A Primer on Trial *in Absentia*

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Give me one reason to stay here and I'll turn right back around
Because I don't want leave you lonely
But you got to make me change my mind.[1]

I. Introduction

A military accused facing trial by court-martial has more than one reason to stay here (and turn right back around) when pending trial, including many rights and procedural safeguards. An accused is entitled to assist defense counsel during trial, confront prosecution witnesses, and personally testify at trial. These rights ensure an accused has the opportunity to defend against court-martial charges. To state the obvious, an accused can only exercise these rights when present for trial.

This article discusses the limited circumstances in which a military accused may be tried *in absentia*.[2] The court-martial of an accused who is not present in court can be deceptively difficult, implicating constitutional rights and procedural requirements. Part II discusses the accused's constitutional right to be present at trial, rooted in the Confrontation Clause and Due Process Clause, as well as the two circumstances in which this right can be personally waived. Part III discusses the "arraignment requirement," a prerequisite to the two exceptions to the general rule that an accused shall be present for the entire court-martial. Part IV discusses the first exception, when an accused is voluntarily absent from trial after arraignment. Part V discusses the second exception, when an accused is removed from the courtroom for disruptive conduct. Part VI discusses unresolved issues in this area of the law. When contemplating trial *in absentia*, it is important to recognize the significant constitutional rights affected when the accused is not present at trial.

II. The Accused's Constitutional Right to Be Present During the Court-Martial

An accused has a right under the Constitution and by statute to be present during the entire court-martial.[3] This right is further defined under Rule for Courts-Martial (RCM) 804(a), which provides, "The accused *shall be present* at the arraignment, the time of the plea, every stage of the trial including sessions conducted under Article 39(a), voir dire and challenges of members, the return of the findings, sentencing proceedings, and post-trial sessions, if any, except as otherwise provided by this rule."[4] The accused's presence throughout trial is part and parcel of the accused's rights under the Confrontation and Due Process Clauses.[5] As the Supreme Court has long held, "One of the most basic of the rights guaranteed by the Confrontation Clause is the accused's right to be present in the courtroom at every stage of his trial."[6] Presence is necessary because an accused cannot challenge panel members, confront witnesses, or assist in his defense if he is not present during the court-martial. Given the importance of the accused's presence, RCM 804 provides two narrow exceptions to the general requirement that an accused be present for the entire court-martial.

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[1] TRACY CHAPMAN, *Give Me One Reason, on* NEW BEGINNING (Elektra 1995).

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

[3] *See* U.S. CONST. amends. V–VI; UCMJ art. 39(b) (2012).

[4] MANUAL FOR COURTS-MARTIAL, UNITED STATES, R.C.M. 804(a) (2012) [hereinafter MCM] (emphasis added).

[5] *See id.*, R.C.M. 804 analysis, at A21-46 (discussing Rule for Court-Martial (RCM) 804(a) and noting, "The right is grounded in the due process clause of the Fifth Amendment and the right to confrontation clause [*sic*] of the Sixth Amendment of the Constitution."); *see also* United States v. Gagnon, 470 U.S. 522, 526 (1985) (holding that the right to be present at trial is "rooted" in Confrontation Clause of Sixth Amendment as well as Due Process Clause of Fifth Amendment); United States v. Ward, 598 F.3d 1054, 1057–58 (8th Cir. 2010) ("The right to be present, which has a recognized due process component, is an essential part of the defendant's right to confront his accusers, to assist in selecting the jury and conducting the defense, and to appear before the jurors who will decide his guilt or innocence."); United States v. Tureseo, 566 F.3d 77, 83 (2d Cir. 2009) ("The Confrontation Clause of the Sixth Amendment guarantees the right of a criminal defendant to be present at trial to confront witnesses and the evidence against him.") (citing *Gagnon*, 470 U.S. at 526); Gray v. Moore, 520 F.3d 616, 622 (6th Cir. 2008) ("A defendant's right to be physically present at every stage of his trial has a longstanding tradition in this country's criminal jurisprudence, with roots in both the Due Process Clause and the Confrontation Clause of the Sixth Amendment.") (citations omitted); United States v. Mitchell, 502 F.3d 931, 987 (9th Cir. 2007) ("[A] defendant's right to be present at every trial stage [is] derived from the Confrontation Clause of the Sixth Amendment and the Due Process Clause of the Fifth Amendment.").

[6] Illinois v. Allen, 397 U.S. 337, 338 (1970) (citing Lewis v. United States, 146 U.S. 370 (1892)).

Under RCM 804(c), an accused may be tried *in absentia* if, following a valid arraignment, he is voluntarily absent or removed for disruption.[7] If one of these exceptions applies, "the accused shall be considered to have waived the right to be present."[8] Under both provisions, the accused must have been present at a valid arraignment, a requirement that has triggered a surprising amount of litigation.

III. The Arraignment Requirement

Because RCM 804(c) only allows trial *in absentia* post-arraignment, the requirements for arraignment have been strictly interpreted by military courts. The arraignment is governed by RCM 904, which only requires that a valid arraignment consist of charges being read to the accused and the accused being called upon to enter a plea.[9] The rule expressly allows the accused to waive reading of the charges without affecting the validity of the arraignment.[10] The discussion to RCM 904 reads that the accused may also defer entering pleas.[11] Put another way, the arraignment is complete once the Government offers to read charges to the accused and the military judge calls on the accused to enter a plea; the arraignment is valid even if the accused waives reading of the charges and defers entering a plea.

Military courts have exactingly enforced the requirements for a valid arraignment in the course of appellate review. In *United States v. Price*, the accused was tried *in absentia* after he was voluntarily absent.[12] On appeal, the Court of Appeals for the Armed Forces (CAAF) set aside the findings and sentence, concluding the accused had not been properly arraigned. Specifically, the military judge stated during arraignment, "I will not ask for the accused's plea, as I was served with notice of several motions that I would obviously need to resolve before any plea was entered in this case."[13] Noting that the text of RCM 904 unequivocally requires an accused be called upon to enter a plea at arraignment, the CAAF ruled that the arraignment was not completed at the time of the accused's absence.[14] The CAAF reasoned that trial *in absentia* is only permitted if the accused is absent "after arraignment."[15] Because the military judge did not call on the accused to enter a plea, the arraignment was incomplete under a plain reading of RCM 904.[16] Because the arraignment was not completed and the plain language of RCM 804 requires an arraignment before an accused may be tried *in absentia*, the CAAF set aside the findings and sentence.[17]

The *Price* decision arguably placed form over substance, overturning a conviction despite substantial conformity with the requirements for an arraignment, and two judges dissented from the opinion.[18] In a short dissenting opinion, Judge Sullivan argued that the accused's arraignment had begun but was only "incomplete" because the accused left before he was called upon to plead.[19] Because the requirements for trial *in absentia* had been "substantially complied with" during the incomplete arraignment, Judge Sullivan would have held the minor "regulatory technicality" did not warrant reversal.[20] A second dissenting opinion by Judge Crawford reasoned that the accused was clearly on notice of the time and date for the court-martial and was voluntarily absent.[21] Specifically, the accused had been present for two Article 39(a) hearings.[22] At the first hearing, the accused elected trial by enlisted members and the court noted several motions from the defense.[23] At the second hearing, the parties litigated motions, the military judge made rulings in two motions adverse to the accused, and the court notified the parties of the trial date.[24] Judge Crawford concluded that the accused was properly on notice of the trial date and only fled because the military judge made unfavorable rulings.[25] The majority,

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[7] MCM, *supra* note 4, R.C.M. 804(c).

[8] *Id.* R.C.M. 804(c). Federal courts have similarly found a civilian defendant may waive the right to be present for trial. *See generally Tureseo*, 566 F.3d at 83 ("The defendant's constitutional and statutory right to be present, however, may be either expressly or effectively waived by the defendant.") (citation omitted).

[9] MCM, *supra* note 4, R.C.M. 904. The rule reads in its entirety: "Arraignment shall be conducted in a court-martial session and shall consist of reading the charges and specifications to the accused and calling on the accused to plead. The accused may waive the reading." *Id.*

[10] *Id.* ("The accused may waive the reading.").

[11] *Id.* R.C.M. 904 discussion ("Arraignment is complete when the accused is called upon to plead; the entry of pleas is not part of the arraignment."). *See also* DAVID A. SCHLUETER, MILITARY CRIMINAL JUSTICE: PRACTICE AND PROCEDURE 604 (7th ed. 2008) ("The accused's plea itself is not a part of the arraignment, and in most cases will not be entered until after the defense has raised any pretrial motions.").

[12] 48 M.J. 181 (C.A.A.F. 1998).

[13] *Id.* at 182.

[14] *Id.* at 182–83.

