

determining whether a commissioned officer of the armed forces is qualified to be advanced in grade, or in determining the assignment or transfer of any such officer or whether any such officer should be retained on active duty, no person may—

(1) consider or evaluate the performance of duty of any member of a military commission under this chapter; or

(2) give a less favorable rating or evaluation to any commissioned officer because of the zeal with which such officer, in acting as counsel, represented any accused before a military commission under this chapter.

(Added Pub. L. 111-84, div. A, title XVIII, §1802, Oct. 28, 2009, 123 Stat. 2583; amended Pub. L. 112-81, div. A, title X, §1034(b), Dec. 31, 2011, 125 Stat. 1573.)

#### PRIOR PROVISIONS

A prior section 949b, added Pub. L. 109-366, §3(a)(1), Oct. 17, 2006, 120 Stat. 2609, related to unlawfully influencing action of military commission, prior to the general amendment of this chapter by Pub. L. 111-84.

#### AMENDMENTS

2011—Subsec. (b)(1)(A). Pub. L. 112-81, §1034(b)(1), substituted “a judge on” for “a military appellate judge or other duly appointed judge under this chapter on”.

Subsec. (b)(2). Pub. L. 112-81, §1034(b)(2), substituted “a judge on” for “a military appellate judge on”.

Subsec. (b)(3)(B). Pub. L. 112-81, §1034(b)(3), substituted “a judge on” for “an appellate military judge or a duly appointed appellate judge on”.

#### § 949c. Duties of trial counsel and defense counsel

(a) TRIAL COUNSEL.—The trial counsel of a military commission under this chapter shall prosecute in the name of the United States.

(b) DEFENSE COUNSEL.—(1) The accused shall be represented in the accused’s defense before a military commission under this chapter as provided in this subsection.

(2) The accused may be represented by military counsel detailed under section 948k of this title or by military counsel of the accused’s own selection, if reasonably available.

(3) The accused may be represented by civilian counsel if retained by the accused, provided that such civilian counsel—

(A) is a United States citizen;

(B) is admitted to the practice of law in a State, district, or possession of the United States, or before a Federal court;

(C) has not been the subject of any sanction of disciplinary action by any court, bar, or other competent governmental authority for relevant misconduct;

(D) has been determined to be eligible for access to information classified at the level Secret or higher; and

(E) has signed a written agreement to comply with all applicable regulations or instructions for counsel, including any rules of court for conduct during the proceedings.

(4) If the accused is represented by civilian counsel, military counsel shall act as associate counsel.

(5) The accused is not entitled to be represented by more than one military counsel.

However, the person authorized under regulations prescribed under section 948k of this title to detail counsel, in such person’s sole discretion, may detail additional military counsel to represent the accused.

(6) Defense counsel may cross-examine each witness for the prosecution who testifies before a military commission under this chapter.

(7) Civilian defense counsel shall protect any classified information received during the course of representation of the accused in accordance with all applicable law governing the protection of classified information, and may not divulge such information to any person not authorized to receive it.

(Added Pub. L. 111-84, div. A, title XVIII, §1802, Oct. 28, 2009, 123 Stat. 2585.)

#### PRIOR PROVISIONS

A prior section 949c, added Pub. L. 109-366, §3(a)(1), Oct. 17, 2006, 120 Stat. 2610, related to duties of trial counsel and defense counsel, prior to the general amendment of this chapter by Pub. L. 111-84.

#### § 949d. Sessions

(a) SESSIONS WITHOUT PRESENCE OF MEMBERS.—(1) At any time after the service of charges which have been referred for trial by military commission under this chapter, the military judge may call the military commission into session without the presence of the members for the purpose of—

(A) hearing and determining motions raising defenses or objections which are capable of determination without trial of the issues raised by a plea of not guilty;

(B) hearing and ruling upon any matter which may be ruled upon by the military judge under this chapter, whether or not the matter is appropriate for later consideration or decision by the members;

(C) if permitted by regulations prescribed by the Secretary of Defense, receiving the pleas of the accused; and

(D) performing any other procedural function which may be performed by the military judge under this chapter or under rules prescribed pursuant to section 949a of this title and which does not require the presence of the members.

(2) Except as provided in subsections (b), (c), and (d), any proceedings under paragraph (1) shall be conducted in the presence of the accused, defense counsel, and trial counsel, and shall be made part of the record.

(b) DELIBERATION OR VOTE OF MEMBERS.—When the members of a military commission under this chapter deliberate or vote, only the members may be present.

(c) CLOSURE OF PROCEEDINGS.—(1) The military judge may close to the public all or part of the proceedings of a military commission under this chapter.

(2) The military judge may close to the public all or a portion of the proceedings under paragraph (1) only upon making a specific finding that such closure is necessary to—

(A) protect information the disclosure of which could reasonably be expected to cause damage to the national security, including in-

telligence or law enforcement sources, methods, or activities; or

(B) ensure the physical safety of individuals.

(3) A finding under paragraph (2) may be based upon a presentation, including a presentation *ex parte* or in camera, by either trial counsel or defense counsel.

