

armed forces is qualified to be advanced in grade, or in determining the assignment or transfer of a member of the armed forces or in determining whether a member of the armed forces should be retained on active duty, no person subject to this chapter may, in preparing any such report (1) consider or evaluate the performance of duty of any such member as a member of a court-martial, or (2) give a less favorable rating or evaluation of any member of the armed forces because of the zeal with which such member, as counsel, represented any person in a court-martial proceeding.

(c) No finding or sentence of a court-martial may be held incorrect on the ground of a violation of this section unless the violation materially prejudices the substantial rights of the accused.

(d)(1) A superior convening authority or commanding officer may withhold the authority of a subordinate convening authority or officer to dispose of offenses in individual cases, types of cases, or generally.

(2) Except as provided in paragraph (1) or as otherwise authorized by this chapter, a superior convening authority or commanding officer may not limit the discretion of a subordinate convening authority or officer to act with respect to a case for which the subordinate convening authority or officer has authority to dispose of the offenses.

(Aug. 10, 1956, ch. 1041, 70A Stat. 50; Pub. L. 90-632, §2(13), Oct. 24, 1968, 82 Stat. 1338; Pub. L. 116-92, div. A, title V, §532(a), Dec. 20, 2019, 133 Stat. 1359.)

HISTORICAL AND REVISION NOTES

Revised section	Source (U.S. Code)	Source (Statutes at Large)
837	50:612.	May 5, 1950, ch. 169, §1 (Art. 37), 64 Stat. 120.

The word "may" is substituted for the word "shall".

Editorial Notes

AMENDMENTS

2019—Pub. L. 116-92, §532(a)(1), substituted "Command influence" for "Unlawfully influencing action of court" in section catchline.

Subsec. (a). Pub. L. 116-92, §532(a)(2), amended subsec. (a) generally. Prior to amendment, subsec. (a) read as follows: "No authority convening a general, special, or summary court-martial, nor any other commanding officer, may censure, reprimand, or admonish the court or any member, military judge, or counsel thereof, with respect to the findings or sentence adjudged by the court, or with respect to any other exercise of its or his functions in the conduct of the proceeding. No person subject to this chapter may attempt to coerce or, by any unauthorized means, influence the action of a court-martial or any other military tribunal or any member thereof, in reaching the findings or sentence in any case, or the action of any convening, approving, or reviewing authority with respect to his judicial acts. The foregoing provisions of the subsection shall not apply with respect to (1) 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 courts-martial, or (2) to statements and instructions given in open court by the military judge, president of a special court-martial, or counsel."

Subsec. (b). Pub. L. 116-92, §532(a)(3), substituted "advanced in grade" for "advanced, in grade" and "person

in a court-martial proceeding" for "accused before a court-martial".

Subsecs. (c), (d). Pub. L. 116-92, §532(a)(4), added subsecs. (c) and (d).

1968—Pub. L. 90-632 designated existing provisions as subsec. (a), substituted "military judge" for "law officer", inserted provisions specifically exempting instructional or general informational lectures on military justice and statements and instructions given in open court by the military judge, president of a special court-martial, or counsel from prohibitions of subsec. (a), and added subsec. (b).

Statutory Notes and Related Subsidiaries

EFFECTIVE DATE OF 2019 AMENDMENT

Pub. L. 116-92, div. A, title V, §532(c), Dec. 20, 2019, 133 Stat. 1361, provided that: "The amendments made by subsections (a) and (b) [amending this section] shall take effect on the date of the enactment of this Act [Dec. 20, 2019] and shall apply with respect to violations of section 837 of title 10, United States Code (article 37 of the Uniform Code of Military Justice), committed on or after such date."

EFFECTIVE DATE OF 1968 AMENDMENT

Amendment by Pub. L. 90-632 effective first day of tenth month following October 1968, see section 4 of Pub. L. 90-632, set out as a note under section 801 of this title.

§ 838. Art. 38. Duties of trial counsel and defense counsel

(a) The trial counsel of a general or special court-martial shall prosecute in the name of the United States, and shall, under the direction of the court, prepare the record of the proceedings.

(b)(1) The accused has the right to be represented in his defense before a general or special court-martial or at a preliminary hearing under section 832 of this title (article 32) as provided in this subsection.

(2) The accused may be represented by civilian counsel if provided by him.