[15] *Id.* at 182. At the time of the accused's trial, the 1995 edition of the *Manual for Courts-Martial* listed the same text that appears in the current RCM 804(c)(1) at RCM 804(b)(1). *Compare* MANUAL FOR COURTS-MARTIAL, UNITED STATES, R.C.M. 804(b)(1) (1995), *with* MCM, *supra* note 4, R.C.M. 804(c)(1).

[16] *Price*, 48 M.J. at 183.

[17] *Id.*

[18] *See id.* at 183–84 (Sullivan, J., dissenting); *id.* at 184–86 (Crawford, J., dissenting).

[19] *Id.* at 183–84 (Sullivan, J., dissenting).

[20] *Id.* at 184 (Sullivan, J., dissenting). The dissent added, "It is black letter law that defective arraignments do not warrant reversal of a conviction." *Id.* (Sullivan, J., dissenting) (citation omitted).

[21] *Id.* at 184–85 (Crawford, J., dissenting).

[22] *Id.* at 182.

[23] *Id.* at 184 (Crawford, J., dissenting).

[24] *Id.* (Crawford, J., dissenting).

[25] *Id.* (Crawford, J., dissenting). Judge Crawford added later in her dissenting opinion: "In essence, after a number of motions were decided against appellant, he voluntarily absented himself from trial. By his

however, rejected this analysis and arguably held the error was jurisdictional in nature and, therefore, not waivable.[26] The strict reading of the "arraignment requirement" is likely a byproduct of the federal approach, which only allows trial *in absentia* after the trial has begun.[27]

Federal Rule of Criminal Procedure 43 (Rule 43) and RCM 804 are similar in their requirements for trying an accused who is voluntarily absent, though RCM 804 allows for trial after arraignment while the federal rule more narrowly requires the absence to occur after trial has actually begun.[28] In interpreting the federal counterpart to RCM 804, the Supreme Court noted, "The language, history, and logic of Rule 43 support a straightforward interpretation that prohibits the trial *in absentia* of a defendant who is not present at the beginning of trial."[29] Notably, the federal rule does not define when the trial has "begun," though appellate courts have generally found that the beginning of jury selection is the pivotal event.[30] The Supreme Court has explained "a defendant's initial presence serves to assure that any waiver is indeed knowing."[31] Because the arraignment in a court-martial can occur several weeks before members are sworn, *Price*'s bright line rule for requiring a complete arraignment is sound.[32]

Once an accused has been arraigned, the court-martial may continue in his absence if either of the two exceptions under RCM 804(c) applies: (1) the accused is voluntarily absent, or (2) the accused is removed for disruption. The next two parts will consider each exception respectively. For the first exception, the court-martial may proceed after arraignment if the accused is voluntarily absent. While the first exception may seem straightforward, courts have struggled to decide what evidence is necessary to prove the absence is actually voluntary and which party bears the burden of proof.

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conduct, it is patently obvious that appellant knowingly and voluntarily waived his right to be present at trial." *Id*. at 185 (Crawford, J., dissenting).

[26] The defense counsel did not object to the court-martial proceeding in the accused's absence. *Id.* at 182. Normally, failure to raise an objection at trial results in waiver of appellate review for that issue. *See* MCM, *supra* note 4, R.C.M. 801(g) ("Failure by a party to raise defenses or objections or to make requests or motions which must be made at the time set by this Manual . . . shall constitute waiver thereof . . . ."); *id.* R.C.M. 905(b) (listing pretrial motions that must be raised before plea is entered); *id.* R.C.M. 905(e) (The defense waives issues listed under RCM 905(b) by failing to object or make a motion for appropriate before entering pleas; however, "[o]ther motions, requests, defenses, or objections, *except lack of jurisdiction* or failure of a charge to allege an offense, must be raised before the court-martial is adjourned for that case and . . . failure to do so shall constitute waiver."). *See also* United States v. Jungbluth, 48 M.J. 953, 957 (N-M. Ct. Crim. App. 1998) (citing *Price* for ruling that "technical violation of the court-martial rule on trial *in absentia* held jurisdictional"), *review denied*, 52 M.J. 294 (C.A.A.F. 1999).

[27] United States v. Ward, 598 F.3d 1054, 1056 n.1 (8th Cir. 2010) ("A criminal trial may not proceed if the defendant is not present at its inception.") (citing Crosby v. United States, 506 U.S. 255, 262 (1993)); United States v. Newman, 733 F.2d 1395, 1401 (10th Cir. 1984) ("A trial may continue if a defendant voluntarily absents himself after the trial has begun.") (citing Taylor v. United States, 414 U.S. 17 (1973)).

[28] *Compare* FED. R. CRIM. P. 43(a) ("[T]he defendant must be present at: (1) 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."), *with* MCM, *supra* note 4, R.C.M. 804(a) ("The accused shall be present at the arraignment, the time of the plea, every stage of the trial including sessions conducted under Article 39(a), voir dire and challenges of members, the return of the findings, sentencing proceedings, and post-trial sessions . . . ."). *Compare* FED. R. CRIM. P. 43(c)(1) ("A defendant who was initially present at trial . . . waives the right to be present under the following circumstances: (A) 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 . . . ."), *with* MCM, *supra* note 4, R.C.M. 804(c) ("[T]he 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) . . . .") (emphasis added).

[29] Crosby v. United States, 506 U.S. 255, 262 (1993). The Court expressly declined to address arguments that the accused's constitutional rights were violated by the improper trial *in absentia*. *Id*. ("Because we find Rule 43 dispositive, we do not reach Crosby's claim that his trial *in absentia* was also prohibited by the Constitution.").

[30] United States v. Bradford, 237 F.3d 1306, 1309 (11th Cir. 2001) ("[E]very other circuit to address the issue . . . [has] held that a trial commences under Rule 43 when jury selection begins.") (citations omitted); *see also* United States v. Krout, 56 F.3d 643, 646 (5th Cir. 1995) ("We . . . hold that, for the purposes of Rule 43 of the Federal Rules of Criminal Procedure, trial begins when jury selection begins."); Government of the Virgin Islands v. George, 680 F.2d 13, 14–15 (3d Cir. 1982) (interpreting Rule 43 for trying a defendant *in absentia*, concluding trial has commenced when jury selection begins, and rejecting defense argument that trial has not commenced until jeopardy has attached). *But cf.* United States v. Lucky, 569 F.3d 101, 107–08 (2d Cir. 2009) (affirming judge's decision to begin and complete jury selection in the defendant's absence after defendant asked to stay in his cell, suggesting the court implicitly found the beginning of trial for purposes of Rule 43 to occur before jury selection); United States v. Lawrence, 161 F.3d 250, 255 (4th Cir. 1998) (suggesting trial had begun "when the case was called" and before jury selection, though assuming *arguendo* that this had been error, it would constitute "invited error" based on defendant's on-the-record request to be absent); United States v. Hines, 407 F. App'x. 975, 978 (7th Cir. 2011) (stating in dicta "the circuits are split about whether a trial commences at or before jury selection").

[31] *Crosby*, 506 U.S. at 261.

[32] *See* United States v. Price, 48 M.J. 181, 183 (C.A.A.F. 1998) ("Military law, however, extends the presumptive waiver point back to arraignment, which often arises well prior to commencement of trial on the merits.") (citations omitted). *Cf.* United States v. Bass, 40 M.J. 220, 223 (C.M.A. 1994) ("In the military justice system, arraignment is the commencement of trial.") (citations omitted). In *Crosby*, the civilian defendant fled the area after appearing before a federal magistrate, entering a not guilty plea, attending pretrial hearings with counsel, and being informed of the scheduled trial date. *Crosby*, 506 U.S. at 256. The Supreme Court reversed, reasoning that the defendant was improperly tried *in absentia*, as he had not been present at the beginning of trial as required by Rule 43. *Id*. at 258–59. This decision illustrates the differences between the military rule and its civilian counterpart. A military accused waives his right to be present if he is voluntarily absent after arraignment, a proceeding that may be limited to trial counsel offering to read the charges and the accused being called on to enter a plea. By contrast, the *Crosby* defendant appeared in front of a magistrate for pretrial hearings and actually entered a plea, which was insufficient to satisfy the federal rule, even though these proceedings were more exhaustive than an arraignment. The *Crosby* Court reasoned that fleeing in the midst of trial is substantively different from fleeing before the beginning of trial, and this interpretation ensures a defendant knowingly waived the right to be present. *Id.* at 262–63; *see also* Pelaez v. United States, 27 F.3d 219 (6th Cir. 1994) (reversing conviction for defendant tried *in absentia* even though he fled to Colombia after being notified in pretrial hearing of firm trial date).

