"DEFENSE COUNSEL, PLEASE RISE": A COMPARATIVE ANALYSIS OF TRIAL *IN ABSENTIA*

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"Run, run as fast as you can. You can't catch me, I'm the Gingerbread Man."[1]

I. Introduction

On May 27, 2007, Private (PVT) Jonathon Medina viciously beat and raped a young enlisted female Soldier in her barracks room.[2] Assigned to the same battalion, PVT Medina and the victim were acquainted with each other and attended the same party earlier in the evening on the night of the attack.[3] After investigators matched DNA recovered from the victim to PVT Medina, his commander charged him with rape,[4] burglary with intent to commit rape, and attempted anal sodomy.[5] On March 17, 2008, the military judge arraigned PVT Medina and advised the Soldier that if he voluntarily failed to appear for trial, he could be tried and sentenced *in absentia*.[6] During the arraignment, Private Medina indicated his understanding.[7] On March 20, 2008, on the eve of his court-martial, PVT Medina voluntarily absented himself from the proceedings.[8] A hearing was held before the commencement of trial

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[1] JIM AYLESWORTH, THE GINGERBREAD MAN 9 (1998).

[2] United States v. Medina, No. 2008-0233 (A. Ct. Crim. App. June 2008), *cert. denied*, United States v. Medina, 09-0775/AR (C.A.A.F. Dec. 4, 2009).

[3] *Id*.

[4] Transcript of Record at 5, United States v. Medina (No. 2008-0233).

[5] *Id*.

[6] *Id*. A "trial *in absentia*" is a "trial held without the accused being present." BLACK'S LAW DICTIONARY 1645 (9th ed. 2009).

[7] Transcript of Record at 24, United States v. Medina (No. 2008-022).

[8] *Id.* at 61.

the following day, wherein the military judge heard testimony from PVT Medina's mother, his roommate, a friend from his unit, and the company first sergeant regarding PVT Medina's actions the last night for which he was accounted.[9] After hearing the evidence, the military judge found that PVT Medina voluntarily absented himself and the Government made all necessary efforts to procure his presence at trial to no avail.[10] The trial proceeded without the accused present and an officer panel the court convicted PVT Medina of rape and unlawful entry,[11] sentencing him to a reduction to the lowest enlisted grade, forfeiture of all pay and allowances, confinement for thirteen years, and a bad-conduct discharge.[12]

Rule for Courts-Martial (RCM) 804(c) allows for trial *in absentia* if an accused voluntarily absents himself before the start of the court-martial but after arraignment.[13] This approach conflicts with the corresponding civilian federal rule and with international law. Under federal law, a civilian accused may not be tried *in absentia* without being present at the beginning of trial which does not include arraignment.[14] States have enacted laws that either adopt the federal view or take the opposite approach to allow for trial *in absentia* once an accused is notified of a court date.[15] In the international arena, trials *in absentia* "are controversial and the subject of critical review by . . . leading human rights bodies. . . ."[16] Internationally, *in absentia* trials are generally not permitted unless the "individual convicted in absentia may obtain a retrial."[17] From an ethical standpoint, trials conducted *in*

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[9] *Id*.
[10] *Id*.
[11] *Id.* at 251.
[12] *Id*. at 290.
[13] MANUAL FOR COURTS-MARTIAL, UNITED STATES, R.C.M. 804(c) (2012) [hereinafter 2012 MCM].
[14] FED. R. CRIM. P. 43(b); Crosby v. United States, 506 U.S. 255 (1993).
[15] Kurtis A. Kemper, Annotation, *Sufficiency of Showing Defendant's "Voluntary Absence" from Trial for Purposes of State Criminal Procedure Rules or Statutes Authorizing Continuation of Trial Notwithstanding Such Absence*, 19 A.L.R. 697 (2006); Gov't of the Virgin Islands v. Brown, 507 F.2d 186 (3d Cir. 1975); United States v. Peterson, 524 F.2d 167 (4th Cir. 1975); United States v. Pastor, 557 F.2d 930 (2d Cir. 1977); Commonwealth v. Hill, 723 A.2d 255 (Pa. Supr. Ct. 1999).
[16] Chris Jenks, *Notice Otherwise Given: Will* In Absentia *Trials at the Special Tribunal for Lebanon Violate Human Rights?*, 33 FORDHAM INT'L L.J. 57, 61 (2009); International Covenant on Civil and Political Rights art. 14, Mar. 23, 1976, 999 U.N.T.S. 171; Convention for the Protection of Human Rights and Fundamental Freedoms art. 6, Nov. 4, 1950, 213 U.N.T.S. 222 [hereinafter CPHRFF].
[17] *Id.*

absentia present insurmountable ethical issues for defense counsel representing the accused.[18]

This article examines the rights afforded an accused under military law, civilian federal law, various state laws, and international law with regard to trial *in absentia*. Part I explains the history of military trials *in absentia* and examines the application of the current rule and case law, with particular attention paid to how the unique structure of the military may affect the treatment of an accused who voluntarily absents himself prior to trial. Part II compares the military trial *in absentia* provision to the federal rule to demonstrate the disparity between the two. Part III examines the international stance on trial *in absentia* from both a doctrinal standpoint and a human rights perspective as compared to the military approach. The ethical implications of the current military system governing to trial *in absentia* and how the federal rule ensures a more equitable and ethical process are discussed in Part IV. In conclusion, this article argues for a change in policy in the military criminal justice system to bring it in line with the federal system and international practices to create a more fair and equitable judicial process for the absent accused.

II. Military Trials *In Absentia*

A. History

One of the earliest mentions in American military writing of trial *in absentia* was in *Military Law*, "a comprehensive treatise on the science of Military Law," written by Colonel William Winthrop, former Assistant Judge Advocate General of the Army, in 1886.[19] Colonel Winthrop wrote extensively on the court-martial process and discussed the manner in which to proceed in the event an accused absented himself from custody and was not present for trial.[20] Understanding that the presence of the accused was fundamental to an equitable court-martial, Colonel Winthrop carved out several exceptions:

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[18] *See* Franics A. Gilligan & Edward J. Imwinkelried, *Waiver Raised to the Second Power: Waivers of Evidentiary Privileges by Lawyers Representing Accused Being Tried* In Absentia, 56 S.C. L. REV. 509 (2005); James G. Starkey, *Trial* In Absentia, 53 ST. JOHN'S L. REV. 721 (1979).

[19] WILLIAM WINTHROP, MILITARY LAW, at v (1886).

[20] The Supreme Court recognizes Colonel Winthrop as the "Blackstone of Military Law." Hamdan v. Rumsfeld, 548 U.S. 557, 597 (2006).

> On all days and occasions of the trial on which any material proceeding is had or business is done, the accused, unless he has willfully absented himself, as by escaping from military custody or deserting the service, or has been obliged to be removed on account of drunkenness or disorderly conduct, is entitled to be present and his presence is essential to the legality of the proceedings and sentence.[21]

With regard to when a trial could proceed in the absence of the accused, Colonel Winthrop regarded the time of arraignment as the point of no return as it were. If an accused escapes from custody after entering a not guilty plea, the trial "may proceed and the prosecution completed without regard to his absence."[22] He left no doubt that proceeding to findings and, if necessary, sentencing after the taking of evidence was complete was expected. He later wrote in *Military Law and Precedents* that "[i]f, after the evidence, or the evidence of the prosecution, is all in, the accused escapes from military custody and absconds, the court may proceed to judgment in the usual manner notwithstanding."[23] In fact, Colonel Winthrop succinctly noted:

> The fact that, *pending the trial*, the accused has escaped from military custody, furnishes no ground for not proceeding to a finding, and, in the event of conviction, to a sentence, in his case; and the court may and should thus find and sentence precisely as in any other instance. The court having once duly assumed jurisdiction of the offense and person, cannot, by any wrongful act of the accused, be ousted of its authority or discharged from its duty to proceed fully to try and determine, according to law and its oath.[24]

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[21] WINTHROP, *supra* note 19, at 715; *see also* HARRIS PRENDERGAST, LAW RELATING TO OFFICERS IN THE ARMY 208 (1855) ("[T]he prisoner has a right to be present during the examination of witness . . . [b]ut if he misconducts himself in such a manner as to obstruct the proceedings of the court, he may lawfully be removed, and the trial may be continued in his absence."); THOMAS SIMMONS, THE CONSTITUTION AND PRACTICE OF COURTS-MARTIAL WITH A SUMMARY OF THE LAW OF EVIDENCE 201 (1873) ("No proceedings in open court can take place except in the presence of the prisoner.").

[22] WINTHROP, *supra* note 19, at 403.

[23] WILLIAM WINTHROP, MILITARY LAW AND PRECEDENTS 374 (1896).

[24] WINTHROP, *supra* note 19, at 554 (emphasis added).

In support of his position regarding trial *in absentia*, Colonel Winthrop cited the 1864 military commission of Harrison Dodd.[25] The commission arrested and charged Harrison Dodd, a founding member of the Sons of Liberty, an antiwar group "devoted to the principles of the founding fathers of the country,"[26] with various crimes related to treason against the United States. Dodd, a civilian, and several others faced the military commission assembled to try them in Indianapolis on September 22, 1864.[27]

At the start of the commission, Dodd's attorney argued that Dodd's civilian status, coupled with the operability of civilian courts at the time, obviated the need for trial by a military commission.[28] When that argument failed, the commission began to take evidence against Dodd. Shortly after the commission began, while transferring to another cell, Dodd escaped from custody.[29] Upon learning of the escape, the Judge Advocate of the commission, Major Henry Burnett, recessed the trial only to reconvene two days later and submit the case to the commission for findings based upon the evidence taken up to that point.[30] Despite Dodd's counsel arguing that no precedent in military law existed to allow an accused "to be proceeded against in his absence,"[31] Major Burnett proceeded.

