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"I Did Not Come Here To Defend Myself": Responding to War on Terror Detainees' Attempts To Dismiss Counsel and Boycott the Trial

ABSTRACT. A significant portion of the war on terror detainees who have been charged at Guantanamo have announced their intentions to dismiss their attorneys, to waive their right to be present at their trials, or to take both actions simultaneously so that their interests will not be represented. This Note demonstrates that strong justifications, rooted in international and domestic legal rules and precedent, support honoring the detainees' requests. Yet the military tribunal proceedings are designed to follow the adversarial model to achieve just outcomes; granting the detainees' procedural requests can, in certain situations, undermine the ability of the military commissions to reach just outcomes in favor of the personal whims of the detainees. When a detainee's procedural request threatens to undermine the adversarial model, I propose that military adjudicators appoint an amicus curiae counsel to provide sufficient process on behalf of the tribunal.

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INTRODUCTION

In the weeks and months following the September 11, 2001, terrorist attacks,[1] the Bush Administration began to develop plans to bring suspected terrorists to justice.[2] With the President's Military Order of November 13, 2001 ("Military Order"), the executive branch announced that it would administer trials by military commission of non-U.S. citizens who were reasonably believed to have "engaged in, aided or abetted, or conspired to commit, acts of international terrorism, or acts in preparation therefor" or "knowingly harbored [such] individuals."[3] Based on the Military Order, the Secretary of Defense would prescribe the procedures for the trials by commission.[4] In January 2002, the United States began to transfer suspected terrorists to a detention facility set up by the Department of Defense at the naval base at Guantanamo Bay, Cuba.[5] On March 21, 2002, Defense Secretary Donald Rumsfeld promulgated the original commission trial procedures.[6] Only ten detainees out of more than 700 were charged under the original regulations[7]

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1. *See* NAT'L COMM'N ON TERRORIST ATTACKS UPON THE UNITED STATES, THE 9/11 COMMISSION REPORT 326-34 (2004) (discussing the Bush Administration's response to the September 11 terrorist attacks and the preparation for a military response in Afghanistan to oust the Taliban); Susan Schmidt & Bob Woodward, *FBI, CIA Warn Congress of More Attacks as Blair Details Case Against Bin Laden: Retaliation Feared if U.S. Strikes Afghanistan*, WASH. POST, Oct. 5, 2001, at A1; President George W. Bush, Address to a Joint Session of Congress (Sept. 20, 2001), *available at* http://archives.cnn.com/2001/US/09/20/gen.bush.transcript/; *U.S. Rejects Taliban Offer To Try Bin Laden*, CNN.COM, Oct. 7, 2001, http://archives.cnn.com/2001/US/10/07/ret.us.taliban/.

2. *See* Jennifer A. Lohr, Note, *A "Full and Fair" Trial: Can the Executive Ensure It Alone? The Case for Judicial Review of Trials by Military Commissions at Guantanamo Bay*, 15 DUKE J. COMP. & INT'L L. 387, 387-88 (2005); Tim Golden, *After Terror, a Secret Rewriting of Military Law*, N.Y. TIMES, Oct. 24, 2004, at A1 (discussing the "aggressive[]" approach secretly undertaken by a few White House officials to allow the military to detain and prosecute suspected foreign terrorists).

3. Military Order of November 13, 2001: Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism, 66 Fed. Reg. 57,833, 57,833-34 (Nov. 16, 2001) [hereinafter Military Order].

4. *Id.* at 57,834.

5. *Shackled Detainees Arrive in Guantanamo*, CNN.COM, Jan. 11, 2002, http://archives.cnn.com/2002/WORLD/asiapcf/central/01/11/ret.detainee.transfer/index.html.

6. 32 C.F.R. pt. 9 (2006); John Mintz, *U.S. Adds Legal Rights in Tribunals: New Rules Also Allow Leeway on Evidence*, WASH. POST, Mar. 21, 2002, at A1.

7. *See* U.S. Dep't of Def., Military Commissions, Charge Sheets, http://www.defenselink.mil/news/Nov2004/charge_sheets.html (last visited Aug. 30, 2007). At the high point, the United States held more than 700 detainees from forty-four

before the military commission proceedings were suspended following the U.S. Supreme Court's June 2006 decision in *Hamdan v. Rumsfeld*.[8] So far, three of the ten detainees who were originally charged have been recharged[9] under new Department of Defense rules[10] promulgated in accordance with the post-*Hamdan* Military Commissions Act of 2006 ("MCA").[11]

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countries at Guantanamo. REED BRODY, HUMAN RIGHTS WATCH, THE ROAD TO ABU GHRAIB 5 (2004), *available at* http://hrw.org/reports/2004/usa0604/usa0604.pdf. The reported total number of Guantanamo inmates has subsequently varied, since the U.S. government has released some detainees. In late 2004, the Pentagon acknowledged there were about 550 detainees at Guantanamo. Press Release, U.S. Dep't of Def., Transfer of Detainees Completed (Sept. 18, 2004), http://www.defenselink.mil/releases/release.aspx?releaseid=7753. In summer 2007, the number of inmates was reportedly 360. William Glaberson, *Hurdles Frustrate Effort To Shrink Guantanamo*, N.Y. TIMES, Aug. 9, 2007, at A1.

8. 126 S. Ct. 2749 (2006). The *Hamdan* Court held, inter alia, that neither the inherent powers of the executive nor an act of Congress had authorized the military commissions. Absent such authorization, the commissions had to comply with the ordinary laws of the United States and the laws of war. In response to the decision, President Bush halted all Guantanamo proceedings.

9. The three detainees who have been recharged are David Hicks, Salim Ahmed Hamdan, and Omar Khadr. *U.S. To Charge Guantanamo Detainees*, BBC NEWS, Feb. 3, 2007, http://news.bbc.co.uk/2/hi/americas/6326767.stm. On March 26, 2007, Hicks entered a guilty plea. Josh White, *Australian's Guilty Plea Is First at Guantanamo*, WASH. POST, Mar. 27, 2007, at A1. Hicks received a seven-year prison sentence, of which all but nine months were suspended. *Hicks To Serve Nine Months' Jail*, BBC NEWS, Mar. 31, 2007, http://news.bbc.co.uk/2/hi/americas/6512945.stm. On June 4, 2007, military tribunal adjudicators dismissed the charges against Khadr and Hamdan because a Combatant Status Review Tribunal had determined that they are "enemy combatants," but not "unlawful enemy combatants." The MCA requires that a detainee be an "unlawful enemy combatant" to be tried by military commission. Sara Wood, *Judge Dismisses Charges Against Second Guantanamo Detainee*, AM. FORCES PRESS SERVICE, June 4, 2007, http://www.defenselink.mil/news/newsarticle.aspx?id=46288. The Pentagon appealed this interpretation of the statute. *See Pentagon Appeals Dismissal of Charges of Guantanamo Detainee Accused of Killing U.S. Soldier*, FOXNEWS.COM, July 6, 2007, http://www.foxnews.com/story/0,2933,288472,00.html. On September 24, 2007, a special military appeals court returned the case to the lower court, stating that the military commission trial judge has authority to consider whether the government's evidence supports labeling the charged detainees as "unlawful enemy combatants." William Glaberson, *Court Advances Military Trials for Detainees*, N.Y. TIMES, Sept. 25, 2007, at A1.

10. *See* U.S. DEP'T OF DEF., THE MANUAL FOR MILITARY COMMISSIONS (2007), *available at* http://www.defenselink.mil/pubs/pdfs/The%20Manual%20for%20Military%20Commissions.pdf.

11. Pub. L. No. 109-366, 2006 U.S.C.C.A.N. (120 Stat.) 2600 (to be codified at 10 U.S.C. §§ 948a-948s, 949a-949u, 950a-950w).

A striking trend has emerged among the ten detainees who have been charged in the military commissions: at least five of them announced their intentions to represent themselves or to boycott their own trials.[12] Three attempted to do both simultaneously, thereby attempting to waive any defense whatsoever. The detainees are making these procedural requests much more frequently than is common among defendants in civilian criminal proceedings in the United States.[13]

While scholars, commentators, politicians, and the general public have debated the legality and fairness of the military commissions since the President issued the Military Order,[14] the public discourse has not considered how the United States should respond to detainees who seek to represent themselves or boycott their trials.[15] Rules precluding defendants from accessing

12. *See infra* Section I.B.

13. *See* Marie Higgins Williams, Comment, *The Pro Se Criminal Defendant, Standby Counsel, and the Judge: A Proposal for Better-Defined Roles*, 71 U. COLO. L. REV. 789, 815 (2000) (explaining that in criminal proceedings, U.S. defendants seldom eschew the right to counsel).

14. *See, e.g.*, LAWYERS COMM. FOR HUMAN RIGHTS, ASSESSING THE NEW NORMAL: LIBERTY AND SECURITY FOR THE POST-SEPTEMBER 11 UNITED STATES 33-36 (2003) (discussing early criticisms of the treatment of September 11 detainees); Laura A. Dickinson, *Using Legal Process To Fight Terrorism: Detentions, Military Commissions, International Tribunals, and the Rule of Law*, 75 S. CAL. L. REV. 1407 (2002) (critiquing the military commissions from a scholarly perspective at an early juncture in the debate); David E. Sanger, *Prisoners Straddle an Ideological Chasm*, N.Y. TIMES, Jan. 27, 2002, at A16; Katharine Q. Seelye & David E. Sanger, *Bush Reconsiders Stand on Treating Captives of War*, N.Y. TIMES, Jan. 29, 2002, at A1; Katharine Q. Seelye, *Criticized, U.S. Brings Visitors to Prison Camp*, N.Y. TIMES, Jan. 26, 2002, at A8.

15. The right to self-representation is well-established in U.S. civilian law, *see, e.g.*, Faretta v. California, 422 U.S. 806 (1975), and binding international treaties, *see, e.g.*, Organization of American States, American Convention on Human Rights art. 8(2)(d), Nov. 22, 1969, O.A.S.T.S. No. 36, 1144 U.N.T.S. 123; International Covenant on Civil and Political Rights art. 14(3)(d), Dec. 16, 1966, S. EXEC. DOC. E, 95-2, 999 U.N.T.S. 171. The right to be absent from one's trial is also established in U.S. domestic law. *See, e.g.*, FED. R. CRIM. P. 43(c)(2) ("If the defendant waives the right to be present, the trial may proceed to completion, including the verdict's return and sentencing, during the defendant's absence."); Crosby v. United States, 506 U.S. 255, 258 (1993) (holding that trials can take place in the absence of the accused provided that the accused was initially present and at some point is "voluntarily absent after the trial has commenced" (quoting FED. R. CRIM. P. 43)). There is also a basis for voluntary absence in international treaty law. *See* Daniel J. Brown, Note, *The International Criminal Court and Trial in Absentia*, 24 BROOK. J. INT'L L. 763, 778-84 (1999). This Note examines international and domestic rules and precedent supporting the right to self-representation and to voluntary absence of presence. *See infra* Sections II.B-C.

independent civilian courts,[16] the prolonged detentions of individuals without charges,[17] allegations of prisoner abuse at the Guantanamo facility,[18] and rules for withholding classified evidence from the detainees[19] have been more prominently debated.

These concerns are extremely important, but the questions of self-representation and boycott are also crucial. There is strong historical support for granting detainees the rights to self-representation and boycott. Throughout the entire history of English criminal jurisprudence, the Star Chamber was the only criminal tribunal that imposed counsel upon an unwilling defendant.[20] American jurisprudence from colonial times to the present has recognized the right to self-representation.[21] The right is overwhelmingly available in contemporary international legal bodies and

16. 10 U.S.C.A. §§ 950a-950j (West 1998 & Supp. 2007) (limiting judicial review); *see also* AMNESTY INT'L, MILITARY COMMISSIONS ACT OF 2006: TURNING BAD POLICY INTO BAD LAW 7-8 (2006), *available at* http://web.amnesty.org/library/index/ENGAMR511542006 (criticizing, inter alia, the lack of judicial review that the MCA affords to Guantanamo detainees); Scott L. Silliman, *On Military Commissions*, 36 CASE W. RES. J. INT'L L. 529, 538-40 (2004); Jay Alan Bauer, Commentary, *Detainees Under Review: Striking the Right Constitutional Balance Between the Executive's War Powers and Judicial Review*, 57 ALA. L. REV. 1081, 1081-83 (2006); Lohr, *supra* note 2, at 396-409; Peter Grier, *Debate Deepens over Guantanamo*, CHRISTIAN SCI. MONITOR, June 16, 2005, at 1.

17. *See, e.g.*, AMNESTY INT'L, GUANTANAMO: LIVES TORN APART—THE IMPACT OF INDEFINITE DETENTION ON DETAINEES AND THEIR FAMILIES (2006), *available at* http://web.amnesty.org/library/index/ENGAMR510072006; Carl Tobias, *Punishment and the War on Terrorism*, 6 U. PA. J. CONST. L. 1116 (2004).

18. *See, e.g.*, Charles H. Brower II, *The Lives of Animals, the Lives of Prisoners, and the Revelations of Abu Ghraib*, 37 VAND. J. TRANSNAT'L L. 1353, 1371 (2004) (describing evidence of abuses at Guantanamo); Jeffrey K. Cassin, Note, *United States' Moral Authority Undermined: The Foreign Affairs Costs of Abusive Detentions*, 4 CARDOZO PUB. L. POL'Y & ETHICS J. 421, 422 (2006); Douglas Jehl, *Pentagon Seeks To Shift Inmates from Cuba Base*, N.Y. TIMES, Mar. 11, 2005, at A1.

19. Note, *Secret Evidence in the War on Terror*, 118 HARV. L. REV. 1962 (2005) (examining the legal and policy issues related to secret evidence in military commissions); Nicholas W. Smith, Note, *Evidence and Confrontation in the President's Military Commissions*, 33 HASTINGS CONST. L.Q. 83, 91-94 (2005).

20. The Star Chamber flourished in Great Britain in the late sixteenth and early seventeenth centuries before it was abolished in 1641. It employed a secretive process to impose torture on individuals who fell into disfavor with the king. *See* 5 WILLIAM HOLDSWORTH, A HISTORY OF ENGLISH LAW 178-79 (2d ed. 1937).

21. *See infra* Subsection II.B.1.

instruments as well.[22] International and domestic legal rules and precedent also support the right to boycott.[23]

The established protections for these procedural rights stem from public policy concerns for the defendant's individual autonomy. As the U.S. Supreme Court has stated, the right to self-representation "affirm[s] the dignity and autonomy of the accused."[24] Because it is the defendant—not the attorney—who "suffers the consequences if the defense fails,"[25] the Court has reasoned that the defendant must be permitted to control his own defense. Thus, self-representation "embodies one of the most cherished ideals of civilization: the right of an individual to determine his own destiny."[26] Similarly, the right of the defendant to be voluntarily absent from his trial also can be justified under an autonomy rationale: the defendant has a right to absent himself from his trial because he is the person most affected by its outcome and should be able to choose to boycott.[27]

The primary argument against granting these rights is based on the effect that they can have on the fairness of proceedings. In the context of self-representation, several judges and scholars have argued that the scenario in which a nonlawyer defendant defends a case against a seasoned prosecutor undermines the court's ability to achieve due process.[28] Similar concerns related to due process, based on perceived benefits of having the accused present when his life and liberty are in jeopardy, form the main argument against granting voluntary waiver of presence.[29]

These concerns are particularly acute in the military commission context. Since September 11, 2001, the U.S. government has faced a need to develop rules for military commissions that allow the nation to protect its security

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22. *See infra* Subsection II.B.2.

