

judge immediately without a vote by the members. The finding shall constitute the finding of the military commission unless the plea of guilty is withdrawn prior to announcement of the sentence, in which event the proceedings shall continue as though the accused had pleaded not guilty.

(c) **PRE-TRIAL AGREEMENTS.**—(1) A plea of guilty made by the accused that is accepted by a military judge under subsection (b) and not withdrawn prior to announcement of the sentence may form the basis for an agreement reducing the maximum sentence approved by the convening authority, including the reduction of a sentence of death to a lesser punishment, or that the case will be referred to a military commission under this chapter without seeking the penalty of death. Such an agreement may provide for terms and conditions in addition to a guilty plea by the accused in order to be effective.

(2) A plea agreement under this subsection may not provide for a sentence of death imposed by a military judge alone. A sentence of death may only be imposed by the unanimous vote of all members of a military commission concurring in the sentence of death as provided in section 949m(b)(2)(D) of this title.

(Added Pub. L. 111-84, div. A, title XVIII, §1802, Oct. 28, 2009, 123 Stat. 2587; amended Pub. L. 112-81, div. A, title X, §1030(b), Dec. 31, 2011, 125 Stat. 1570; Pub. L. 113-291, div. A, title X, §1071(f)(9), Dec. 19, 2014, 128 Stat. 3510.)

#### Editorial Notes

##### PRIOR PROVISIONS

A prior section 949i, added Pub. L. 109-366, §3(a)(1), Oct. 17, 2006, 120 Stat. 2614, related to pleas of the accused, prior to the general amendment of this chapter by Pub. L. 111-84.

##### AMENDMENTS

2014—Subsec. (b). Pub. L. 113-291 substituted a comma for “,” after “referred capital”.

2011—Subsec. (b). Pub. L. 112-81, §1030(b)(1), in the first sentence, inserted “, including a charge or specification that has been referred capital,” after “military judge”, “by the military judge” after “may be entered”, and “by the members” after “vote”.

Subsec. (c). Pub. L. 112-81, §1030(b)(2), added subsec. (c).

#### § 949j. Opportunity to obtain witnesses and other evidence

(a) **IN GENERAL.**—(1) Defense counsel in a military commission under this chapter shall have a reasonable opportunity to obtain witnesses and other evidence as provided in regulations prescribed by the Secretary of Defense. The opportunity to obtain witnesses and evidence shall be comparable to the opportunity available to a criminal defendant in a court of the United States under article III of the Constitution.

(2) Process issued in military commissions under this chapter to compel witnesses to appear and testify and to compel the production of other evidence—

(A) shall be similar to that which courts of the United States having criminal jurisdiction may lawfully issue; and

(B) shall run to any place where the United States shall have jurisdiction thereof.

(b) **DISCLOSURE OF EXCULPATORY EVIDENCE.**—(1) As soon as practicable, trial counsel in a military commission under this chapter shall disclose to the defense the existence of any evidence that reasonably tends to—

(A) negate the guilt of the accused of an offense charged; or

(B) reduce the degree of guilt of the accused with respect to an offense charged.

(2) The trial counsel shall, as soon as practicable, disclose to the defense the existence of evidence that reasonably tends to impeach the credibility of a witness whom the government intends to call at trial.

(3) The trial counsel shall, as soon as practicable upon a finding of guilt, disclose to the defense the existence of evidence that is not subject 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.)

#### Editorial Notes

##### 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.