(d) EXCLUSION OF ACCUSED FROM CERTAIN PROCEEDINGS.—The military judge may exclude the accused from any portion of a proceeding upon a determination that, after being warned by the military judge, the accused persists in conduct that justifies exclusion from the courtroom—

(1) to ensure the physical safety of individuals; or

(2) to prevent disruption of the proceedings by the accused.

(Added Pub. L. 111-84, div. A, title XVIII, §1802, Oct. 28, 2009, 123 Stat. 2585.)

#### PRIOR PROVISIONS

A prior section 949d, added Pub. L. 109-366, §3(a)(1), Oct. 17, 2006, 120 Stat. 2611, related to sessions of military commissions, prior to the general amendment of this chapter by Pub. L. 111-84.

#### § 949e. Continuances

The military judge in a military commission under this chapter may, for reasonable cause, grant a continuance to any party for such time, and as often, as may appear to be just.

(Added Pub. L. 111-84, div. A, title XVIII, §1802, Oct. 28, 2009, 123 Stat. 2586.)

#### PRIOR PROVISIONS

A prior section 949e, added Pub. L. 109-366, §3(a)(1), Oct. 17, 2006, 120 Stat. 2613, related to continuances, prior to the general amendment of this chapter by Pub. L. 111-84.

#### § 949f. Challenges

(a) CHALLENGES AUTHORIZED.—The military judge and primary or alternate members of a military commission under this chapter may be challenged by the accused or trial counsel for cause stated to the military commission. The military judge shall determine the relevance and validity of challenges for cause, and may not receive a challenge to more than one person at a time. Challenges by trial counsel shall ordinarily be presented and decided before those by the accused are offered.

(b) PEREMPTORY CHALLENGES.—The accused and trial counsel are each entitled to one peremptory challenge, but the military judge may not be challenged except for cause. Nothing in this section prohibits the military judge from awarding to each party such additional peremptory challenges as may be required in the interests of justice.

(c) CHALLENGES AGAINST ADDITIONAL MEMBERS.—Whenever additional members are detailed to a military commission under this chapter, and after any challenges for cause against such additional members are presented and decided, the accused and trial counsel are each entitled to one peremptory challenge against members not previously subject to peremptory challenge.

(Added Pub. L. 111-84, div. A, title XVIII, §1802, Oct. 28, 2009, 123 Stat. 2586; amended Pub. L.

113-66, div. A, title X, §1031(b), Dec. 26, 2013, 127 Stat. 850.)

#### PRIOR PROVISIONS

A prior section 949f, added Pub. L. 109-366, §3(a)(1), Oct. 17, 2006, 120 Stat. 2613, related to challenges, prior to the general amendment of this chapter by Pub. L. 111-84.

#### AMENDMENTS

2013—Subsec. (a). Pub. L. 113-66, §1031(b)(1), inserted “primary or alternate” before “members”.

Subsec. (b). Pub. L. 113-66, §1031(b)(2), inserted at end “Nothing in this section prohibits the military judge from awarding to each party such additional peremptory challenges as may be required in the interests of justice.”

#### § 949g. Oaths

(a) IN GENERAL.—(1) Before performing their respective duties in a military commission under this chapter, military judges, members, trial counsel, defense counsel, reporters, and interpreters shall take an oath to perform their duties faithfully.

(2) The form of the oath required by paragraph (1), the time and place of the taking thereof, the manner of recording thereof, and whether the oath shall be taken for all cases in which duties are to be performed or for a particular case, shall be as provided in regulations prescribed by the Secretary of Defense. The regulations may provide that—

(A) an oath to perform faithfully duties as a military judge, trial counsel, or defense counsel may be taken at any time by any judge advocate or other person certified to be qualified or competent for the duty; and

(B) if such an oath is taken, such oath need not again be taken at the time the judge advocate or other person is detailed to that duty.

(b) WITNESSES.—Each witness before a military commission under this chapter shall be examined on oath.

(c) OATH DEFINED.—In this section, the term “oath” includes an affirmation.

(Added Pub. L. 111-84, div. A, title XVIII, §1802, Oct. 28, 2009, 123 Stat. 2587.)

#### PRIOR PROVISIONS

A prior section 949g, added Pub. L. 109-366, §3(a)(1), Oct. 17, 2006, 120 Stat. 2613, related to oaths, prior to the general amendment of this chapter by Pub. L. 111-84.

#### § 949h. Former jeopardy

(a) IN GENERAL.—No person may, without the person’s consent, be tried by a military commission under this chapter a second time for the same offense.

(b) SCOPE OF TRIAL.—No proceeding in which the accused has been found guilty by military commission under this chapter upon any charge or specification is a trial in the sense of this section until the finding of guilty has become final after review of the case has been fully completed.

(Added Pub. L. 111-84, div. A, title XVIII, §1802, Oct. 28, 2009, 123 Stat. 2587.)

#### PRIOR PROVISIONS

A prior section 949h, added Pub. L. 109-366, §3(a)(1), Oct. 17, 2006, 120 Stat. 2614, related to former jeopardy,