In support of his decision to move forward despite the absence of the accused, Major Burnett relied upon case law from the supreme courts of Ohio and Indiana.[32] In those cases, the courts held that that if the accused voluntarily absents himself after being present at the commencement of the trial, the trial could proceed as though the accused were present, to include the taking of evidence.[33] In Dodd's case, Major

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[25] *Id*.
[26] MICHAL R. BELKNAP, AMERICAN POLITICAL TRIALS 101 (1994).
[27] *Id*. at 103.
[28] *Id*.
[29] *Id*. at 104.
[30] *Id*.
[31] THE TRIALS FOR TREASON AT INDIANAPOLIS, DISCLOSING THE PLANS FOR ESTABLISHING A NORTH-WESTERN CONFEDERACY 53 (Benn Pitman ed., 1865).
[32] *Id*. at 51.
[33] State v. Wamire, 16 Ind. 357 (1861) (if defendant is present at commencement of trial and later voluntarily absents himself, the court may proceed to verdict); McCorkle v. State, 14 Ind. 39 (Ind. 1860) (trial court properly conducted examination of witnesses when defendant deliberately and voluntarily absented himself during testimony of some witnesses); Fight v. State, 7 Ohio 180 (1835) (trial court proceeded as it should have

Burnett reasoned that he did not go as far as the esteemed courts did because he closed the case and did not allow further evidence to be heard once Dodd escaped from custody.[34] Major Burnett found that by voluntarily absenting himself after the commencement of trial, the accused waived his rights to be present and to be heard.[35]

Major Burnett indicated that his finding might be different if the accused escaped before the start of the trial. He relied on *Fight v. State*:[36]

> If on bail, I apprehend, neither the courts of Great Britain nor the United States would proceed to impanel a jury, in a trial for felony, unless the accused were present to look at his challenges. If the trial, however, is once commenced, and the prisoner, in his own wrong, *leaves the Court, abandons his case to the management of counsel, and runs away*, I can find no adjudged case to sustain the position, that in England the proceedings would be stayed.[37]

Interestingly, the very cases cited by Major Burnett and the Dodd Commission and subsequently cited by Colonel Winthrop only provide for trial *in absentia* after the taking of evidence. Moreover, Colonel Winthrop clearly noted some six years earlier that a trial *in absentia* could not occur "after the accused has pleaded guilty, or after he has pleaded not guilty and the evidence for the prosecution has been presented, he effects an escape from military custody and disappears."[38] His writings seem to suggest that his opinion shifted from the allowance of trial *in absentia* only after evidence was presented to permitting it as long as arraignment occurred prior to the absence. It is the latter position that formed the basis for military law regarding trial *in absentia*.[39]

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when defendant voluntarily left during trial and court proceeded to verdict in his absence).

[34] TRIALS FOR TREASON, *supra* note 31, at 52.

[35] *Id*. at 53.

[36] *Id*.

[37] *Fight*, 7 Ohio at 182–83.

[38] WILLIAM WINTHROP, DIGEST OF OPINIONS OF THE JUDGE ADVOCATE GENERAL OF THE ARMY 205 (1880).

[39] In *Ex parte Milligan*, the Supreme Court overturned the convictions of Dodd's co-conspirators, noting that the military commission did not have jurisdiction over civilians. 71 U.S. 2 (1866).

B. Trial *In Absentia* Rules Evolve in the Manual for Courts-Martial

1. Rule for Courts-Martial 804(c)

Published in 1890, the first *Manual for Courts-Martial* (*MCM*) contained the same language from Colonel Winthrop's *Military Law*:

> A court having once duly assumed jurisdiction of an offense and person, cannot, by any wrongful act of the accused, be ousted of its authority or discharged from its duty to proceed fully to try and determine, according to law and its oath. Thus the fact that, *pending the trial*, the accused has escaped from military custody, furnishes no ground for not proceeding to a finding, and, in the event of conviction, to a sentence, in the case; and the court may and should find and sentence as in any other case.[40]

Thus, an accused could be tried and sentenced *in absentia* if he escaped from custody while "pending" trial, seemingly allowing for trial *in absentia* if an accused absents himself prior to the swearing of a panel or the taking of evidence. Again, the cases cited by Colonel Winthrop are illustrative as they are the same cases cited by Major Bennett in the Dodd Commission. Those cases, *Fight*, *McCorkle*, and *Wamire*, allow for trial *in absentia* only after a trial has commenced.[41]

Further, it is clear from the *1890 MCM* that Colonel Winthrop contemplated proceeding only after arraignment of an accused by his use of the phrase "proceeding to a finding" which supports the supposition that a court-marital already had begun before the accused became absent. As aforementioned, Colonel Winthrop made clear that an accused waives "his right of defence [sic] and the court is authorized to proceed with its finding" if an accused absents himself after pleading guilty or, after pleading not guilty (at arraignment), the prosecution has presented evidence.[42]

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[40] MANUAL FOR COURTS-MARTIAL, UNITED STATES 15 (Jurisdiction) (1890) (emphasis added).
[41] WINTHROP, *supra* note 38, at 393.
[42] *Id.* at 205.

The rule remained the same in the *Manual for Courts-Martial* published in 1891, 1893, 1901, and 1908.[43] In the *1917 MCM*, the phrase "pending the trial" was changed to "after arraignment and during the trial."[44]

> A court-martial having once duly assumed jurisdiction of a case, cannot, by any wrongful act of the accused, be ousted of its authority or discharged from its duty to proceed fully to try and determine according to law and its oath. Thus the fact that, *after arraignment and during the trial*, the accused has escaped from military custody furnishes no ground for not proceeding to a finding, and, in the event of conviction, to a sentence, in the case; and the court may and should find and sentence as in any other case. During such absence it is proper for his counsel to continue to represent him in all respects as though present.[45]

The new language changed the prior rule by clearly solidifying the drafters' intent to ensure that a trial could not proceed in the absence of an accused unless such absence occurred (1) after arraignment or (2) during the trial itself.

The *MCM*s published in 1921, 1928, 1949, 1951, and 1968 (the first *MCM* published for all three services), all contain the same or a similar provision as the one written in the *1917 MCM*.[46] It was not until the *1969 MCM* that the rule regarding trial *in absentia* changed again.[47] The new rule as codified in the *1969 MCM* changed the definition of the beginning of trial from the time of arraignment to the time any Article 39(a) session began.[48]

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[43] MANUAL FOR COURTS-MARTIAL, UNITED STATES, 8, Jurisdiction (1891); MANUAL FOR COURTS-MARTIAL, UNITED STATES, 16, Jurisdiction (1893); MANUAL FOR COURTS-MARTIAL, UNITED STATES pt. I, ¶ 7 (1901); MANUAL FOR COURTS-MARTIAL, UNITED STATES pt. I, ¶ 7 (1908).

[44] MANUAL FOR COURTS-MARTIAL, UNITED STATES pt. IV, ¶ 36 (1917).

[45] *Id*. (emphasis added).

[46] MANUAL FOR COURTS-MARTIAL, UNITED STATES pt. IV, ¶ 36 (1921); MANUAL FOR COURTS-MARTIAL, UNITED STATES pt. IV, ¶ 10 (1928); MANUAL FOR COURTS-MARTIAL, UNITED STATES pt. IV, ¶ 11 (1949); MANUAL FOR COURTS-MARTIAL, UNITED STATES pt. IV, ¶ 11 (1951); MANUAL FOR COURTS-MARTIAL, UNITED STATES pt. IV, ¶ 11 (1968).

[47] MANUAL FOR COURTS-MARTIAL, UNITED STATES pt. IV, ¶ 10 (1969) [hereinafter 1969 MCM].

[48] *Id*.

> The accused's voluntary and unauthorized absence after *the trial has commenced in his presence* and he has been arraigned does not terminate the jurisdiction of the court, which may proceed with the trial to findings and sentence notwithstanding his absence. In such a case the accused, by his wrongful act, forfeits his right of confrontation.[49]

According to the drafters, the change was made "to correct the statement that trial commences in the accused's presence 'by arraignment.'"[50] With trial commencement possible at an Article 39(a) session held prior to arraignment, the drafters made clear that "[a]rraignment is retained as the time subsequent to which the accused's voluntary absence does not terminate the jurisdiction of the court."[51] In other words, arraignment was no longer considered the time at which a trial commenced. Thus, as long as an accused had been arraigned and there had been an Article 39(a) session at which the accused was present, a court could proceed to trial.

The *1984 MCM* once again changed the provision regarding trial *in absentia* and encapsulated it in RCM 804(c). The drafters deleted the phrase "after the trial has commenced" as it appeared in the *1969 MCM* and the rule became what it is today.[52] The current RCM 804(c) provides:

> The further progress of the trial to and including the return of the findings and, if necessary, determination of a sentence shall not be prevented and the accused shall be considered to have waived the right to be present whenever an accused, initially present: (1) Is *voluntarily absent after arraignment* (whether or not informed by the military judge of the obligation to remain during the trial) . . . .[53]

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[49] *Id.*
[50] U.S. DEP'T OF ARMY, PAM. 27-2, ANALYSIS OF CONTENTS FOR COURTS-MARTIAL, UNITED STATES 1969, REVISED EDITION para. 11c (July 1970) [hereinafter DA PAM. 27-2].
[51] *Id.*
[52] MANUAL FOR COURTS-MARTIAL, UNITED STATES, R.C.M. 804(c) (1984) [hereinafter 1984 MCM].
[53] 2012 MCM, *supra* note 13, R.C.M. 804(c) (emphasis added).

While the language differs from that in the *1969 MCM*, the meaning remains the same: "Trial in absentia, when an accused voluntarily fails to appear at trial following arraignment, has long been permitted in the military."[54] In order for an accused to be tried *in absentia*, an accused must be present initially, even if only at an Article 39(a) session, and he must be arraigned.[55]

2. Article 36, Uniform Code of Military Justice

Rule for Court-Martial 804(c) differs from Federal Rule of Civil Procedure (FRCP) 43(a) in that arraignment is not the time at which a trial commences in federal court but rather at jury empanelment,[56] whereas in the military, trial begins with any Article 39(a) session.[57] The allowance for variance between two rules is provided for in Article 36 of the Uniform Code of Military Justice (UCMJ). Article 36 mandates that the President will prescribe the rules governing courts-martial, one of which is RCM 804(c), set forth in the *MCM*.[58] Article 36 makes it clear that the "pretrial, trial, and post-trial procedures . . . shall . . . apply the principles of law and the rules of evidence generally recognized in the trial of criminal cases in the United States district courts."[59] This concept of uniformity is of particular importance when dealing with trial procedures. The military rule should be in line with the federal rule "so far as [the President] considers practicable."[60] It is for this reason that the drafters used the language they did in the analysis of RCM 804(c)[61]:

> Fed. R. Crim. P. 43(c) was not adopted since it is not compatible with military practice . . . . [T]rial on the merits may take place when the accused is absent under this rule. Such a construction is necessary in the military because delaying a sentencing determination increases the expense and inconvenience of

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[54] 1984 MCM, *supra* note 51, R.C.M. 804(c) analysis.
[55] 2012 MCM, *supra* note 13, R.C.M. 804(c).
[56] Frost v. United States, 618 A.2d 653, (D.C. 1992) (jury impaneled day prior to defendant's absence); People v. Snyder, 56 Cal. App. 3d 195 (2d Dist. 1976) (if jury trial, commencement occurs when jury is impaneled and sworn and if bench trial, commencement occurs when first witness is sworn).
[57] DA PAM. 27-2, *supra* note 50.
[58] UCMJ art. 36 (2012).
[59] *Id*.
[60] *Id*.
[61] 2012 MCM, *supra* note 13, R.C.M. 804(c) anaylsis.

