"CONGRESS SHALL HAVE POWER . . . TO CONSTITUTE TRIBUNALS:" USING ARTICLE I COURTS TO PROSECUTE INTERNATIONAL AND DOMESTIC ACTS OF TERRORISM AGAINST THE UNITED STATES

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I. INTRODUCTION

On September 11, 2001, the United States was attacked by a terrorist organization known as Al Qaeda.[1] This group successfully hijacked four civilian Boeing 757 airliners and used the planes to attack the World Trade Center and the Pentagon.[2] Following days of survival-rescue missions—accompanied by national grief and mourning—the death toll became clear: 2,977 individuals were killed during the attack.[3] Almost immediately, President George W. Bush and his administration began to grapple with this national tragedy. After making a declaration of war on terrorism generally, and on Al Qaeda and the Taliban specifically,[4] the Bush Administration started forming plans on executing the war. One of the essential aspects of that plan was to capture and prosecute terrorists for their crimes.[5]

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[1] *See, e.g.*, Samantha Schmidt, *On 9/11 Anniversary, Somber Reflections on Lives, and a World, Changed*, N.Y. TIMES (Sept. 11, 2016), https://www.nytimes.com/2016/09/12/nyregion/15th-anniversary-9-11-september-11.html.

[2] *Id.* The passengers of the fourth plane "staged a revolt" and crashed the aircraft into a field in Pennsylvania.

[3] *Id.* Most of those killed during the 9/11 attacks were civilians. *See September 11 Terror Attacks Fast Facts*, CNN (last updated Oct. 4, 2023, 2:12 PM), https://www.cnn.com/2013/07/27/us/september-11-anniversary-fast-facts/index.html.

[4] President George W. Bush, Address to Joint Session of Congress and the American People (Sept. 20, 2001) (transcript available at *A Nation Challenged; President Bush's Address on Terrorism Before a Joint Meeting of Congress*, N.Y. TIMES (Sept. 21, 2001), https://www.nytimes.com/2001/09/21/us/nation-challenged-president-bush-s-address-terrorism-before-joint-meeting.html). The Bush Administration determined that the Taliban were harboring Al Qaeda members and were therefore subject to American retaliation. *Id.*

[5] *See, e.g.*, Memorandum from Patrick F. Philbin, Deputy Assistant Att'y Gen. to the Counsel to the President (Nov. 6, 2001) [hereinafter Philbin Memorandum]; Tim Golden, *Threats and Responses: Tough Justice; After Terror, a Secret Rewriting of Military Law*, N.Y. TIMES, (Oct. 24, 2004), http://www.nytimes.com/2004/10/24/us/threats-and-responses-tough-justice-after-terror-a-secret-rewriting-of.html (White House officials were "[d]etermined to deal aggressively

Rather than prosecute these terrorists in Article III courts, however, the Bush Administration established special tribunals to carry out the prosecution. The tribunals became known as military commissions.[6] In essence, these commissions were modeled after similar tribunals established by President Franklin D. Roosevelt during World War II.[7] On November 13, 2001, President Bush formally established the commissions by military order with the expressed purpose of "tr[ying terrorists] for violations of the laws of war[.]"[8]

As history would come to inform, these commissions were subject to a litany of problems. First, the commissions exercised exclusive jurisdiction over terrorist defendants without providing an avenue for appellate or habeas review in Article III courts.[9] Second, the November 13 Order circumvented basic evidentiary tenants to the detriment of due process.[10] Third, defendants—and their legal counsel—did not receive appropriate discovery.[11] These discovery limitations hindered the ability of the accused to litigate their cases effectively, further hindering their due process rights to an effective defense.[12] And fourth, defendants were not afforded a hearing to challenge their combatant status.[13] These problems eventually resulted in not only the appearance of illegitimacy, but actual illegitimacy, as highlighted by several Supreme Court rulings holding the process employed by the commissions unconstitutional.[14]

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with the terrorists they expected to capture . . ." and authorized the military to "prosecute them in tribunals not used since World War II.").

[6] *See* Morris Davis, *Justice and Guantanamo Bay*, WALL ST. J. (Nov. 10, 2009, 8:51 PM), https://www.wsj.com/articles/SB10001424052748704402404574525581723576284.

[7] *See Military Commissions History*, OFF. OF MIL. COMM'NS, https://www.mc.mil/About-Us/Military-Commissions-History (last visited Dec. 5, 2023); *see also Ex Parte* Quirin, 317 U.S. 1, 20–21 (1942) (upholding trials by military commission for unlawful enemy combatants during World War II).