IV. The "Voluntarily Absent" Exception

You got a fast car
And I want a ticket to go anywhere.[33]

Under RCM 804(c)(1), an accused may be tried *in absentia* if "voluntarily absent after arraignment (whether or not informed by the military judge of the obligation to remain present during the trial)."[34] The text of this subparagraph provides no additional guidance for the "voluntarily absent" provision. The exception ultimately hinges on two requirements. First, the accused must be present for a valid arraignment. Second, the accused must be voluntarily absent from trial. As set forth above, the CAAF has adopted a simple bright line rule for what constitutes an arraignment, strictly enforcing the RCM 904 requirements that the charges are read to the accused and the accused is called upon to enter a plea.[35] The second requirement is significantly more nuanced and fact-intensive.

Under RCM 804(c)(1), the Government carries the burden to show by a preponderance that the accused is voluntarily absent from trial.[36] The discussion section to RCM 804(c)(1) somewhat cryptically explains, "Voluntariness may not be presumed, but it may be inferred, depending on the circumstances."[37] The discussion notes, as an example, that if an accused was present when the court recessed, knew of the scheduled date for future proceedings, and was not present when the court reconvened, it "may be inferred" that the absence is voluntary.[38] Much of this non-binding discussion to RCM 804 can be traced back to case law.

The seminal and most-instructive case for trying a voluntarily-absent military accused is *United States v. Sharp*.[39] Sharp was granted holiday leave following an arraignment that generally alluded to a January trial date.[40] When the accused did not return from holiday leave, the military judge granted a continuance to the end of January, and the accused was ultimately tried *in absentia*.[41] On appeal, the defense argued that it was improper to try an absent accused when the "government failed to establish that [he] was given notice of the trial date."[42] The court rejected this argument and concluded there was no requirement that an accused be notified of the *exact* trial date at arraignment.[43] The court further held that an absent accused could be tried even if not warned that trial might continue in his absence.[44] The current version of RCM 804(c)(1) similarly imposes no requirement that the military judge notify the accused of the trial date or that the accused may be tried *in absentia* if he leaves the area.[45] However, there may be some limited exceptions to this rule. Notably, *Sharp* cited an earlier case holding that an absent accused was improperly tried *in absentia* because he was not notified of a scheduled trial date eight months after a continuance.[46] Put another way, if an accused flees during an extended delay without notice of the general date of trial, the military judge or appellate court could properly make a factual finding that the accused did not *knowingly* waive the right to be present at trial.[47]

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[33] TRACY CHAPMAN, *Fast Car*, *on* TRACY CHAPMAN (Elektra 1988).

[34] MCM, *supra* note 4, R.C.M. 804(c).

[35] *Id.* R.C.M. 904; *supra* notes 9–17 and accompanying text.

[36] MCM, *supra* note 4, R.C.M. 804(c) discussion ("The prosecution has the burden to establish by a preponderance of the evidence that the accused's absence from trial is voluntary."); *see also* United States v. Stewart, 37 M.J. 523, 525 (A.C.M.R. 1993) ("The government has the burden of proving the absence is voluntary by a preponderance of the evidence.").

[37] MCM, *supra* note 4, R.C.M. 804(c) discussion.

[38] *Id.*

[39] 38 M.J. 33 (C.M.A. 1993), *cert. denied*, 510 U.S. 1164 (1994).

[40] *Id*. at 34. At arraignment, the military judge did not advise the accused of the date for the court-martial. *Id*. Rather, the military judge granted a defense continuance request, which sought a delay to 4 or 5 January. *Id*. The military judge then noted that he might call another session or phone conference "prior to the 4th of January." *Id.* Notably, neither counsel asked for clarification about the date for trial. *Id*.

[41] *Id*. The accused's authorized leave ended on 2 January. *Id*. When he did not return, his civilian defense counsel proffered that the accused was en route to his home of record and never arrived, which suggested he was injured as opposed to being voluntarily absent. *Id*. The military judge then granted a defense continuance to 31 January. *Id*.

[42] *Id*.

[43] *Id.* at 35 ("The initial question we must answer is whether notice to appellant of the exact trial date is a prerequisite to trying appellant *in absentia*. We answer this question in the negative.").

[44] *Id.* ("There is no requirement that appellant be warned that he has a right to be present and that the trial might continue in his absence.") (citing Taylor v. United States, 414 U.S. 17, 19 (1973)); *see also Taylor*, 414 U.S. at 19–20 (rejecting argument that civilian defendant did not *knowingly* waive his right to be present at trial, even though judge did not expressly warn him that trial would continue in his absence).

[45] MCM, *supra* note 4, R.C.M. 804(c)(1) (noting an accused who is voluntarily absent may be tried *in absentia* "whether or not informed by the military judge of the obligation to remain during the trial").

[46] *Sharp*, 38 M.J. at 37 (citing United States v. Peebles, 3 M.J. 177 (C.M.A. 1977)).

[47] The non-binding discussion to RCM 804(c) also adopts this position. MCM, *supra* note 4, R.C.M. 804(c) discussion ("For an absence from court-martial proceedings to be voluntary, the accused must have known of the scheduled proceedings and intentionally missed them."). Judge Wiss wrote separately in *Sharp* to argue, "It would seem that a knowing waiver in this regard, at a minimum, would require some notice to the accused of at least the general point at which the proceedings would resume (at least if the hiatus is to be lengthy) . . . ." *Sharp*, 38 M.J. at 39 (Wiss, J., concurring in part and in the result) (citing *Peebles*, 3 M.J. 177). Judge Wiss also argued the accused must be on notice the proceedings could continue in his absence, as the Supreme Court has implicitly reasoned an absence from trial only constitutes a waiver of the right to be present if the waiver is both knowing and voluntary. *Id*. at 38–39 (Wiss, J., concurring in part and in the result) (citing Crosby v. United States, 506 U.S. 255 (1993)). However, the discussion section to RCM 804(c), reviewed in this footnote, seems to combine the voluntary and knowing requirements based on its recommendation that a waiver is only voluntary if the accused knows of the next scheduled proceeding.

There has been some confusion among appellate courts regarding who bears the burden of showing the accused's absence is "voluntary" for applying RCM 804. The most logical reading of RCM 804(c) and related cases is that the Government bears the burden at trial to show by a preponderance that the accused is voluntarily absent.[48] However, the Navy-Marine Corps Court of Criminal Appeals (NMCCA) has suggested a possible burden shift to the defense in the right circumstances.[49] This approach is problematic, particularly considering the constitutional rights at issue when an accused is tried *in absentia*. The Army appellate court recommends a more conservative approach, allowing for a presumption that the absence is voluntary when there is no evidence to the contrary.[50]

At the trial level, the military judge has great discretion in making factual and legal determinations regarding an absent accused. For the factual determination about whether an absence is voluntary, the Army's approach of a rebuttable presumption is more appropriate. Given the constitutional rights at stake when an accused is tried *in absentia*, military judges would be wise to make findings of fact that rely on evidence that the accused is voluntarily absent as opposed to more-speculative inferences.[51] At a minimum, the court should review evidence about the accused's absence, which may be as simple as testimony about the accused taking a vehicle, packing up his room, or other proof of a voluntary absence. This evidentiary hearing may be necessary to show the accused had the mental capacity to voluntarily waive the right to be present.[52] The military judge also has discretion in determining whether trial should proceed, even if the accused is voluntarily absent. The discussion to RCM 804(c)(1) notes the rule "authorizes but does not require trial to proceed in the absence of the accused upon the accused's voluntary absence."[53] Hence, a military judge can make findings of fact regarding the voluntariness of the accused's absence and decide whether the court-martial should proceed. Finally, the military judge has wide discretion in allowing recesses or continuances before proceeding with trial *in absentia*.[54] A more recent case illustrates the challenges in establishing relevant facts for trying an absent accused.

United States v. Asif provides a typical fact pattern for trying an accused *in absentia*.[55] Asif was in an AWOL status at the time of trial.[56] Before his absence, he was present for arraignment and another pretrial hearing; at both proceedings, the military judge warned the accused that trial could proceed in his absence.[57] In order to show the accused was voluntarily absent, the Government called an agent from Naval Criminal Investigative Service (NCIS) who testified that he attempted to locate the accused without success.[58] The trial counsel also contacted Asif's uncle and mother, who said they did not know where to find him.[59] Although the record is unclear about how the trial counsel obtained this information, he further proffered that the accused had met with his civilian defense counsel, cancelled a later appointment with counsel, and then missed another appointment because of car trouble.[60]

In a unanimous, unpublished decision, the NMCCA found these facts sufficient to show the accused was voluntarily absent from trial.[61] However, the court added questionable and unnecessary legal analysis in arriving at its

[48] MCM, *supra* note 4, R.C.M. 804(c) discussion ("The prosecution has the burden to establish by a preponderance of the evidence that the accused's absence from trial is voluntary.").