(3) The accused may be represented—

(A) by military counsel detailed under section 827 of this title (article 27); or

(B) by military counsel of his own selection if that counsel is reasonably available (as determined under regulations prescribed under paragraph (7)).

(4) If the accused is represented by civilian counsel, military counsel detailed or selected under paragraph (3) shall act as associate counsel unless excused at the request of the accused.

(5) Except as provided under paragraph (6), if the accused is represented by military counsel of his own selection under paragraph (3)(B), any military counsel detailed under paragraph (3)(A) shall be excused.

(6) The accused is not entitled to be represented by more than one military counsel. However, the person authorized under regulations prescribed under section 827 of this title (article 27) to detail counsel, in his sole discretion—

(A) may detail additional military counsel as assistant defense counsel; and

(B) if the accused is represented by military counsel of his own selection under paragraph (3)(B), may approve a request from the accused that military counsel detailed under paragraph (3)(A) act as associate defense counsel.

(7) The Secretary concerned shall, by regulation, define “reasonably available” for the purpose of paragraph (3)(B) and establish procedures for determining whether the military counsel selected by an accused under that paragraph is reasonably available. Such regulations may not prescribe any limitation based on the reasonable availability of counsel solely on the grounds that the counsel selected by the accused is from an armed force other than the armed force of which the accused is a member. To the maximum extent practicable, such regulations shall establish uniform policies among the armed forces while recognizing the differences in the circumstances and needs of the various armed forces. The Secretary concerned shall submit copies of regulations prescribed under this paragraph to the Committee on Armed Services of the Senate and the Committee on Armed Services of the House of Representatives.

(c) In any court-martial proceeding resulting in a conviction, the defense counsel—

(1) may forward for attachment to the record of proceedings a brief of such matters as he determines should be considered in behalf of the accused on review (including any objection to the contents of the record which he considers appropriate);

(2) may assist the accused in the submission of any matter under section 860, 860a, or 860b of this title (article 60, 60a, or 60b); and

(3) may take other action authorized by this chapter.

(d) An assistant trial counsel of a general court-martial may, under the direction of the trial counsel or when he is qualified to be a trial counsel as required by section 827 of this title (article 27), perform any duty imposed by law, regulation, or the custom of the service upon the trial counsel of the court. An assistant trial counsel of a special court-martial may perform any duty of the trial counsel.

(e) An assistant defense counsel of a general or special court-martial may perform any duty imposed by law, regulation, or the custom of the service upon counsel for the accused.

(Aug. 10, 1956, ch. 1041, 70A Stat. 50; Pub. L. 90-632, §2(14), Oct. 24, 1968, 82 Stat. 1338; Pub. L. 97-81, §4(b), Nov. 20, 1981, 95 Stat. 1088; Pub. L. 98-209, §3(e), Dec. 6, 1983, 97 Stat. 1394; Pub. L. 104-106, div. A, title XV, §1502(a)(1), Feb. 10, 1996, 110 Stat. 502; Pub. L. 106-65, div. A, title X, §1067(1), Oct. 5, 1999, 113 Stat. 774; Pub. L. 113-66, div. A, title XVII, §1702(c)(3)(C), Dec. 26, 2013, 127 Stat. 957; Pub. L. 114-328, div. E, title LVII, §5221, Dec. 23, 2016, 130 Stat. 2909; Pub. L. 115-91, div. A, title V, §531(c), Dec. 12, 2017, 131 Stat. 1384.)

HISTORICAL AND REVISION NOTES

Revised section	Source (U.S. Code)	Source (Statutes at Large)
838(a)	50:613(a).	May 5, 1950, ch. 169, §1 (Art. 38), 64 Stat. 120.
838(b)	50:613(b).	
838(c)	50:613(c).	
838(d)	50:613(d).	
838(e)	50:613(e).	

In subsection (b), the word “has” is substituted for the words “shall have”. The word “under” is substituted for the words “pursuant to”. The word “duly” is omitted as surplusage. The words “detailed” and

“who were detailed” are substituted for the word “appointed”, since the filling of the position involved is not appointment to an office in the constitutional sense.

In subsection (c), the word “considers” is substituted for the words “may deem”.

Editorial Notes

AMENDMENTS

2017—Subsec. (c)(2). Pub. L. 115-91 substituted “section 860, 860a, or 860b of this title (article 60, 60a, or 60b)” for “section 860 of this title (article 60)”.