[8] Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism, 66 Fed. Reg. 57833 (Nov. 16, 2001) [hereinafter Military Order of Nov. 13, 2001]. The Order was issued on November 13, 2001. However, it was not published in the Federal Register until November 16, 2001. This Essay refers to the Order as the "November 13 Order" and the "Military Order of Nov. 13, 2001."

[9] *See infra* notes 28–30 and accompanying text.

[10] *See infra* notes 31–33 and accompanying text.

[11] *See infra* note 34 and accompanying text.

[12] *See infra* note 34 and accompanying text.

[13] *See infra* note 35 and accompanying text.

[14] *See, e.g.*, Boumediene v. Bush, 553 U.S. 723, 733 (2008) (holding Section 7 of the Military Commissions Act of 2006 was an unconstitutional suspension of the writ of habeas corpus); Hamdi v. Rumsfeld, 542 U.S. 507, 509 (2004) (plurality opinion) (holding "due process

Despite this abysmal backdrop, using military commissions in lieu of Article III courts to prosecute unlawful enemy combatants was not a wholly provocative idea. After all, Article III precedent had established that military commissions were an appropriate avenue to prosecute unlawful enemy combatants.[15] Moreover, Article III courts would not have been a suitable place to try high-profile unlawful enemy combatants, due to a variety of security and evidentiary concerns.[16] Therefore, an alternative, non-Article III process was necessary to both adequately safeguard defendants' rights, as well as insulate the government's unique interests in national security.[17]

In hindsight, however, it is clear that the commissions did not provide the proper avenue to prosecute terrorists. With the benefit of over twenty years of hindsight, this Essay will highlight the problems inherent with prosecuting unlawful enemy combatants in Article III courts, while also showcasing the various issues with the commissions. As a solution, this Essay will showcase Article I tribunals as an effective and constitutional way to criminally prosecute terrorists.[18] After all, Congress has authority under the Constitution to establish inferior courts; this includes creating courts which are quasi-independent from the Article III judiciary.[19] In this way, the Article I tribunals would have retained some of the

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demands that a citizen held in the United States as an enemy combatant be given a meaningful opportunity to contest the factual basis for that detention before a neutral decisionmaker.").

[15] *See Ex Parte* Quirin, 317 U.S. 1, 20–21 (1942). Due to the practical limitations of the essay, this Essay assumes that members of Al Qaeda and other similarly situated terrorists are unlawful enemy combatants. However, the author recognizes the ongoing academic debate about this characterization. *Compare* Michael Beattie & Lisa Yonka Stevens, *An Open Debate on United States Citizens Designated as Enemy Combatants: Where Do We Go from Here?*, 62 MD. L. REV. 975 (2003), *with* Michael H. Hoffman, *Terrorists are Unlawful Belligerents, Not Unlawful Combatants: A Distinction with Implications for the Future of International Humanitarian Law*, 34 CASE W. RES. J. INT'L L. 227 (2002).

[16] *See, e.g.*, Jonathan Hafetz, *Reconceptualizing Federal Courts in the War on Terror*, 56 ST. LOUIS U. L. J. 1055, 1056 (2012); Andrew C. McCarthy, *Terrorism on Trial: The Trials of Al Qaeda*, 36 CASE W. RES. J. INT'L L. 513 (2004).

[17] *See* discussion *infra* Part II.

[18] While this Essay is written in the past tense—criticizing the military commissions and offering a solution to the legal problems arising therefrom—much of what is said can be applied proscriptively moving forward. After all, the military commissions are still ongoing, and some of the suggestions in this Essay can be assessed as a solution to those commissions. Further, terrorists remain vigilant and determined; it is likely that terrorists, in the future, will attempt another major attack on our civilian population. If this occurs, the solutions proposed in this Essay can be used prospectively, avoiding many of the problems encountered with the commissions.

[19] *See* James E. Pfander, *Article I Tribunals, Article III Courts, and the Judicial Power of the United States*, 118 HARV. L. REV. 643 (2004); *see, e.g.*, *In re* Roberts Farms, Inc., 652 F.2d 793, 798 (9th Cir. 1981) (indicating that Article I bankruptcy courts could escape Article III review through equity principles).

independence that was initially desired by the military commissions. Additionally, Congress can prescribe various limitations on Article I courts, including alternative rules of evidence, special procedures, and some limitations on due process.[20] This would have enabled the government to safeguard its national security interests, including its interests in confidential information. Moreover, Article I tribunals—such as bankruptcy courts—are a common aspect of the federal judiciary.[21] As such, the American public would likely not be naturally skeptical of these tribunals, as they look, act, and behave like Article III courts.[22]

The issue of trying unlawful enemy combatants continues to be an important aspect of civilian and military justice. Whether the United States is engaged in a conventional war with a near peer adversary, or in a guerilla conflict with quasi-conventional forces, there will always be accusations of unlawful combat. Because of this, it is important to review our mistakes—in this case, the commissions—and contemplate potential solutions, such as Article I tribunals.