23. *See infra* Section II.C.

24. McKaskle v. Wiggins, 465 U.S. 168, 176-77 (1984).

25. Faretta v. California, 422 U.S. 806, 820 (1975).

26. People v. Gordon, 688 N.Y.S.2d 380, 382 (Sup. Ct. 1999).

27. *See, e.g.*, Taylor v. United States, 414 U.S. 17, 20 (1973) (per curiam); Diaz v. United States, 223 U.S. 442, 455 (1912); People v. Epps, 334 N.E.2d 566, 571 (N.Y. 1975); Nancy Jean King, *Priceless Process: Nonnegotiable Features of Criminal Litigation*, 47 UCLA L. REV. 113, 128-29 (1999) (criticizing the fact that the right to voluntary waiver of presence is based on a "defendant-centered model").

28. *See* United States v. Farhad, 190 F.3d 1097, 1106-07 (9th Cir. 1999) (Reinhardt, J., concurring) (arguing that the right to self-representation frequently conflicts with the right to a fair trial); Erica J. Hashimoto, *Defending the Right of Self-Representation: An Empirical Look at the Pro Se Felony Defendant*, 85 N.C. L. REV. 423, 446-47 (2007).

29. King, *supra* note 27, at 128-29 (discussing Hopt v. Utah, 110 U.S. 574, 579 (1884)).

while adhering to rule-of-law norms. The Guantanamo military commissions have been controversial and subject to significant legal challenges since their inception.[30] Currently, many are calling for Guantanamo's closure.[31] As even critics of the Bush Administration's detention policies acknowledge, though, some of the detainees are too dangerous to release, and the evidence against them is too sensitive to be presented in a U.S. civilian court.[32] Therefore, the United States will almost certainly try a significant number of its war on terror detainees in ad hoc military tribunals at Guantanamo or on U.S. soil.[33] The

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30. Legal scholars were predicting major legal battles related to the MCA even before President Bush signed the bill into law. *E.g.*, R. Jeffrey Smith, *Many Rights in U.S. Legal System Absent in New Bill*, WASH. POST, Sept. 29, 2006, at A13 ("Many constitutional experts say . . . that the bill pushes at the edges of so much settled U.S. law that its passage will not be the last word on America's detainee policies. They predict it will shift the public debate to the federal courts . . . ."). As they predicted, lawsuits challenging the constitutionality of the MCA flooded the courts around the time of its passage. Warren Richey, *New Lawsuits Challenge Congress's Detainee Act*, CHRISTIAN SCI. MONITOR, Oct. 6, 2006, at 1. For example, the father of detainee David Hicks announced that his legal team would challenge the MCA's constitutionality within a day of the bill's passage. James M. Yoch, Jr., *Hicks To Challenge U.S. Military Commissions Law*, JURIST, Oct. 18, 2006, http://jurist.law.pitt.edu/paperchase/2006/10/hicks-to-challenge-us-military.php.

    In February 2007, the United States Court of Appeals for the District of Columbia Circuit dismissed cases filed by sixty-three detainees challenging the MCA. Boumediene v. Bush, 476 F.3d 981 (D.C. Cir. 2007); *see also* Warren Richey & Linda Feldman, *No Federal Court for Guantanamo Detainees*, CHRISTIAN SCI. MONITOR, Feb. 21, 2007, at 1. The Supreme Court initially denied certiorari in *Boumediene*, and it also denied certiorari in response to a separate petition from Hamdan and Khadr. Hamdan v. Gates, 127 S. Ct. 2133 (2007) (mem.); Boumediene v. Bush, 127 S. Ct. 1478 (2007). This appeared to prevent further legal challenges to the MCA and to clear the way for military trials. Warren Richey, *Court Declines To Enter Fray on Detainee Trials*, CHRISTIAN SCI. MONITOR, May 1, 2007, at 2. However, on June 29, 2007, in a rare and surprising move, the Supreme Court vacated its April 2, 2007, order and granted certiorari in *Boumediene*. Boumediene v. Bush, 127 S. Ct. 3078 (2007) (mem.).

31. *See, e.g.*, Dianne Feinstein, Op-Ed., *Close Guantanamo Now*, S.F. CHRON., July 30, 2007, at B7; Walter Pincus, *Powell Calls for Closure of Military Prison at Guantanamo*, WASH. POST, June 11, 2007, at A3; Carol J. Williams, *Guantanamo Under Steady Fire*, L.A. TIMES, June 17, 2007, at A18. *But see* Michael Abramowitz, *Cheney Opposes Closing Guantanamo*, WASH. POST, Aug. 1, 2007, at A4.

32. For example, Neal Katyal, Hamdan's lead attorney and an opponent of current detention policies, said that "it's not realistic to think that all people can be tried in an ordinary criminal court." Thom Shankar & David Johnston, *Legislation Could Be Path to Closing Guantanamo*, N.Y. TIMES, July 3, 2007, at A10.

33. Trying a subset of detainees in yet-to-be-devised tribunals on U.S. soil seems to be an increasingly viable scenario. *See* Drake Bennett, *The Road from Guantanamo*, BOSTON GLOBE, June 25, 2006, at D1; Editorial, *Closing Guantanamo*, WASH. POST, June 27, 2007, at A18; Shankar & Johnston, *supra* note 32.

United States has been a leader in developing rule-of-law standards worldwide.[34] Because the fairness of these proceedings is a matter of international political concern,[35] the world will closely watch how the United States handles detainee requests to represent themselves, to boycott their trials, or to do both simultaneously.

As the United States wrestles with whether and how to reform procedures for trying war on terror detainees, this Note examines whether a defendant in a military tribunal should be able to dismiss his counsel and/or boycott his trial. (Because detainees have often attempted these maneuvers in tandem, they are intertwined at Guantanamo and are best examined side-by-side.) In Part I, I describe the pretrial procedural requests that charged detainees have made, the government's response before *Hamdan* was announced, and the government's post-*Hamdan* response (embodied largely in the MCA). In Part II, I analyze how well policy makers and adjudicators have responded to the detainees' requests by balancing the defendant's individual autonomy rights against third-party interests in the overall legitimacy of the military commission system, its capacity to reach just outcomes, and national security. I fault the government responses for flouting international and domestic legal rules and precedent. That said, I recognize two complications that allowing these autonomy rights would present: no one would be present to represent a defendant's interests if he went forward with the trial (and did not enter into a plea bargain)[36] but then boycotted the proceedings and dismissed his lawyer simultaneously; and if a defendant elected self-representation, he would not be able to review classified evidence (including potentially exculpatory evidence) in his case. In other words, granting the detainees' procedural requests would in certain situations make portions of the proceedings entirely nonadversarial, which would compromise the ability of the already maligned military commission system to reach just outcomes. Part III proposes a solution that balances the detainees' autonomy rights and the third-party interests in

34. *See* Cassin, *supra* note 18, at 423, 446-56 (arguing that, although the United States has been a moral human rights leader, its image and credibility are suffering because of prosecutions at Guantanamo).

35. *See* Anton L. Janik, Jr., *Prosecuting al Qaeda: America's Human Rights Policy Interests Are Best Served by Trying Terrorists Under International Tribunals*, 30 DENV. J. INT'L L. & POL'Y 498, 521-27 (2002); Cassin, *supra* note 18, at 423, 446-56.

36. While a defendant has the right to sacrifice adversarial process by entering a plea bargain, once he forgoes this right and proceeds to trial, the judicial system must provide a fair trial. *See* Boykin v. Alabama, 395 U.S. 238, 243 (1969); Marci A. Hamilton & Clemens G. Kohnen, *The Jurisprudence of Information Flow: How the Constitution Constructs the Pathways of Information*, 25 CARDOZO L. REV. 267, 297 (2003).

adversarial process. In situations where granting a detainee's procedural request would sacrifice adversarial process, the tribunal should not force counsel on an unwilling detainee, but should appoint amicus curiae counsel to test evidence from the defense's perspective on behalf of the tribunal.

I. DETAINEES' PROCEDURAL DEMANDS AND THE GOVERNMENT'S RESPONSE

Some detainees were charged with crimes as early as February 2004, but no detainees were put on trial prior to the June 2006 *Hamdan* decision and the MCA's subsequent rewriting of military commission rules.[37] The military commission system was riddled with confusion, including problems with defense team staffing and translation services;[38] procedural delays;[39] and challenges in U.S. federal courts between 2004 and 2006.[40] The commissions did hold pretrial hearings during this time.[41] In making their first public appearances at the pretrial hearings, many of the charged detainees sought to represent themselves and/or announced their intention to boycott their trials.[42]

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37. Hamdan v. Rumsfeld*: Establishing a Constitutional Process: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. para. 2 (2006) [hereinafter *Establishing a Constitutional Process Hearing*] (statement of Sen. Patrick Leahy), *available at* http://judiciary.senate.gov/member_statement.cfm?id=1986&wit_id=2629 ("[T]here have been no trials and no convictions of any of the detainees and no one has been brought to justice through these commissions.").

38. Kathleen T. Rhem, *Parties Still Working Behind the Scenes on Military Commissions*, AM. FORCES PRESS SERVICE, Mar. 8, 2005, http://www.defenselink.mil/news/Mar2005/20050308_118.html (describing the trials as in abeyance pending the outcome of federal litigation, and describing prior defense team staffing issues and problems with translation services).

39. *E.g.*, Kathleen T. Rhem, *Lawyers Address Thorny Issues on Eve of Military Commissions Hearings*, AM. FORCES PRESS SERVICE, Jan. 10, 2006, http://www.defenselink.mil/news/Jan2006/20060110_3886.html ("Legal wrangling and delays have kept [al-Bahlul's] case out of court until now . . . .").

40. *E.g.*, Hamdan v. Rumsfeld, 344 F. Supp. 2d 152 (D.D.C. 2004).

41. *See* Silliman, *supra* note 16, at 529 (referencing pretrial hearings); Deborah Pearlstein, Military Commission Trial Observation, http://www.humanrightsfirst.org/us_law/detainees/military_commission_diary.htm (last visited Aug. 30, 2007) (providing military commission monitors' daily updates, which contain firsthand accounts of the pretrial proceedings).

42. *See infra* Section I.B.

Thereafter the government had to respond to these requests, which it did in the MCA. So far, three detainees have been recharged under the MCA.[43]

*A. Pre-*Hamdan *Procedures for the Military Commissions*

A brief examination of the procedures that the Secretary of Defense established for the military commissions on March 21, 2002, sheds light on the context in which the detainees announced their procedural requests prior to *Hamdan*. These regulations provided that the Secretary of Defense or a designee would appoint members of each military commission, including the presiding officer,[44] who would lead the commission proceedings.[45]

The proceedings would begin when the appointing authority referred the charges against a detainee to the commission.[46] Once referred, the regulations mandated that the accused be notified of the charges against him.[47] He had the right to reach a plea agreement before trial.[48] The regulations also required the presiding officer to obtain evidence by legal process so as "to ensure a full and fair trial."[49] At the preliminary proceedings, in a process similar to voir dire, the presiding officers permitted defense lawyers to question them and the other members of the commissions to demonstrate that the commission members were impartial.[50]

*B. Pre-*Hamdan *Demands for Self-Representation and/or Boycott*

Only ten detainees were charged under the 2002 Department of Defense procedures, including the preliminary proceedings. At the preliminary hearings, five of the ten requested to represent themselves or to boycott future

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43. *See supra* note 9.

44. 32 C.F.R. §§ 9.2, 9.4 (2006). Each commission would consist of between three and seven members. *Id.* § 9.4(a)(2). The members would have to be commissioned officers of the U.S. armed forces. *Id.* § 9.4(a)(3). The presiding officer would have to be a judge advocate. *Id.* § 9.4(a)(4).

45. *Id.* § 9.4(a)(4); *see also id.* § 9.4(a)(5) (listing the duties of the presiding officer).

46. *Id.* § 9.6.

47. *Id.* § 9.6(a)(3).

48. *Id.* § 9.6(a)(4).

49. *Id.* § 9.6(a)(5)(ii).

50. *See* Deborah Pearlstein, *A Defendant Asks to Represent Himself*, Military Commission Trial Observation (Aug. 26, 2004), http://www.humanrightsfirst.org/us_law/detainees/military_commission_diary.htm.

proceedings.[51] By the time they were brought in front of commission members and outside monitors for the first time, all of the charged detainees had been in U.S. custody for several years.[52]

The detainees made known their procedural requests in several different ways, often combining their requests so that they simultaneously were asking to boycott and to represent themselves. Ali Hamza Ahmed Sulayman al-Bahlul, who allegedly served as Osama bin Laden's bodyguard and produced propaganda videos for al Qaeda,[53] requested to represent himself at his first pretrial proceeding in August 2004.[54] Col. Peter Brownback III, the presiding officer, said he believed the military commission rules did not allow the request, but that al-Bahlul's attorneys could submit a memorandum addressing the right to self-representation, which they did.[55] In 2005, John D. Altenburg, Jr., the appointing authority for the Defense Department's Office of Military

51. *E.g.*, Beth Gorham, *U.S. Prosecutor in Khadr Case Blasts Sympathetic Views of Canadian Teen*, CBC NEWS, Jan. 10, 2006, http://www.cbc.ca/cp/world/060110/w011074.html; Kathleen T. Rhem, *Military Commissions to Begin at Guantanamo*, AM. FORCES PRESS SERVICE, Aug. 18, 2004, http://www.defenselink.mil/news/Aug2004/n08182004_2004081807.html.

52. For example, detainee al-Qahtani was captured in December 2001 and shipped to Guantanamo soon thereafter. Bill Dedman, *Can the "20th Hijacker" of Sept. 11 Stand Trial?* (pt. 2), MSNBC, Oct. 26, 2006, http://www.msnbc.msn.com/id/15361462. Khadr arrived at Guantanamo in October 2002. Gorham, *supra* note 51. Al-Bahlul was at Guantanamo by early 2002. Sean Flynn, *Practicing Justice*, DUKE MAG., July-Aug. 2006, at 26, 26. Al-Sharbi was captured in March 2002. Human Rights First, Ghassan Abdullah al-Sharbi, http://www.humanrightsfirst.org/us_law/detainees/cases/sharbi.htm (last visited Aug. 30, 2007). Muhammad was allegedly captured on April 10, 2002. Human Rights First, The Case of Binyam Ahmed Muhammad, http://www.humanrightsfirst.org/us_law/detainees/cases/ahmed-Muhammad.htm (last visited Aug. 30, 2007).

53. Flynn, *supra* note 52. Specifically, al-Bahlul is accused of serving as bin Laden's bodyguard, making a videotape glorifying al Qaeda's October 2000 attack on the USS *Cole* in Yemen that killed seventeen American sailors, and wearing an explosive belt to protect bin Laden in 2001. Complaint at 2-4, United States v. al-Bahlul, No. 04-0003 (Military Comm'n Feb. 24, 2004), *available at* http://www.defenselink.mil/news/Feb2004/d20040224AlBahlul.pdf.

54. Toni Locy, *Tribunal Struggles with First Hearings*, USA TODAY, Aug. 30, 2004, at 12A; Kathleen T. Rhem, *Yemeni Detainee Asks To Represent Self, Admits to Being al Qaeda*, AM. FORCES PRESS SERVICE, Aug. 26, 2004, http://www.defenselink.mil/news/Aug2004/n08262004_2004082603.html. In the alternative, as a Yemeni citizen, al-Bahlul said he would accept a Yemeni national as counsel. *Id.*

55. Rhem, *supra* note 54. Al-Bahlul's defense attorneys prepared a memorandum of law for the commission. Memorandum of Law: Right to Self-Representation, United States v. al-Bahlul, No. 04-0003 (Military Comm'n Sept. 2, 2004), *available at* http://www.pegc.us/archive/Swift_v_Rumsfeld/d20040917Selfrep.pdf.

