

prior to the general amendment of this chapter by Pub. L. 111-84.

SUBCHAPTER IV—TRIAL PROCEDURE

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§ 949a. Rules

(a) PROCEDURES AND RULES OF EVIDENCE.—Pre-trial, trial, and post-trial procedures, including elements and modes of proof, for cases triable by military commission under this chapter may be prescribed by the Secretary of Defense. Such procedures may not be contrary to or inconsistent with this chapter. Except as otherwise provided in this chapter or chapter 47 of this title, the procedures and rules of evidence applicable in trials by general courts-martial of the United States shall apply in trials by military commission under this chapter.

(b) EXCEPTIONS.—(1) In trials by military commission under this chapter, the Secretary of Defense, in consultation with the Attorney General, may make such exceptions in the applicability of the procedures and rules of evidence otherwise applicable in general courts-martial as may be required by the unique circumstances of the conduct of military and intelligence operations during hostilities or by other practical need consistent with this chapter.

(2) Notwithstanding any exceptions authorized by paragraph (1), the procedures and rules of evidence in trials by military commission under this chapter shall include, at a minimum, the following rights of the accused:

(A) To present evidence in the accused's defense, to cross-examine the witnesses who testify against the accused, and to examine and respond to all evidence admitted against the accused on the issue of guilt or innocence and for sentencing, as provided for by this chapter.

(B) To be present at all sessions of the military commission (other than those for deliberations or voting), except when excluded under section 949d of this title.

(C)(i) When none of the charges sworn against the accused are capital, to be represented before a military commission by civilian counsel if provided at no expense to the Government, and by either the defense counsel detailed or the military counsel of the accused's own selection, if reasonably available.

(ii) When any of the charges sworn against the accused are capital, to be represented before a military commission in accordance with clause (i) and, to the greatest extent prac-

ticable, by at least one additional counsel who is learned in applicable law relating to capital cases and who, if necessary, may be a civilian and compensated in accordance with regulations prescribed by the Secretary of Defense.

(D) To self-representation, if the accused knowingly and competently waives the assistance of counsel, subject to the provisions of paragraph (4).

(E) To the suppression of evidence that is not reliable or probative.

(F) To the suppression of evidence the probative value of which is substantially outweighed by—

(i) the danger of unfair prejudice, confusion of the issues, or misleading the members; or

(ii) considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

(3) In making exceptions in the applicability in trials by military commission under this chapter from the procedures and rules otherwise applicable in general courts-martial, the Secretary of Defense may provide the following:

(A) Evidence seized outside the United States shall not be excluded from trial by military commission on the grounds that the evidence was not seized pursuant to a search warrant or authorization.

(B) A statement of the accused that is otherwise admissible shall not be excluded from trial by military commission on grounds of alleged coercion or compulsory self-incrimination so long as the evidence complies with the provisions of section 948r of this title.

(C) Evidence shall be admitted as authentic so long as—

(i) the military judge of the military commission determines that there is sufficient evidence that the evidence is what it is claimed to be; and

(ii) the military judge instructs the members that they may consider any issue as to authentication or identification of evidence in determining the weight, if any, to be given to the evidence.

(D) Hearsay evidence not otherwise admissible under the rules of evidence applicable in trial by general courts-martial may be admitted in a trial by military commission only if—

(i) the proponent of the evidence makes known to the adverse party, sufficiently in advance to provide the adverse party with a fair opportunity to meet the evidence, the proponent's intention to offer the evidence, and the particulars of the evidence (including information on the circumstances under which the evidence was obtained); and

(ii) the military judge, after taking into account all of the circumstances surrounding the taking of the statement, including the degree to which the statement is corroborated, the indicia of reliability within the statement itself, and whether the will of the declarant was overborne, determines that—

(I) the statement is offered as evidence of a material fact;

(II) the statement is probative on the point for which it is offered;

(III) direct testimony from the witness is not available as a practical matter, taking into consideration the physical location of the witness, the unique circumstances of military and intelligence operations during hostilities, and the adverse impacts on military or intelligence operations that would likely result from the production of the witness; and

(IV) the general purposes of the rules of evidence and the interests of justice will best be served by admission of the statement into evidence.