To demonstrate that Article I courts are a superior option for criminally prosecuting terrorists, this Essay will proceed in four parts. In Part I, this Essay will review the problems inherent with the military commissions as established by the November 13 Order. Part II of this Essay will review many of the problems associated with criminally prosecuting terrorists in Article III courts and address the need for an alternative tribunal to handle such prosecutions. Part III will review Article I courts generally and their structure specifically. Part IV will assess the merits of Article I courts for prosecuting terrorists. And finally, in Part V, this Essay will briefly conclude, as well as address potential criticisms to this approach.

II. THE MILITARY COMMISSIONS: PROBLEMS FROM THE BEGINNING

As foreshadowed above, the commissions were riddled with problems from their outset. These problems left them open to scrutiny by both the public and the Article III courts. One of the primary problems at the outset was that the commissions had exclusive jurisdiction over terrorist

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[20] *See* Martin H. Redish, *Legislative Courts, Administrative Agencies, and the* Northern Pipeline *Decision*, 1983 DUKE L. J. 197, 218–19 (1983) (discussing Northern Pipeline Const. Co. v. Marathon Pipe Line Co., 458 U.S. 50 (1982), and the alternative evidentiary standards used by Article I bankruptcy courts in the 1980s).

[21] *Bankruptcy*, U.S. CTS., https://www.uscourts.gov/services-forms/bankruptcy (last visited Dec. 5, 2023).

[22] *See id.*

defendants and did not provide an avenue for either appellate or habeas corpus review in Article III courts.[23] This lack of review became a common ground with which military defense counsel challenged the military commissions.[24] Ultimately, these defenses resulted in several Supreme Court cases which expressly challenged the legitimacy of the military commissions.[25]

Second, the November 13 Order attempted to circumvent basic evidentiary tenants. Specifically, the November 13 Order altered the admissibility of evidence under Military Rule of Evidence (M.R.E.) 403,[26] stating that evidence with any probative value could be admitted regardless of the potential prejudice it imposed on the defendant.[27] Additionally, evidence could be concealed from the public and the defendant if the presiding officer determined that the evidence should remain confidential.[28]

Third, a variety of due process concerns were posed by the military commissions. Some of these concerns can be traced back to the lack of appellate and habeas review, as well as evidentiary issues, addressed above. However, the commissions also subjected the defendants to a plethora of other due process violations. The most notable violation was the fact that defendants and their legal counsel had limited access to the evidence used against them due to "security concerns."[29] Additionally, there were due process concerns which arose from lack of a proper hearing to determine the combatant status of the defendants, which was a prerequisite for their trial by the commissions.[30]

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[23] *See* Military Order of Nov. 13, 2001, *supra* note 8.

[24] *See, e.g.*, Boumediene v. Bush, 553 U.S. 723, 735 (2008); Hamdi v. Rumsfeld, 542 U.S. 507, 509 (2004) (plurality opinion).

[25] *See Boumediene*, 553 U.S. at 798.

[26] "The court may exclude relevant evidence if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence." MIL. R. EVID. 403. This rule is equivalent to Federal Rule of Evidence (F.R.E.) 403.

[27] Military Order of Nov. 13, 2001, *supra* note 8 at 57834.

[28] *See id.*

[29] *See id.* at 57833.

[30] *Cf.* Rasul v. Bush, 542 U.S. 466, 474 (2004) (holding that Article III courts could review habeas petitions on the grounds that the accused was being detained without a proper classification hearing). Under International Humanitarian Law ("IHL"), when a State captures a lawful combatant, that combatant retains certain privileges. *See* Geneva Convention Relative to the Treatment of Prisoners of War art. 14, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 [hereinafter Geneva III]. If the holding State is uncertain about the combatant's status, they must be afforded a classification hearing; until that hearing, the combatant must be treated as a lawful enemy. Geneva III art. 5 ("[S]uch persons shall enjoy the protection of the present Convention until such time as their status has been determined by a competent tribunal.").