[49] United States v. Bolden, No. 95-00456, 1996 CCA LEXIS 553, at *10–11 (N-M. Ct. Crim. App. Apr. 19, 1996) (per curiam) (unpublished) ("The *Sharp* court also recognized that in order to preclude trial *in absentia*, the burden of proof is on [the] accused to demonstrate that he did not voluntarily absent himself from the proceedings.") (citing United States v. Houghtaling, 8 C.M.R. 30 (C.M.A. 1953); United States v. Abilar, 14 M.J. 733, 735 (A.F.C.M.R. 1982), *petition denied*, 15 M.J. 324 (C.M.A. 1983)), *review denied*, No. 96-0891, 1996 CAAF LEXIS 505 (C.A.A.F. July 29, 1996).

[50] United States v. Stewart, 37 M.J. 523, 525 (A.C.M.R. 1993) ("Absence alone warrants a finding of voluntariness if there are no circumstances indicating the contrary.") (citing United States v. Peebles, 3 M.J. 177, 179 (C.M.A. 1977); United States v. Cook, 43 C.M.R. 344 (C.M.A. 1971)).

[51] *See Sharp*, 38 M.J. at 38 n.1 (Wiss, J., concurring in part and in the result) ("I have some concern that the majority opinion—speaking as it does in terms of a defense 'burden of going forward' and concluding as it does 'that the defense' here 'did not meet this burden,'—might mislead a reader into thinking that voluntariness may be presumed.") (quoting *Sharp*, 38 M.J. at 37).

[52] MCM, *supra* note 4, R.C.M. 804(c) discussion ("Where there is some evidence that an accused who is absent for a hearing or trial may lack mental capacity to stand trial, capacity to voluntarily waive the right to be present for trial must be shown.") (citing *id.* R.C.M. 909). The Court of Military Appeals held that "mere absence" does not justify a finding that the accused's absence is voluntary when there is evidence of mental illness that could have triggered the absence. *Peebles*, 3 M.J. at 179 (discussing *Cook*, 43 C.M.R. 344).

[53] MCM, *supra* note 4, R.C.M. 804(c) discussion.

[54] *Id.* ("When an accused is absent from trial after arraignment, a continuance or a recess may be appropriate, depending on all the circumstances."). *See also* United States v. Aldridge, 16 M.J. 1008, 1010 (A.C.M.R. 1983) (military judge's decision to grant or deny continuance after accused's absence is reviewed for abuse of discretion, and requires balancing accused's right to be present against cost and inconvenience to government, witnesses, and court).

[55] No. 200601040, 2009 WL 1285528 (N-M. Ct. Crim. App. May 7, 2009) (unpublished), *review denied*, 68 M.J. 401 (C.A.A.F. 2009).

[56] *Id*. at *1.

[57] *Id*.

[58] *Id*.

[59] *Id*.

[60] *Id*.

[61] *Id*. at *8. The court summarily rejected an argument on appeal that the accused was possibly absent for trial because the original trial date was moved ahead one day; this argument carried little weight as the accused continued to be absent on the second day of trial (when the court-martial was previously set to begin). *Id*. at *2 ("[E]ven if the appellant was somehow unaware that his court-martial was to begin on 13 August 2001, he, nevertheless, failed to appear the following day, 14 August 2001, when he claims his court-martial was scheduled to begin.").

decision. First, the court ruled that once an accused is not present at trial, the defense bears the burden of offering evidence to refute the inference that the absence is voluntary.[62] As discussed above, this burden shift to the defense is likely contrary to the rule, which directs that the Government bears the burden of proof by a preponderance of the evidence.[63] Second, the NMCCA noted that the military judge held that "the case law created an affirmative duty" on the accused to "stay in touch with his counsel, and keep apprised of developments regarding his case once RCM 804 warnings are issued."[64] The appellate court neither expressly adopted nor rejected the military judge's conclusion. This approach is also problematic, as the waiver of a constitutional right must be knowing and voluntary, as opposed to a mere failure to coordinate with counsel.[65]

Much less common, an accused may affirmatively waive the right to be present for trial without leaving the area. The discussion section to RCM 804 notes an accused may "expressly waive" the right to be present, even though there is no recognized right to be absent from one's court-martial.[66] While not binding, the discussion provides this sage guidance that encourages the Government to require the accused be present, even if the accused attempts to waive that right:

> The right to be present is so fundamental, and the Government's interest in the attendance of the accused so substantial, that the accused should be permitted to waive the right to be present only for good cause, and only after the military judge explains to the accused the right, and the consequences of foregoing it, and secures the accused's personal consent to proceeding without the accused.[67]

Because the right to be present at trial is grounded in the Constitution, an accused's waiver of that right must be knowing and voluntary.[68]

There are several practice pointers from these cases to assist military judges and practitioners when an accused is absent after arraignment. First, courts have not established a minimum time for an absence that allows for trial *in absentia* under RCM 804. As the Air Force Court of Criminal Appeals (AFCCA) has noted, there is no "witching hour before which the military judge may not proceed."[69] The military judge is given latitude to determine the reasons for the accused's absence and then to decide if trial *in absentia* is appropriate.[70] Second, while not expressly required, military judges would be wise to warn the accused at the initial arraignment that the trial could proceed *in absentia* if the accused flees.[71] Such a warning may discourage an accused from fleeing the court-martial, or at least ensure that an absent accused understood the consequences before leaving the area. As set forth above, there is a strong argument that a lengthy break between arraignment and the court-martial would vitiate the inference that an accused is voluntary absent from trial.[72] Third, in making findings of fact, military judges would be wise to focus on evidence that the accused affirmatively waived the right to be present, rather than inferences or a speculative duty for the accused to maintain contact with counsel. When an accused waives the right to be present at trial by voluntarily leaving the area, that act necessarily includes waiver of due process and confrontation rights. The Supreme Court and the CAAF have reasoned that such a waiver must be knowing and voluntary, as opposed to mere forfeiture by inaction.[73] If the waiver is knowing and voluntary, an accused may waive substantial constitutional rights.[74]

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[62] *Id*. at *2 (citing United States v. Sharp, 38 M.J. 33, 37 (C.M.A. 1993)).

[63] *See supra* note 36 and accompanying text; *see also supra* note 51.

[64] *Asif*, 2009 WL 1285528, at *2.

[65] *See infra* notes 68, 73–74, and accompanying text.

[66] MCM, *supra* note 4, R.C.M. 804(c) discussion. The military judge can compel the accused's presence at trial, which may be necessary for in-court identification. *See* United States v. Lumitap, 111 F.3d 81, 84 (9th Cir. 1997) (holding that government can compel defendant's presence for in-court identification); United States v. Durham, 587 F.2d 799, 800 (5th Cir. 1979) (holding that the judge did not abuse discretion by ordering defendants' presence in court when necessary for witnesses to identify them).

[67] MCM, *supra* note 4, R.C.M. 804(c) discussion.

[68] *See* Cohen v. Senkowski, 290 F.3d 485, 491 (2d Cir. 2002) (discussing criminal defendant's right to be present at trial and noting "waiver of this constitutional right 'must be both knowing and voluntary'") (quoting United States v. Fontanez, 878 F.2d 33, 36 (2d Cir. 1989)), *cert. denied*, 537 U.S. 1117 (2003).

[69] United States v. Lane, 48 M.J. 851, 857 (A.F. Ct. Crim. App. 1998); *see also id*. ("We decline to establish any brightline rule for how long is long enough to justify proceeding without the accused.").

[70] *Id*. ("[W]e leave that determination to the discretion of the military judge with the reminder to consider the number of prior delays granted, the timeliness and stage in the proceedings at which the continuance is requested, and the completeness of the military judge[']s inquiry into the reasons for the requested continuance.") (citations omitted).

[71] *See* United States v. Bass, 40 M.J. 220, 223 n.4 (C.M.A. 1994) ("We agree that it would be a good practice at arraignment for military judges to warn a defendant of the consequences of a voluntary absence."). The *Military Judges' Benchbook* provides a suggested advisement following arraignment:

> An arraignment has certain legal consequences, one of which I'd like to explain to you now. Under ordinary circumstances, you have the right to be present at every stage of your trial. However, if you are voluntarily absent on the date this trial is scheduled to proceed, you may forfeit the right to be present. The trial could go forward on the date scheduled even if you were not present, up to and including sentencing, if necessary.

U.S. DEP'T OF THE ARMY, PAM. 27-9, MILITARY JUDGES' BENCHBOOK para. 2-7-26, at 152 (Jan. 1, 2010) [hereinafter BENCHBOOK].

[72] *See supra* note 46 and accompanying text.

[73] United States v. Olano, 507 U.S. 725, 733 (1993) ("Waiver is different from forfeiture. Whereas forfeiture is the failure to make the timely assertion of a right, waiver is the 'intentional relinquishment or abandonment of a known right.'") (quoting Johnson v. Zerbst, 304 U.S.