> reassembling the court-martial and the risk that such reassembly will be impossible. Federal courts do not face a similar problem.[62]

The most obvious issue with the analysis is that the drafters only address the difference as it pertains to sentencing. They do reason that "arraignment" was substituted for "the trial has commenced" because "arraignment is a more appropriate point of reference" since a court session is involved.[63] Such justification is rather weak in that federal criminal courts hold motion hearings, arraignments, and status conferences, yet the point of no return is still considered the time at which a jury is impaneled. Without a strong, logical reason for variance, RCM 804(c) should mirror FRCP 43 and a review of cases involving trial *in absentia* supports this notion.

C. Case Law

Beginning with the commissions in 1864, military courts have held that an accused can be tried, convicted, and sentenced *in absentia*.[64] In 1953, the Court of Military Appeals heard the case of *United States v. Houghtaling* wherein the accused escaped from confinement after the court-martial convened and read the charges.[65] *Houghtaling* established that "one, who by his own act removes himself from the presence of the court trying him on a criminal charge, thereby waives—or at least forfeits—his right to have all phases of the trial conducted in his presence."[66] The court further held that reading of the charges and requesting the accused enter pleas constitute arraignment."[67]

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[62] *Id*.
[63] *Id*.
[64] TRIALS FOR TREASON, *supra* note 31; *see also* United States v. Houghtaling, 8 C.M.R. 30 (C.M.A. 1953); United States v. Sharp, 38 M.J. 33 (C.A.A.F. 1993).
[65] 8 C.M.R. at 30.
[66] *Id*.
[67] *Id.* at 32.

In *United States v. Sharp*, decided in 1993, the court, citing *Houghtaling*, reaffirmed that "under RCM 804, an accused may be tried *in absentia* when there is a voluntary absence after arraignment" and that trial by court-martial begins when an accused is arraigned by a military judge.[68] Holding that "[t]he voluntariness of an absence must be established on the record before trial *in absentia* may proceed," the court reasoned that the prosecution bears the burden in proving voluntariness as the moving party for trial *in absentia*.[69] Additionally, an accused must also be on notice that a trial will commence even if he is not present in order for him to be tried *in absentia*. Thus, "an accused who fails to receive actual notice of the trial date, some 8 months after the case had been continued for an unknown period, could not be tried in absentia."[70] In summation, for an accused to be tried *in absentia* by the military, his absence must be after arraignment and it must be voluntary in contrast to federal law where absence must be voluntary and "commencement of trial . . . apparently denotes commencement of trial on the merits."[71]

D. Analysis

Proponents of the current law argue that the cost of delaying trial combined with issues involved with reassembling the panel distinguish the military and federal systems, thereby justifying a variance in the law regarding trial *in absentia*.[72] It is reasoned that an accused who is given notice that a trial can proceed in his absence and then chooses to absent himself assumes the risk involved.[73] Allowing for trial *in absentia* in the military is deemed "necessary in the military because delaying a sentence determination increases the expense and inconvenience of reassembling the court-martial and the risk that such reassembly will be impossible. Federal courts do not face a similar problem."[74]

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[68] *Sharp*, 38 M.J. at 37.
[69] 2012 MCM, *supra* note 13, R.C.M. 804(c) analysis.
[70] United States v. Peebles, 3 M.J. 177 (C.M.A. 1977).
[71] United States v. Price, 48 M.J. 181, 182 (C.A.A.F. 1998).
[72] *Id*.
[73] United States v. Sharp, 38 M.J. 33 (C.A.A.F. 1993); United States v. Bass, 40 M.J. 220 (C.M.A. 1994).
[74] 2012 MCM, *supra* note 13, R.C.M. 804(c) analysis.

The federal rule does not permit a trial to continue without the accused unless the accused was present after the trial commenced.[75] However, military courts have found that guaranteeing this right to servicemembers would significantly degrade the efficacy of the system. The court in *Houghtaling* held:

> Of necessity military personnel are highly mobile, and on occasion are scattered to the four winds within a matter of hours. In overseas theaters, and particularly in combat areas, witnesses, both military and civilian, are exposed to uncommon hazards which make their assembly for trial difficult always and too often impossible. . . . We discern no reason for impeding—perhaps even defeating—the prosecution of those who choose not to be present for trial, regardless of the offense with which they are charged. This would, we believe, be distinctly in derogation of the just claims of the military society, an interest often disregarded in febrile evaluation of the rights of frequently undeserving individuals.[76]

Another reason behind the military's variance from the federal rule is that arraignment "is a clearer demarcation of the point after which the accused's voluntary absence will not preclude continuation of the proceedings."[77] Thus, if an accused is present for arraignment, which may occur months prior to the start of the court-martial, and does not appear in court for trial, the trial may proceed *in absentia*.

> [A] military accused is arraigned by a military judge, rather than a Federal magistrate, and that gives special force to the argument that the subsequently absent military accused has "by his own act remove[d] himself from the presence of a court trying him on a criminal charge . . . ."[78]

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[75] FED. R. CRIM. P. 43.
[76] 8 C.M.R. 30, 34 (C.M.A 1953).
[77] 2012 MCM, *supra* note 13, R.C.M. 804(c) analysis.
[78] *Sharp*, 8 M.J. 33 (quoting *Houghtaling*, 8 C.M.R. 30).

The court explained that there are

> [d]ifferences between the usual operations of the military justice system and the Federal civilian system . . . [the court found] no compelling reason to deviate from the *Houghtaling* notion that, in the military justice system, arraignment constitutes commencement of the trial for purposes of marking the point after which an accused may be tried though voluntarily absent. . . . [A] military accused who absents himself after arraignment has done so just as knowingly as has a civilian defendant in the midst of trial.[79]

Despite tenable arguments in support of RCM 804(c), its current construction does not fully protect the rights of an accused. Not only is the right of an accused to be present at all trial proceedings rooted in case law, the right is also "grounded in the due process clause of the Fifth Amendment and the right to confrontation clause of the Sixth Amendment of the Constitution."[80] Moreover, this right is encapsulated in the federal rule governing trial *in absentia* and in the Supreme Court's decision in *Crosby v. United States* in 1993:

> As a general matter, the costs of suspending a proceeding already under way will be greater than the cost of postponing a trial not yet begun. If a clear line is to be drawn marking the point at which the costs of delay are likely to outweigh the interests of the defendant and society in having the defendant present, that commencement of trial is at least a plausible place at which to draw the line.[81]

Flight mid-trial is more clearly knowing and voluntary than flight before trial.[82] Additionally, since "the notion that trial may be commenced *in absentia* still seems to shake most lawyers, it would hardly seem appropriate to impute knowledge that this will occur to their clients."[83]

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[79] *Id.* at 39.
[80] 2012 MCM, *supra* note 13, R.C.M. 804(c) analysis.
[81] 506 U.S. 255, 261 (1993).
[82] *Id*.
[83] James G. Starkey, *Trial* In Absentia, 54 N.Y. ST. B.J. 30, 34 n.28 (1982).

Finally, Article 36 requires the President to promulgate rules of procedure that are consistent with the practice of federal district courts unless it is impracticable to apply such rules to courts-martial.[84] Because RCM 804(c) differs from FRCP 43, the drafters' analysis and discussion takes great pains to find a difference between court-martial practice and federal criminal practice.[85] Essentially, the only apparent reason for the failure of the military to adopt the federal rule governing trial *in absentia* is the expense and inconvenience involved in starting anew as seen as by the military courts. That reasoning is flawed in that federal courts face the same issues in restarting the trial process and have chosen to use the beginning of the trial as the "marking point at which costs of delaying trial are likely to increase and helping to ensure that any waiver is knowing and voluntary."[86]

III. Civilian Trials *In Absentia*

A. Federal Approach

Distinct from RCM 804(c), FRCP 43 prohibits holding felony trials *in absentia* unless the defendant leaves after the trial has begun.[87] If that occurs, the trial may continue as if the defendant were present.[88] The federal rule says in part that "the defendant must be present at: the initial appearance, the initial arraignment, and the plea; (2) every trial stage, including jury impanelment and the return of the verdict; and (3) sentencing."[89] The defendant may waive continued presence and that waiver is in effect through sentencing.[90] Voluntary absence by a defendant is considered to be a waiver of the right to be present.

> A defendant who was initially present at trial . . . waives the right to be present . . . when the defendant is voluntarily absent after the trial has begun, regardless of whether the court informed the defendant of an obligation to remain during trial . . . [and] . . . in a

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[84] 2012 MCM, *supra* note 13, art. 36.
[85] *Id.* R.C.M. 804(c) analysis.
[86] *Crosby*, 506 U.S. at 255.
[87] FED. R. CRIM. P. 43(a)(1)—(3).
[88] Diaz v. United States, 223 U.S. 455 (1912).
[89] FED. R. CRIM. P. 43(a)(1)—(3).
[90] *Id.* 43(c).

> noncapital case, when the defendant is voluntarily absent during sentencing . . . .[91]

The development of the current federal rule and the case law which support it date back to the early days of British jurisprudence.

1. History

Early criminal trials were more akin to civil suits in which one individual accused another of a wrongdoing thus establishing the necessity for all parties involved to be present at trial.[92] "The presence of the defendant at his own trial has long been a valued part of the Anglo-Saxon criminal justice system."[93] The presence of a defendant was paramount during all proceedings and trial *in absentia* was simply not possible. For example, "at one time the accused himself had to submit to trial by water or fire ordeal, and his guilt or innocence was determined by his reaction to that test."[94] Used following the Norman Conquest, trial by battle "required the defendant's presence as one of the combatants."[95] As times changed, judges became the chief arbitrators and the accused had to present his case to a judge and open himself up to the testimony of witnesses.[96] The "presence of the accused was still an absolute necessity for the legitimacy of the proceedings."[97] Further, "the accused was not permitted the assistance of counsel"[98] so his presence was a "fundamental aspect of the defense."[99]

2. Case Law

The first American case to address the issue of trial *in absentia* in federal court was *Hopt v. Utah*.[100] In *Hopt*, the defendant was not present during the selection of potential jurors for his capital case.[101]

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[91] *Id.* 43(c)(1)(A)—(B).
[92] Neil P. Cohen, *Trial* in Absentia *Re-Examined*, 40 TENN. L. REV. 155, 167 (1973).
[93] *Id*. at 155.
[94] *Id*. at 167.
[95] Starkey, *supra* note 83, at 722.
[96] Cohen, *supra* note 92, at 168.
[97] *Id*.
[98] *Id*.
[99] *Id*.
[100] 110 U.S. 574 (1884).
[101] *Id*. at 576.