The concerns referenced above were only worsened by the poor aesthetics surrounding the tribunals. Specifically, when a superpower prosecutes an enemy combatant before a uniformed military tribunal, it is unlikely that the general public, or the international community, will view that trial as fair and impartial.[31] This aesthetic was exasperated when allegations of enhanced interrogation and torture surfaced in the American media.[32] Because of the aforementioned problems, Article III courts[33] and the American public lost faith that the military commission process was fair and just for its defendants.[34]

Making matters worse, it is clear that the commissions failed in their primary mission: to try and convict terrorists. Over the course of twenty years, the commissions have convicted only eight detainees.[35] This, too, has created a secondary due process issue for the prisoners at Guantanamo who have not been convicted: they remain indefinitely detained at the Naval Station.[36] Taken together, the prior referenced information demonstrates that military commissions have failed to uphold the rights of the accused, have lost public and institutional support, and have failed in their primary mission to successfully prosecute and convict terrorists.

III. THE CRIMINAL PROSECUTION OF TERRORISTS IN ARTICLE III COURTS

With such an abysmal performance and shaky foundation, readers may wonder why the Bush Administration did not simply use the Article

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[31] This is particularly the case when the alleged offender's uniformed legal counsel and judge wear the same uniform as the arresting officers and prosecution attorneys.

[32] *See The Guantanamo Trials*, HUM. RTS. WATCH, https://www.hrw.org/guantanamo-trials (last visited Dec. 5, 2023).

[33] Since the beginning, Article III courts have found numerous issues with the commissions. *See, e.g.*, Boumediene v. Bush, 553 U.S. 723, 735 (2008); Hamdi v. Rumsfeld, 542 U.S. 507, 514–15 (2004) (plurality opinion); *Rasul*, 542 U.S. at 474.

[34] *See* Liz Halloran, *Terrorism Justice: Courts vs. Commissions*, NPR (Nov. 27, 2009, 7:00 AM), https://www.npr.org/2009/11/27/120849479/terrorism-justice-courts-vs-commissions.

[35] *Q & A: Guantanamo Bay, US Detentions, and the Trump Administration*, HUM. RTS. WATCH (last updated June 27, 2018), https://www.hrw.org/news/2018/06/27/qa-guantanamo-bay-us-detentions-and-trump-administration ("Only eight verdicts have been obtained in the military commissions. Three of them have been completely overturned by US court decisions, and others partially.").

[36] *See* Christopher Anders, *No Thanks, Obama and McCain. Continuing Indefinite Detention Isn't Closing Guantanamo*, ACLU (Aug. 12, 2015), https://www.aclu.org/blog/national-security/detention/no-thanks-obama-and-mccain-continuing-indefinite-detention-isnt; *see also The Guantanamo Docket*, N.Y. TIMES (last updated Sept. 22, 2023), https://www.nytimes.com/interactive/2021/us/guantanamo-bay-detainees.html.

III judiciary to prosecute these foreign terrorists. In fact, prior to September 11, 2001, criminal prosecutions against terrorists were generally,and exclusively, adjudicated by Article III courts.[37] However, these courts also proved incapable of successfully handling the prosecution of foreign terrorists.

The Bush Administration realized this, understanding that Article III courts would not have been sufficient to try terrorists captured during the War on Terror.[38] To be sure, criminally prosecuting terrorists in Article III courts is a complex process, made difficult by both pragmatic and normative problems.[39] From a pragmatic view, Article III courts place heavy burdens on the government for establishing the validity of evidence,[40] a burden that a war-time government may not be able to meet without risking national security. Moreover, Article III courts are faced with increased security concerns when dealing with terrorist trials, which dramatically escalate the cost of the prosecutions.[41] And lastly, trying an unlawful enemy combatant in an Article III court effectively disposes of the defendant's status as a combatant in lieu of a civilian status, forcing a "square peg . . . into [a] round hole."[42]

A. Pragmatic Concerns with Prosecuting Terrorists in Article III Courts

1. Issues Concerning the Admissibility of Evidence

In terrorism cases, litigation in Article III courts presents various issues regarding the admissibility of evidence. The first evidentiary problem that arises from terrorism cases is that at least some of the evidence used by the Government will lack a sufficient chain of custody required by

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[37] *See, e.g.*, McCarthy, *supra* note 16, at 514.

[38] *See id.* at 521–22.