2016—Subsec. (e). Pub. L. 114-328 struck out “, under the direction of the defense counsel or when he is qualified to be the defense counsel as required by section 827 of this title (article 27),” after “court-martial may”.

2013—Subsec. (b)(1). Pub. L. 113-66 substituted “a preliminary hearing under section 832” for “an investigation under section 832”.

1999—Subsec. (b)(7). Pub. L. 106-65 substituted “and the Committee on Armed Services” for “and the Committee on National Security”.

1996—Subsec. (b)(7). Pub. L. 104-106 substituted “Committee on Armed Services of the Senate and the Committee on National Security of the House of Representatives” for “Committees on Armed Services of the Senate and House of Representatives”.

1983—Subsec. (b)(6). Pub. L. 98-209, §3(e)(1), substituted “the person authorized under regulations prescribed under section 827 of this title (article 27) to detail counsel” for “a convening authority”.

Subsec. (b)(7). Pub. L. 98-209, §3(e)(2), inserted provision that such regulations may not prescribe any limitation based on the reasonable availability of counsel solely on the grounds that the counsel selected by the accused is from an armed force other than the armed force of which the accused is a member.

Subsec. (c). Pub. L. 98-209, §3(e)(3), designated existing provisions as par. (1), made minor changes in phraseology and punctuation, and added pars. (2) and (3).

1981—Subsec. (b). Pub. L. 97-81 revised subsec. (b) by dividing its provisions into seven numbered paragraphs and inserted provisions relating to the right to counsel at an investigation under section 832 of this title (article 32), authorizing the promulgation of regulations relating to the “reasonable availability” of military counsel, and authorizing the detailing of additional military counsel for the accused under specified circumstances.

1968—Subsec. (b). Pub. L. 90-632 substituted “military judge or by the president of a court-martial without a military judge” for “president of the court”.

Statutory Notes and Related Subsidiaries

EFFECTIVE DATE OF 2017 AMENDMENT

Amendment by Pub. L. 115-91 effective immediately after the amendments made by div. E (§§5001-5542) of Pub. L. 114-328 take effect as provided for in section 5542 of that Act (10 U.S.C. 801 note), see section 531(p) of Pub. L. 115-91, set out as a note under section 801 of this title.

EFFECTIVE DATE OF 2016 AMENDMENT

Amendment by Pub. L. 114-328 effective on Jan. 1, 2019, as designated by the President, with implementing regulations and provisions relating to applicability to various situations, see section 5542 of Pub. L. 114-328 and Ex. Ord. No. 13825, set out as notes under section 801 of this title.

EFFECTIVE DATE OF 2013 AMENDMENT

Amendment by Pub. L. 113-66 effective on the later of Dec. 26, 2014, or the date of the enactment of the Carl Levin and Howard P. “Buck” McKeon National Defense Authorization Act for Fiscal Year 2015 (Dec. 19, 2014) and applicable with respect to preliminary hearings

conducted on or after that effective date, see section 1702(d)(1) of Pub. L. 113-66, set out as a note under section 802 of this title.

EFFECTIVE DATE OF 1983 AMENDMENT

Amendment by Pub. L. 98-209 effective first day of eighth calendar month after Dec. 6, 1983, but not to affect the designation or detail of a military judge or military counsel to a court-martial before that date, see section 12(a)(1), (2) of Pub. L. 98-209, set out as a note under section 801 of this title.

EFFECTIVE DATE OF 1981 AMENDMENT

Amendment by Pub. L. 97-81 to take effect at end of 60-day period beginning on Nov. 20, 1981, and to apply to trials by courts-martial in which all charges are referred to trial on or after that date, see section 7(a) and (b)(4) of Pub. L. 97-81, set out as an Effective Date note under section 706 of this title.

EFFECTIVE DATE OF 1968 AMENDMENT

Amendment by Pub. L. 90-632 effective on first day of tenth month following October 1968, see section 4 of Pub. L. 90-632, set out as a note under section 801 of this title.