Commissions, issued a memo denying al-Bahlul's request.[56] Yet in January 2006, al-Bahlul again addressed Colonel Brownback, stating: "[D]o what you have to do . . . . This life will go on and will be gone at one point. . . . God will rule based on justice. And those who call upon other than God are not calling about anything."[57] He held up a piece of paper with the word "boycott" written in Arabic and repeated the word three times in English.[58] While one cannot know al-Bahlul's true motives, by maintaining his request to represent himself while simultaneously making known his intention to boycott, it appears he wanted his hearing to go on with absolutely no defense.

On April 5, 2006, Omar Ahmed Khadr, an accused al Qaeda fighter and Canadian citizen, announced his intention to boycott his trial. In doing so, he sought to challenge the legitimacy of the proceeding, describing it as inhumane and unfair.[59] The trend continued[60] when, on the next day, Binyam Ahmed Muhammad told his presiding officer that the proceeding "is not a Commission, this is a con-mission, is a mission to con the world."[61] An Ethiopian charged with conspiring with al Qaeda members to commit terrorism, Muhammad announced that he wanted to dismiss his counsel: "I

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56. Kathleen T. Rhem, *Guantanamo Proceedings Deal with Unique Legal Challenges*, AM. FORCES PRESS SERVICE, Jan. 13, 2006, http://www.dod.mil/news/Jan2006/20060113_3920.html; Sara Wood, *Commission Continues To Argue Representation Issue in Gitmo Case*, AM. FORCES PRESS SERVICE, Apr. 7, 2006, http://www.defenselink.mil/news/Apr2006/20060407_4752.html.

57. Record of Trial at 60, United States v. al-Bahlul, No. 04-0003 (Military Comm'n Jan. 11, 2006), *available at* http://www.defenselink.mil/news/Jan2006/d20060125Bahlulvol6.pdf; *see also* David S. Cloud, *Terror Suspect Upsets Plan To Resume Trials in Cuba*, N.Y. TIMES, Jan. 12, 2006, at A24 (noting that al-Bahlul's demands threw the proceedings into "disarray").

58. Record of Trial, *supra* note 57, at 60-61; *see also* Cloud, *supra* note 57.

59. Khadr also boycotted in the hopes of improving the conditions of his captivity. 8 Record of Trial at 249-50, United States v. Khadr, No. 05-0008 (Military Comm'n Apr. 5 & 7, 2006) [hereinafter Khadr Transcript]; *see also* Priti Patel, *Khadr Boycotts Hearings: Challenges Conditions of Confinement*, Military Commission Trial Observation (Apr. 5, 2006), http://www.humanrightsfirst.org/us_law/detainees/gitmo_diary/post-040506-patel.asp.

60. There has been some speculation that al-Bahlul instigated the trend by turning other detainees against their lawyers. *See* Jonathan Mahler, *The Bush Administration vs. Salim Hamdan*, N.Y. TIMES MAG., Jan. 8, 2006, at 44, 86 (describing al-Bahlul as having "a reputation for turning other detainees against their U.S. attorneys").

61. 1 Record of Trial at 79, United States v. Muhammad, No. 05-0009 (Military Comm'n Apr. 6, 2006) [hereinafter Muhammad Transcript]; *see also* Priti Patel, *Muhammad Challenges the Commissions; His Lawyer Raises an Ethical Objection and Pleads the Fifth*, Military Commission Trial Observation (Apr. 6, 2006), http://www.humanrightsfirst.org/us_law/detainees/gitmo_diary/post-040606-patel.asp.

wish no representation . . . I didn't ask for a trial. You can kill me tomorrow; I don't really care."[62]

Like al-Bahlul and Muhammad before him, on April 25, 2006, Mohammed al-Qahtani, a Saudi citizen captured in Pakistan and allegedly the individual who was supposed to be the "20th hijacker" on September 11,[63] proclaimed his intentions to dismiss his counsel and boycott his trial. "I don't want an attorney," he said. "I don't want a court."[64]

Finally, on April 27, 2006, Ghassan Abdullah al-Sharbi, a Saudi accused of conspiring with members and associates of al Qaeda to commit terrorism, attack civilians, murder, and destroy property, formally requested the right to self-representation. He claimed that he simply was going to stand in front of the tribunal and recount his actions because he was "proud" to have fought against the United States, he was willing to pay the price, and he would feel honored to spend time in prison for fighting for a cause that he believed in. "I did not come here to defend myself," he said.[65]

C. *Pre-*Hamdan *Responses to the Detainees' Procedural Requests*

Once the detainees made their procedural requests, the military commission members and other government officials quickly had to decide how to respond. The assigned military defense counsel also faced difficult questions about how to treat their clients' wishes and whether to challenge commission decisions. As lawyers representing Guantanamo defendants have pointed out, "[t]here is no question more fundamental to a criminal proceeding than the question of who will represent the defendant."[66]

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62. Muhammad Transcript, *supra* note 61, at 54, 82.

63. Dedman, *supra* note 52.

64. 1 Record of Trial at 6, United States v. al-Qahtani, No. 05-0007 (Military Comm'n Apr. 25, 2006) [hereinafter al-Qahtani Transcript]; *see also* Priti Patel, *Al-Qahtani Joins Line of Defendants Refusing To Participate in Military Commissions*, Military Commission Trial Observation (Apr. 25, 2006), http://www.humanrightsfirst.org/us_law/detainees/gitmo_diary/post-042506-patel.asp.

65. 1 Record of Trial at 20, United States v. al-Sharbi, No. 05-0005 (Military Comm'n Apr. 27, 2006) [hereinafter al-Sharbi Transcript]; *see also* Priti Patel, *Another Guantanamo Detainee Asks To Represent Himself*, Military Commission Trial Observation (Apr. 27, 2006), http://www.humanrightsfirst.org/us_law/detainees/gitmo_diary/post-042706-patel.asp.

66. Brief for Military Attorneys Detailed To Represent Ali Hamza Ahmad Sulayman al Bahlul Before a Military Commission as Amicus Curiae in Support of Petitioner at 3, Hamdan v. Rumsfeld, 543 U.S. 1096 (2005) (No. 04-702) [hereinafter Brief for Military Attorneys], *available at* http://www.law.georgetown.edu/faculty/nkk/documents/bahlul.sct.pdf.

When al-Bahlul, Muhammad, al-Qahtani, and al-Sharbi requested to represent themselves, their defense attorneys found themselves in an ethical conundrum. The lawyers—all members of civilian state bar associations as well as Judge Advocate General's (JAG) Corps members—feared that remaining on a case against the wishes of their clients would violate their ethical duty to respect their clients' desires.[67] The attorneys sought advisory opinions on this ethical question from their state bar ethics committees, and they received divergent results. For instance, the Kentucky State Bar deemed it ethical for Lt. Col. Bryan Broyles to continue to represent al-Qahtani,[68] but the State Bar of California told Lt. Cmdr. William Kuebler that he could no longer represent al-Sharbi given al-Sharbi's wishes. Kuebler then made a motion to withdraw from the case.[69] Al-Bahlul's attorney Maj. Thomas Fleener, who is licensed in both Wyoming and Iowa, also sought withdrawal to avoid violation of state ethics rules.[70]

Neither policy makers nor the commission adjudicators seemed sympathetic to the ethical dilemma facing the attorneys or to the detainees' attempts to exercise their rights. Policy makers ignored established due process norms. The regulations eventually promulgated stated first that "[t]he Accused must be represented at all relevant times by Detailed Defense Counsel,"[71] and second, that "Detailed Defense Counsel shall so serve notwithstanding any intention expressed by the Accused to represent himself."[72]

Relying on the Defense Department rules, presiding officers or appointing authorities denied all detainees the right to self-representation. The adjudicator of al-Qahtani's and al-Sharbi's cases cited the Defense Department order alone to justify his decision that the accused could not dismiss counsel. He made no

67. Pamela A. MacLean, *JAG Lawyers in a 'Catch-22' Trap*, NAT'L L.J., Oct. 2, 2006, at 7, 7.

68. Sara Wood, *Representation Issue Arises in Case of Suspected Saudi Terrorist*, AM. FORCES PRESS SERVICE, Apr. 25, 2006, http://www.defenselink.mil/news/Apr2006/20060425_4928.html.

69. Al-Sharbi Transcript, *supra* note 65, at 36; *see also* Patel, *supra* note 65 (stating that the State Bar of California advised Kuebler that he could not represent al-Sharbi given al-Sharbi's rejection of his legal representation).

70. Kathleen T. Rhem, *Guantanamo Hearing Opens Amid Legal Issues*, AM. FORCES PRESS SERVICE, Jan. 12, 2006, http://www.defenselink.mil/news/Jan2006/20060112_3906.html; Rhem, *supra* note 39.

71. 32 C.F.R. § 9.4(c)(2)(4) (2006).

72. 32 C.F.R. § 13.3(c)(2) (2006).

mention of precedent allowing self-representation.[73] Muhammad's presiding officer, Colonel Kohlmann, reached the same conclusion.[74]

Al-Bahlul's case engendered more debate. He first asked to represent himself in August 2004.[75] When denying al-Bahlul's request, the appointing authority for the Office of Military Commissions, John D. Altenburg, Jr., stated that detainees could not represent themselves in light of the security risks and procedural impracticalities, such as the detainees' unfamiliarity with substantive law, rules of evidence and procedure, and the English language. "An unrepresented accused will be unable to investigate his case adequately because of national security concerns," Altenburg wrote. "An accused confined at Guantanamo, Cuba, who is unfamiliar with applicable substantive law, rules of evidence and procedure, will not be able to present an adequate defense."[76] He continued, noting that if a pro se defendant could not understand English, translation requirements would be "exponentially magnified."[77] Finally, at the time, the rules of procedure permitted closed hearings in which classified evidence could be presented. Detainees would need to be excluded from such hearings, but defense attorneys could be present to represent their clients' interests.[78] Altenburg's memo concluded, "Self-representation under these unique commission circumstances would be ineffective representation, and result in an unfair proceeding."[79]

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73. *See* al-Qahtani Transcript, *supra* note 64, at 8; al-Sharbi Transcript, *supra* note 65, at 14; *see also* Patel, *supra* note 65 ("Cpt. O'Toole made a decision on a legal issue without providing any legal basis for his determination. . . . [H]e never actually clarified what legal standard he was using or under what legal authority he was basing his decision. Apart from citing Military Commission Order 1, there was no discussion of the large body of jurisprudence under U.S. domestic law and U.S. military law on the issue of self-representation."). For information about U.S. military law precedent for the right to self-representation, see *infra* notes 158-159 and accompanying text.

74. Muhammad Transcript, *supra* note 61, at 94-95 (describing Colonel Kohlmann's response to Muhammad's request for self-representation by saying "you don't have that right"); *see also* Patel, *supra* note 61; Sara Wood, *Muhammad Gitmo Proceedings Begin Despite Defense Boycott*, AM. FORCES PRESS SERVICE, Apr. 7, 2006, http://www.defenselink.mil/news/Apr2006/20060407_4746.html.

75. Pearlstein, *supra* note 50.

76. Rhem, *supra* note 56 (quoting John D. Altenburg, Jr., Appointing Authority, U.S. Department of Defense Office of Military Commissions, Memorandum on Self-Representation (July 14, 2005)).

77. *Id.*

78. *Id.*

79. *Id.*

Despite Altenburg's memo, Colonel Brownback still heard arguments on whether al-Bahlul had a right to self-representation.[80] Al-Bahlul's lawyer relied on *Faretta v. California*,[81] the Sixth Amendment, the Due Process Clause of the Fifth Amendment, U.S. criminal law, U.S. statutory law, and customary international law to argue that his client should have the right to dismiss him.[82] For the first time, the prosecution agreed that al-Bahlul had a right to self-representation.[83] The prosecutors argued, however, that the presiding officer was bound by Altenburg's memo and that he therefore could not recognize a right to self-representation in the commission proceedings. At most, they claimed, he could ask Altenburg to reconsider the matter.[84] Fleener countered that Brownback had authority to establish the right on his own.[85] Brownback said he would rule "in due course," but he did not issue a ruling prior to *Hamdan*.[86] Thus, there was no self-representation at Guantanamo pre-*Hamdan*.

As for the right to boycott, the Department of Defense regulations stated: "The Accused *may* be present at every stage of the trial before the Commission . . . unless the Accused engages in disruptive conduct that justifies exclusion by the Presiding Officer."[87] This phrase granted detainees a right to be present, but by using the word "may" seemed to imply a right to be absent as well. However, in August 2005, the Department of Defense amended the procedures to "make clear that the accused shall be present except when necessary to protect classified information . . . ."[88] These regulations, promulgated pre-*Hamdan*, no longer permitted the accused to voluntarily waive his presence. No reason for the change was given.

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80. Priti Patel, *On Trial: U.S. Detention and Interrogation Practices at Guantanamo*, Military Commission Trial Observation (Apr. 7, 2006), http://www.humanrightsfirst.org/us_law/detainees/gitmo_diary/post-040706-patel.asp.

81. 422 U.S. 806 (1975) (establishing the constitutional right to self-representation); *see also infra* notes 159-166 and accompanying text.

82. Patel, *supra* note 80.

83. *Id.*

84. *Id.*

85. *See id.*

86. *Id.*; MacLean, *supra* note 67.

87. 32 C.F.R. § 9.5(k) (2006) (emphasis added).

88. John R. Crook, *Contemporary Practice of the United States Related to International Law*, 99 AM. J. INT'L L. 889, 901-02 (2005) (quoting U.S. Dep't of Def., News Release No. 897-05, Secretary Rumsfeld Approves Changes To Improve Military Commission Procedures (Aug. 31, 2005), *available at* http://www.defenselink.mil/releases/2005/nr20050831-4608.html. For information about the procedures, see 32 C.F.R. pt. 9 (2006).

Despite this rule change, even after August 2005, military adjudicators at Guantanamo permitted boycotts during the pre-trial hearings. After al-Qahtani boycotted, his defense counsel, Lieutenant Colonel Broyles, was permitted to conduct voir dire of the Presiding Officer without al-Qahtani present.[89] Similarly, Lt. Col. Colby Vokey, Khadr's attorney, conducted the voir dire of presiding officer Col. Robert Chester directly following his client's boycott pronouncement.[90]

Because of the ban on self-representation, no adjudicator officially ruled on what would happen if a detainee requested both to represent himself and boycott his trial. During al-Bahlul's proceedings, however, Colonel Brownback stated, "Obviously a person who will not participate in the proceedings cannot represent himself,"[91] making clear his views on simultaneous requests for self-representation and waiver of presence.

D. Self-Representation and Boycotts in the Military Commissions Act

Hamdan and the MCA sought to make the structures and processes of the military commissions at Guantanamo compliant with established legal principles.[92] Salim Ahmed Hamdan, one of the ten detainees to be charged,[93] had petitioned for a writ of habeas corpus to challenge "the lawfulness of the Secretary of Defense's plan to try him for alleged war crimes before a military commission convened under special orders issued by the President of the United States, rather than before a court-martial convened under the Uniform Code of Military Justice."[94] While al-Bahlul's attorneys raised the issue of self-representation in an amicus curiae brief,[95] the Court did not address the issue.[96] In June 2006, the U.S. Supreme Court held in a five-three decision that

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89. *See* al-Qahtani Transcript, *supra* note 64, at 19, 26; *see also* Patel, *supra* note 64.