Once an accused is voluntarily absent, the court-martial will proceed at the procedural posture of the case at the time of the accused's absence. If the accused leaves after arraignment and before entering a plea, the military judge is required to enter a plea of "not guilty" on the accused's behalf.[75] If the accused has not made forum election, the court will proceed with an officer panel.[76] If the accused has properly made forum election before fleeing, the court-martial can proceed with that election.[77] If the accused has entered a plea of guilty but did not successfully complete the providence inquiry before his absence, the military judge must enter a plea of "not guilty" on the accused's behalf and the Government may proceed with a contested trial.[78] Finally, if the case is tried before members, the military judge should instruct the panel to draw no negative inference from the accused's absence, using the suggested language from the *Benchbook*.[79]

If the accused returns during the trial, the military judge would be wise to give the defense an opportunity to present additional matters. In *United States v. Jackson*, the accused absented himself after arraignment, was tried *in absentia*, and then was apprehended while the members were deliberating on the merits.[80] The military judge advised the accused that the defense could reopen its case and provide additional evidence to the members; the accused declined.[81] Following this summary, the appellate court noted with approval that the accused's "interests were protected throughout this court-martial despite his own misconduct."[82]

When a military accused is tried *in absentia*, it is normally because he has fled the area following arraignment, effectively waiving the right to be present for the rest of the court-martial. Though less common in military courts, an accused may also be tried *in absentia* if the military judge orders removal based on disruptive conduct.

V. Removal for Disruption

Should I stay or should I go, now?
If I go there will be trouble
And if I stay it will be double.
So you gotta let me know
Should I stay or should I go?[83]

Under RCM 804(c)(2), following arraignment, an accused may be tried *in absentia* if he "[a]fter being warned by the military judge that disruptive conduct will cause the accused to be removed from the courtroom, persists in conduct which is such as to justify exclusion from the courtroom."[84] The discussion notes that to be disruptive, the

458, 464 (1938)); United States v. Gladue, 67 M.J. 311, 313 (C.A.A.F. 2009) (quoting *Olano*, 507 U.S. at 733.).

[74] *Gladue*, 67 M.J. at 314 ("A criminal defendant may knowingly and voluntarily waive many of the most fundamental protections afforded by the Constitution.") (quoting United States v. Mezzanatto, 513 U.S. 196, 201 (1995)).

[75] MCM, *supra* note 4, R.C.M. 910(b) ("If an accused fails or refuses to plead, or makes an irregular plea, the military judge shall enter a plea of not guilty for the accused.").

[76] *Id.* R.C.M. 903(c)(3) ("In the absence of a request for enlisted members or a request for trial by military judge alone, trial shall be by a court-martial composed of officers."); *id*. R.C.M. 903(c)(2)(A) discussion ("Ordinarily the military judge should inquire personally of the accused to ensure that the accused's waiver of the right to trial by members is knowing and understanding.").

[77] United States v. Amos, 26 M.J. 806, 809, 810–11 (A.C.M.R. 1988) (accused provided written request for trial by panel of officer and enlisted members, absented himself, and defense counsel then stated the accused actually wished to be tried by military judge alone; military judge properly denied the request and directed trial in accordance with written request).

[78] *Id.* at 809 n.2 (concurring with military judge's assessment that an absent accused cannot plead guilty as judge cannot advise an absent accused, there is no way to ensure the accused understands the meaning and effect of the plea and is entering voluntary plea, and the military judge cannot elicit a factual basis from the accused). *See also* MCM, *supra* note 4, R.C.M. 910(c)–(e) (listing same requirements for guilty plea inquiry).

[79] The recommended instruction admonishes panel members that the accused's absence may not be used in any way during the merits or presentencing phases of trial:

> You are not permitted to speculate as to why the accused is not present in court today and that you must not draw any inference adverse to the accused because (he) (she) is not appearing personally before you. You may neither impute to the accused any wrongdoing generally, nor impute to (him) (her) any inference of guilt as respects (his) (her) nonappearance here today. Further, should the accused be found guilty of any offense presently before this court, you must not consider the accused's nonappearance before this court in any manner when you close to deliberate upon the sentence to be adjudged.

BENCHBOOK, *supra* note 71, para. 2-7-23, at 146 (Jan. 1, 2010). The military judge should not tell members that the absence is unauthorized. *See* United States v. Minter, 8 M.J. 867, 868–69 (N.C.M.R. 1980) (finding military judge erred by instructing members that an accused's absence was "unauthorized" before proceeding with trial *in absentia*), *aff'd*, 9 M.J. 397 (C.M.A. 1980) (summary disposition). *Minter* recommends military judges advise the members that the accused has waived his right to be present and that the absence cannot be held against the accused. *Id*. at 869. *But cf.* United States v. Lane, 48 M.J. 851, 858 (A.F. Ct. Crim. App. 1998) (affirming military judge's decision to admit Air Force form at presentencing that indicated accused was in unauthorized absence status during dates of trial, as personnel record relating to character of service under RCM 1001(b)(2)), *review denied*, 51 M.J. 322 (C.A.A.F. 1999).

[80] 40 M.J. 620 (N.M.C.M.R. 1994), *review denied*, 42 M.J. 18 (C.A.A.F. 1994).

[81] *Jackson*, 40 M.J. at 625.

[82] *Id.*

[83] THE CLASH, *Should I Stay or Should I Go*, *on* COMBAT ROCK (Epic 1982).

[84] MCM, *supra* note 4, R.C.M. 804(c)(2). The language in the rule is similar to the Supreme Court's conclusions regarding the removal of a civilian defendant who disrupts proceedings.

> [W]e explicitly hold today that a defendant can lose his right to be present at trial if, *after he has been warned by the judge that he will be removed* if he continues his disruptive behavior, he nevertheless insists on conducting himself in a manner so disorderly, disruptive, and disrespectful of the court

conduct must "materially interfere" with the court-martial.[85] While there is scant military case law on removing an accused for disruption, civilian courts have uniformly held mere disruption is not sufficient, but rather the defendant's conduct must be so extreme as to hinder the proceedings.[86]

In *United States v. Ward*, a civilian defendant, charged with production and possession of child pornography, was improperly removed for disruption.[87] The Eighth Circuit Court of Appeals found that the defendant was denied his constitutional right to be present at trial, so it reversed and remanded for a new trial.[88] The facts leading up to the defendant's removal suggest he was disruptive and mildly erratic. Before the federal trial began, Arkansas authorities charged the defendant with rape; he was convicted and sentenced to life in prison before the federal child pornography case was tried.[89] At the federal trial, the defendant agreed to plead guilty, but filed several written objections that caused the judge to reject the plea.[90] The judge ordered a mental examination of the defendant, which concluded he was mentally responsible and could assist in his own defense; however, the mental evaluation noted, "behavioral issues are considered likely, given various statements by the defendant of 'fireworks' in the court."[91] This prediction proved to be entirely accurate.

At his next court appearance, the defendant complained he was not allowed to bring legal papers from the jail and defense counsel grumbled that the defendant was "going off on tangents."[92] The judge directed the prosecutor to provide the defendant's legal papers to defense counsel.[93] Before voir dire began, defendant "repeatedly" interrupted defense counsel and the court.[94] The judge directed the defendant "to write out what you want to tell your lawyer . . . because if you've been in his ear, he can't listen to me."[95] The defendant responded that he needed to speak to his counsel to ensure objections were made in a timely manner.[96] The judge then told the defendant, "If you interrupt me again if you talk again without going through your lawyer, I'm going to send you to a cell and you can hear the trial from there."[97] A few moments later, the judge admonished the defendant for speaking to his counsel too loudly and then had the defendant removed.[98]

After removal, defense counsel suggested the judge give the defendant time to "cool down."[99] The court overruled the request and proceeded to jury selection with the defendant absent.[100] After jury selection, the judge directed defense counsel to tell the defendant that he could return if he would

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> that his trial cannot be carried on with him the in the courtroom.

Illinois v. Allen, 397 U.S. 337, 343 (1970) (emphasis added). *See also id.* at 350 (Brennan, J., concurring) ("Of course, no action against an unruly defendant is permissible except after he has been fully and fairly informed that his conduct is wrong and intolerable, and warned of the possible consequences of continued misbehavior."); 1 FRANCIS A. GILLIGAN & FREDERIC I. LEDERER, COURT-MARTIAL PROCEDURE 13–17 (3d ed. 2006) ("Before taking any action, the military judge must warn the accused of the possible consequences of misconduct in the courtroom.").

[85] MCM, *supra* note 4, R.C.M. 804(c) discussion ("In order to justify removal from the proceedings, the accused's behavior should be of such a nature as to materially interfere with the conduct of the proceedings.").