§ 839. Art. 39. Sessions

(a) At any time after the service of charges which have been referred for trial to a court-martial composed of a military judge and members, the military judge may, subject to section 835 of this title (article 35), call the court into session without the presence of the members for the purpose of—

- (1) 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;
- (2) 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 of the court;
- (3) holding the arraignment and receiving the pleas of the accused;
- (4) conducting a sentencing proceeding and sentencing the accused under section 853(b)(1) of this title (article 53(b)(1)); and
- (5) performing any other procedural function which may be performed by the military judge under this chapter or under rules prescribed pursuant to section 836 of this title (article 36) and which does not require the presence of the members of the court.

(b) Proceedings under subsection (a) shall be conducted in the presence of the accused, the defense counsel, and the trial counsel and shall be made a part of the record. These proceedings may be conducted notwithstanding the number of members of the court and without regard to section 829 of this title (article 29). If authorized by regulations of the Secretary concerned, and if at least one defense counsel is physically in the presence of the accused, the presence required by this subsection may otherwise be established by audiovisual technology (such as videoteleconferencing technology).

(c) When the members of a court-martial deliberate or vote, only the members may be present. All other proceedings, including any other consultation of the members of the court with counsel or the military judge, shall be

made a part of the record and shall be in the presence of the accused, the defense counsel, the trial counsel, and the military judge.

(d) The findings, holdings, interpretations, and other precedents of military commissions under chapter 47A of this title—

- (1) may not be introduced or considered in any hearing, trial, or other proceeding of a court-martial under this chapter; and
- (2) may not form the basis of any holding, decision, or other determination of a court-martial.

(Aug. 10, 1956, ch. 1041, 70A Stat. 51; Pub. L. 90-632, §2(15), Oct. 24, 1968, 82 Stat. 1338; Pub. L. 101-510, div. A, title V, §541(a), Nov. 5, 1990, 104 Stat. 1565; Pub. L. 109-163, div. A, title V, §556, Jan. 6, 2006, 119 Stat. 3266; Pub. L. 111-84, div. A, title XVIII, §1803(a)(2), Oct. 28, 2009, 123 Stat. 2612; Pub. L. 114-328, div. E, title LVII, §5222, Dec. 23, 2016, 130 Stat. 2909; Pub. L. 115-91, div. A, title X, §1081(c)(1)(D), Dec. 12, 2017, 131 Stat. 1598.)

HISTORICAL AND REVISION NOTES

Revised section	Source (U.S. Code)	Source (Statutes at Large)
839	50:614.	May 5, 1950, ch. 169, §1 (Art. 39), 64 Stat. 121.

The word “When” is substituted for the word “Whenever”. The words “deliberates or votes” are substituted for the words “is to deliberate or vote”. The word “may” is substituted for the word “shall”. The word “shall” is inserted before the words “be in the presence” for clarity.

Editorial Notes

AMENDMENTS

2017—Subsec. (a)(4). Pub. L. 115-91 substituted “under section 853(b)(1) of this title (article 53(b)(1))” for “in non-capital cases unless the accused requests sentencing by members under section 825 of this title (article 25)”.

2016—Subsec. (a)(3). Pub. L. 114-328, §5222(1)(A), struck out “if permitted by regulations of the Secretary concerned,” before “holding” and “and” after “accused”.

Subsec. (a)(4), (5). Pub. L. 114-328, §5222(1)(B), (C), added par. (4) and redesignated former par. (4) as (5).

Subsec. (c). Pub. L. 114-328, §5222(2), struck out “, in cases in which a military judge has been detailed to the court,” after “the trial counsel, and”.

2009—Subsec. (d). Pub. L. 111-84 added subsec. (d).

2006—Pub. L. 109-163 redesignated concluding provisions of subsec. (a) as subsec. (b), substituted “Proceedings under subsection (a) shall be conducted” for “These proceedings shall be conducted”, inserted at end “If authorized by regulations of the Secretary concerned, and if at least one defense counsel is physically in the presence of the accused, the presence required by this subsection may otherwise be established by audiovisual technology (such as videoteleconferencing technology).”, and redesignated former subsec. (b) as (c).

1990—Subsec. (a). Pub. L. 101-510 inserted at end “These proceedings may be conducted notwithstanding the number of members of the court and without regard to section 829 of this title (article 29).”

1968—Pub. L. 90-632 added subsec. (a), designated existing provisions as subsec. (b), substituted “military judge” for “law officer”, and struck out provisions authorizing the court after voting on the findings in a general court-martial to request the law officer and the reporter to appear before the court to put the findings in proper form.