90. *See* Khadr Transcript, *supra* note 59, at 287, 294, 296.

91. Rhem, *supra* note 70.

92. *See* Press Release, Sen. John Thune, Senate Passes Military Commissions Act: Legislation Creates System for Prosecuting Suspected Terrorists (Sept. 28, 2006), http://thune.senate.gov/public/index.cfm?FuseAction=PressReleases.Detail&PressRelease_id=354&Month=9&Year=2006 (describing the MCA as providing "clarity and direction for fighting the War on Terror").

93. Paul Reynolds, *Pressure Grows on Guantanamo Bay*, BBC NEWS, June 12, 2006, http://news.bbc.co.uk/1/hi/world/americas/5071870.stm.

94. Hamdan v. Rumsfeld, 344 F. Supp. 2d 152, 155 (D.D.C. 2004).

95. Brief for Military Attorneys, *supra* note 66.

96. Hamdan v. Rumsfeld, 126 S. Ct. 2749 (2006).

the military commissions were unlawful absent explicit congressional authorization and that the procedures established for the commissions to try enemy combatants violated both the Uniform Code of Military Justice and the Geneva Conventions.[97]

Some read the decision as mandating that detainees face trial by courts-martial, while others argued that the proceedings at Guantanamo "could be rendered legal by having Congress adopt it [the initial plan], without change, in a statute."[98] The Administration adopted the latter interpretation.[99] Thus, in the days following the decision, the President and his aides announced their intention to work with Congress to pass enabling legislation.[100] The objective was new procedures for the military commissions, including procedures for handling requests for self-representation and voluntary waiver of presence.[101]

During the drafting of the MCA, congressional hearings addressed self-representation issues. On July 11, 2006, the U.S. Senate Committee on the Judiciary held a hearing on how Congress should respond to the decision to rework the military commissions at Guantanamo.[102] Paul "Whit" Cobb, former Deputy General Counsel of the Department of Defense, forcefully testified against granting the right of self-representation to detainees:

> [C]onsistent with the need to limit access to classified information is the need for the procedures to specify that the accused be represented by counsel who can be cleared to the highest level of classified information presented at trial. The accused should not have the right to self-representation. War crimes trials will involve a complicated military justice procedural environment, and it will be difficult to

97. *Id.*

98. DIANE MARIE AMANN, MILITARY AND CIVILIAN JUSTICE IN THE UNITED STATES AND THE POST-SEPTEMBER 11 MILITARY COMMISSIONS 24-25 (2006), http://www.nimj.org/documents/us_fnlreport_engclear_28aug2006_amann.doc.

99. *See* Press Release, The White House, Fact Sheet: The Military Commissions Act of 2006 (Oct. 17, 2006), http://www.whitehouse.gov/news/releases/2006/10/20061017.html ("After the legality of this system was challenged and the Supreme Court ruled that military commissions need explicit authorization by Congress, the President asked Congress for that authority—and Congress provided it.").

100. Josh White, *U.S. Officials Scramble To Find Options*, WASH. POST, June 30, 2006, at A6.

101. *See infra* notes 104-124 and accompanying text.

102. *Establishing a Constitutional Process Hearing*, *supra* note 37.

> guarantee a full and fair trial without counsel. In addition, self-representation would defeat protections for classified information.[103]

Initial legislative proposals for military commission procedures reflected Cobb's views about self-representation. Supported by the Bush Administration, Senate Majority Leader Bill Frist, Senate Majority Whip Mitch McConnell, and Senator James Inhofe introduced the Bringing Terrorists to Justice Act of 2006[104] in the Senate, and Chairman of the House Armed Services Committee Duncan Hunter introduced the Military Commissions Act of 2006[105] in the House. Neither bill granted detainees the right to self-representation. Both contained provisions that "[t]he accused shall be represented in his defense before a military commission."[106] Appointed military counsel would defend the accused unless he hired a U.S. citizen civilian lawyer and met other requirements, in which case the military counsel would serve as associate counsel of record.[107]

The Hunter bill and the Frist/McConnell/Inhofe bill also would have explicitly prohibited trials in the absence of the accused. The bills stated that proceedings shall "be conducted in the presence of the accused" and did not make an exception for voluntary waiver,[108] essentially adopting the August 2005 amendment to the Defense Department regulations.[109]

There was significant disagreement in the Senate over these provisions and other components of the initial proposals. Senator John Warner, joined by Senators John McCain and Lindsey Graham, proposed an alternative bill that authorized military commissions but departed in significant particulars from

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103. *Id.* (statement of Paul W. "Whit" Cobb, former Deputy General Counsel, Dep't of Def.).

104. S. 3861, 109th Cong. (2006).

105. H.R. 6054, 109th Cong. (as introduced in the House, Sept. 12, 2006).

106. *Id.* § 3(a)(1) (discussing proposed 10 U.S.C. § 949c(b)); S. 3861, § 4(a)(1).

107. H.R. 6054, § 3(a)(1); S. 3861, § 4(a)(1). For information about the role of an associate counsel in the military context, see *DAD Notes*, 1987 ARMY LAW. 36, 38 nn.21 & 31. Appointment of associate counsel, who maintains significant responsibilities in the case, is also common in U.S. death penalty cases, *see* James R. Acker, *When the Cheering Stopped: An Overview and Analysis of New York's Death Penalty Legislation*, 17 PACE L. REV. 41, 164-66 (1996), and in cases requiring a relationship between a local attorney and an out-of-town attorney, *see* Mark B. Canepa, *Caveat Associate Counsel: Guidelines To Consider when Agreeing To Appear as Associate Counsel*, S.F. ATT'Y, Sept./Oct. 2001, at 20.

108. H.R. 6054, § 3(a)(1) (discussing proposed 10 U.S.C. § 949d(a)(2)(A)); S. 3861, § 4(a)(1).

109. *See* 32 C.F.R. § 9.6(e)(1) (2006).

the Frist/McConnell/Inhofe bill.[110] The Warner proposal would have permitted terror suspects to view all classified evidence against them, which is an important provision, especially for the pro se defendant who would not have a lawyer testing evidence on his behalf.[111] The Warner bill also would have explicitly granted the right "[t]o self-representation, if the accused knowingly and competently waives the assistance of counsel."[112] Additionally, the Warner proposal would have permitted the defendants "[t]o be present at all sessions of the military commission," implying a right to waive that presence.[113] On September 14, 2006, the Senate Armed Services Committee passed the Warner bill and reported it to the full Senate,[114] breaking dramatically from the Bush Administration. While the provision allowing self-representation was not the most important change in the Warner alternative, this provision nonetheless represented a major breakthrough.

The battle over which bill should become law, however, was just beginning.[115] As the debate among policy makers continued,[116] Major Fleener and Lieutenant Commander Kuebler, defense attorneys for al-Bahlul and al-Sharbi, respectively, hired their own lawyers for advice on how to proceed depending on which version became law.[117] They still feared charges of violating state ethics rules if they proceeded against the wishes of their clients, or a court-martial if they refused to follow orders to continue representation. "It is not ethical to represent someone against their will," said Fleener.[118] He maintained that if Congress passed a bill barring self-representation and the dismissal of counsel, he would quit.

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110. S. 3901, 109th Cong., 152 CONG. REC. S9629 (daily ed. Sept. 14, 2006) (as introduced in the Senate).

111. S. 3901, § 4(a)(1).

112. *Id.* (discussing proposed 10 U.S.C. § 949a(b)(2)(D)). The Warner bill also omitted a proposal from the Frist/McConnell/Inhofe bill that would have reinterpreted article 3 of the Geneva Convention prohibiting cruel and inhuman treatment of detainees. Geneva Convention Relative to the Protection of Civilian Persons in Time of War art. 3, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287.

113. S. 3901, § 4(a)(1).

114. 152 CONG. REC. S9629 (daily ed. Sept. 14, 2006) (statement of Sen. Warner).

115. Senator Frist publicly expressed his disapproval of the Warner version and threatened a filibuster. *See* Charles Babington & Jonathan Weisman, *Dissidents' Detainee Bill May Face Filibuster*, WASH. POST, Sept. 20, 2006, at A4.

116. *See* Jennifer A. Dlouhy, *GOP Senators Heading Battle with Bush Are Heavy Hitters*, S.F. CHRON., Sept. 17, 2006, at A13.

117. MacLean, *supra* note 67.

118. *Id.*

The debate over the bill was resolved after much intense negotiation on September 21, 2006, when the Bush Administration struck an agreement with Graham, McCain, and Warner.[119] The compromise version of the rules provided that defendants could not be convicted solely on the basis of classified documents and that if the military prosecutors used classified evidence the judge would have to give the defendants an "adequate substitute" for the material in the form of summaries or edited versions of the classified documents.[120] The issues of boycott and self-representation were considerations that factored into the compromise bill, which passed Congress on September 28, 2006.[121] President Bush signed the Military Commissions Act of 2006 into law on October 17, 2006.[122]

Under these new rules, what the law requires when a detainee asks to represent himself is still an open question. Significantly, the Act states: "The accused shall be permitted to represent himself, as provided for by paragraph (3),"[123] which provides:

> (A) The accused in a military commission under this chapter who exercises the right to self-representation under paragraph (1)(D) shall conform his deportment and the conduct of the defense to the rules of evidence, procedure, and decorum applicable to trials by military commission.
>
> (B) Failure of the accused to conform to the rules described in subparagraph (A) may result in a partial or total revocation by the military judge of the right of self-representation under paragraph (1)(D). In such case, the detailed defense counsel of the accused or an appropriately authorized civilian counsel shall perform the functions necessary for the defense.[124]

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119. R. Jeffrey Smith & Charles Babington, *White House, Senators Near Pact on Interrogation Rules: President Would Have a Voice in How Detainees Are Questioned*, WASH. POST, Sept. 22, 2006, at A1.

120. 10 U.S.C.A. § 949j(c)-(d) (West 1998 & Supp. 2007).

121. *See* Charles Babington & Jonathan Weisman, *Senate Approves Detainee Bill Backed by Bush: Constitutional Challenges Predicted*, WASH. POST, Sept. 29, 2006, at A1.

122. Michael A. Fletcher, *Bush Signs Terrorism Measure: New Law Governs Interrogation, Prosecution of Detainees*, WASH. POST, Oct. 18, 2006, at A4.

123. 10 U.S.C.A. § 949a(b)(1)(D) (West 1998 & Supp. 2007).

124. *Id.* § 949a(b)(3)(A)-(B).

The language of these provisions seems to give military adjudicators broad discretion to revoke the right of self-representation at any time.[125]

Moreover, the legislative intent appears to have been to allow the adjudicator broad discretion to appoint associate counsel from the beginning.[126] In a debate on the House floor on September 27, 2006, hours before passage of the bill, Representative Steve Buyer interpreted the legislation as requiring "the detailed military counsel to remain as an associate counsel should the accused exercise his right of self-representation."[127] Representative Duncan Hunter replied, "Mr. Buyer, that is correct. It is the intent of the legislation that the detailed military counsel shall act as an associate counsel during the course of self-representation."[128] Since the Department of Defense and the military adjudicators have not yet had the opportunity to apply these provisions of the statute, questions as to how they will be interpreted remain unresolved.[129]

In the boycott context, the rights-sensitive provision in the Warner bill did not make it into the final law. The MCA mandates that "[t]he accused shall be present at all sessions of the military commission."[130] The congressional debates do not indicate why the Warner provision allowing voluntary absence did not survive in the compromise bill.

The effect of a boycott request on a defendant who also wants to dismiss his counsel remains an open question. A boycott request might be seen as a

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125. *See* Smith, *supra* note 30 ("[The bill] limits the traditional right to self-representation by requiring that defendants accept military defense attorneys."). In the proposed Warner bill, the right to self-representation was qualified only by the traditional requirement that the waiver be knowing and voluntary. S. 3901, 109th Cong. § 4(a)(1) (2006).

126. Presumably the assigned military defense counsel would, as associate counsel, remain counsel of record and assist the detainee, who would become "lead counsel." Associate counsel retains significant responsibility for the presentation of the case. *See supra* note 107.

127. 152 CONG. REC. H7539 (daily ed. Sept. 27, 2006) (statement of Rep. Buyer).

128. *Id.*

129. In early June 2007, with his trial date fast approaching, Omar Khadr dismissed his defense attorney so that he had no representation. William Glaberson, *U.S. Rejects Age Limit for Charges of War Crimes*, INT'L HERALD TRIB., June 4, 2007, at 1. Khadr's actions restored to the spotlight the controversy over the extent to which the defendant can control the presentation of his defense in the military commissions. However, Khadr's proceeding was stalled before these questions could be resolved. On June 4, 2007, military Judge Peter Brownback dismissed charges against Khadr because he had been classified as an "enemy combatant," but not as an "alien unlawful enemy combatant," as the MCA appeared to require. *See* Wood, *supra* note 9.

130. 10 U.S.C.A. § 949a(b)(1)(B) (West 1998 & Supp. 2007).

violation of the "deportment" requirement,[131] so that when one requests to boycott under the new rules he also is automatically forfeiting his right to represent himself.

II. ANALYZING GOVERNMENT RESPONSES TO THE DETAINEES' PROCEDURAL REQUESTS

The MCA was a quick response to *Hamdan*, but whether it is a good and fair response is in dispute. Scholars, policy makers, and the public heatedly continue to debate the merits of the military commission system established by the MCA.[132] This debate is becoming even more crucial as the likelihood that Congress will revisit the MCA or enact entirely new legislation for trying war on terror detainees—perhaps on U.S. soil—increases.[133] Just as before, requests for self-representation, voluntary absence, and requests to take both procedural actions simultaneously touch on important interests.

A. Interests Implicated by the Detainees' Requests

Several competing interests come into play when considering government responses to the detainees' procedural requests. Any decision regarding whether the detainees should be able to represent themselves, to boycott, or both, implicates the accused's interest in autonomy and controlling his own defense. However, third-party interests also come into play when considering whether to grant the requests. Indeed, as current scholarship acknowledges, the procedural rights are "not categorically inviolable,"[134] but require policy makers and adjudicators to "balance the rights and interests of defendants against other important rights and interests."[135] This Section identifies the interests implicated by the detainees' requests.

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131. *Id.* § 949a(b)(3)(A).

132. *Compare* AMNESTY INT'L, *supra* note 16, *with* John Yoo, Op-Ed., *Congress to Courts: 'Get Out of the War on Terror,'* WALL ST. J., Oct. 19, 2006, at A18.

133. *See supra* notes 31-33 and accompanying text.

134. Joanne Williams, *Slobodan Milosevic and the Guarantee of Self-Representation*, 32 BROOK. J. INT'L L. 553, 557 (2007) (quoting Milosevic v. Prosecutor, Case No. IT-02-54-AR73.7, Decision on Interlocutory Appeal of the Trial Chamber's Decision on the Assignment of Defense Counsel, ¶ 12 (Nov. 1, 2004)).

135. Joseph A. Colquitt, *Hybrid Representation: Standing the Two-Sided Coin on Its Edge*, 38 WAKE FOREST L. REV. 55, 65 (2003).

The detainees have an interest in controlling how their defenses are presented at trial. While one cannot know the true motivations of the detainees who make procedural requests, a few possible motivations come to mind. One possibility is that they mistrust their assigned attorneys and believe they could present a better defense themselves.[136] However, the detentions at Guantanamo have political implications not present in the average criminal case, so the detainees might have political and religious qualms with the military commissions and wish to challenge the legitimacy of the proceedings.[137] Objectively, the detainees' requests would reduce the chance of receiving a favorable verdict in their proceedings. The detainees would have to forfeit their attorneys' procedural expertise, or if they boycott entirely, would completely forfeit the right to present a defense.[138] However, the defendants

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136. The fact that al-Bahlul at one point said he would proceed within the system rather than challenge the legitimacy of the system if he were granted the right to representation by a Yemeni attorney, Patel, *supra* note 80, suggests that mistrust of the assigned attorneys may be a motivating factor.