[39] While this Part of the Essay deals exclusively with problems associated with Article III judicial proceedings, it is relevant to note that many of the issues reviewed here are applicable to both Article III courts and courts martial. This is because the relevant procedures for courts martial mimic those for Article III tribunals. *See* Ernest L. Langley, *Military Justice and the Constitution-Improvements Offered by the New Uniform Code of Military Justice?*, 1975 MIL. L. REV. 71, 76–88 (1975) (reviewing the due process rights afforded to criminal defendants in courts martial); *see also* 10 U.S.C. §§ 836–854 (discussing the trial process under the Uniform Code of Military Justice).

[40] *See, e.g.*, FED. R. EVID. 901 (requiring chain of custody).

[41] *N.Y. Officials: Sept. 11 Terror Trial in NYC 'Unlikely,' Obama Considering New Location*, ABC NEWS (Jan. 29, 2010, 8:57 AM), https://abcnews.go.com/Politics/sept-11-trials-move-york-city-obama-administration/story?id=9697164.

[42] McCarthy, *supra* note 16, at 520.

F.R.E. 901.[43] Rule 901 requires that when a tangible object is offered as evidence, the custodian must have a documented chain of custody for that tangible object.[44] But, in a warzone, like that witnessed in the War on Terror, servicemembers engage the enemy, capture combatants, and obtain various forms of intelligence without due concern for Rule 901 custody. After all, as Professor Yoo points out, a servicemember is not trained to preserve Rule 901 custody; further, prohibiting intelligence gathering under the restrictive 901 standards would hinder national security by limiting servicemembers from gathering *all* information from the enemy.[45]

A second evidentiary issue in Article III courts concerns the classification status of the evidence. Civilian courts generally require that evidence be available to the public[46] and all evidence be made available to the defense.[47] While the typical civilian trial does not pose a substantial burden on the government to disclose all evidence, this is not true for a wartime government prosecuting unlawful enemy combatants.[48] To be sure, a wartime government has an interest in classified information which affects the national security of the homeland, as well as the safety of troops deployed overseas.[49] As Andrew C. McCarthy—a former Assistant United States Attorney ("AUSA") who prosecuted various terrorists in civilian courts—argues, in civilian Article III prosecutions, the government educates, rather than punishes, the enemy.[50]

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[43] *See* John Yoo, *An Imperial Judiciary at War:* Hamdan v. Rumsfeld, 2006 CATO SUP. CT. REV. 83, 87 (2006).

[44] *See* FED. R. EVID. 901; *see also* Yoo, *supra* note 43, at 87 (providing an example where important evidence that would be rejected in civilian court is admissible in miliary commissions).

[45] *See* Yoo, *supra* note 43, at 87 (discussing instances where national security would have been hindered had servicemembers been held to civilian court custody standards). *But see* David J. R. Frakt, *Applying International Fair Trial Standards to the Military Commissions of Guantanamo*, 37 S. ILL. U. L. J. 551, 570 (arguing that chain of custody could easily be preserved by soldiers).

[46] Both the First and Sixth Amendments mandate that a trial—and evidence used therein—be public. *See* U.S. CONST. amends. I, VI; Press-Enterprise Co. v. Superior Court, 478 U.S. 1, 6–7 (1986).

[47] FED. R. CRIM. P. 16. While criminal defendants have a statutory right to all evidence, they also have a Sixth Amendment constitutional right to exculpatory evidence. Brady v. Maryland, 373 U.S. 83, 87–88 (1963).

[48] *See, e.g.*, CONG. RSCH. SERV., RL31724, DETENTION OF AMERICAN CITIZENS AS ENEMY COMBATANTS (last updated Mar. 31, 2005).

[49] *See* Alan M. Katz, *Government Information Leaks and the First Amendment*, 64 CAL. L. REV. 108, 109 (1976) (discussing the government's "greatest interest" in national security).

[50] McCarthy, *supra* note 16, at 520–21.

2. Issues Concerning the Security of the Proceedings

Article III courts are also the subject of security concerns when they prosecute terrorists.[51] These security concerns affect the judiciary's functions in a variety of ways. First, increased security risks necessarily result in higher financial costs.[52] For example, when the Obama Administration planned to prosecute five high-profile terrorists in the Southern District of New York, security costs were estimated at $400 million.[53] Similarly, security risks increase the burden placed on judicial employees—such as judges and their clerks—as well as the prosecution and jury members, who require security details to perform their duties.[54] Second, increased security concerns tend to limit the due process afforded to the defendant.[55] For example, increased security might compel a court to close the proceedings from the public.[56] Additionally, an increase in security measures may tend to bias, either implicitly or explicitly, members of the court—such as the jury—against the defendant.[57]

