

ject to paragraph (1) or paragraph (2) but that reasonably may be viewed as mitigation evidence at sentencing.

(4) The disclosure obligations under this subsection encompass evidence that is known or reasonably should be known to any government officials who participated in the investigation and prosecution of the case against the defendant.

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

#### PRIOR PROVISIONS

A prior section 949j, added Pub. L. 109-366, §3(a)(1), Oct. 17, 2006, 120 Stat. 2614, related to the opportunity to obtain witnesses and other evidence, prior to the general amendment of this chapter by Pub. L. 111-84.

#### § 949k. Defense of lack of mental responsibility

(a) AFFIRMATIVE DEFENSE.—It is an affirmative defense in a trial by military commission under this chapter that, at the time of the commission of the acts constituting the offense, the accused, as a result of a severe mental disease or defect, was unable to appreciate the nature and quality or the wrongfulness of the acts. Mental disease or defect does not otherwise constitute a defense.

(b) BURDEN OF PROOF.—The accused in a military commission under this chapter has the burden of proving the defense of lack of mental responsibility by clear and convincing evidence.

(c) FINDINGS FOLLOWING ASSERTION OF DEFENSE.—Whenever lack of mental responsibility of the accused with respect to an offense is properly at issue in a military commission under this chapter, the military judge shall instruct the members as to the defense of lack of mental responsibility under this section and shall charge the members to find the accused—

- (1) guilty;
- (2) not guilty; or
- (3) subject to subsection (d), not guilty by reason of lack of mental responsibility.

(d) MAJORITY VOTE REQUIRED FOR FINDING.—The accused shall be found not guilty by reason of lack of mental responsibility under subsection (c)(3) only if a majority of the members present at the time the vote is taken determines that the defense of lack of mental responsibility has been established.

(Added Pub. L. 111-84, div. A, title XVIII, § 1802, Oct. 28, 2009, 123 Stat. 2588.)

#### PRIOR PROVISIONS

A prior section 949k, added Pub. L. 109-366, §3(a)(1), Oct. 17, 2006, 120 Stat. 2615, related to the defense of lack of mental responsibility, prior to the general amendment of this chapter by Pub. L. 111-84.

#### § 949l. Voting and rulings

(a) VOTE BY SECRET WRITTEN BALLOT.—Voting by members of a military commission under this chapter on the findings and on the sentence shall be by secret written ballot.

(b) RULINGS.—(1) The military judge in a military commission under this chapter shall rule upon all questions of law, including the admissibility of evidence and all interlocutory questions arising during the proceedings.

(2) Any ruling made by the military judge upon a question of law or an interlocutory question (other than the factual issue of mental responsibility of the accused) is conclusive and constitutes the ruling of the military commission. However, a military judge may change such a ruling at any time during the trial.

(c) INSTRUCTIONS PRIOR TO VOTE.—Before a vote is taken of the findings of a military commission under this chapter, the military judge shall, in the presence of the accused and counsel, instruct the members as to the elements of the offense and charge the members—

(1) that the accused must be presumed to be innocent until the accused's guilt is established by legal and competent evidence beyond a reasonable doubt;

(2) that in the case being considered, if there is a reasonable doubt as to the guilt of the accused, the doubt must be resolved in favor of the accused and the accused must be acquitted;

(3) that, if there is reasonable doubt as to the degree of guilt, the finding must be in a lower degree as to which there is no reasonable doubt; and

(4) that the burden of proof to establish the guilt of the accused beyond a reasonable doubt is upon the United States.

(Added Pub. L. 111-84, div. A, title XVIII, § 1802, Oct. 28, 2009, 123 Stat. 2589.)

#### PRIOR PROVISIONS

A prior section 949l, added Pub. L. 109-366, §3(a)(1), Oct. 17, 2006, 120 Stat. 2615, related to voting and rulings, prior to the general amendment of this chapter by Pub. L. 111-84.

#### § 949m. Number of votes required

(a) CONVICTION.—No person may be convicted by a military commission under this chapter of any offense, except as provided in section 949i(b) of this title or by concurrence of two-thirds of the primary members present at the time the vote is taken.

(b) SENTENCES.—(1) Except as provided in paragraphs (2) and (3), sentences shall be determined by a military commission by the concurrence of two-thirds of the primary members present at the time the vote is taken.

(2) No person may be sentenced to death by a military commission, except insofar as—

(A) the penalty of death has been expressly authorized under this chapter, chapter 47 of this title, or the law of war for an offense of which the accused has been found guilty;

(B) trial counsel expressly sought the penalty of death by filing an appropriate notice in advance of trial;

(C) the accused was convicted of the offense by the concurrence of all the primary members present at the time the vote is taken, or a guilty plea was accepted and not withdrawn prior to announcement of the sentence in accordance with section 949i(b) of this title; and

(D) all primary members present at the time the vote was taken on the sentence concurred in the sentence of death.

(3) No person may be sentenced to life imprisonment, or to confinement for more than 10