> The legislature has deemed it essential to the protection of one whose life or liberty is involved in a prosecution for felony, that he shall be personally present at the trial, that is, at every stage of the trial when his substantial rights may be affected by the proceedings against him. If he be deprived of his life or liberty without being so present, such deprivation would be without that due process of law required by the Constitution.[102]

The Court made it clear that the presence of an accused was vital to every felony trial, thereby establishing the basis for what would become FRCP 43.

The Court next dealt with the issue of trial *in absentia* in *Lewis v. United States* and held that in felony trials an accused could not waive his presence.[103] This is especially true in a capital case like *Hopt* where the Court reasoned that "the dictates of humanity" necessitate the requirement that an accused be present.[104] However, following *Lewis* was another capital case, *Howard v. Kentucky*, where the court upheld a murder conviction despite the defendant's claim that he was not present when the trial judge dismissed a juror. The Court found no due process violation when, during the trial, there was an "occasional absence of the accused" if there was no injury to his substantial rights.[105] This was the first case essentially to allow the "waiver of presence under limited circumstances in felony prosecutions" thus leading the way for waiver and moving away from requiring the presence of the accused during all stages of a trial.[106]

The next non-capital case to deal with trial *in absentia* was *Diaz v. United States* in 1912.[107] In *Diaz*, the defendant was absent during the questioning of two prosecution witnesses, but he did consent to the trial continuing despite his absence as long as his defense counsel was present.[108] The Court held that voluntary absence after the trial in a non-

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[102] *Id*. at 579.
[103] 146 U.S. 370 (1892).
[104] *Id*. at 372.
[105] 200 U.S. 164, 175 (1906).
[106] Cohen, *supra* note 92, at 170.
[107] 223 U.S. 442 (1912).
[108] *Id*.

capital case begins constitutes a waiver of his right to be present and the court may continue with the trial as though the accused were present.[109]

> If, after the trial has begun in his presence, he voluntarily absents himself, this does not nullify what has been done or prevent the completion of the trial, but, on the contrary, operates as a waiver of his right to be present, and leaves the court free to proceed with the trial in like manner and with like effect as if he were present.[110]

The Court reasoned that the accused's constitutional right to be present "does not guarantee an accused person against the legitimate consequences of his own wrongful acts."[111] The voluntariness of the accused's absence was a decisive factor.

A trial also may continue when an accused is removed from the courtroom due to his own misconduct, as in *Illinois v. Allen*.[112] During Allen's trial for armed robbery, the accused, representing himself, repeatedly disrespected the judge and did not heed the warnings from the judge regarding his questioning of the jurors and his numerous outbursts.[113] The judge ordered Allen removed from the courtroom but permitted his return once Allen promised to conduct himself in accordance with the court's orders.[114] In reviewing the case, the Court held that the accused cannot "be permitted by his disruptive conduct indefinitely to avoid being tried on the charges brought against him."[115]

Following *Allen* and *Diaz*, the Supreme Court next addressed the issue in *Taylor v. United States*.[116] Taylor was present during a morning session of his trial but did not reappear for the afternoon session.[117] Despite his absence, the trial continued and the court ultimately convicted Taylor *in absentia*.[118] In spite of his argument that voluntary absence does not effectuate a valid waiver of his right to be present, the

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[109] *Id.* at 455.
[110] *Id*.
[111] *Id*. at 452.
[112] 397 U.S. 337 (1970).
[113] *Id*. at 339–40.
[114] *Id*. at 337.
[115] *Id*. at 346.
[116] 414 U.S. 17 (1973).
[117] *Id*.
[118] *Id*. at 20.

Court affirmed his conviction, holding that a defendant does not have to be warned of his right to be present or that the trial could continue in his absence, the Court found it inconceivable "that a defendant who flees from a courtroom in the midst of a trial—where judge, jury, witnesses and lawyers are present and ready to continue—would not know that as a consequence the trial could continue in his absence."[119]

In 1993, the Supreme Court again addressed FRCP 43 in *Crosby v. United States*, holding that it does not permit the trial *in absentia* of a defendant who is absent at the beginning of trial.[120] This ruling undermined the analysis set forth in *United States v. Tortora* where the United States Court of Appeals for the Second Circuit held that in federal court voluntary absence prior to the selection of a jury constitutes a waiver.[121] "A defendant's knowing and deliberate absence does not deprive the court of the power to begin the trial and to continue it until a verdict is reached."[122] However, *Crosby* overruled the *Tortora* analysis.

The defendant in *Crosby*, despite notice of the time and date of trial, did not appear.[123] The court delayed the trial several days to undertake a search for Crosby. After a five-day delay, the court found that "Crosby had been given adequate notice of the trial date, that his absence was knowing and deliberate, and . . . that the public interest in proceeding with the trial in his absence outweighed his interest in being present during the proceedings."[124] The trial commenced in Crosby's absence; the court convicted him.[125]

In granting certiorari, the Court succinctly noted that:

> This case requires us to decide whether Federal Rule of Criminal Procedure 43 permits the trial *in absentia* of a defendant who absconds prior to trial and is absent at its beginning. We hold that it does not . . . . The Rule declares explicitly: "The defendant shall be present . . . at every stage of the trial . . . *except as otherwise*

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[119] *Id*.
[120] 506 U.S. 255 (1993).
[121] 464 F.2d 1202 (2d Cir. 1972), *cert. denied sub nom.* Santoro v. United States, 409 U.S. 1063 (1972).
[122] *Tortora*, 464 F.2d at 1209.
[123] *Crosby*, 506 U.S. at 256.
[124] *Id*.
[125] *Id*.

> *provided by this rule"* (emphasis added). The list of situations in which the trial may proceed without the defendant is marked as exclusive not by the "expression of one" circumstance, but rather by the express use of a limiting phrase. In that respect the language and structure of the Rule could not be more clear.[126]

However, the *Crosby* Court reiterated an eighty-year-old precedent that allows for trial *in absentia* if a defendant voluntarily absents himself after the start of trial.

> Where the offense is not capital and the accused is not in custody, . . . if, *after the trial has begun in his presence*, he voluntarily absents himself, this does not nullify what has been done or prevent the completion of the trial, but, on the contrary, operates as a waiver of his right to be present and leaves the court free to proceed with the trial in like manner and with like effect as if he were present.[127]

It is noteworthy that the Court distinguishes between "flight before and flight during a trial" in its ruling.[128] Flight before the start of trial does not allow for *in absentia* proceedings while flight after trial begins does.[129] As mentioned above, the start of a trial in federal court is considered to be commencement of jury selection, as opposed to arraignment like in courts-martial, in part because a knowing and voluntary waiver is clearer if made when the defendant is initially present.[130] Having such a rule rightfully "deprives the defendant of the option of gambling on an acquittal knowing that he can terminate the trial if it seems the verdict will go against him—an option that might otherwise appear preferable to the costly, perhaps unnecessary, path of becoming a fugitive from the outset."[131]

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[126] *Id*.
[127] *Id*. at 260 (quoting *Diaz*, 223 U.S. at 455 (emphasis added)).
[128] *Id*. at 261.
[129] *Id.* ("We do not find the distinction between pretrial and midtrial flight so farfetched as to convince us that Rule 43 cannot mean what it says.").
[130] *Id*.
[131] *Id*. at 262.

B. State Approaches to Trials *In Absentia*

1. Overview

Almost all of the states have enacted a procedural rule or statute establishing the legal framework to adjudicate a trial *in absentia*.[132] Despite prohibiting trial *in absentia* in cases where a defendant does not appear at the outset pursuant to FRCP 43, the Supreme Court has not prohibited states from trying cases *in absentia* as long as a compelling enough reason is shown.[133] However, the states are currently divided in how they approach trials *in absentia*. "In a number of states, a rule of criminal procedure or statute provides that when a defendant, who was present at the commencement of trial, voluntarily absents himself or herself from trial, the court may continue with the trial in the defendant's absence."[134] Other states permit the trial of a defendant even if he is not present at the beginning of trial.[135]

2. Trial In Absentia *Permitted if Present at Commencement*

The vast majority of states follow the federal rule wherein a defendant must be present at the beginning of the trial and must voluntarily waive presence thereafter.[136] Statutes or rules authorizing courts to proceed with trial in the event a defendant voluntarily absents

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[132] ALA. R. CRIM. P. 9.1(b); ALASKA R. OF CRIM. P. 38; ARIZ. R. CRIM. P. 9.1; ARK. CODE ANN. § 16-89-103; COLO. R. OF CRIM. P. 43(b); CT. SUPER. CT. R. 44-8; DEL. SUP. CT. CRIM. R. 43(b); D.C. SUPER. CT. CRIM. R. 43; FLA. R. CRIM. P. 3.180; IDAHO CRIM. R. 43; 720 ILL. COMP. STAT. ANN. 5 § 115-4.1; KAN. STAT. ANN. § 22-3405; KY. R. CRIM. P. 8.28; La. CODE. CRIM. P. ANN. ART. 832; ME. R. CRIM. P. 43; MD. R. 4-231(c); MASS. R. CRIM. P. 18; MINN. R. CRIM. P. 26.03; MISS. CODE ANN. § 99-17-9; MONT. CODE ANN. § 46-16-122(3)(b) ; N.J. R. CRIM. R. 3:16; N.M. R. 5-612(B); N.D. R. CRIM. P. 43; OHIO CRIM. R. 43(A); PENN. R. CRIM. P. 602(A); R.I. SUPER. R. CRIM. P. 43; S.D. CODIFIED LAWS § 23A-39-2; TENN. R. CRIM. P. 43; TEX. CODE CRIM. P. ANN. Art. 33.03; VT. R. CRIM. P. 43(b); VA. CODE ANN. § 19.2-259; WYO. R. CRIM. P. 42.

[133] United States v. Tortora, 464 F.2d 1202 (2d Cir. 1972).