B. Normative Concerns: Treating Enemy Combatants as Civilian Criminals is Detrimental to Justice and Fairness

Apart from the pragmatic concerns, there are some theoretical problems with prosecuting unlawful enemy combatants in civilian courts. As AUSA McCarthy put it in one article, prosecuting an enemy combatant in a civilian court is like putting a square peg into a round hole.[58] Put another way, historically, war criminals are not afforded a civilian trial, and when civilian courts prosecute enemy combatants from a warzone, the courts erode the "majesty" of the judiciary function.[59]

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[51] *N.Y. Officials: Sept. 11 Terror Trial in NYC 'Unlikely,' Obama Considering New Location*, *supra* note 41.

[52] Such costs are likely to be prohibitively expensive. *See supra* note 41 and accompanying text.

[53] *See N.Y. Officials: Sept. 11 Terror Trial in NYC 'Unlikely,' Obama Considering New Location*, *supra* note 41.

[54] *See* Robert S. Litt & Wells C. Bennett, *Better Rules for Terrorism Trials,* BROOKINGS (May 8, 2009), https://www.brookings.edu/articles/better-rules-for-terrorism-trials/.

[55] *See, e.g.*, McCarthy, *supra* note 16, at 520–22.

[56] A court can close a criminal trial from the public if the court can demonstrate the state has a compelling interest in security. Globe Newspaper Co. v. Superior Court, 457 U.S. 596, 606–07 (1982).

[57] From the author's research, no one has done a quantitative analysis of this point. However, it logically follows that when members of the court—and, more specifically, the jury—are subject to routine security presence, they will become at least subconsciously biased against the criminal defendant who is responsible for said security concerns.

[58] McCarthy, *supra* note 16, at 520.

[59] *Id.* at 521.

Additionally, when an Article III court takes into account the pragmatic difficulties in prosecuting terrorists, it will naturally begin to "cut corners," therefore eroding certain protections for the terrorist.[60] And, as AUSA McCarthy notes, this will have a trickledown effect on the rights of domestic criminal defendants.[61] Further, there is a public relations concern that treating enemy combatants like criminals tends to downplay the risk that terrorists pose to national security, generally, and our servicemembers, specifically.[62]

IV. A BRIEF OVERVIEW OF ARTICLE I COURTS

As reviewed above, there are a litany of problems inherent with prosecuting terrorists in Article III courts. Alternatively, however, the government's solution of using military commissions has been the subject of widespread controversy and failure.[63] As will be discussed in this Part, Article I courts solve many of the problems inherent in prosecuting unlawful enemy combatants in Article III courts and the commissions. Before squarely addressing why Article I courts are the appropriate solution, it is imperative to review the constitutional and structural framework of Article I tribunals. After all, Article I courts exist within a somewhat tenuous constitutional theory, and their structure differs substantially from traditional Article III courts. This is made even more complex by the fact that no two Article I courts are the same, and often the differences between two Article I courts are staggering.

A. Overview of Article I Courts

Article I, Section 8 of the Constitution provides that Congress may establish inferior courts.[64] However, Section 8 also provides that such courts should be inferior to the Supreme Court and, therefore, a part of the Article III federal judiciary.[65] Professor James Pfander recognizes this textual discrepancy and argues that a literal account of the Constitution's words, on their own, cannot justify Article I tribunals.[66] To be sure, the Constitution only provides Congress with the power to create inferior

[60] *Id.*

[61] *Id.*

[62] *Id.* at 520–21.

[63] *See supra* Part I.

[64] U.S. CONST. art. I, § 8.

[65] *Id.*

[66] Pfander, *supra* note 19, at 656–60.

Article III courts.[67] Despite this, the founding generation created Article I courts to "resolv[e] matters that most observers have regarded as coming within the scope of the judicial power of the United States."[68] Not only did the founding generation create these tribunals, but Article I courts were routinely held to be constitutional by the early Supreme Court.[69]

Since the Founding, the Supreme Court has developed a comprehensive doctrine to determine the constitutionality of Article I courts. The first modern case to deal with the Article I doctrine was *Northern Pipeline Construction Co. v. Marathon Pipe Line Co*.[70] In that case, a plurality of the Court concluded that certain categories of Article I courts were permissible; this included the military and territorial courts.[71]

