that either:

(A) The child witness is likely to suffer substantial trauma if made to testify in the presence of the accused; or

(B) The prosecution will be unable to elicit testimony from the child witness in the presence of the accused.

(3) Remote examination of a child witness will not be utilized where the accused elects to absent himself from the courtroom in accordance with R.C.M. 804(c).

The analysis accompanying MRE 611 is amended by adding the following:

199_ Amendment: This amendment to MRE 611 gives substantive guidance to military judges regarding the use of alternative examination methods for child abuse victims. The use of two-way television, to some degree, may defeat the purpose of these alternative procedures, which is to avoid trauma to the victim who must view his or her alleged abuser. In such cases, the judge has discretion to direct one-way television communication. The use of one-way television was approved by the Supreme Court in *Maryland v. Craig*, 497 U.S. 836 (1990). This amendment also gives the accused the election to absent himself from the courtroom to prevent remote testimony. Such a provision gives the accused a greater role in determining how this issue will be resolved.