[134] Kemper, *supra* note 15, at 697.

[135] AL. R. CRIM. P. 9.1(b); N.J. R. CRIM. P. 3:16; Government of the Virgin Islands v. Brown, 507 F.2d 186 (3d Cir. 1975); United States v. Peterson, 524 F.2d 167 (4th Cir. 1975); United States v. Pastor, 557 F.2d 930 (2d Cir. 1977); Commonwealth v. Hill, 723 A.2d 255 (Pa. Supr. Ct. 1999).

[136] COLO. R. CRIM. P. 43(b); FLA. R. CRIM. P. 3.180; State v. Aceto, 100 P.3d 629 (Mont. 2004); State v. Staples, 354 A.2d 771 (Me. 1976); Reece v. State, 928 S.W.2d 334 (Ark. 1996).

himself after commencement have been recognized as valid.[137] The commencement of trial is uniformly considered to be when selection of a jury begins or when a jury is impaneled.[138]

In *State v. Staples*, the Maine Supreme Court determined that the defendant's failure to return to the court during the taking of evidence was a voluntary absence because of his initial presence during the examination of witnesses.[139] The court reasoned:

> If a mistrial were to be declared whenever the defendant voluntarily absented himself from trial, the defendant could, after evaluating the course of the proceedings against him, simply leave the courtroom whenever he anticipated an adverse verdict. His voluntary absence would then entitle him to a fresh trial and a second chance at acquittal. The defendant's right to his day in court does not permit him unilaterally to select whatever date his pleasure dictates.[140]

Unlike the defendant in *Staples*, the defendant in *State v. Meade* absconded from the courthouse prior to the jury being impaneled and sworn.[141] The trial court proceeded in the defendant's absence, finding that the trial commenced earlier that morning during plea negotiations.[142] The Supreme Court of Ohio disagreed, relying on *Crosby*, *Diaz*, and *Fight* finding that a trial must commence in order to proceed *in absentia*.[143] Ohio Rule of Criminal Procedure 43(A) mirrors FRCP 43 and the court ruled that "[a] jury trial commences after the jury is impaneled and sworn in the presence of the defendant. Here, Meade fled before the jury had been impaneled and sworn."[144]The states that have adopted FRCP 43 clearly follow the reasoning set forth in *Diaz* and

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[137] Kemper, *supra* note 15, at 697; State v. Elliot, 882 P.2d 978 (Idaho Ct. App. 1994); State v. Staples, 354 A.2d 771 (Me. 1976); State v. Thomson, 872 P.2d 1097 (Wash. 1994).

[138] Campbell v. United States, 295 A.2d 498 (D.C. 1972) (jury impaneling commences a trial); State v. Tenney, 828 A.2d 755 (Me. 2003) (selection of jury is when trial begins); State v. Meade, 687 N.E.2d 278 (Ohio 1997) (defendant present when jury impaneled and sworn; therefore, commencement of trial).

[139] 354 A.2d at 771.

[140] *Id*.

[141] *Meade*, 687 N.E.2d at 279.

[142] *Id*.

[143] *Id*.

[144] *Id*. at 282.

Crosby. It is this approach to trial *in absentia* that the majority of states have adopted.[145]

3. Trial In Absentia *Permitted Even if Not Present at Commencement*

Some states permit trial *in absentia* even if the defendant is not present at the start of trial.[146] While these states provide the legal basis for trial *in absentia*, there is still a belief that "a trial in absentia is not favored and it should be the extraordinary case, undertaken only after the exercise of a careful discretion by the trial court."[147] The *1930 Model Code of Criminal Procedure of the American Law Institute* first introduced the notion that a defendant could be tried by a state court *in absentia* if he fled before the commencement of trial.[148] Arizona became the first state to commence trials *in absentia* under the circumstances and the constitutionality of the practice was not challenged for almost three decades.[149]

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[145] State v. Aceto, 100 P.3d 629 (Mont. 2004); State v. Tenney, 828 A.2d 755 (Me. 2003); Reece v. State, 928 S.W.2d 334 (Ark. 1996); State v. Staples, 354 A.2d 771 (Me. 1976); Campbell v. United States, 295 A.2d 498 (D.C. 1972).

[146] Gov't of the Virgin Islands v. Brown, 507 F.2d 186 (3d Cir. 1975); Tweedy v. State, 845 A.2d 1215 (Md. 2004).

[147] *Tweedy*, 845 A.2d 1215.

[148] ALI MODEL CODE CRIM. PROC. § 287 (1930). Section 287 provides:

> Presence of a defendant under prosecution for felony. In a prosecution for a felony the defendant shall be present:
> (a) At arraignment.
> (b) When a plea of guilty is made.
> (c) At the calling, examination, challenging, impaneling and swearing of a jury.
> (d) At all proceedings before the court when the jury is present.
> (e) When evidence is addressed to the court out of the presence of the jury for the purpose of laying
> the foundation for the introduction of evidence before the jury.
> (f) At a view by the jury.
> (g) At the rendition of the verdict.
> If the defendant is voluntarily absent, the proceedings mentioned above except those in clauses (a) and (b) may be had in his absence if the court so orders.

[149] Starkey, *supra* note 83, at 726.

The case challenging the Arizona statute in 1967 was *In re* Hunt.[150] The defendant was tried and convicted in 1964, but the appellate court later granted him a new trial.[151] While awaiting retrial, the defendant left Arizona and moved to Michigan.[152] After failing to appear in court numerous times, the trial court proceeded to convict the defendant.[153] Appealing her conviction, the defendant argued that the Arizona absentia statute was unconstitutional.[154]

The U.S. Court of Appeals for the Sixth Circuit upheld her conviction, finding little difference between the Arizona statute and the federal rule.[155] The court reasoned that the defendant "was present at her first trial and upon remand her attorney was present at every stage of the proceeding, including the trial had in her voluntary absence."[156] In other words, the court completely discounted the fact that the federal rule only allows for trial *in absentia* if the accused was present at the commencement of trial, which was not the case in *Hunt*. The court gave no reason for not distinguishing the Arizona statute from the federal statute. Other states are not distinguishing the commencement of trial from any other stage in a case.

In *Gov't of the Virgin Islands v. Brown*, the court served the defendant with a subpoena to appear in court; he failed to do so.[157] The trial began without him and although he appeared later during the first day of trial, the court found that his absence was voluntary.[158] The court held that there is nothing truly noteworthy to "differentiate the commencement of a trial from later stages."[159]

An analogous case, *Lampkins v. State*, held that "[a] defendant may waive [the] right to be present at all stages of trial, and be tried *in absentia*, if the trial court determines that the defendant knowingly and

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[150] 276 F. Supp. 112 (E.D. Mich. 1967), *vacated sub nom*. Arizona v. Hunt, 408 F.2d 1086 (6th Cir. 1969), *cert. denied*, 396 U.S. 845 (1969).
[151] *Hunt*, 408 F.2d at 1087.
[152] *Id*.
[153] *Id*.
[154] *Id*.
[155] *Id*. at 1095.
[156] *Id*.
[157] 507 F.2d 186 (3d Cir. 1975).
[158] *Id*.
[159] *Id*.

voluntarily waived that right."[160] The court reasoned that "[t]he fact that he knew of his trial date and failed to appear on that set date is evidence that he knowingly and voluntarily was absent."[161] Thus, states that follow Indiana's lead allow a knowing and voluntary standard to determine waiver of the right to be present.

While courts have placed considerable weight on the right of the accused to be present, they also have found that the right to be present is a constitutional right that can be waived.[162] The Supreme Court in *Frank v. Magnum* held that a state may permit waiver of presence pursuant to the due process clause.[163] Focusing on the privilege of confrontation, the Court grounded its position in the Sixth Amendment stating that the privilege is "guaranteed by the sixth amendment and 'assumed' to be reinforced by the fourteenth amendment."[164] The right to presence affords the defendant in a felony trial "the privilege . . . to be present in his own person . . . to the extent that a fair and just hearing would be thwarted by his absence, and to that extent only."[165] Consent or misconduct by the accused can cause the loss of the privilege of presence, just as in the federal system.[166]

The states that allow for trial *in absentia* notwithstanding the fact that the accused absented himself prior to commencement of trial do so under the guise of not allowing the accused to forestall justice. While a valid point, such reasoning is not in line with the federal rule, which draws an important distinction between pretrial and midtrial flight. Assurance that an absence of an accused is truly knowing and voluntary does not exist trial if *in absentia* is permitted before to the commencement of trial.

IV. International Trials *In Absentia*

The international community is not immune to the issues surrounding trial *in absentia* and has, likewise, worked to develop a

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[160] 682 N.E.2d 1268, 1269 (Ind. 1997); *see also* State v, Andrial, 375 A.2d 292 (N.J. 1977).
[161] *Lampkins*, 682 N.E.2d at 1273.
[162] Cohen, *supra* note 92, at 171.
[163] *Id*.
[164] *Id*. at 172 (quoting Snyder v. Massachusetts, 291 U.S. 97 (1934)).
[165] *Id*.
[166] *Id*.

system that recognizes those principles established through American jurisprudence. The Rome Treaty does not permit trial *in absentia*, nor does the UN Human Rights Committee (HRC) or the European Court of Human Rights (ECtHR).[167] The international view is that a trial may not begin without the accused present; but like the federal rule, a trial may continue if already commenced, as a trial *in absentia* if the accused is not present.[168] Another "criterion by which the HRC and ECtHR assess the permissibility of such trials is whether an individual convicted *in absentia* may obtain retrial."[169]

A. History

Following World War II, the International Military Tribunal (IMT) at Nuremberg held trials which allowed for total absentia.[170] These trials allowed for the *in absentia* prosecution of war criminals who never appeared before the tribunal: "The Tribunal shall have the right to take proceedings against a person charged with crimes . . . in his absence, if he has not been found or if the Tribunal, for any reason, finds it necessary, in the interests of justice, to conduct the hearing in his absence."[171] At least one person, Martin Bormann, secretary of the Nazi Party was tried, convicted, and sentenced to death *in absentia*.[172] Since the Nuremberg trials, "no tribunal . . . has allowed total in absentia trials. Instead, modern tribunals, first by practice and later by rule, generally allow "partial in absentia" proceedings, meaning that the accused initially appears but is absent at subsequent proceedings."[173]

In 1993, the international community established the International Criminal Tribunal for Yugoslavia (ICTY) to prosecute war crimes alleged to have occurred in Yugoslavia.[174] Rejecting the allowance of *in absentia* trials in the tribunal, the UN Secretary-General commented:

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[167] *Id.* at 62.
[168] *Id*.
[169] *Id.* at 61.
[170] U.N. Charter of the International Military Tribunal—Annex to the Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis ("London Agreement"), Aug. 8 1945, *available at* http://www.unhcr.org/refworld/docid/3ae6b39614.html (last visited July 31, 2013).
[171] *Id*. art. 12
[172] Louise Arbor, *The Prosecution of International Crimes: Prospect and Pitfalls*, 1 WASH. U. J.L. & POL'Y 13, 22 (1999).
[173] Jenks, *supra* note 16, at 68.
[174] *Id*.