Then, in *Commodity Futures Trading Commission v. Schor*,[72] the Court created a balancing test to determine the constitutionality of Article I courts.[73] In *Commodity Futures*, the Court balanced the importance of Article III judicial independence with the congressional interest in an "expert and efficient alternative to the federal courts[.]"[74] To determine if an Article I tribunal is constitutional, the *Commodity Futures* Court reasoned that an ad-hoc balancing test was needed.[75] Specifically, courts should balance the Article III interest in independence against the Article I (congressional) interest in an efficient alternative to the federal judiciary.[76]

While the primary balancing analysis required in *Commodity Futures* was to balance the interests of Article III and Article I, the Court also noted some additional factors to consider. One such factor is to assess the amount of Article III appellate review permitted within an Article I court scheme.[77] The more independent an Article I court is—or the less Article III appellate review allowed—the less likely it is that the interests are constitutionally balanced.[78] Another factor required in the analysis in *Commodity*

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[67] *Id.*; *see also* U.S. CONST. art. I, § 8.

[68] Pfander, *supra* note 19, at 656.

[69] *Id.*; *see also* Am. Ins. Co. v. 356 Bales of Cotton, 26 U.S. (1 Pet.) 511, 546 (1828).

[70] 458 U.S. 50 (1982).

[71] *Id.* at 64–66 (plurality opinion).

[72] 478 U.S. 833 (1986).

[73] *Id.* at 851.

[74] Pfander, *supra* note 19, at 663.

[75] *Commodity Futures*, 478 U.S. at 851.

[76] Pfander, *supra* note 19, at 663–64. As will be reviewed *infra* Part IV.A, this efficiency typically comes in the form of expertise (i.e., bankruptcy courts) and special national security concerns (FISA courts).

[77] It is relevant to note that an Article I tribunal without some type of Article III review would likely be unconstitutional. *See Commodity Futures*, 478 U.S. at 851.

[78] *See id.*

Futures is how narrow the Article I court's jurisdiction is defined.[79] For example, when an Article I court's jurisdiction is exceedingly narrow, the balancing test weighs in favor of its constitutionality.[80] However, if the jurisdiction is wide, then the Article I interests may be overcome by the Article III interests.[81]

B. Procedures for Creating an Article I Tribunal

An Article I court must be established by federal law.[82] That is to say, Congress must pass an act creating a tribunal, and that act must be signed by the President.[83] Outside of the rudimentary constitutional regulations of lawmaking, there are no set procedures for establishing Article I courts. For instance, some courts are established when Congress creates a large agency, anticipating litigation over certain benefits.[84] Other times, Congress creates Article I courts to increase the efficiency for the Article III system.[85] Still other times, Congress authorizes courts for specific, limited functions, such as granting search warrants under the Foreign Intelligence Surveillance Act ("FISA").[86]

C. Structure of Article I Courts: Some Examples

While all Article I courts are subject to the constitutional limitations articulated by the Supreme Court, the structure of individual Article I tribunals varies widely from system to system.[87] As such, it is important to review the structure, jurisdiction, and procedures relevant in various Article I tribunals. This Part will review two common Article I courts: the FISA Court, and bankruptcy and magistrate judges.

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[79] *Id.*

[80] *See id.* at 852–53.

[81] *See id.*

[82] Pfander, *supra* note 19, at 650.

[83] *Id.* at 744.

[84] Richard H. Fallon, *Of Legislative Courts, Administrative Agencies, and Article III*, 101 HARV. L. REV. 915, 921–22 (1988).

[85] *See, e.g.*, 28 U.S.C. § 631 (authorizing magistrate judges to assist federal district court judges).

[86] *See, e.g.*, 50 U.S.C. § 1801 (defining the courts used for matters arising under the Foreign Intelligence Surveillance Act).

[87] *See* Pfander, *supra* note 19, at 697.

1. The FISA Court

The FISA Court was established by Congress in 1978 to create a check on the President's ability to collect and surveille foreign intelligence.[88] As such, the FISA Court has extremely limited subject matter jurisdiction. To be sure, FISA legislation essentially restricts the President from collecting or surveilling certain intelligence for more than one year.[89] If the President wishes to conduct surveillance outside of the restrictions laid forth by Congress, the President can submit an application to the FISA Court.[90] Thereafter, the FISA Court can make an *ex parte* determination authorizing additional electronic surveillance if probable cause exists.[91]

Congress likewise prescribed strict limitations on the specific structure of the FISA Court. Under Section 1805, the Chief Justice of the United States designates eleven district court judges to serve on the FISA Court.[92] In addition, Congress strictly specified the appellate process for the FISA Court. In Section 1803, Congress created automatic appeals *only* when the government's application is denied.[93] Specifically, Congress designated a two-step appeal: first, appeals go before a designated FISA court of review; and second, if that FISA appellate court upholds the denial, the government receives an automatic appeal—under seal—to the United States Supreme Court.[94] Finally, Congress specifically limited the types of evidence available to FISA judges.[95]