[86] *See* Tatum v. United States, 703 A.2d 1218, 1223 (D.C. 1997) ("Several federal and state courts, however, have held that under *Illinois v. Allen*, a defendant may constitutionally be excluded from the courtroom during the testimony of a witness only when his behavior is extreme, abusive, disrespectful, or likely to hinder seriously the progress of the trial. Behavior that is merely disruptive is insufficient under *Allen* to justify removal.") (citing *Allen*, 397 U.S. 337); *see also* Hasan v. Gross, Nos. 13-8011, 13-8012, 2012 WL 6050349 (C.A.A.F. 2012) (per curiam) (stating in dicta that there was insufficient showing on the record that an accused who had been removed for disruption had "materially interfered with the proceedings" by growing and displaying a beard in violation of both Army grooming standards and an order from the court to shave) (citing MCM, *supra* note 4, R.C.M. 804 discussion).

[87] 598 F.3d. 1054 (8th Cir. 2010).

[88] *Id*. at 1056, 1060.

[89] *Id.* at 1056.

[90] *Id.*

[91] *Id.*

[92] *Id.*

[93] *Id.*

[94] *Id.*

[95] *Id.*

[96] *Id.* The defendant told the trial judge: "The being quiet I got a problem with . . . . The last time they tell me to be quiet, then they want to later say, because I didn't say something, then I can't object to it later." *Id*. (alteration in original).

[97] *Id.*

[98] *Id*. The opinion provided this summary:

> THE COURT: We can hear you talking up here [Mr. Ward]. Everybody in the courtroom can hear you talking and I've told you to write or be quiet.
>
> THE DEFENDANT: I'm talking to my attorney.
>
> THE COURT: You can write him a note.
>
> THE DEFENDANT: I can't do that, Your Honor. If you have someone I can dictate to and have them write it, because I can't do it.
>
> THE COURT: Are you ready to go to the lock-up?
>
> THE DEFENDANT: You can do whatever you want.
>
> THE COURT: Let's move him—he won't hush—over his objection.
>
> THE DEFENDANT: You cannot go further in this case without me present. I prohibit you to do it. You are not to go any further with any of my defense. You have to wait until I'm here. If he won't bring me –
>
> (Defendant removed from courtroom.)

Id. at 1056-57 (alterations in original).

[99] *Id*. at 1057.

[100] *Id.*

"pledge" not to speak out loud and only communicate in writing with counsel.[101] Before trial began in the afternoon, defense counsel told the judge the defendant could not comply with the court's requirements.[102] On the second day of trial, defense counsel renewed his objection to the defendant's absence from proceedings but also stated, "I don't see there's any way he could guarantee that he'd be quiet."[103] On the third day of trial (which consisted of instructions, closing arguments, and deliberations), there was no discussion in the record of the defendant returning to the courtroom.[104] During deliberations, the jury asked the court why the defendant was not present.[105]

The Eighth Circuit emphasized that a criminal defendant has a constitutional right to be present throughout the trial.[106] Relying on the Supreme Court's decision in *Illinois v. Allen*, the court found this right can be waived if the defendant's conduct is sufficiently disorderly to stop the proceedings.[107] In this case, the defendant had not threatened anyone and was not violent. The court noted a judge "clearly has discretion to take firm action" when courtroom safety is at issue.[108] When a defendant is removed for disruption alone, the judge is afforded less discretion.[109] In this case, the judge erred by (1) issuing an "absolute ban" on the defendant speaking to his counsel, a possible violation of the right to counsel; and (2) not personally advising the defendant about his right to return if he could "conduct himself consistently with the decorum and respect inherent in the concept of courts and judicial proceedings."[110]

The Government alternatively argued that the defendant's absence, if error, was harmless.[111] Because this error violated a constitutional right, the Government had to prove the error was harmless beyond a reasonable doubt.[112] In rejecting the Government argument, the Eighth Circuit noted the defendant was not able to assist in jury selection, confront the witnesses and evidence against him, or be "brought face to face with the jurors at the time when the challenges were made."[113] The jurors also inquired during deliberations about the defendant's absence.[114] While this laundry list was enough to show prejudice, the court added: "If more concrete harm than this is needed, which we strongly doubt, we note that the video of the twelve-year-old girl was the sole basis for Ward's conviction of *producing* child pornography, for which he received a 300-month sentence . . . . As described at trial, it [the video] includes nudity but appears not to depict 'sexually explicit conduct' as defined in 18 U.S.C. § 2256(2) as a matter of law."[115] Finally, the Eighth Circuit soundly reasoned that the defendant's improper removal also obliterated his right to testify, a fundamental constitutional right that only the defendant may waive.[116] Defendant had "repeatedly asserted" that the Government tampered with video evidence, which suggested he may have testified even if counsel advised him to the contrary.[117] More interestingly, the court suggested the defendant could not have *knowingly* waived his right to testify, as he was not present when the video was shown to the jury.[118]

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[101] *Id*. The trial judge offered the following to the defense counsel:

> I'd like for you to visit with your client and if he can pledge to you that he will act right . . . not be talking out loud and if he will communicate with you in writing when you're trying to listen to witnesses and me and the other lawyer and everything, that I will allow him to come back in the courtroom.

Id.

[102] *Id*.

[103] *Id*.

[104] *Id*.

[105] *Id*.

[106] *Id*. ("The Supreme Court has long held that, 'One of the most basic of the rights guaranteed by the Confrontation Clause [of the Sixth Amendment] is the accused's right to be present in the courtroom at every stage of his trial.'") (quoting Illinois v. Allen, 397 U.S. 337, 338 (1970)) (alteration in original); *id.* at 1057–58 ("The right to be present, which has a recognized due process component, is an essential part of the defendant's right to confront his accusers, to assist in selecting the jury and conducting the defense, and to appear before the jurors who will decide his guilt or innocence.").

[107] *Id*. at 1058 (rejecting government argument that defendant's behavior warranted removal, concluding "that argument pays too little heed to the narrower *holding* in *Allen*—a defendant may be removed if he 'insists on conducting himself in a manner so disorderly, disruptive, and disrespectful of the court *that his trial cannot be carried on with him in the courtroom.*'") (quoting *Allen*, 397 U.S. at 343) (emphasis added by court).

[108] *Id.* at 1059.

[109] *Id*.

[110] *Id*. The court held the trial judge should have personally addressed the accused about his right to return to court; it was not sufficient to use defense counsel as a conduit for this advisement. *Id*.

[111] *Id*. at 1060.

[112] *Id*. (citing United States v. Shepherd, 287 F.3d 965, 968 (8th Cir. 2002)).

[113] *Id*. *See also* Tatum v. United States, 703 A.2d 1218, 1224 (D.C. 1997) (reasoning that erroneous removal of criminal defendant during witness testimony "can almost never be harmless" because it violates confrontation rights).

[114] *Ward*, 598 F.3d at 1057, 1060.

[115] *Id*. at 1060.

[116] *Id*. at 1059 (citing Rock v. Arkansas, 483 U.S. 44, 49, 51-52 (1987)).

[117] *Id*.

[118] In dicta, the court questioned, "[H]ow could Ward's waiver be knowing when he had not seen the version of the tape viewed by the jury, and how could the court be satisfied that defense counsel's resting without putting on any evidence reflected Ward's *personal* waiver of his constitutional right to testify?" *Id.* at 1059 (emphasis in original).

Ward is notable because it illustrates the challenges for defense counsel in representing a contumacious accused. At the time of trial, the defendant had already been sentenced to life in Arkansas state court on a separate charge, so he had little to lose at the federal trial.[119] The court correctly opined that both the judge and defense counsel probably preferred to try the case without the defendant, but the Constitution compels a different result:

> [B]oth defense counsel and the judge wanted to be free of Ward's interruptions. Ward's absence no doubt ensured a smoother trial, probably to Ward's ultimate advantage. But the defendant's right to be present at trial is a more powerful, constitutionally mandated concern. *A defendant's constitutional right to be present at his trial includes the right to be an irritating fool in front of a jury of his peers*.[120]

Defense counsel should have continually objected to trial in the accused's absence. Because the defendant's disruptions were too minor to warrant his removal from the courtroom, the Eighth Circuit reversed the case and remanded for a new trial.