> A trial should not commence until the accused is physically present before the International Tribunal. There is a widespread perception that trials in absentia should not be provided for in the statute as this would not be consistent with article 14 of the International Covenant on Civil and Political Rights which provides that the accused shall be entitled to be tried in this presence.[175]

Interestingly, Slobodan Milošević, was present at the start of his trial, but, due to illness, did not appear for subsequent sessions.[176] The ICTY proceeded in his absence reasoning that he was present a the start of the trial but "such proceedings were still in absentia, albeit of the partial variant, the authority for which is not clear under the ICTY statute."[177]

The following year the International Criminal Tribunal for Rwanda (ICTR) "completed a trial without an accused, when, having previously attended, he refused to appear in court."[178] The statute governing the ICTR is analogous to the statute governing the ICTY. They both allowed "partial *in absentia* trials when the accused was unable or unwilling to attend proceedings."[179] Both the ICTY and ICTR were codified in 2000 in the UN Transitional Administration in East Timor (UNTAET).[180] The transitional rules of procedures established by the UNTAET "allowed *in absentia* proceedings if the accused is initially present and then flees, refuses to attend, or disrupts the proceedings."[181] Tribunals established post-2000 used similar language regarding *in absentia* proceedings.[182] Their approach was in line with the Rome

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[175] U.N. Secretary-General, *Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolute 808*, U.N. Doc. S/25704, at 26 (May 3, 1993).
[176] Jenks, *supra* note 16, at 69.
[177] *Id*.
[178] *Id*.
[179] *Id*.
[180] *Id.* at 70.
[181] *Id*.
[182] *See* Agreement Between the United Nations and the Government of Sierra Leone on the Establishment of a Special Court for Sierra Leone, Jan. 16, 2002, 2178 U.N.T.S. 138 (accused has right to be present but trial continues if he flees or refuses to attend); Extraordinary Chambers in the Courts of Cambodia, Internal Rules (Rev. 4) (Sept. 11, 2009) (trial *in absentia* permitted if accused initially present but later flees, refuses to attend, or disrupts proceedings); *But see* U.N. Interim Admin. Mission in Kosovo, Reg. No. 2001/1 on the Prohibition of Trials *in Absentia* for Serious Violations of International Humanitarian Law, U.N. Doc UNMIK/REG/2001/1 (Jan. 12, 2001) (trials *in absentia* prohibited).

Statute, which established the International Criminal Court in 1998 in that they allowed trial *in absentia* in limited circumstances.[183]

Article 67 of the Rome Statute provides, in part, that an accused has the right:

> Subject to article 63, paragraph 2, to be present at the trial, to conduct the defence in person or through legal assistance of the accused's choosing, to be informed, if the accused does not have legal assistance, of this right and to have legal assistance assigned by the Court in any case where the interests of justice so require, and without payment if the accused lacks sufficient means to pay for it.[184]

An "accused shall be present during trial,"[185] and a trial may only continue "outside the presence of the accused if the accused is disruptive."[186] If disruption by the accused causes his removal from the courtroom, "the statute requires that the trial chamber make provisions for the accused to observe the proceedings."[187] In essence, there are no trials *in absentia* in the ICC.

The most recent international tribunal, established following the 2005 car bomb explosion in Beirut that killed the former Prime Minister of Lebanon, Rafic Hariri, is the Special Tribunal for Lebanon (STL), which permits trials *in absentia*.[188] After receiving approval from the Lebanese government, in April 2005, "the United Nations Security Council established a commission to assist the Lebanese authorities in their investigation of all aspects of this terrorist act, including to help identify its perpetrators, sponsors, organizers and accomplices."[189] The STL was established to "prosecute persons responsible for the attack of 14 February 2005 resulting in the death of former Lebanese Prime

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[183] Rome Statute of the International Criminal Court art. 67, July 17, 1998, 2187 U.N.T.S. 90.
[184] *Id*. art. 67(1)(d).
[185] *Id*. art. 63(1).
[186] Jenks, *supra* note 16, at 71.
[187] *Id*.
[188] *Id.* at 57.
[189] *Id*.

Minister Rafic Hariri."[190] Total trials *in absentia* are permitted under the STL statute. Under the STL, an accused may be tried and convicted "without ever appearing or designating defense counsel, based on notice otherwise given . . . the STL's *in absentia* trial provisions provide for a form of 'total *in absentia*' trial, a departure from the *in absentia* trial provisions of other international tribunals."[191]

B. Human Rights Concerns

There are two primary human rights treaties that cover the most fundamental and basic civil and political rights of the contracting parties: the International Covenant on Civil and Political Rights (ICCPR) and the European Convention for Protection of Human Rights and Freedoms (European Convention).[192]

1. International Covenant on Civil and Political Rights

Relying on the 1948 Universal Declaration of Human Rights, the ICCPR has been ratified by 165 states and is enforced through the HRC.[193] Under the ICCPR, an accused is to "be tried in his presence, and to defend himself in person or through legal assistance of his choosing; to be informed, if he does not have legal assistance, of this right."[194] The HRC enforces the ICCPR.[195] The ICCPR only permits trial *in absentia* if the defendant voluntarily absents himself after being informed of the trial.[196]

In 1997, the HRC held in *Maleki v. Italy* that trials *in absentia* comport with the ICCPR "only when the accused was summoned in a

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[190] Agreement Between the United Nations and the Lebanese Republic on the Establishment of a Special Tribunal for Lebanon art. 1(1), S.C. Res. 1757, Annex, U.N. Doc. S/RES/1757 (May 30, 2007).
[191] Jenks, *supra* note 16, at 57.
[192] *Id.* at 73–85.
[193] *Id.* at 74.
[194] International Covenant on Civil and Political Rights art. 14, Mar. 23, 1976, 999 U.N.T.S. 171.
[195] Jenks, *supra* note 16, at 75.
[196] U.N. Human Rights Comm. [HRC], Commc'n No. 699/1996: Views of the Human Rights Committee Under Article 5, Paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Protections (Maleki v. Italy), U.N. Doc. CCPR/C/66/D.699/1996 (Sept. 13, 1999) [hereinafter *Maleki*].

timely manner and informed of the proceedings against him."[197] Maleki, an Iranian citizen, was tried and convicted *in absentia* in Italy for drug trafficking.[198] While Maleki did not attend the trial, he did have court-appointed counsel.[199] His conviction was appealed to the HRC with the argument that Italy's trial of him *in absentia* violated the ICCPR.[200] Italy argued that Maleki's trial *in absentia* complied with the ICCPR because Maleki, while absent, had a fair trial due to the presence of his court-appointed counsel.[201] The court disagreed, finding that while "*in absentia* trials are not per se impermissible, a state that holds such proceedings assumes a heavy burden to justify the trials."[202] In *Maleki*, Italy failed to verify that Maleki had notice of the trial and Italy's failure to do so violated Maleki's right to be tried in person pursuant to the ICCPR.[203]

2. European Convention for Protection of Human Rights and Freedoms

An international treaty, the European Convention provides that the Council of Europe member states must ensure that the fundamental civil and political rights of all individuals in their jurisdiction are not violated.[204] There are forty-seven member states, all the member states of the council, who have acceded to the convention.[205] While the European Convention does not clearly provide the accused the right to be present at trial like the ICCPR guarantees, "the right to be present is implicit within other stated rights."[206] The European Convention sets forth the following rights: (1) fair and public hearing;[207] (2) in-person defense;[208] (3) witness examination by the accused or his representative;[209] and (4) an interpreter if the accused is unable to

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[197] *Id*.
[198] Jenks, *supra* note 16, at 77.
[199] *Id*.
[200] *Id*.
[201] *Id*.
[202] *Id*.
[203] *Id*.
[204] CPHRFF, *supra* note 16].
[205] *Id*..
[206] Jenks, *supra* note 16, at 85.
[207] CPHRFF, *supra* note 16, art. 6(1).
[208] *Id*. art. 6(3)(c).
[209] *Id*. art. 6(3)(d).

understand or speak the language of the court.[210] Regarding the rights of an accused and trials *in absentia*, the ECtHR has held that an accused cannot exercise the rights afforded by the European Convention if he is not present at trial.[211]

In *Sejdovic v. Italy*, the ECtHR held that while "the European Convention does not per se prohibit *in absentia* trials,"[212] an accused must unequivocally waive the right to be present at trial.[213] Sejdovic was a Yugoslavian national tried and convicted in Italy of murdering another person while at a camp in Rome.[214] Although a court-appointed attorney represented him *in absentia*, the ECtHR held that there was "no evidence that [Sejdovic] knew of the proceedings against him or of the date of his trial."[215] Like the ICCPR, the European Convention requires unequivocal notice to an accused of the charges against him and notice of the trial date similar to the judicial process in the American legal system.

C. Military Personnel and International Trial *In Absentia*

In keeping with RCM 804(c) and its allowance for trial of military members *in absentia*, the Army allows for its Soldiers to be tried *in absentia* by foreign countries if certain requirements are met. As it relates to military personnel and trial *in absentia* internationally, Army Regulation (AR) 27-50 provides some guidance.[216] The Army allows personnel "alleged to have committed offenses subject to primary or exclusive jurisdiction of that country" to be tried by that country *in absentia* if "the accused, after having been advised by proper authorities that the accused may be tried *in absentia* and convicted, consents in writing to removal [from the country] despite trial and conviction *in absentia*."[217] This notice requirement mirrors the standard set forth in RCM 804(c) and the provisions of the ICCPR and European Covention.[218]

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[210] *Id*. art. 6(3)(e).
[211] Sejdovic v. Italy, App. No. 56581/00, 42 Eur. H.R. Rep. 17, 44 (2004) (citing Belziuk v. Poland, 1988-II Eur. Ct. H.R. 558, 570 (2004)).
[212] Jenks, *supra* note 16, at 93.
[213] *Sejdovic*, App. No. 56581/00, 42 Eur. H.R. Rep. at 33.
[214] *Id*. at 8–12.
[215] *Id*. at 34.
[216] U.S. DEP'T OF ARMY, REG. 27-50, STATUS OF FORCES POLICIES, PROCEDURES, AND INFORMATION para. 1-10 (15 Dec. 1989).
[217] *Id*.
[218] 2012 MCM, *supra* note 13, R.C.M. 803(c).