137. For example, Muhammad noted that the world is watching and "what happens in America happens around the world." Muhammad Transcript, *supra* note 61, at 84; *see also* Patel, *supra* note 61.

Criminal defendants previously have made procedural requests for self-representation or boycott in order to make political statements. Zacarias Moussaoui, a defendant in a federal terrorism case, is one example: On the first day of jury selection, he interrupted Judge Leonie Brinkema to make known his contempt for the trial by protesting that he wanted to dismiss his defense attorneys. "I am al Qaeda," he stated. "They are American. They are my enemies." *Moussaoui: 'I Am al Qaeda': 9/11 Conspirator Is Volatile as Jury Selection Begins in Trial*, CNN.COM, Feb. 6, 2006, http://www.cnn.com/2006/LAW/02/06/moussaoui.trial/. Moussaoui issued similar political statements in subsequent pretrial proceedings and during his trial. He called for the "'destruction of the United States'" and "'the destruction of the Jewish people and state.'" Viveca Novak, *How the Moussaoui Case Crumbled*, TIME, Oct. 27, 2003, at 34.

Slobodan Milosevic's actions before the International Criminal Tribunal for the Former Yugoslavia are another prominent example. Milosevic was allowed to represent himself. Michael P. Scharf, *The Legacy of the Milosevic Trial*, 37 NEW ENG. L. REV. 915, 917-18 (2003). One commentator noted that "rather than mounting a traditional legal defense, Milosevic may really wish to perpetuate the political view that the Serbs were the victims of an international plot to break up Yugoslavia, and that he was the chief peacemaker of the Balkans, not an architect of its wars." Nina H.B. Jørgensen, *The Right of the Accused to Self-Representation Before International Criminal Tribunals*, 98 AM. J. INT'L L. 711, 711 (2004).

138. Many scholars have observed that such tactics appear to be irrational, from the perspective of obtaining a favorable legal outcome. *See, e.g.*, John F. Decker, *The Sixth Amendment Right To Shoot Oneself in the Foot: An Assessment of the Guarantee of Self-Representation Twenty Years After* Faretta, 6 SETON HALL CONST. L.J. 483 (1996); Jørgensen, *supra* note 137, at 711; Dahlia Lithwick, *Moussaoui Hijacks the Legal System: An Accused Terrorist Puts the U.S. Courts on Trial*, SLATE, May 1, 2002, http://www.slate.com/?id=2065191.

may believe that an acquittal is highly unlikely anyway and that "justice" under the American system is incompatible with their beliefs. They may have concluded they should represent themselves, boycott their trials, or forfeit their defenses altogether in order to disseminate their disdain through the media.[139] The act of boycotting or the act of dismissing counsel and simultaneously boycotting can be a means of objecting to the legitimacy of the entire proceeding.

Beyond autonomy interests of the defendant, the general public—both within the United States and internationally—has an interest in the fair and legitimate adjudication of cases against the detainees. This interest can be characterized as the public interest in ensuring the legitimacy of the system writ large. Public trust in the legal system is necessary to maintain stability in society.[140] The legitimacy of a system designed to handle high-visibility trials like those in the war on terror is particularly important to stability because of the trials' salience in the public consciousness.[141] For a legal system to be perceived as legitimate, it must be fair to all parties who come before it. A crucial component of fairness is recognition of established individual rights like the rights to self-representation and voluntary waiver of presence. In light of the importance of defendants having access to established rights to ensure the legitimacy of an adjudicatory system, a public interested in maintaining stability in society would probably agree that the rights to self-representation and voluntary absence, which are already prevalent in the United States and internationally,[142] should be granted in these trials.[143]

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139. Besides suicide, which some detainees have utilized, *see* Josh White, *Three Detainees Commit Suicide at Guantanamo*, WASH. POST, June 11, 2006, at A1, these procedural tactics may represent the detainees' only options for signaling to the world that they do not believe in the legitimacy of the U.S. system of justice.

140. *See* John Dermody, Note, *Beyond Good Intentions: Can Hybrid Tribunals Work After Unilateral Intervention?*, 30 HASTINGS INT'L & COMP. L. REV. 77, 80 (2006).

141. *See* John C. Coffee, Jr., *Does "Unlawful" Mean "Criminal"?: Reflections on the Disappearing Tort/Crime Distinction in American Law*, 71 B.U. L. REV. 193, 236 (1991) ("[T]he public's image of the criminal law . . . is probably shaped by . . . a few high visibility cases."). The general public in the United States and across the developed world has scrutinized the military trials intently because of the importance of prosecuting terror suspects. For examples of such scrutiny, see David Ignatius, *A Prison We Need To Escape*, WASH. POST, June 14, 2006, at A23; *Suicides Fuel Guantanamo Criticism: Detainee Deaths Bring Renewed Calls for Change, Prison Closure*, CNN.COM, June 12, 2006, http://www.cnn.com/2006/WORLD/americas/06/12/Guantanamo.suicides/; and *U.S. 'Must End Secret Detentions*,' BBC NEWS, May 19, 2006, http://news.bbc.co.uk/1/hi/world/americas/4996798.stm.

142. *See infra* Subsections II.B.1-2.

There is a separate consideration, distinct from legitimacy concerns about the system as a whole, in ensuring that individual hearings are conducted fairly and perceived as such. Judicial authorities, who in this case consist of the military commission adjudicators and other authorities, have a duty to ensure that the adjudication process is capable of reaching a fair and just outcome.[144] This objective, which this Note will refer to as the adjudicatory duty to achieve just outcomes, may not be realized if a detainee jeopardizes his own defense. American judicial philosophy has long assumed that the adversarial system is the best way to achieve a fair and just outcome.[145] Based on the text of the Sixth Amendment,[146] the U.S. Supreme Court has held that a fair trial is "one in which evidence subject to adversarial testing is presented to an impartial tribunal for resolution of issues defined in advance of the proceeding."[147] In light of the judicial authorities' duty to achieve accurate individual outcomes, a civilian judge typically must balance the right of a competent defendant to represent himself or to boycott the proceedings against the interest in fair adversarial process.[148] Consistent with this interest in just outcomes, it might

143. Indeed, when exposed to such procedural moves, the public becomes accustomed to them. *See* Martin Sabelli & Stacey Leyton, *Train Wrecks and Freeway Crashes: An Argument for Fairness and Against Self Representation in the Criminal Justice System*, 91 J. CRIM. L. & CRIMINOLOGY 161, 161 (2000) (noting that the public can be accustomed, or "sensitized," to self-representation).

144. For example, U.S. judges are charged not just with resolving cases, but also with acting in the best interest of the legal system and in the overall interest of justice. ANNOTATED MODEL CODE OF JUDICIAL CONDUCT canon 1 (2004) ("An independent and honorable judiciary is indispensable to justice in our society. A judge should participate in establishing, maintaining and enforcing high standards of conduct, and shall personally observe those standards so that the integrity and independence of the judiciary will be preserved."). It is in the best interest of the legal system and of justice to ensure that the adjudicative process is legitimate; acceptance is necessary to maintain peace and order.

145. This assumption is, however, controversial. *See, e.g.*, Shannan E. Higgins, Note, *Ethical Rules of Lawyering: An Analysis of Role-Based Reasoning from Zealous Advocacy to Purposivism*, 12 GEO. J. LEGAL ETHICS 639, 649-50 (1999) ("[O]ne could question whether the adversarial system is truly the best means of attaining justice.").

146. In *Strickland v. Washington*, 466 U.S. 668 (1984), the Supreme Court stated that "[t]he Constitution guarantees a fair trial through the Due Process Clauses, but it defines the basic elements of a fair trial largely through the several provisions of the Sixth Amendment . . . ." *Id.* at 684-85.

147. *Id.* at 685.

148. *E.g.*, Massie v. Sumner, 624 F.2d 72, 74 (9th Cir. 1980) (recognizing that the right to proceed pro se "is limited and a court may appoint counsel over an accused's objection in order to protect the public interest in the fairness and integrity of the proceedings"); United States v. Taylor, 569 F.2d 448, 452 (7th Cir. 1978).

be problematic for a detainee at Guantanamo to waive entirely the presentation of a defense, because doing so implicates not only his interests, but also the duties of adjudicators in the military commission system who are tasked with conducting a fair hearing through the adversarial process. It might also be problematic for a detainee to dismiss his lawyer if the detainee would be unable to test classified evidence using typical adversarial procedures.

In the terrorism context, judges and policy makers must balance yet another interest: national security. The Supreme Court has long recognized the judiciary's duty to consider issues of national security.[149] In the current war on terror, the Court demonstrated the importance of this interest in *Hamdi v. Rumsfeld*.[150] In *Hamdi*, the Court balanced the defendant's rights against national security, hoping to prevent the combatant from rejoining the enemy without imposing a burden of distracting litigation on U.S. military personnel worldwide.[151] In other words, *Hamdi* confirms that adjudicators have a duty to balance national security concerns against detainees' individual rights.

The remainder of this Part evaluates how well government actors have balanced these various interests thus far. It examines each type of procedural request separately. Part III then presents a normative proposal for balancing the detainees' requests with the third-party interests.

B. Evaluating Responses to Self-Representation

This Section considers how well the pre- and post-*Hamdan* official responses to the detainees' requests for self-representation have balanced the important interests at stake. The pre-*Hamdan* response to self-representation was embodied in the Altenburg memo described above, which categorically denied the right to self-representation at Guantanamo, citing concerns over language barriers, classified evidence, and the ability of the detainee to present an "adequate" defense.[152] The MCA contains the post-*Hamdan* response. As described, it explicitly grants a qualified right to self-representation, but it also

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149. For example, in *United States v. U.S. District Court*, 407 U.S. 297 (1972), the Court rejected the argument that the judiciary lacked the expertise to deal with problems of national security. The Court stated: "Courts regularly deal with the most difficult issues of our society. There is no reason to believe that federal judges will be insensitive to or uncomprehending of the issues involved . . . ." *Id.* at 320.

150. 542 U.S. 507 (2004) (plurality opinion). The language in *Hamdi* (while not directly on point) demonstrates the importance of the national security interest.

151. *Hamdi*, 542 U.S. at 531-32.

152. Rhem, *supra* note 56; *see also supra* notes 76-79 and accompanying text.

contains provisions limiting the classified evidence that the pro se defendant would be able to view, strictly regulating the decorum of the pro se defendant, and implying broad discretion for the court to assign associate counsel to the defendant who wishes to decline full representation.[153]

The MCA certainly does more to recognize a defendant's right to self-representation than does the Altenburg memo, but one must closely examine the relevant legal instruments to determine whether either response to the procedural requests does justice to the autonomy justifications and the legal basis for the right to self-representation. Several legal regimes provide relevant precedent for the detainees' right to self-representation in the Guantanamo military commissions. U.S. military law is controlling at Guantanamo.[154] Federal law is at least relevant because it is a source of legal authority for U.S. military law,[155] and the U.S. Constitution should protect the detainees at Guantanamo.[156] International humanitarian law is relevant because the

153. *See supra* notes 122-128 and accompanying text.

154. The foundation of U.S. military law, the Uniform Code of Military Justice (UCMJ), is the controlling source of rules for Guantanamo military commissions. *See* Hamdan v. Rumsfeld, 126 S. Ct. 2749 (2006) (holding that the military commissions violate the UCMJ).

155. *See* Fredric I. Lederer & Barbara S. Hundley, *Needed: An Independent Military Judiciary—A Proposal To Amend the Uniform Code of Military Justice*, 3 WM. & MARY BILL RTS. J. 629, 636-37 (1994) (describing the U.S. Constitution as a source of U.S. military law).

156. Admittedly, there is considerable debate about which provisions of the U.S. Constitution can reach a non-American in U.S. custody outside the United States. Constitutional due process protections probably do apply to the detainees at Guantanamo, since the United States exerts nearly complete control and jurisdiction there even though it is not technically sovereign. In *Zadvydas v. Davis*, 533 U.S. 678 (2001), the Supreme Court implied that *some* constitutional protections apply to aliens extraterritorially when it stated only that "certain constitutional protections" are unavailable. *Id.* at 693. Justice Kennedy's concurrence in *United States v. Verdugo-Urquidez*, 494 U.S. 259 (1990), affirmed "that the Government may act only as the Constitution authorizes, whether the actions in question are foreign or domestic." *Id.* at 277 (Kennedy, J., concurring). He stressed that the Supreme Court had never held that extraterritorial aliens enjoy no constitutional rights: "All would agree, for instance, that the dictates of the Due Process Clause of the Fifth Amendment protect the defendant." *Id.* at 278. Justice Kennedy's point persists to this day. Diane Marie Amann, *Guantanamo*, 42 COLUM. J. TRANSNAT'L L. 263, 295-97 (2004); *see also* Gerald L. Neuman, *Closing the Guantanamo Loophole*, 50 LOY. L. REV. 1, 51 (2004) ("Like a prisoner abducted into the United States, long-term detainees held in an offshore prison are entitled to fundamental due process protection. . . . The claim that aliens in prolonged federal custody outside the United States have no constitutional rights mocks both of the purposes of the rights provisions in our constitutional system."). Sixth Amendment rights, like the right to self-representation, can be "filtered through" the Fifth Amendment. *E.g.*, United States v. Plattner, 330 F.2d 271, 273 (2d Cir. 1964) ("Under the Fifth Amendment, no person may be deprived of liberty without due process of law. Minimum requirements of due process . . .

foundational instrument of U.S. military law, the Uniform Code of Military Justice, requires that trials be conducted in accordance with international humanitarian law.[157]

1. Standards from U.S. Military and Civilian Criminal Law

In U.S. military law, the Manual for Courts-Martial sets forth:

> The accused may expressly waive the right to be represented by counsel and may thereafter conduct the defense personally. Such waiver shall be accepted by the military judge only if the military judge finds that the accused is competent to understand the disadvantages of self-representation and that the waiver is voluntary and understanding.[158]

This passage represents a strong endorsement of the right to self-representation.

The controlling U.S. military law standard is essentially a codification of the domestic criminal law standard. The seminal domestic law case on the subject is *Faretta v. California*,[159] which held that the state cannot force a lawyer upon a defendant.[160] The affirmative right to self-representation[161] flows from

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are set forth in the Sixth Amendment."). Therefore, Justice Kennedy's dissent protects self-representation at Guantanamo. Justice Kennedy's opinions on this issue are especially important since he holds the "swing vote" on the current Court. *E.g.*, Charles Lane, *Kennedy Seen as the Next Justice in Court's Middle*, WASH. POST, Jan. 31, 2006, at A4.

157. Moreover, the U.S. military is bound to respect treaties, and international actors would criticize and retaliate against the U.S. government for disobeying key treaties. Dep't of Def. Directive 2310.1, DoD Program for Enemy Prisoners of War (EPOW) and Other Detainees, at 2 (Aug. 18, 1994), *available at* https://www.southcom.mil/jsrc/Documents/Pubs/DoDD%202310.1.doc ("The U.S. Military Services shall comply with the principles, spirit, and intent of the international law of war, both customary and codified, to include the Geneva Conventions . . . ."). Further, the treatment of captured war prisoners is an international concern. Procedural rules for comparable international tribunals for the prosecution of war crimes also may be useful in interpreting international law and deciding whether to grant the fundamental right of self-representation to the detainees.