When an accused is so disruptive that he substantially interferes with the proceedings, the military judge can take certain remedial actions. As a threshold matter, the military judge must warn the accused that he may be removed for disrupting the proceedings and that the court-martial will continue in his absence.[121] In the rare case that an accused creates an immediate threat to courtroom safety, a warning may not be necessary before removal.[122] After warning the accused, the military judge may order the removal of an accused who continues to be disruptive, provided the disruptive conduct is so severe that it interferes with the proceedings.[123] The court may order the accused be physically restrained or segregated in the courtroom.[124] The discussion to RCM 804 advises, "The military judge should consider alternatives to removal of a disruptive accused."[125] However, it is not mandatory for the military judge to attempt alternatives before removing a disruptive accused.[126] In deciding between these options, the military judge should consider the *Manual*'s guidance that "[r]emoval may be preferable to such an alternative as binding and gagging, which can be an affront to the dignity and decorum of the proceedings."[127] The American Bar Association similarly recommends removal over restraining the accused.[128] As a practical matter, it may be less prejudicial for a disruptive accused to be removed, rather than sitting before the factfinder bound and gagged.[129] Further, a shackled accused would have difficulty communicating with counsel, which is otherwise one of the principal benefits of remaining in the courtroom during trial.[130]

Once an accused has been removed from the court-martial for disruption, the military judge has several matters to address. In terms of protecting the accused's rights, the military judge should liberally allow recesses for defense counsel to consult with the accused, periodically advise the accused that he may return so long as he is not disruptive, and, if possible, allow the accused to observe the proceedings by closed-circuit feed or otherwise listen to the proceedings.[131] The American Bar Association has a similar

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[119] *Id*. at 1056.

[120] *Id.* at 1059 (emphasis added).

[121] MCM, *supra* note 4, R.C.M. 804(c)(2). *See also* Gray v. Moore, 520 F.3d 616, 624 (6th Cir. 2008) (analyzing Supreme Court and circuit court cases and determining a trial court must give unruly defendant "one last chance to comply with courtroom civility" before ordering removal). If the accused has elected trial before members, the military judge should warn the accused during an Article 39(a) session without members present in order to prevent any improper inferences against the accused.

[122] *See Ward*, 598 F.3d at 1059 ("A trial judge with a legitimate concern for safety in the courtroom faces a very different situation and clearly has discretion to take firm action.") (citing Bibbs v. Wyrick, 526 F.2d 226, 227–28 (8th Cir. 1975), *cert. denied*, 425 U.S. 981 (1976)).

[123] MCM, *supra* note 4, R.C.M. 804(c)(2); *id.* R.C.M. 804(c) discussion ("Trial may proceed without the presence of an accused who has disrupted the proceedings, but only after at least one warning by the military judge that such behavior may result in removal from the courtroom."). *See also* 1 GILLIGAN & LEDERER, *supra* note 84, at 13–17 ("Given such a warning, an accused who continues to misbehave in a fashion that makes it 'difficult or wholly impossible to carry on the trial' may be excluded from trial or restrained.") (quoting Illinois v. Allen, 397 U.S. 337, 338 (1970)) (footnotes omitted); Captain Steven F. Lancaster, *Disruption in the Courtroom: The Troublesome Defendant*, 75 MIL. L. REV. 35, 40 (1977) ("A minor disruption of a nonviolent character, such as a single profane word or gesture may prompt the judge to delay taking action . . . . On the other hand, a judge can warn the defendant concerning his conduct at the time it takes place, with the hope that such a warning will inhibit future misconduct.").

[124] MCM, *supra* note 4, R.C.M. 804(c) discussion ("Such alternatives include physical restraint (such as binding, shackling, and gagging) of the accused, or physically segregating the accused in the courtroom.").

[125] *Id.*

[126] *Id.* ("Such alternatives need not be tried before removing a disruptive accused under subsection (2).").

[127] *Id.*

[128] *See* ABA STANDARDS FOR CRIMINAL JUSTICE: SPECIAL FUNCTIONS OF THE TRIAL JUDGE Standard 6-3.8, at 65 (3d ed. 2000) [hereinafter ABA STANDARDS FOR CRIMINAL JUSTICE] ("Removal is preferable to gagging or shackling the disruptive defendant.").

[129] *See* Illinois v. Allen, 397 U.S. 337, 344 (1970) ("[T]he sight of shackles and gags might have a significant effect on the jury's feelings about the defendant . . . .").

[130] *Id*. ("Moreover, one of the defendant's primary advantages of being present at the trial, his ability to communicate with his counsel, is greatly reduced when the defendant is in a condition of total physical restraint.").

[131] MCM, *supra* note 4, R.C.M. 804(c) discussion. The discussion provides these suggestions:

> When the accused is removed from the courtroom for disruptive behavior, the military judge should—(A) Afford the accused and defense counsel ample opportunity to consult throughout the proceedings. To this end, the accused should be held or otherwise

framework for handling a disruptive civilian defendant.[132] As set forth in *United States v. Ward*, the military judge should also advise the accused of his right to testify and have the accused make an election on the record.[133] While it may go without saying, the military judge should also "[e]nsure that the reasons for removal appear in the record."[134] Finally, if the case is tried before members, the military judge should instruct the panel to draw no negative inference from the accused's absence.[135]

The disruptive accused seems to be rare in military practice. The military judge faced with such an accused should follow guidance from federal courts and only remove a disruptive accused as a last resort. The *Ward* decision provides useful guidelines for addressing a disruptive accused while also ensuring a fair trial. The trial of an absent accused implicates important constitutional protections and there are still some open issues in this area.

VI. Open Issues

For practitioners and military judges, there are two potentially problematic areas when trying an accused *in absentia*. The first area concerns presentencing evidence. For defense counsel, the CAAF has held that privileged information may not be disclosed in a trial *in absentia* unless the accused has previously consented.[136] The court even extended this rule to include the accused's unsworn statement, so defense counsel is barred from offering privileged information during presentencing even if it is in the accused's best interest.[137] Defense counsel should also be cautioned against submitting post-trial matters discussing the accused's absence.[138] For trial counsel at presentencing, there is some authority for admitting personnel records showing the accused's unauthorized absence during trial, though the *Benchbook* instruction directs the panel to disregard the accused's absence during sentencing deliberations.[139] This creates a fine line that allows evidence of the absence to be admitted, though the panel may only consider it for rehabilitative potential.[140] The trial counsel may also cross-examine defense character witnesses on the

> required to remain in the vicinity of the trial, and frequent recesses permitted to allow counsel to confer with the accused.
> (B) Take such additional steps as may be reasonably practicable to enable the accused to be informed about the proceedings. Although not required, technological aids, such as closed-circuit television or audio transmissions, may be used for this purpose.
> (C) Afford the accused a continuing opportunity to return to the courtroom upon assurance of good behavior. To this end, the accused should be brought to the courtroom at appropriate intervals, and offered the opportunity to remain upon good behavior.

Id. *See* ABA STANDARDS FOR CRIMINAL JUSTICE, *supra* note 128, at Standard 6-3.8, cmt., at 66 ("[W]hen practical, the removed defendant should be permitted to hear and observe the proceedings through audio / visual equipment."). *See also Allen*, 397 U.S. at 351 (Brennan, J., concurring) ("[W]hen a defendant is excluded from his trial, the court should make reasonable efforts to enable him to communicate with his attorney and, if possible, keep apprised of the progress of his trial."); 1 GILLIGAN & LEDERER, *supra* note 84, at 13–18 ("The accused should be permitted to return to trial after a promise to comply with normal standards of behavior.") (footnote omitted).

[132] The ABA Criminal Justice Standards Committee provides:

> Standard 6-3.8. The disruptive defendant
>
> A defendant may be removed from the courtroom during trial when the defendant's conduct is so disruptive that the trial cannot proceed in an orderly manner. Removal is preferable to gagging or shackling the disruptive defendant. The removed defendant ordinarily should be required to be present in the court building while the trial is in progress. The removed defendant should be afforded an opportunity to hear the proceedings and, at appropriate intervals, be offered on the record an opportunity to return to the courtroom upon assurance of good behavior. The offer to return need not be repeated in open court each time. A removed defendant who does not hear the proceedings should be given the opportunity to learn of the proceedings from defense counsel at reasonable intervals.

ABA STANDARDS FOR CRIMINAL JUSTICE, *supra* note 128, at 65.

[133] United States v. Ward, 598 F.3d. 1054, 1059 (8th Cir. 2010). In dicta, the court questioned, "[H]ow could Ward's waiver be knowing when he had not seen the version of the tape viewed by the jury, and how could the court be satisfied that defense counsel's resting without putting on any evidence reflected Ward's *personal* waiver of his constitutional right to testify?" *Id.* at 1059 (emphasis in original).

[134] MCM, *supra* note 4, R.C.M. 804(c) discussion.

[135] *See supra* note 79 and accompanying text.

[136] United States v. Marcum, 60 M.J. 198 (C.A.A.F. 2004). The CAAF reasoned:

> Therefore, 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 specific statement on his behalf. Although defense counsel may refer to evidence presented at trial during his sentencing argument, he may not offer an unsworn statement containing material subject to the attorney-client privilege without waiver of the privilege by his client.