D. Analysis of Tenets of International Law

Like military, federal, and most state laws within the United States, some tenets of international law allow for the waiver of presence by an accused as long as that waiver is voluntary and unequivocal.[219] The reasoning behind such an approach with the European Convention and the ICCPR is that an accused should be afforded the right to be informed of the charges and date of commencement of trial and if he, after being so informed, fails to appear, a trial may be held *in absentia*.[220] However, no waiver of presence is permitted by the Rome Statute, which governs the ICC.[221] Thus, trials *in absentia* are not permitted in the ICC unless an accused is disruptive, and even then, the accused must be afforded the opportunity to observe the proceedings.[222] Clearly, the rather strict approach by the ICC provides the most protection of an accused's right to be present and ensures the most just and equitable judicial process.

V. Ethical Considerations

In addition to the divide that exists within the military, state, federal, and international legal communities regarding trial *in absentia*, there are ethical concerns with respect to the role of the defense attorney when a trial commences with no defendant present.[223] The ethical standards for military lawyers are encapsulated in AR 27-26, Rules of Professional Conduct for Lawyers, which were modeled after the American Bar Association's Model Rules of Professional Conduct (MPRC).[224] A thorough examination of each pertinent rule, its applicability, and the relevant case law in relation to the representation of a client in a trial *in absentia* will aid in the analysis regarding the ethical implications of representing a client who is not present during a court-martial.

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[219] *Maleki*, *supra* note 193.
[220] *Id*.
[221] Rome Statute of the International Criminal Court art. 67, July 17, 1998, 2187 U.N.T.S. 90.
[222] Jenks, *supra* note 16, at 71.
[223] *See* Gilligan & Imwinkelried, *supra* note 16, at 56; Starkey, *supra* note 83, at 53.
[224] U.S. DEP'T OF ARMY, REG. 27-26, RULES OF PROF. CONDUCT FOR LAWYERS (1 May 1992) [hereinafter AR 27-26]; MODEL RULES OF PROF. CONDUCT [hereinafter MRPC].

A. Rules Governing Professional Conduct In Relation to Trial *In Absentia*

The MRPC guide the conduct of counsel and are applicable to military counsel along with the rules set forth in AR 27-26. Several rules promulgated by the ABA are relevant to the discussion of representation of a client being tried *in absentia*. These rules govern informed consent, confidentiality, scope of representation, and expeditious litigation.

Model Rule of Professional Conduct Rule 1.0(e) stresses the importance of informed consent and MPRC Rule 1.4 outlines the need for communication between attorney and client regarding certain courses of action and the consequences thereof.[225] Certainly, when a client is absent for trial, an attorney's ability to communicate and ensure informed consent regarding the case is not possible. While informed consent is not specifically discussed in AR 27-26, the informed decision-making by a client is stressed: "A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions about the representation." [226] Like Rule 1.0(e) in the MRPC, the practicality of this rule decreases when an attorney is representing a client with whom he cannot communicate or inform due to absence.

Model Rule of Professional Conduct 1.6(a) governs confidentiality and states in part that "a lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation."[227] This is identical to the Army's Rule 1.6. When representing an absent client during trial, this rule is of vital importance because a lawyer must understand what the left and right limits of disclosure are with respect to attorney-client communication. Those limits are not always clear if the attorney has information that he wishes to use during trial given to him by the client that he wishes to utilize during trial but may not be permitted to do so without the express consent of his client, who is absent.

Another relevant rule, MPRC Rule 3.2, provides guidance regarding the expeditious handling of litigation. Specifically, the rule mandates that "[a] lawyer shall make reasonable efforts to expedite litigation

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[225] MRPC, *supra* note 224, R. 1.0(e).
[226] AR 27-26, *supra* note 224, R. 1.4(b).
[227] MRPC, *supra* note 224, R. 1.6(a).

consistent with the interests of the client."[228] This is of particular importance due to the role and candor of counsel in addressing the court in the event a client absconds before or during trial. For example, the issue may arise when counsel has to determine whether or not to request a continuance and balance the interests of the client with the need for judicial efficiency.

Army Regulation 27-26 Rule 3.2 differs from the MPRC rule by adding that a lawyer has "responsibilities to the tribunal to avoid unwarranted delay."[229] The reasoning is set forth in the Rule's comment:

> Dilatory practices bring the administration of criminal, civil and other administrative proceedings into disrepute. The interests of the client are rarely well-served by such tactics. Delay exacts a toll upon a client in uncertainty, frustration, and apprehension. Expediting litigation, in contrast, often can directly benefit the client's interest in obtaining bargaining concessions and in obtaining an early resolution of the matter. Delay should not be indulged merely for the convenience of the advocates, or for the purpose of frustrating an opposing party's attempt to obtain rightful redress or repose. It is not a justification that similar conduct is often tolerated by the bench and bar. The question is whether a competent lawyer acting in good faith would regard the course of action as having some substantial purpose other than delay. Realizing financial or other benefit from otherwise improper delay in litigation is not a legitimate interest of the client.[230]

This differs from MPRC 3.2 in that the military rule stresses that a client's interests are not served by delay, thereby asserting that the sooner a case goes to trial, the better a lawyer serves his client's interests.[231] In the context of a trial *in absentia*, that is not necessarily the case. It could be argued that to postpone a trial until such a time as to secure the client's presence will result in a more comprehensive and collaborative defense effort. Additionally, there is a certain advantage

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[228] *Id.* R. 3.2.
[229] AR 27-26, *supra* note 224, R. 3.2.
[230] *Id.* R. 3.2 (cmt.).
[231] *Id*.

gained by the client in some cases if a trial is postponed, as cases do not usually grow stronger for the prosecution over time but rather weaker due to issues with witness movement, fading memories, and degradation or loss of evidence.[232] So while the rule suggests that swift movement of a case through the judicial system is in the best interests of a client, that may not necessarily be the case when the client is an accused in a criminal matter. To be sure, an accused should not be permitted to "game" the system by deliberately circumventing a trial through absence.[233] However, to place the burden upon a lawyer, particularly defense counsel in the context of an absent client, to expeditiously move a case through the judicial process is nonsensical as that may not, in fact, be in the best interest of the client.

B. Case Law

At the military commission of Harrison Dodd, Dodd's counsel was not permitted to present evidence in defense of the accused following the accused's absence.[234] Finding that counsel of an absent accused in a civilian court "has no authority, the prisoner having abandoned his cause, to introduce evidence and make a defense," the court found that the same held true in a military court.[235] While courts are not as archaic in their thinking anymore, there are still issues with respect to what defense counsel is able to present in the absence of the accused, as illustrated in *United States v. Marcum*.[236]

In *Marcum*, the Court of Appeals for the Armed Forces (CAAF) dealt with the use of an unsworn statement offered by defense counsel in accordance with RCM 1001 during pre-sentencing proceedings in an *in absentia* court-martial.[237] Despite the defendant going AWOL during the court-martial, the court convicted him.[238] During pre-sentencing, defense

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[232] United States v. Houghtaling, 8 C.M.R. 30 (C.M.A. 1953); Starkey, *supra* note 80, at 743 ("Prolonged delay in the commencement of trial frequently means that the case is never tried at all because evidence is lost by accident, or carelessness, witnesses die or drift out of reach. . .").

[233] State v. Staples, 354 A.2d 771, 775 (Me. 1976).

[234] TRIALS FOR TREASON, *supra* note 29, at 54.

[235] *Id*.

[236] 60 M.J. 198 (C.A.A.F. 2004). *But see* United States v. Moss, No. 20110337 (A. Ct. Crim. App. Jan. 17, 2013) (Defense counsel may read unsworn statement of absent accused during presentencing without specific authorization).

[237] *Marcum*, 60 M.J. at 200; 2012 MCM, *supra* note 13, R.C.M. 1001.

[238] *Marcum*, 60 M.J. at 198.

counsel used a written statement provided to him by the appellant during the course of case preparation.[239] The intermediate appellate court, the Air Force Court of Criminal Appeals, found that defense counsel had the authority to waive the privilege belonging to the accused:

> Even if . . . the appellant did not waive the attorney-client privilege himself "the [attorney] generally has implicit authority to waive the privilege as well in the course of representation." Our superior court recognized this authority in *United States v. Province*, 45 M.J. 359 (1996). In that case, the accused gave a copy of 4 1/2 year-old "stragglers' orders" to his trial defense counsel. In effect, these orders documented the accused's prior uncharged period of unauthorized absence. Trial defense counsel used the orders during pretrial negotiations in an attempt to get an administrative separation for the accused. He also gave a copy of the orders to [the prosecutor] out of concern that the information would come out during the providence inquire and complicate the plea . . . Our superior court held that "the disclosure of the stragglers' orders was made in facilitation of representation, and defense counsel would be impliedly authorized to disclose this information for [that] purpose.[240]

The court's use of the *Province* case is not compelling as the disclosure was made during plea negotiations.[241] Additionally, the court did not answer the question as to whether "[c]ounsel representing an accused being tried *in absentia* should have the authority to waive the accused's privilege."[242]

The CAAF found that the appellant waived "his right to make an unsworn statement" unless he specifically authorized defense counsel to make a statement prior to his absence.[243] The court held that "if an accused is absent without leave his right to make an unsworn statement is forfeited unless prior to his absence he authorized his counsel to make a

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[239] *Id*.
[240] United States v. Marcum, No. 34216 (A.F. Ct. Crim. App. 2002).
[241] United States v. Province, 45 M.J. 359 (C.A.A.F. 1996).
[242] Gilligan & Imwinkelreid, *supra* note 18, at 513.
[243] United States v. Marcum, 60 M.J. 198 (C.A.A.F. 2004).

specific statement on his behalf."[244] In finding that defense counsel erred in using the statement, the court cited Military Rule of Evidence 511,, which "designat[es] the client as the holder of the attorney-client privilege."[245] In the dissent, Chief Judge Crawford noted "that the appellant had forfeited any right to object to his counsel's use of the statement by appellant's own misconduct in going AWOL."[246]

Not only is a defense attorney not permitted to waive the accused's privilege, as noted above, defense counsel may also not waive other important rights. "In general, the courts have been scrupulous to protect the affected rights, consistent with the policy considerations involved in the practice of conducting trials *in absentia*."[247]

> It has been held, for example, that while the defendant may waive the right to be present, counsel has no authority to do so on his client's behalf and counsel for an absent defendant has no power to waive his client's right to trial by jury. Nor may counsel, during the inquiry concerning the reasons for defendant's absence, properly disclose communications from his client which arose out of the attorney-client relationship and which were clearly meant to be confidential. It also seems that waiver by voluntary absence acts as a waiver of neither the right to counsel nor the requirement that the prosecution adduce evidence sufficient to prove guilt beyond a reasonable doubt.[248]

In *People v. Aiken*, the defendant failed to appear for trial and, after being convicted, argued on appeal that his defense counsel was ineffective because of "counsel's waiver of an opening and closing statement; failure to cross-examine witnesses called by either the People or his codefendant; failure to call witnesses to testify on appellant's behalf; and, finally, failure to object to the introduction of any evidence by either the People or his codefendant."[249] The New York Court of Appeals noted:

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[244] *Id*. at 210.
[245] Gilligan & Imwinkelreid, *supra* note 18, at 513.
[246] *Marcum*, 60 M.J. at 212.
[247] Starkey, *supra* note 83, at 740.
[248] *Id*.
[249] 45 N.Y.2d 394, 397 (1978).