158. MANUAL FOR COURTS-MARTIAL, UNITED STATES, R. 506(d), at II-51 (2005). For an example of a military court applying this law, see *United States v. Proctor*, 37 M.J. 330 (C.M.A. 1993). *See also TJAGSA Practice Notes: Criminal Law Notes*, 1994 ARMY LAW. 30 (clarifying the standard for pro se representation in a military court-martial).

159. 422 U.S. 806 (1975).

160. *Id.* at 834.

this proposition, which is based on the Sixth Amendment and English and colonial American jurisprudence.[162]

While acknowledging that most "defendants could better defend with counsel's guidance," *Faretta* presents three reasons why an adjudicator should not force counsel upon an unwilling defendant: 1) in some instances, the defendant may conduct his case more effectively than would an attorney; 2) the defendant is the one who faces the consequences of a conviction; and 3) to force a lawyer on a defendant "can only lead him to believe that the law contrives against him."[163] *Faretta* explicitly acknowledges the possibility that defendants might seek to make political statements rather than vigorously seek exoneration and still upholds the right to self-representation.[164]

Faretta and subsequent cases have qualified the right to self-representation, however. *Faretta* recognized that "the trial judge may terminate self-representation by a defendant who deliberately engages in serious and obstructionist misconduct."[165] Also, the Court accepted that "standby counsel"—an attorney who remains in the courtroom with a pro se defendant to aid the accused in presenting his case and to be available to represent him should the adjudicator need to terminate self-representation—can be appointed "even over objection by the accused."[166] Subsequent case law has established that defendants generally do not have a right to dismiss standby counsel.[167]

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161. *Faretta* held that the defendant will be determined competent if he makes the decision to dismiss his lawyer "knowingly and intelligently," but he "need not himself have the skill and experience of a lawyer." *Id.* at 835.

162. After surveying English criminal jurisprudence, the *Faretta* Court concluded that only the Star Chamber "adopted a practice of forcing counsel upon an unwilling defendant in a criminal proceeding." *Id.* at 821. Colonial American jurisprudence presents a similar landscape. *Id.* at 827-28 ("This is not to say that the Colonies were slow to recognize the value of counsel in criminal cases. . . . At the same time, however, the basic right of self-representation was never questioned. We have found no instance where a colonial court required a defendant in a criminal case to accept as his representative an unwanted lawyer.").

163. *Id.* at 834.

164. *Id.* at 834 n.46.

165. *Id.*

166. *Id.* at 835 n.46. Standby counsel should not be permitted "to make or substantially interfere with any significant tactical decisions, or to control the questioning of witnesses, or to speak *instead* of the defendant on any matter of importance." McKaskle v. Wiggins, 465 U.S. 168, 178 (1984). Standby counsel has less power and responsibility over the presentation of a case than does "associate counsel." *See supra* notes 107 & 126 and accompanying text.

167. *See, e.g.*, *Wiggins*, 465 U.S. at 183 (holding that standby counsel cannot "interfer[e] with the defendant's actual control over the presentation of his defense").

Finally, in at least one exceptional case—the case of Theodore Kaczynski (the "Unabomber")—the judge ex ante refused a request for self-representation because he felt that the accused only wanted to delay the trial.[168] Despite these noteworthy qualifications, in U.S. domestic law the *Faretta* standard provides a strong precedent grounded in history and principles of individual autonomy[169] for the Guantanamo detainees' right to dismiss counsel and represent themselves.

2. Standards from International Law and Tribunals

Further, the right to self-representation is well established in international tribunals that adjudicate or have adjudicated violations of international humanitarian law.[170] As the Trial Chamber of the International Criminal Tribunal for the former Yugoslavia (ICTY) recognized in the trial of Slobodan Milosevic, "the international and regional conventions . . . plainly articulate a right to defend oneself in person."[171]

The oldest war crimes tribunals, and the tribunals that constitute the most important precedents for war crimes prosecutions in international law, are the International Military Tribunals at Nuremberg and Tokyo,[172] which both provided the right to self-representation to defendants. For example, the rules of procedure from one of the Nuremberg tribunals provided that "[e]ach defendant has the right to conduct his own defense."[173] The Rules of Procedure Adopted by Military Tribunal I in the Trial of the Medical Case and the 1948

168. Williams, *supra* note 13, at 790-91. Some in the legal community were outraged by this decision. *See* Recent Case, *Ninth Circuit Affirms Denial of Unabomber Theodore Kaczynski's Request To Represent Himself at Trial*, 115 HARV. L. REV. 1253, 1256-58 (2002).

169. *See supra* notes 24-26 and accompanying text.

170. *See* Allison Marston Danner, *When Courts Make Law: How the International Criminal Tribunals Recast the Laws of War*, 59 VAND. L. REV. 1, 56 (2006); Williams, *supra* note 134, at 555-56.

171. Prosecutor v. Milosevic, Case No. IT-02-54-T, Reasons for Decision on the Prosecution Motion Concerning Assignment of Counsel, ¶ 36 (Apr. 4, 2003), *available at* http://www.un.org/icty/milosevic/trialc/decision-e/040403.htm.

172. *See* Theodor Meron, *Reflections on the Prosecution of War Crimes by International Tribunals*, 100 AM. J. INT'L L. 551, 561, 577 (2006) (noting that the Nuremburg and Tokyo trials were significant for the development of future international tribunals, such as the ICTY, International Criminal Tribunal for Rwanda (ICTR), and Special Court for Sierra Leone).

173. Rules of Procedure, R. 2(d) (Oct. 29, 1945) *in* INTERNATIONAL MILITARY TRIBUNAL, TRIAL OF THE MAJOR WAR CRIMINALS BEFORE THE INTERNATIONAL MILITARY TRIBUNAL 19, 19 (1947), *available at* http://www.yale.edu/lawweb/avalon/imt/proc/imtrules.htm.

Revised Uniform Rules of Procedure each contain very similar language providing the right to self-representation.[174] The participants at Nuremberg recognized that this right was important for autonomy and fairness reasons. As Robert Jackson, the chief United States prosecutor at the Nuremberg Trials, said in his closing argument: "Of one thing we may be sure. The future will never have to ask, with misgiving: 'What could the Nazis have said in their favor?' History will know that whatever could be said, they were allowed to say."[175] The Tokyo Trials took a similar approach. Article 9(d) of the Charter of the International Military Tribunal for the Far East provides that "An accused shall have the right, through himself or through his counsel (but not through both), to conduct his defense . . . ."[176]

Consistent with procedures employed at Nuremberg and Tokyo, contemporary war crimes tribunals grant defendants the right to self-representation. The International Criminal Court (ICC)—the permanent international judicial body tasked with trying individuals accused of grave war crimes[177]—grants defendants the right to self-representation.[178] The Special Court for Sierra Leone[179] and the Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed During the Period of Democratic Kampuchea[180] guarantee self-representation rights to the accused.

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174. Rules of Procedure for Military Tribunal I, R. 7(a) (Feb. 18, 1947), *available at* http://www.yale.edu/lawweb/avalon/imt/rules3.htm; Nuremberg Trial Proceedings Rules of Procedure, R. 7(a), *available at* http://www.yale.edu/lawweb/avalon/imt/rules5.htm.

175. ROBERT H. JACKSON, *Closing Address* (July 26, 1946), *in* THE NÜRNBERG CASE 120, 122 (1971).

176. Charter of the International Military Tribunal for the Far East art. 9(d) (1946), *reprinted in* U.S. DEP'T OF STATE, TRIAL OF JAPANESE WAR CRIMINALS 39-44 (Pub. No. 2613, Far Eastern Series No. 12, 1946).

177. *See* International Criminal Court: About the Court, http://www.icc-cpi.int/about.html (last visited June 29, 2007); *see also* Alisha D. Telci, *The International Criminal Court: Is the United States Overlooking an Easier Way To Hold Saddam Hussein and Osama Bin Laden Accountable for Their Actions?*, 38 NEW ENG. L. REV. 451, 451 (2004) (articulating the importance of the International Criminal Court).

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

179. Statute of the Special Court for Sierra Leone art. 17(d), Jan. 16, 2002, 2178 U.N.T.S. 145. Former Liberian President Charles Taylor is testing these rules in the context of his trial at The Hague. *Taylor Boycotts "Charade" Trial*, CNN.COM, June 5, 2007, http://edition.cnn.com/2007/WORLD/africa/06/04/taylor.trial/index.html.

180. Law on the Establishment of Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed During the Period of Democratic Kampuchea, as

The ICTY provides the accused the right "to defend himself in person or through legal assistance of his own choosing."[181] The International Criminal Tribunal for Rwanda (ICTR) statute contains identical text.[182] However, ICTR rules state that: "The Trial Chamber may, if it decides that it is in the interests of justice, instruct the Registrar to assign a counsel to represent the interests of the accused."[183] This rule for the Rwanda tribunal is unique among the contemporary international criminal tribunals.[184] It was written in July 2002, and "[t]he reasoning behind it seemed to be to enable a proper image of the Tribunal to be conveyed even if an accused decided to remain completely silent or refused to appear before the court at all."[185] This reason does not justify an assignment of counsel at the outset, but if the defendant is not participating, it would justify some action by the adjudicator to ensure adversarial process.

In addition to the procedures of international war crimes tribunals, for comparative purposes, one might look at international human rights sources that recognize the right to self-representation (although the weight that these sources have at Guantanamo is unclear).[186] The International Covenant on

amended, Reach Kram No. NS/RKM/1004/006, Oct. 27, 2004, ch. 15, art. 44 (Cambodia), *available at* http://www.pict-pcti.org/courts/cambodia_basic_doc.html.

181. Statute of the International Tribunal art. 21(d), May 25, 1993, 32 I.L.M. 1192.

182. Statute of the International Tribunal for Rwanda art. 20(4)(d), Nov. 8, 1994, 33 I.L.M. 1602.

183. INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA RULES OF PROCEDURE AND EVIDENCE, RULE 45 *Quarter* (2002).

184. Jørgensen, *supra* note 137, at 713.

185. *Id.*

186. The International Covenant on Civil and Political Rights (ICCPR), *supra* note 15, and the American Convention on Human Rights, *supra* note 15, are part of the larger category of "human rights" law, as distinguished from "humanitarian" law. The former constitutes a variety of treaties, signed and ratified by countries including the United States. Decisions and statements by relevant U.N. bodies constitute its jurisprudence. International human rights law applies in all contexts, armed conflict or not, unless the relevant country has derogated it because of a declared public emergency. International humanitarian law includes the Geneva Conventions and only applies in armed conflict. To the extent there is a conflict between international human rights law and international humanitarian law, international humanitarian law trumps in times of armed conflict. There has been much debate over whether international human rights law applies at Guantanamo. *See* Joan Fitzpatrick, *Sovereignty, Territoriality, and the Rule of Law*, 25 HASTINGS INT'L & COMP. L. REV. 303 (2002). The United States claims that the ICCPR does not apply at Guantanamo because the detainees are being held under the law of war, which "applies during armed conflict to regulate interactions between governments and members of enemy forces." Brief for Appellees at 45-46, Coalition of Clergy, Lawyers & Professors v. Bush, 310 F.3d 1153 (9th Cir. 2002) (No. 02-55367). Plaintiffs argued that the ICCPR was enforceable. The Ninth

Civil and Political Rights contains very similar language to the ICTY statute.[187] Under the American Convention on Human Rights, the defendant has the right "to defend himself personally or to be assisted by legal counsel of his own choosing."[188] Similarly, the European Convention on Human Rights recognizes the right to self-representation.[189]

In sum, the war on terror detainees can rely on a variety of sources when they request self-representation. Domestic and international legal rules and precedent, combined with philosophical justifications based on autonomy, form the basis for their right to self-representation.

3. Third-Party Interests and Self-Representation

The third-party interests implicated by the procedural requests at Guantanamo do not seem to justify the Altenburg memo's prohibition of self-representation, which curtailed autonomy significantly. The public interest in ensuring the legitimacy of the system writ large does not support the approach of the Altenburg memo, and Altenburg's claim that the defendant could not effectively represent himself if he did not speak English does not justify refusing entirely the right to self-representation. Some detainees, including Muhammad, speak English well.[190] For the others, the United States already must provide translators,[191] so the defendant's lack of English fluency should be no barrier to his presentation of the defense.

Circuit dismissed the case without reaching the issue. *Coalition of Clergy*, 310 F.3d at 1156. The U.S. Supreme Court has not spoken on which body of treaties applies at Guantanamo.

187. International Covenant on Civil and Political Rights, *supra* note 15, art. 14(3), S. EXEC. DOC. E, 95-2, at 27-28, 999 U.N.T.S. at 177 ("In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality: . . . To be tried in his presence, and to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of this right; and to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it . . . .").

188. American Convention on Human Rights, *supra* note 15, art. 8(2)(d), 1144 U.N.T.S. at 147.

189. Council of Europe, Convention for the Protection of Human Rights and Fundamental Freedoms art. 6(3)(c), Nov. 4, 1950, Europ. T.S. No. 5, 213 U.N.T.S. 221, 228 (granting an accused the right "to defend himself in person").

190. Muhammad Transcript, *supra* note 61, at 6 (stating that English is the accused's native language); *see also* Patel, *supra* note 61.

191. Even if a defendant is represented by a lawyer, he is entitled to translation under domestic and international law. *E.g.*, International Covenant on Civil and Political Rights, *supra* note 15, art. 14, S. EXEC. DOC. E, 95-2, at 28, 999 U.N.T.S. at 177; Augustin v. Sava, 735 F.2d 32,

Indeed, a pro se detainee can satisfy the adversarial testing requirement.[192] Certainly if the defendant chooses to represent himself and then refuses to speak in his own defense, he may fail the adversarial testing requirement.[193] The commission can direct him to take part in the trial, and if he still neglects to take part, then it might look for another solution to achieve adversarial testing of evidence on the defendant's behalf.[194] If a pro se detainee engages in obstructionist misconduct, even *Faretta* supports revoking his right to represent himself.[195] However, overall the adversarial testing requirement is a low bar that pro se detainees will generally meet.[196]

Even concerns about national security do not justify the Altenburg memo's approach. As mentioned, the use of classified evidence at Guantanamo presents a potential complication for self-representation.[197] Yet, as the MCA acknowledges,[198] the commission members can at least attempt to find adequate substitutes to protect classified national security material in cases where suspected al Qaeda members defend themselves. In short, the total bar on self-representation that policy makers advocated in the Altenburg memo pre-*Hamdan* is an overly broad way to achieve the narrow goal of protecting classified material.

In granting the right to some form of self-representation, the MCA is a significant improvement over the Altenburg memo, but the MCA still does not fully protect the right to self-representation. While national security may justify keeping some classified evidence from the detainees, the MCA does not define how the military adjudicators will determine what evidence will be kept from the detainees and grants excessively broad discretion to military adjudicators to decide this issue. The burden should be on the government to

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37-38 (2d Cir. 1984). The Nuremburg trials also recognized the right to translation of proceedings. 1 VIRGINIA MORRIS & MICHAEL P. SCHARF, THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA 6 (1998).

192. The main exception is for classified materials, which detainees are not permitted to view—a problematic situation addressed *infra* Part III.

193. *See* Myron Moskovitz, *Advising the Pro Se Defendant: The Trial Court's Duties Under* Faretta, 42 BRANDEIS L.J. 329, 339-40 (2003-04).

194. *See infra* Part III.

195. Faretta v. California, 422 U.S. 806, 834 n.46 (1975).

196. *See* Moskovitz, *supra* note 193.