Id. at 210. *See also* MCM, *supra* note 4, MIL. R. EVID. 511(a) ("Evidence of a statement or other disclosure of privileged matter is not admissible against the holder of the privilege if disclosure was compelled erroneously or was made without an opportunity for the holder of the privilege to claim the privilege.").

[137] *Marcum*, 60 M.J. at 210. For a more detailed analysis of the privilege issues facing defense counsel representing an absent accused, see Francis A. Gilligan & Edward J. Imwinkelried, *Waiver Raised to the Second Power: Waivers of Evidentiary Privilege Representing Accused Being Tried* in Absentia, 56 S.C. L. REV. 509 (2005).

[138] Courts have used the accused's post-trial submissions to confirm that the accused was voluntarily absent. United States v. Stewart, 37 M.J. 523, 526 n.1 (A.C.M.R. 1993) ("In his petition for clemency pursuant to R.C.M. 1105, the appellant admitted that he left his unit on 17 December 1991 to avoid trial.").

[139] *See supra* note 79 and accompanying text.

[140] United States v. Lane, 48 M.J. 851, 859 (A.F. Ct. Crim. App. 1998).

absence as a specific instance of misconduct, though extrinsic evidence may not be admitted for this purpose.[141]

The second nebulous area concerns appellate review of trial *in absentia* cases and whether errors are jurisdictional in nature or subject to harmless error analysis. As discussed in Part III section of this article, *United States v. Price* ruled that an accused was improperly tried *in absentia* because the military judge did not complete the arraignment before the accused fled.[142] Notably, the defense counsel did not object at trial, so the CAAF may have treated the defective arraignment as jurisdictional in nature.[143] Outside from defects in the arraignment, other errors in trying an accused *in absentia* are clearly subject to a harmless error analysis. The analysis to RCM 804 notes that the accused's absence from trial is "not jurisdictional" and that erroneously conducting a trial in the accused's absence may be harmless in some circumstances.[144] However, the analysis also notes that such an error will "normally require reversal."[145] In an unpublished decision, the AFCCA found that a military judge erred by conducting a five-minute Article 39(a) session in the accused's absence, though the error was "harmless beyond a reasonable doubt" on the facts of the case.[146] Federal courts have similarly applied this legal standard to determine if a defendant's absence from trial warrants appellate relief.[147] In considering whether erroneous removal amounted to harmless error, appellate courts review the portions of the trial the defendant did not attend. It will normally constitute prejudicial error if the defendant is improperly removed during the testimony of government witnesses,[148] during voir dire of members,[149] or during instructions to the members.[150] Because an appellate court will likely find prejudice if an accused is erroneously tried *in absentia*, judges and practitioners should proceed with caution.

VI. Conclusion

Like many areas of the law, the rules for trial *in absentia* balance conflicting interests. An accused has the right to confront witnesses and assist in his own defense under the Confrontation Clause and Due Process Clause. As the Supreme Court has correctly observed, "courts must indulge every reasonable presumption against the loss of constitutional rights."[151] During a trial *in absentia*, the accused has effectively lost the right to confront witnesses, to consult with counsel, and to present a defense. At the same time, it would be unjust if the accused were able to paralyze the court-martial process by fleeing the area or

[141] *Id*. at 858 (citing United States v. Wingart, 27 M.J. 128, 136 (C.M.A. 1988)).

[142] United States v. Price, 48 M.J. 181 (C.A.A.F. 1998).

[143] *See* United States v. Jungbluth, 48 M.J. 953 (N-M. Ct. Crim. App. 1998) (citing *Price* for "technical violation of court-martial rule on trial *in absentia* held jurisdictional").

[144] MCM, *supra* note 4, R.C.M. 804 analysis, at A21-46 (discussing RCM 804(a) and noting, "The requirement that the accused be present is not jurisdictional"); *id.* (discussing RCM 804(a) and noting, "While proceeding in the absence of the accused, without the express or implied consent of the accused, will normally require reversal, the harmless error rule may apply in some instances.") (citing United States v. Walls, 577 F.2d 690 (9th Cir.) *cert. denied*, 439 U.S. 893 (1978); United States v. Nelson, 570 F.2d 258 (8th Cir. 1978); United States v. Taylor, 562 F.2d 1345 (2d Cir.), *cert. denied*, 434 U.S. 853 (1977)).

[145] *See* MCM, *supra* note 4, R.C.M. 804 analysis, at A21-46 (discussing RCM 804(a)).

[146] United States v. Minor, ACM S30801, 2006 WL 2268868 (A.F. Ct. Crim. App. July 26, 2006) (unpublished), *review. denied*, 64 M.J. 237 (C.A.A.F. 2006). The military judge erroneously conducted a five-minute Article 39(a) session with counsel in the accused's absence. *Id.* at *1. The military judge had recessed the court-martial for lunch until 1300; at 1245, an Article 39(a) session was held regarding panel instructions. *Id.* The accused was not present but his defense counsel said he was prepared to discuss instructions in his client's absence. *Id.* The military judge noted the accused was "probably still at lunch" and proceeded with the session. *Id.* The military judge and counsel discussed the findings instructions and findings worksheet and then concluded at 1250. *Id.* When court reconvened at 1300, the accused was present. *Id.* The Air Force Court Criminal Appeals found that conducting the session without the accused violated Article 39(b), as well as the accused's constitutional right to be present during trial: The court noted the legal standard, "Since this error was of a constitutional dimension, the test is whether the reviewing court is 'able to declare a belief that it was harmless beyond a reasonable doubt.'" *Id.* at *2 (quoting United States v. Bins, 43 M.J. 79, 86 (C.A.A.F. 1995) (quoting Chapman v. California, 386 U.S. 18, 24 (1967))). On these facts, the AFCCA found the error was harmless beyond a reasonable doubt. *Id.* Specifically, the Article 39(a) session only lasted five minutes; the instructions were standard for a wrongful use case; the accused was present when the instructions were read to the panel and did not object to the instructions; the findings worksheet included a single charge and specification with no lesser-included offenses; and counsel did not object to the instructions at trial or argue on appeal that additional instructions were warranted. *Id.* Practitioners should note that the AFCCA correctly ruled that defense counsel could not waive an accused's "statutory and constitutional right" to be present. *Id*. at *1.

[147] *See* United States v. Toliver, 330 F.3d 607, 611 (3d Cir. 2003) ("Other circuit courts have more directly (and more recently) addressed whether a violation of a defendant's constitutional and statutory rights to be present in all trial phases is properly subject to harmless error analysis, with many concluding that it is.") (citing United States v. Rosales-Rodriguez, 289 F.3d 1106, 1111 (9th Cir. 2002); United States v. Sylvester, 143 F.3d 923, 928–29 (5th Cir. 1998); United States v. Coffman, 94 F.3d 330, 335–36 (7th Cir. 1996); United States v. Gomez, 67 F.3d 1515, 1528 (10th Cir. 1995); United States v. Harris, 9 F.3d 493, 499 (6th Cir. 1993)).

[148] *See* Tatum v. United States, 703 A.2d 1218, 1224 (D.C. 1997) ("This court has expressly held that the erroneous exclusion of a defendant during the testimony of a witness can almost never be harmless because it infringes the defendant's rights under the Sixth Amendment.") (reversing case in which defendant was removed for a portion of a prosecution witness's testimony that lasted approximately thirty minutes).

[149] *See* Cohen v. Senkowski, 290 F.3d 485, 489 (2d Cir. 2002) (noting that defendant has constitutional right to be present during impaneling of jury).

[150] Larson v. Tansy, 911 F.2d 392, 395–96 (10th Cir. 1990). *Cf.* United States v. Henderson, 626 F.3d 326, 342–43 (6th Cir. 2010) (no prejudice when, after jury had been excused for deliberations, judge answered question from jury in open court in defendant's absence about recessing early for the weekend and instructed jurors to deliberate); United States v. Brika, 416 F.3d 514, 527 (6th Cir. 2005) (no prejudice when "the judge did nothing more than give the jurors a technical and perfunctory rereading or explanation of previously-given jury instructions" without defendant present).

[151] Illinois v. Allen, 397 U.S. 337, 343 (1970) (citing Johnson v. Zerbst, 304 U.S. 458, 464 (1938)).

disrupting trial. In limited circumstances, a trial should be able to continue without the accused. When considering a trial *in absentia*, the military judge should carefully balance the accused's right to be present against the government's interest in the timely administration of justice.[152] The framework under RCM 804 can guide this assessment and ensure the court-martial of an absent accused comports with constitutional and legal requirements.

[152] *See* Lancaster, *supra* note 123, at 39 ("[T]he judge must delicately balance the rights of the accused with the interest of society in the expedient, orderly process of justice. This is not an easy task, nor one which should be approached with less than total awareness of the interests involved.").