(4)(A) The accused in a military commission under this chapter who exercises the right to self-representation under paragraph (2)(D) shall conform the accused's deportment and the conduct of the defense to the rules of evidence, procedure, and decorum applicable to trials by military commission.

(B) Failure of the accused to conform to the rules described in subparagraph (A) may result in a partial or total revocation by the military judge of the right of self-representation under paragraph (2)(D). In such case, the military counsel of the accused or an appropriately authorized civilian counsel shall perform the functions necessary for the defense.

(c) DELEGATION OF AUTHORITY TO PRESCRIBE REGULATIONS.—The Secretary of Defense may delegate the authority of the Secretary to prescribe regulations under this chapter.

(d) NOTICE TO CONGRESS OF MODIFICATION OF RULES.—Not later than 60 days before the date on which any proposed modification of the rules in effect for military commissions under this chapter goes into effect, the Secretary of Defense shall submit to the Committee on Armed Services of the Senate and the Committee on Armed Services of the House of Representatives a report describing the proposed modification.

(Added Pub. L. 111-84, div. A, title XVIII, §1802, Oct. 28, 2009, 123 Stat. 2581; amended Pub. L. 112-81, div. A, title X, §1034(a), Dec. 31, 2011, 125 Stat. 1572.)

PRIOR PROVISIONS

A prior section 949a, added Pub. L. 109-366, §3(a)(1), Oct. 17, 2006, 120 Stat. 2608, related to rules, prior to the general amendment of this chapter by Pub. L. 111-84.

AMENDMENTS

2011—Subsec. (b)(2)(C)(i), (ii). Pub. L. 112-81 substituted “sworn” for “preferred”.

§ 949b. Unlawfully influencing action of military commission and United States Court of Military Commission Review

(a) MILITARY COMMISSIONS.—(1) No authority convening a military commission under this chapter may censure, reprimand, or admonish the military commission, or any member, military judge, or counsel thereof, with respect to the findings or sentence adjudged by the military commission, or with respect to any other exercises of its or their functions in the conduct of the proceedings.

(2) No person may attempt to coerce or, by any unauthorized means, influence—

(A) the action of a military commission under this chapter, or any member thereof, in reaching the findings or sentence in any case;

(B) the action of any convening, approving, or reviewing authority with respect to their judicial acts; or

(C) the exercise of professional judgment by trial counsel or defense counsel.

(3) The provisions of this subsection shall not apply with respect to—

(A) general instructional or informational courses in military justice if such courses are designed solely for the purpose of instructing members of a command in the substantive and procedural aspects of military commissions; or

(B) statements and instructions given in open proceedings by a military judge or counsel.

(b) UNITED STATES COURT OF MILITARY COMMISSION REVIEW.—(1) No person may attempt to coerce or, by any unauthorized means, influence—

(A) the action of a judge on the United States Court of Military Commissions Review in reaching a decision on the findings or sentence on appeal in any case; or

(B) the exercise of professional judgment by trial counsel or defense counsel appearing before the United States Court of Military Commission Review.

(2) No person may censure, reprimand, or admonish a judge on the United States Court of Military Commission Review, or counsel thereof, with respect to any exercise of their functions in the conduct of proceedings under this chapter.

(3) The provisions of this subsection shall not apply with respect to—

(A) general instructional or informational courses in military justice if such courses are designed solely for the purpose of instructing members of a command in the substantive and procedural aspects of military commissions; or

(B) statements and instructions given in open proceedings by a judge on the United States Court of Military Commission Review, or counsel.

(4) No appellate military judge on the United States Court of Military Commission Review may be reassigned to other duties, except under circumstances as follows:

(A) The appellate military judge voluntarily requests to be reassigned to other duties and the Secretary of Defense, or the designee of the Secretary, in consultation with the Judge Advocate General of the armed force of which the appellate military judge is a member, approves such reassignment.

(B) The appellate military judge retires or otherwise separates from the armed forces.

(C) The appellate military judge is reassigned to other duties by the Secretary of Defense, or the designee of the Secretary, in consultation with the Judge Advocate General of the armed force of which the appellate military judge is a member, based on military necessity and such reassignment is consistent with service rotation regulations (to the extent such regulations are applicable).

(D) The appellate military judge is withdrawn by the Secretary of Defense, or the designee of the Secretary, in consultation with the Judge Advocate General of the armed