> Although a defendant may not, by absence alone, waive his right to effective legal representation, his absence must, of necessity, be taken into consideration on the issue of counsel's effectiveness. To be sure, a defendant's absence from trial may severely hamper even the most diligent counsel's ability to represent his client effectively.[250]

It also follows that the right to testify may be considered waived if the defendant is tried *in absentia*.[251] Sentencing proceedings also present some issues in that there is no defendant present to actually provide a statement to the court or in any way assist counsel with gathering helpful evidence, thereby limiting the matters defense counsel is able to present.

C. Trials *In Absentia* Present Ethical Challenges for Defense Counsel

The most common issue addressed in case law regarding representation during trial *in absentia* is the claim of ineffective assistance of counsel.[252] The Sixth Amendment to the U.S. Constitution guarantees a defendant's right to effective assistance of counsel.[253] In order to have a fair trial, the assistance of counsel must be effective pursuant to the standard set forth in *Strickland v. United States*.[254]

> First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.[255]

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[250] *Id*. at 399.
[251] *See* Taylor v. United States, 414 U.S. 17 (1973).
[252] *See* People v. Diggins, No. 4637/03, 2009 WL 3461616 (N.Y. Sup. Ct. Oct. 19, 2009); United States v. Sanchez, 790 F.2d 245, 254 (2d Cir. 1986); People v. Aiken, 45 N.Y.2d 394 (N.Y. 1978).
[253] U.S. CONST. amend. VI.
[254] 466 U.S. 668, 684–85 (1984) ("[T]he Sixth Amendment right to counsel exists, and is needed, in order to protect the fundamental right to a fair trial.").
[255] *Id*. at 687.

Essentially, when determining whether counsel is ineffective, the court "must judge the reasonableness of counsel's challenged conduct on the facts of the particular case, viewed as of the time of counsel's conduct."[256]

In many cases tried *in absentia*, defense counsel elect not to actively participate in the proceedings.[257] *United States v. Sanchez* involved the trial and conviction of a defendant *in absentia*. Following his conviction, the defendant alleged that his attorney failed to effectively represent him by failing to "make opening or closing statements or objections to the admission of evidence or to cross-examine witnesses."[258]

> [T]he right to counsel does not impose upon a defense attorney a duty unilaterally to investigate and find evidence, or to pursue a fishing expedition by cross examination, or to present opening or closing remarks on the basis of no helpful information, or to object without purpose, on behalf of an uncooperative and unavailable client.[259]

Similar to the defendant in *Sanchez*, the defendant in *People v. Diggins* was tried *in absentia*.[260] After his client failed to appear, defense counsel expressed that the "case is highly dependent on [Diggins'] help to defend himself"[261] and that "he could not effectively represent [the] defendant unless the defendant was present for the proceedings."[262] He requested permission to withdraw from the case; however, his application was denied.[263] With no client present, defense counsel made the tactical decision not to participate in the proceedings. During the course of the trial, defense counsel did not question or challenge any jurors, gave no opening statement, did not call or cross-examine any witnesses, make any motions, object, or make a closing argument.[264] Despite defense counsel's failure to participate, the court held that to find defense counsel

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[256] *Id*. at 690.
[257] United States v. Sanchez, 790 F.2d 245 (2d Cir. 1986); People v. Diggins, No. 4637/03, 2009 WL 3461616 (N.Y. Sup. Ct. Oct. 19, 2009).
[258] 790 F.2d at 247.
[259] *Id*. at 253.
[260] 2009 WL 3461616, at * 1.
[261] *Id*.
[262] *Id*. at *2.
[263] *Id*.
[264] *Id*.

ineffective under the circumstances "would provide an incentive for defendants to abscond and thereby obtain retrials. The adjudicative process cannot be subject to such manipulation. Nor can trials *in absentia* be rendered a nullity by an attorney's strategic decision not to participate in them."[265]

To be fair, when determining whether or not a defense attorney is ineffective in these types of cases, substantial weight is given to the fact that a defendant fails to appear for trial.[266] This analysis is logical because the presence or absence of a defendant significantly affects how a case will be presented by the defense. And while these ethical concerns are not alleviated by merely changing the commencement of trial from the time of arraignment to the swearing of a panel, there is a greater likelihood of collaborative preparation between defense counsel and the accused if the accused is present at least through the initial stages of trial.

VI. Conclusion

The right for an accused to be present at trial is well established in case law and, more importantly, set forth in both the Due Process Clause of the Fourteenth Amendment and the Confrontation Clause of the Sixth Amendment.[267] While "the Constitution neither orders nor prohibits waiver in any cases[,] [d]istinctions based on the severity of the crime or the custody of the defendant are constitutionally acceptable, but not required by the Court."[268] This notion is codified in FRCP 43 and may be waived by a defendant either voluntarily or through his behavior after the commencement of trial.[269]

Through its rulings, the Supreme Court has made it clear that it is permissible for a rule to allow for trial *in absentia* even if the defendant is not present at what is traditionally considered commencement of trial; however, Congress has chosen not to change FRCP 43. By requiring the defendant be present at the beginning of trial, the rule ensures that any departure thereafter is with the full understanding that the trial will

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[265] *Id*. at *16.
[266] Strickland v. United States, 466 U.S. 668, 691 (1984).
[267] Cohen, *supra* note 92, at 173.
[268] *Id*.
[269] FED. R. CRIM. P. 43.

continue in his or her absence. The reasoning is sound in "that a defendant who flees from a courtroom in the midst of a trial—where judge, jury, witnesses and lawyers are present and ready to continue—would . . . know that as a consequence the trial could continue in his absence."[270]

The right to be present at the start of trial in the military is supported by precedent dating back to 1864.[271] It was only in 1969 that the military veered from the precedent set by the Supreme Court and the military commissions when it changed the rule.[272] The only stated reason for the change is the uniqueness of military culture as discussed in *United States v. Houghtaling*.[273] The court held that "undeserving individuals" do not deserve to postpone justice given the difficulty in holding courts-martial in overseas theaters.[274] Referring to defendants as "undeserving individuals" erodes the supposition that one is innocent until proven guilty.. Further, it would be highly unusual, if not near impossible, to absent oneself from court-martial while in a deployed environment. Additionally, civilian society is only slightly less mobile than military society. It is not uncommon to have issues locating and securing the presence of civilian witnesses as criminal defendants and the individuals they associate with are not known for their stability. In the military, due to the nature of accountability for its members, ensuring the presence of servicemember-witnesses would be relatively easy.

Moreover, Article 36, UCMJ, requires the President to promulgate rules of procedure that are consistent with the practice of federal district courts unless it impracticable to apply such rules to courts-martial. This requirement is precisely why the drafters, in their analysis and discussion of RCM 804(c), take such great pains to find a difference between court-martial and federal criminal practice. However, there are no more pressing matters in the military that make its culture so unique as to necessitate a departure from federal law. To suggest that mission operational tempo and frequent movement require a special rule for the military is not persuasive. The holding in *Houghtaling* no longer appears to justify the divergence in military law and federal law with respect to trial *in absentia* as required by Article 36, UCMJ.[275]

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[270] Taylor v. United States, 414 U.S. 17, 20 (1973).
[271] TRIALS FOR TREASON, *supra* note 31, at 52.
[272] 1969 MCM, *supra* note 47.
[273] 8 C.M.R. 30 (C.M.A. 1953).
[274] *Id*. at 35.
[275] UCMJ art. 36 (2008).

A majority of states conform to the federal rule[276] and like the federal government and most states, even the International Criminal Court believes that the best way to ensure an absence is deliberate is to hold the trial *in absentia* only after the defendant has appeared at the beginning to guarantee, to the best of their ability, that a defendant received proper notice of the proceedings.[277]

From an ethical standpoint, the hands of a defense attorney are veritably tied when it comes to representing a client *in absentia*. Moreover, ineffective assistance of counsel claims are most assuredly going to arise out of each case tried *in absentia*, thereby forcing defense counsel to justify his actions, or lack thereof, on behalf of a client who was not even present. As a result, defense counsel are placed in precarious situations in which they must balance ethical and tactical decisions against the best interests of the accused and the judicial system.

History supports changing the current rule governing trial *in absentia* and bringing the military in line with federal criminal courts. The new rule should allow a trial *in absentia* to occur only if an accused is present at the beginning of trial and has waived his right to be present knowingly and voluntarily. The change would define the beginning of a trial as the swearing of a panel.[278] Notice at the arraignment, which may be months in advance of a court-martial is insufficient and does not comport with common sense or precedent set by the Supreme Court.

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[276] State v. Aceto, 100 P.3d 629 (Mont. 2004); State v. Staples, 354 A.2d 771 (Me. 1976); Reece v. State, 928 S.W.2d 334 (Ark. 1996).

[277] Rome Statute of the International Criminal Court art. 67(1)(d), July 17, 1998, 2187 U.N.T.S. 90.

[278] Current RCM 804(c)(1): Is voluntarily absent after arraignment (whether or not informed by the military judge of the obligation to remain during the trial); or

Proposed Revision: Is voluntarily absent after the panel has been sworn; or