197. For example, Altenburg argued that national security concerns that arise in revealing classified evidence to detainees justify barring self-representation. *See supra* Section I.C.

198. *See* 10 U.S.C.A. § 949j(c)(1) (West 1998 & Supp. 2007).

demonstrate that a piece of evidence is classified and must be withheld from the detainee.

Congressional intent supporting "associate representation" also seems to limit the detainee's autonomy unjustifiably. Most courts, including international tribunals and U.S. domestic courts, honor the right of self-representation and do not require the defendant to submit to anything approaching an associate counsel. No third-party interests justify the associate counsel's encroachment on the autonomy rights of the detainees. In fact, neither the public's interest in the system's legitimacy, nor the adjudicatory duty to achieve just outcomes, nor national security supports the MCA's limitations on self-representation.

C. Evaluating Responses to Boycott Requests

The U.S. government has also had to respond to boycott requests. Al-Bahlul, Khadr, Muhammad, and al-Qahtani all announced intentions to boycott their proceedings.[199] These defendants may have felt that their presence would add legitimacy to a system they saw as wholly illegitimate, and they possibly did not want to be seen as accepting U.S. notions of justice. The importance of the defendant's autonomy right, the public's interest in fairness, the adjudicatory duty to achieve adversarial testing, and national security all must factor into the government's decision regarding detainee boycott requests.

Like self-representation, the right to boycott is supported in international and domestic legal rules and precedent. In U.S. military law, Rule of Courts-Martial 804(b)(1) provides that an accused can be voluntarily absent after arraignment, and the trial will continue.[200]

Again, the military rule stems from federal law. Under U.S. law, every defendant has the right to be present at his own trial, as guaranteed by the Confrontation Clause of the Sixth Amendment.[201] However, the right to be present and the bar against involuntary trials in absentia does not mean that a defendant cannot voluntarily skip his trial. Federal Rule of Criminal Procedure

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199. *See supra* Section I.B.

200. MANUAL FOR COURTS-MARTIAL, *supra* note 158, R. 804(b)(1), at II-77; *see* United States v. Reynolds, 44 M.J. 726 (A. Ct. Crim. App. 1996); United States v. Price, 43 M.J. 823 (A. Ct. Crim. App. 1996); *see also* Gregory B. Coe, *On Freedom's Frontier: Significant Developments in Pretrial and Trial Procedure*, 1999 ARMY LAW. 1, 11-15 (discussing the *Price* and *Reynolds* decisions).

201. U.S. CONST. amend. VI.

43 provides a basis for the right of voluntary waiver.[202] In *Crosby v. United States*,[203] the U.S. Supreme Court decided that Rule 43 "prohibits the trial *in absentia* of a defendant who is not present at the beginning of trial," but stated that trials in noncapital cases could take place in the absence of the accused provided that the accused was initially present and at some point "is voluntarily absent after the trial has commenced."[204] Requiring the defendant's presence initially ensures that a subsequent voluntary absence represents an informed waiver of the right to be present during trial, and it protects against the trial of defendants who do not know that they are on trial. The U.S. government has not sought the death penalty against any detainee at Guantanamo.[205] Therefore, if they were facing trial in a civilian court, the detainees would enjoy the right to absent themselves from their trials after an initial appearance.[206]

Within international treaty law, the ICCPR provides a defendant the right "[t]o be tried in his presence"[207] Trials in absentia necessarily violate this article.[208] However, as in the United States, a defendant can waive the right to be present, and his trial may go forward "when the defendant has been 'sufficiently' informed in advance about the proceedings against him."[209]

At least one international tribunal, the International Criminal Court (ICC), appears more concerned with ensuring that an accused is not tried in absentia than it is with granting the right of voluntary absence. The Rome Statute, an

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202. FED. R. CRIM. P. 43(c)(1).

203. 506 U.S. 255 (1993).

204. *Id.* at 258, 262 (quoting FED. R. CRIM. P. 43). *Crosby* reinforced earlier case law. *E.g.*, Taylor v. United States, 414 U.S. 17 (1973) (holding that the defendant's voluntary absence from the trial constituted a valid waiver of the right to be present at trial); Diaz v. United States, 223 U.S. 442, 455 (1912) (holding that when a defendant knowingly absents himself from court during trial, the court may "proceed with the trial in like manner and with like effect as if he were present").

205. *Adviser Sees No Capital Cases*, BOSTON GLOBE, July 20, 2005, at A15.

206. *See Crosby*, 506 U.S. at 261-62.

207. International Covenant on Civil and Political Rights art. 14(3)(d), *supra* note 15, at 177. As noted previously, debate continues over the ICCPR's relevance at Guantanamo. *See supra* note 186.

208. David S. Bloch & Elon Weinstein, *Velvet Glove and Iron Fist: A New Paradigm for the Permanent War Crimes Court*, 22 HASTINGS INT'L & COMP. L. REV. 1, 39 (1998) ("Trials *in absentia*, moreover, necessarily violate Article 14(3)(d) of the International Covenant on Civil and Political Rights, which recognizes the right of any accused '[t]o be tried in his presence.'").

209. Julie V. Mayfield, Note & Comment, *The Prosecution of War Crimes and Respect for Human Rights: Ethiopia's Balancing Act*, 9 EMORY INT'L L. REV. 553, 587 (1995) (quoting Monguya Mbenge v. Zaire, 78 I.L.R. 18, 19 (U.N.H.R. Comm. 1983)).

international agreement, established the ICC in 2002 as a permanent tribunal to prosecute individuals for genocide, crimes against humanity, war crimes, and the crime of aggression.[210] The Rome Statute expressly allows the accused to waive his right to be present at the indictment stage,[211] but it states that "[t]he accused shall be present during the trial," except when the accused has disrupted his proceedings.[212] The omission of the right to voluntary waiver of presence during trial may be an intentional reaction to questions by the United States and other nations about whether the ICC would respect its prohibition against involuntary trials in absentia in practice.[213] The ICC represents an example of one international institution that does not allow the accused to waive his right to be present at his trial. Still, in light of U.S. domestic law, U.S. military law, and the ICCPR, there is overwhelming support for permitting the Guantanamo detainees to absent themselves from their proceedings.

There is little downside from a national security perspective to letting al-Bahlul, Khadr, Muhammad, and al-Qahtani absent themselves. The detainees will not even be present to disrupt their trials, so a boycott diminishes the possibility that the detainees will attempt to use the trial as a platform for inciting terrorist action. Furthermore, a boycott removes some of the problems associated with the use of classified information because it is unnecessary to find an adequate substitute for classified evidence.[214]

Some may claim that the adjudicatory duty to achieve just outcomes should outweigh the defendant's right to boycott. But even when a detainee boycotts a proceeding, the adversarial testing requirement can still be met by the defense counsel.[215] Such a scenario, in which the defendant has waived his presence, is

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210. Rome Statute, *supra* note 178; *see* Sheryl Grant, Note, *The International Criminal Court: The Nations of the World Must Not Give In to All of the United States Demands if the Court Is To Be a Strong, Independent, International Organ*, 23 SUFFOLK TRANSNAT'L L. REV. 327, 333 (1999).

211. Rome Statute art. 61(2), *supra* note 178, at 124-25.

212. *Id.* art. 63, at 126.

213. *See* Brown, *supra* note 15, at 788-94.

214. The military judge has the ability to exclude the public from sensitive parts of the trial, so there is not a need to produce a substitute because classified evidence might be exposed to the public. U.S. DEP'T OF DEF., *supra* note 10, R. 505(f)(5).

215. Courts and commentators have long recognized that the lawyer is capable of providing adversarial testing of evidence without the defendant present. *See, e.g.*, State v. Kelly, 2 S.E. 185, 186 (N.C. 1887) ("[The Defendant] may deem it of advantage to him not to be present, or it may be inconvenient for him to be. He may choose to rely upon the skill and judgment of his counsel, and expect that the court will see that the trial is conducted according to law, as it will always do.").

very different from an in absentia proceeding in which the defendant never appeared in the first place. In the case of the war on terror detainees, provided that the waiver is voluntary, the adjudicator can be certain that informed defendants have exercised their rights knowingly to waive their presence but that adversarial testing of evidence will still take place.

In terms of the public interest in ensuring the legitimacy of the system writ large, the public will likely recognize that permitting detainees to exercise the right can benefit the goal of enhancing the legitimacy of the system. The public—which has been exposed to many trials in which the attorneys conduct the defense while the defendant is absent for a variety of reasons[216]—will probably respect the autonomy interests of the defendants. Moreover, certain segments of the public critical of the military commission system seem likely to support the detainees' efforts to shed light on the illegitimacies of the system through political boycott. Proponents of the MCA's stance requiring the detainees' presence might counter that the military commissions are different and that even if the public thinks it is fair to allow defendants to boycott their proceedings in other contexts, the military lawyers cannot be trusted to adequately represent the detainees' interests. Yet the military defense lawyers have fought for their clients' rights (and have been openly critical of the Bush Administration's policies[217]) throughout the process.[218] Also, while they cannot hire lawyers who are not U.S. citizens, the detainees have the option of hiring U.S.-born or naturalized civilian lawyers if they do not trust their assigned counsel. No interest justifies entirely denying the right to voluntary waiver of presence at Guantanamo.

D. Evaluating Responses to Requests To Dismiss Counsel and Boycott Simultaneously

Military commission adjudicators have yet to rule on whether a detainee can exercise both rights simultaneously. In al-Bahlul's proceeding, though, Colonel Brownback proclaimed that he would not allow al-Bahlul to represent himself precisely *because* al-Bahlul intended to boycott the proceedings.[219] Of

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216. *See, e.g.*, Illinois v. Allen, 397 U.S. 337, 345-47 (1970); Butler v. United States, 340 F.2d 63, 65 (8th Cir. 1965); United States v. Boykin, 222 F. Supp. 398, 399 (D. Md. 1963).

217. *See* Marie Brenner, *Taking on Guantanamo*, VANITY FAIR, Mar. 2007, at 328 (describing how JAG lawyers assigned to the Department of Defense Military Commissions have forcefully challenged the Bush Administration's policies in court and in the media).

218. *E.g.*, MacLean, *supra* note 67.

219. *See supra* note 91 and accompanying text.

course, Brownback is technically correct that al-Bahlul would not be available to present a traditional pro se defense if he were absent from the trial. On the other hand, domestic and international legal instruments overwhelmingly support a detainee's individual autonomy rights to represent himself or to boycott the trial.[220] While few judges have had to decide what should happen when a defendant tries to exercise both rights simultaneously, the right to represent oneself and the right to boycott each implicate the right of the defendant to exercise individual autonomy to control the defense. Moreover, national security does not seem to be in jeopardy when the detainee exercises both rights; there is no classified evidence issue when the detainee is not present.

However, a defendant's choice to utilize both procedural tactics conflicts with the adjudicatory duty to ensure that the tribunals are capable of achieving just outcomes. No one would be available to test the evidence for the defense if a detainee both boycotted the trial and successfully demanded that a lawyer not be present to represent him. It would be problematic to sacrifice fairness fundamental to the adversarial system because of the personal whims of a defendant, particularly in the military commission context where the proceedings are already susceptible to being viewed as illegitimate. The detainee should only be permitted to elect to proceed with his trial and then forfeit the presentation of a defense entirely if there is some way to both respect his autonomy and have someone adversarially test the evidence on his behalf.

III. TOWARD A NORMATIVE SOLUTION FOR DETAINEES' PROCEDURAL REQUESTS

The above analysis demonstrates that international and domestic legal rules and precedent strongly support permitting the war on terror detainees to exercise the right to self-representation and/or the right to voluntarily waive their presence at their military commission proceedings at Guantanamo. The protections for these rights would be at least as strong, if not stronger, in military commissions conducted on U.S. soil.[221] However, if military commissions began recognizing these rights, two potentially problematic scenarios could arise: 1) a detainee could be granted the right to simultaneously

220. *See supra* Sections II.B-C.

221. Constitutional protections for war on terror detainees imprisoned on U.S. soil would most likely be greater than protections for detainees at Guantanamo. *See* Marty Lederman, *Does the Constitution Apply in Kansas*, Balkinization, June 21, 2007, http://balkin.blogspot.com/2007/06/does-constitution-apply-in-kansas.html.

dismiss his counsel and boycott his trial so that no one would present adversarial testing of evidence from the defense perspective; and 2) a detainee could be granted the right to represent himself in a case involving classified evidence. Under the Military Commissions Act, a pro se defendant would not be permitted to view the uncensored classified evidence against him, which means he would not have an opportunity to provide "adversarial testing" to this evidence. This Part describes these problems in greater depth, and it advances a proposal that respects both the adversarial process and the detainee's individual autonomy rights to dismiss counsel and/or to voluntarily waive his presence.

A. Requests To Dismiss Counsel and Boycott Simultaneously

Problems would arise related to lack of adversarial process if a detainee were permitted to dismiss his counsel and, simultaneously, to boycott the trial. There would be no adversarial testing of any evidence. Without adversarial testing in this scenario, the adjudicator would have to consider all admissible evidence introduced by the prosecution without hearing the defense's objections during cross-examination or alternative explanations of evidence during direct and re-direct examination.[222] In fact, there would be no cross-examination of the prosecution's witnesses at all, so their testimony would remain unchallenged. The importance of the adversarial testing requirement exemplifies the difference between self-representation and no representation. An attorney would likely do a better job than a pro se defendant in testing the prosecution's evidence. There is adversarial testing, however, as long as *someone* represents the defense perspective, even if it is the defendant himself. The defendant is capable of challenging the evidence as the prosecution presents it, but a hearing that is not adversarial only establishes one side of the truth.

Granting al-Bahlul's, Muhammad's, and al-Qahtani's demands to forfeit their defenses entirely would conflict with the adversarial system's ability to flesh out the truth, which is especially important in light of the public's widespread doubt about the ability of military commissions to reach the truth. The detainees might contend not to care whether their trials are fair; they may only want to make political statements by forfeiting their defenses.[223] However,

222. The evidence still would be subject to the reasonable doubt standard. *See* 10 U.S.C.A. § 949*l*(c) (West 1998 & Supp. 2007).

223. Indeed, it appears that many of the detainees are requesting to dismiss their counsel and/or boycott their trials to make political statements. *See supra* note 137 and accompanying text.

a desire to disseminate a political message is not a sufficient reason to neglect the important interest of the military commission authorities in upholding the adversarial process. The public and the news media, who have strongly criticized the military commission system, are much more likely to accept the outcome when the processes for reaching it are legitimate. Some sort of adversarial testing from the defense perspective should occur to increase the likelihood that the military commission is capable of reaching a just outcome and the adjudication is legitimate.[224]

B. Requests for Self-Representation with Classified Evidence

Even if the defendant legitimately wanted to conduct his own defense, the provisions of the MCA that bar detainees from viewing classified evidence because of national security concerns would pose problems. The military judge can prohibit the accused from viewing evidence that the government trial counsel deems classified.[225] While a detainee's defense lawyer would be permitted to view and test this evidence,[226] a detainee appearing pro se could not benefit from any adversarial testing of classified evidence. If the evidence were damaging, he would not have the opportunity to test evidence against him. If the evidence were exculpatory, he would not have a chance to use that evidence to contest other aspects of the government's case. The realization of either scenario would undermine the adversarial system.

The MCA requires that the government furnish the detainees with an "adequate substitute" for classified evidence,[227] but the MCA does not define "adequate substitute." This phrase could be referring to the Classified Information Procedures Act, which defines a "substitute" as adequate when it provides "the defendant with substantially the same ability to make his defense as would disclosure of the specific classified information."[228] There is no indication in the legislative history of the MCA, however, that Congress intended for this definition to apply. Without explicitly defining the term "adequate substitute," the MCA leaves the determination of what can "adequately" replace classified evidence to the discretion of a military adjudicator, thereby increasing the likelihood of overinclusive interpretations

224. *See* Strickland v. Washington, 466 U.S. 668, 685 (1984).

225. 10 U.S.C.A. § 949j(c)(1) (West 1998 & Supp. 2007).

226. *See id.*

227. *Id.*

228. Classified Information Procedures Act of 1980, 18 U.S.C. app. § 6(c)(1) (2000).

of this phrase. For instance, a military judge could conceivably determine that a substitute that does not contain information about the source of the evidence is "adequate," and this seemingly benign omission could hamper the defendant's ability to challenge the weight or credibility of the evidence.

Indeed, if the government does not produce an adequate substitute, evidence that establishes the innocence of the pro se defendant could be hidden from him.[229] While human rights advocates have argued against hiding classified evidence regarding an individual detainee from that detainee,[230] the government seems unlikely to adopt such a position in the current climate. Assuming that the government does not change its position, military commissions should require that someone test classified evidence from the defense perspective to maintain the adversarial process in the interest of fairness.

C. Examining the Standby Counsel Solution

The question remains: is there any way to respect the detainees' autonomy rights while also achieving adversarial process? While there have been very few past situations in which defendants have tried to put on no defense whatsoever, one response in such cases has been to appoint standby counsel. Traditionally, standby counsel is a lawyer appointed by the court when a defendant elects to appear pro se. Standby counsel stays in court with the defendant and assists the defendant in navigating courtroom procedure. He can speak in court on such matters as long as he does not impinge on the defendant's actual control of the case.[231]

In *Johnson v. State*, criminal defendant Ernest Johnson, Jr., attempted to waive the right to counsel; to assert the right to self-representation; and, subsequently, to absent himself from the trial.[232] He was deemed competent, though his statements demonstrate that he was unstable and frustrated with the criminal justice system. The court decided that it was fair to let him

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229. Human Rights Watch, Q and A: Military Commissions Act of 2006 (2006), http://hrw.org/backgrounder/usa/qna1006/2.htm.

230. *See* AMNESTY INT'L, *supra* note 16, at 8 (labeling the practice of keeping classified evidence from detainees "of particular concern in light of the high level of secrecy and resort to national security arguments employed by the administration" and arguing "that the administration appears on occasion to have resorted to classification [of evidence] to prevent independent scrutiny of human rights violations").

231. McKaskle v. Wiggins, 465 U.S. 168, 178-79 (1984); *see* Williams, *supra* note 13, at 793-94.

232. 507 A.2d 1134, 1138-47 (Md. Ct. Spec. App. 1986).

simultaneously dismiss his counsel and boycott his trial.[233] However, it appointed standby counsel in the defendant's absence to observe the trial and broadly represent the interests of the defendant when the counsel felt it was necessary to do so.[234]

In *United States v. Moussaoui*, a pro se defendant attempted to view classified evidence and the judge appointed standby counsel.[235] Zacarias Moussaoui was charged as a conspirator in the September 11 attacks in December 2001, and he faced trial in the U.S. District Court for the Eastern District of Virginia.[236] Moussaoui sought self-representation, and Judge Leonie Brinkema initially deemed him competent to represent himself. She then denied him access to classified discovery materials. She ruled instead that Moussaoui's interests could be adequately protected by disclosing classified materials to standby counsel, and she appointed standby counsel to provide adversarial testing of the classified evidence.[237] This arrangement became moot when Judge Brinkema deemed Moussaoui's conduct obstructionist and revoked his right to represent himself.[238]

While it may seem appealing to rely on the standby counsel solution of imposing counsel on the defendant in both scenarios, this solution was inadequate in both *Johnson* and *Moussaoui*, and it would be inadequate for the military commission tribunals. The standby counsel solution contravenes the U.S. Supreme Court's holding in *Faretta v. California* that a court cannot force counsel upon an unwilling defendant.[239] The Supreme Court has made clear in *McKaskle v. Wiggins* that the appointment of standby counsel itself does not

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233. *Id.* at 1139, 1147 ("I think that the Court cannot force Mr. Johnson to have a lawyer, and I think the Court cannot force Mr. Johnson to leave or stay.").

234. *Id.* at 1148.

235. 282 F. Supp. 2d 480 (E.D. Va. 2003), *aff'd in part*, *vacated in part*, 365 F.3d 292 (4th Cir. 2004).

236. Indictment, United States v. Moussaoui, No. 01-455-A (E.D. Va. Dec. 11, 2001), *available at* http://notablecases.vaed.uscourts.gov/1:01-cr-00455/docs/64329/0.pdf; *see* Jessica Reaves, *The Case Against Zacarias Moussaoui*, TIME, Jan. 2, 2002, http://www.time.com/time/world/article/0,8599,190413,00.html.

237. Order on Defendant's Motion to Get Access to So Called Secret Evidence, United States v. Moussaoui, No. 01-455-A (E.D. Va. Aug. 23, 2002) (order denying defendant's access to classified material), *available at* http://fl1.findlaw.com/news.findlaw.com/hdocs/docs/moussaoui/usmouss82302ord.pdf.

238. Jerry Seper, *Moussaoui Right To Represent Self Revoked*, WASH. TIMES, Nov. 15, 2003, at A2.

239. 422 U.S. 806, 836 (1975); *see also supra* notes 159-164 and accompanying text (describing the *Faretta* holding).

violate *Faretta*.[240] However, *Wiggins* limits the role the standby counsel can play, undermining the power of a standby counsel to ensure adversarial testing. Standby counsel is typically appointed to assist a pro se defendant with procedural matters, not to adversarially test evidence when a defendant who has dismissed his counsel cannot or will not do so.[241] Standby counsel cannot exercise any control over the organization and conduct of the defense. The pro se defendant is constitutionally entitled "to present his case in his own way,"[242] which implies the ability to eschew a defense altogether. Forcing standby counsel on the defendant against his wishes not to assist him in navigating judicial procedures but to adversarially test evidence on his behalf (as was the case in *Johnson*, would have been the case in *Moussaoui*, and would be the case in the military commissions) undermines the holdings in *Faretta* and *Wiggins*. Moreover, as a policy matter, the state act of forcing government counsel upon an unwilling defendant to test evidence on his behalf compromises notions of autonomy and fairness that form the basis for the right to self-representation.

D. Amicus Curiae Counsel as a Superior Solution

A better solution for the military commissions would be appointing amicus curiae counsel to provide for proper adversarial testing in situations when the detainee wishes to view classified evidence while appearing pro se or wants to forfeit his defense entirely. There is a fine distinction between standby counsel and amicus counsel, based upon which interests the counsel represents at trial. Rather than testing evidence on the detainee's behalf, as a standby counsel would do, amicus counsel would be an impartial third party responsible to the court alone.[243] While appointment of amicus counsel is unusual, courts have held that the amicus counsel's function is to provide advice and suggestions to the court and not to serve the parties in any way.[244] This innovative solution

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240. McKaskle v. Wiggins, 465 U.S. 168, 177 (1984).

241. *See supra* note 166 and accompanying text.

242. *Faretta*, 465 U.S. at 177.

243. The fact that amicus counsel would technically work for the government does not compromise the potential for impartiality. The defense lawyers from the U.S. Department of Defense Office of Military Commissions, like public defenders generally, are employees of the government and have been able to give detainees impartial representation. *See* Brenner, *supra* note 217.

244. *See* Briggs v. United States, 597 A.2d 370, 373-74 (D.C. 1991) (refusing appeal by amicus curiae counsel on behalf of a party to the case because amicus counsel's role was to advise the court and not represent a party); Givens v. Goldstein, 52 A.2d 725, 726 (D.C. 1947) (limiting amicus counsel's role to that of an advisor to the court).

for the military commission tribunals would bypass the problems associated with forcing counsel upon an unwilling detainee.

Such a scenario is exceedingly rare but not entirely unprecedented in the civilian context. *Torres v. United States* illustrates how amicus counsel can work in practice. Marie Haydee Beltran Torres was a member of the Fuerzas Armada de Liberacion Nacional ("FALN"), a terrorist organization that pursued its agenda of Puerto Rican independence from the United States through violence.[245] She faced trial for the 1977 bombing of the Mobil Oil Building in Manhattan, and at her trial she "refused the appointment of counsel, demanded to represent herself and then informed the district court that she would neither present a defense nor participate in the proceedings."[246] After making sure that Torres's waiver of counsel was knowing and valid and that she did not wish to participate in the proceedings,[247] the district court appointed a lawyer to serve as amicus curiae counsel responsible to the court. The judge told the amicus counsel that Torres had the constitutional right not to take part in the trial, and "therefore, I do not wish you to impose your help on her."[248] The amicus counsel tested the evidence so that the trial would be fair, doing so on behalf of the court rather than on behalf of the defendant so as not to force counsel on her unwillingly.[249]

An arrangement like the amicus assignment described in *Torres* would strike an appropriate balance in military commission tribunals between respecting the right of the detainees to control their cases and ensuring that trials are able to achieve just outcomes through adversarial process. If a detainee sought to dismiss his counsel and boycott the proceeding, the amicus counsel would work on behalf of the court. The amicus would test evidence from the defense perspective in the interest of fairness. Such an appointment would ensure that the tribunal had the relevant information and that the information had undergone proper adversarial testing so that the adjudicator could reach a just decision.

If a detainee elects to represent himself in a case involving classified evidence, the prosecution should be required to demonstrate to the tribunal why a piece of evidence needs to be hidden from the pro se defendant. Amicus counsel should be called in to view the evidence and contest the prosecution's

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245. 140 F.3d 392 (2d Cir. 1998).

246. *Id.* at 395.

247. *Id.* at 396-97.

248. *Id.* at 398.

249. *See id.*

argument. If the prosecution prevailed in that argument, another, short hearing should follow in which the prosecution and the amicus counsel would argue over whether it were possible to provide a truly adequate substitute for the classified evidence. If the military judge determined that it was not possible to do so, the amicus counsel would provide adversarial testing of the classified evidence on behalf of the court in a session closed to the defendant. The amicus counsel would not take part in any proceedings that did not involve classified evidence, allowing the defendant to maintain complete control over his defense. As such, the defendant's autonomy interest would remain as intact as possible.

One possible criticism of this argument is that appointment of amicus counsel would disturb the adversarial nature of the proceeding. Indeed, when an impartial third-party plays a key role in the presentation of evidence, the trial does not follow the traditional adversarial model. However, the role of the amicus counsel would be to provide adversarial testing to evidence that otherwise would go untested. By adding this component to a trial, the amicus counsel would really preserve, and not diminish, the adversarial nature of the trial.

Additionally, one could argue that the amicus counsel/standby counsel distinction is just a difference of semantics, and that an amicus counsel would in effect represent the detainee's interests against his wishes. However, there are important practical and symbolic differences. In violation of the limits placed on the role of standby counsel in *Wiggins*, standby counsel would speak on behalf of the defendant in the course of adversarially testing evidence despite the defendant's demands to the contrary.[250] Indeed, the *Johnson* court gave the standby counsel broad ability to speak on behalf of the defendant.[251] The standby counsel appointed in *Moussaoui* would have spoken for the defendant on many matters beyond narrow procedural issues as well. Such a role for standby counsel would disparage the individual autonomy rights of the detainee.

Amicus counsel would not speak on behalf of the defendant. He would step in to adversarially test evidence from the defense perspective on behalf of the court only when the tribunal deemed it essential to do so in order to achieve a fair trial. Thus, amicus counsel could be brought in for only portions of the trial, such as portions involving classified evidence. Amicus counsel would never be bound to follow the defendant's directives. Responsible only to the

250. *See* McKaskle v. Wiggins, 465 U.S. 168, 176-79 (1984).

251. *See* Johnson v. State, 507 A.2d 1134, 1148 (Md. Ct. Spec. App. 1986).

tribunal, the amicus counsel could provide basic adversarial testing even if the detainee ordered him not to do so.

Unlike the standby counsel solution for providing adversarial testing, the amicus counsel solution is not inconsistent with *Faretta*. The detainees would be completely free to control their own defenses (and to make political statements) without anyone advancing other arguments on their behalf. The amicus solution merely would permit the presentation of another point of view to the adjudicators. As commentators have pointed out in the context of the penalty phase in capital cases, "*Faretta* does not entail the right to silence alternative points of view that the law deems worthy, if not essential, for consideration."[252] Unlike standby counsel, the appointment of amicus counsel would not conflict with the defendant's individual autonomy right to control his own defense, but it would enable adversarial testing of evidence to occur.

As a public policy matter, the adjudicatory duty to achieve a just outcome through adversarial process while also respecting the autonomy rights of the detainees should outweigh the potential pitfalls of appointing amicus curiae counsel. The practical and symbolic distinctions between standby counsel and amicus counsel would be evident in both the situation in which a detainee chose to forfeit his entire defense and the situation in which a pro se defendant could not view classified evidence.

The fairness—both real and perceived—that amicus counsel would provide is especially important in light of scrutiny of the military commission system by the media and the international community. While media and international actors focus on whether the detainees are allowed to exercise their rights (such as the rights to self-representation and voluntary waiver of presence), many of them also would highlight inequities if proceedings took place without adversarial testing. Each time unfairness in the system becomes evident, the image of the United States at home and abroad and its ability to pursue the war on terror is further damaged.

Greater adversarial testing would also lessen the potential for wrongful imprisonment. For instance, just because al-Bahlul wants to boycott his trial does not mean that he is per se guilty. There is a greater chance that he will be wrongfully imprisoned without adversarial testing of the evidence.

The rights of the war on terror detainees are necessarily more limited than the rights of typical U.S. civilian defendants, but they are entitled to significantly more agency over their cases than the MCA provides. For

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252. Daniel R. Williams, *Mitigation and the Capital Defendant Who Wants To Die: A Study in the Rhetoric of Autonomy and the Hidden Discourse of Collective Responsibility*, 57 HASTINGS L.J. 693, 704 (2006).

example, there should be no problem with a detainee boycotting the trial alone while a lawyer represents him, as this situation would not raise significant problems related to adversarial process.[253] Yet, detainees should not be permitted to override important interests of the military commission system in achieving just outcomes. Policy makers and adjudicators must strike the right balance between the rights of the defendants and third-party interests. An amicus counsel system best balances these interests when a detainee seeks to forfeit his defense altogether or requests self-representation in a case involving classified evidence.

CONCLUSION

While the United States is fighting a unique and complex physical war on terror on multiple fronts, much of what the nation now grapples with is ideological. The nation's enemies deeply despise the U.S. system. The ideological beliefs and societal distrusts have lead to the procedural requests many Guantanamo detainees have made. Because the ideological chasm separating the United States from those who view the United States as their primary enemy remains post-*Hamdan*, requests for self-representation, voluntary waiver of presence, or both will likely continue to arise regardless of where war on terror detainees ultimately are tried. The U.S. government's official response has been to deny the detainees' rights, not only in famously stripping the right to habeas corpus, but also in barring voluntary waiver of presence and limiting the long-established right to self-representation. Smothering procedure, as the MCA does, signifies that the enemy has altered the American system. The ability to exercise procedural rights for political purposes or most other reasons is as much an American tradition as the justice system itself, and this right must remain unfettered in the war on terror.

253. While one might argue that a boycott would still impede the fairness of the trial because the attorney would not have the benefit of the defendant's knowledge about what happened, a lawyer—whether a JAG or a civilian attorney—still would have the opportunity to test adversarially the government's evidence in the defendant's absence.