There are a number of notable factors about the FISA Court. First, Congress imposed specific limitations on the subject matter jurisdiction of the court, the personnel and location of the court, the evidence available to the judges, and the appellate review available to the parties.[96] Second, FISA proceedings, and their appeals, take place wholly behind closed doors.[97] Third, despite the seemingly Orwellian nature of FISA

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[88] Beryl A. Howell & Dana J. Lesemann, *FISA's Fruits in Criminal Cases: An Opportunity for Improved Accountability*, 12 UCLA J. INT'L L. & FOREIGN AFF. 145, 146 (2007).

[89] 50 U.S.C. § 1802.

[90] *Id.* § 1804.

[91] *Id.* § 1805.

[92] *Id.* § 1803(a).

[93] *Id.* § 1803(b).

[94] *Id.*

[95] *See id.* § 1804.

[96] *See id.* §§ 1801–1805.

[97] *See Foreign Intelligence Surveillance Court (FISC)*, EPIC, https://epic.org/foreign-intelligence-surveillance-court-fisc/#:~:text=The%20FISC%20and%20FISCR%20consider,applications%20in%20ex%20parte%20proceedings (last visited Dec. 5, 2023).

proceedings, the constitutionality of these courts has never been substantively questioned by the Article III judiciary.[98]

2. Bankruptcy Courts and Magistrate Judges

While the FISA Court was established to limit presidential authority, Article I bankruptcy and magistrate judges were established to increase the efficiency of the Article III judiciary.[99] Bankruptcy and magistrate judges are appointed and reviewed by Article III courts.[100] To appear before a magistrate judge, litigants must consent;[101] however, Congress does not require such consent for preliminary matters, such as arraignments.[102] Even with consent, parties still receive an automatic appeal to a district judge, where the Article III court reviews the magistrate's decisions *de novo*.[103] While no consent is necessary for appearance before a bankruptcy judge, the Supreme Court has held that bankruptcy courts cannot be the final arbiter of litigants' issues; rather, some type of Article III review is necessary.[104] Finally, while magistrate judges use the Federal Rules of Evidence and Procedure, Congress specified a different set of procedures for bankruptcy courts.[105]

As the above examples illustrate, the structure of Article I tribunals varies significantly depending on the needs and interests of Congress. What is notable is that Congress clearly has wide latitude to prescribe specific procedures, rules of evidence, and appellate review for Article I tribunals.

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[98] *See, e.g.*, Clapper v. Amnesty Int'l USA, 568 U.S. 398, 422 (2013) (holding that the parties lacked standing to challenge the FISA courts).

[99] *See* Craig A. Gargotta, *Who Are Bankruptcy Judges and How Did They Become Federal Judges?*, THE FED. LAW. (Apr. 2018), https://www.fedbar.org/wp-content/uploads/2018/04/Bankruptcy-Brief-pdf-1.pdf.

[100] *About Federal Judges*, U.S. CTS., https://www.uscourts.gov/judges-judgeships/about-federal-judges (last visited Dec. 5, 2023).

[101] FED. R. CIV. P. 73(a) (describing the consent necessary to appear before a magistrate judge).

[102] *See* United States v. Stephenson, 244 Fed. Appx. 166, 2007 WL2298030 (9th Cir. 2007) (holding that a district court could lawfully delegate arraignment to a magistrate judge, even if the criminal defendant objects).

[103] *See* FED. R. CIV. P. 73(c).

[104] *But see* Wellness Int'l Network, Ltd. v. Sharif, 575 U.S. 665, 677 (2015) (holding that litigants can consent to a bankruptcy court's decision if that decision is going to ultimately dispose of the case).

[105] *See* FED. R. BANKR. P. 1001.

V. ARTICLE I COURTS: A REPLACEMENT FOR MILITARY COMMISSIONS

As the Introduction indicated, both Article III courts and military commissions pose significant barriers for fairly trying and, ultimately, convicting terrorists.[106] However, Article I tribunals are not subject to the same problems associated with either Article III courts or military commissions.[107] Due to a lack of scholarship in this field, much of the following analysis is novel and, therefore, inherently speculative. With that in mind, this discussion will proceed in three parts: (1) defining the structure and defending the constitutionality of the proposed Article I tribunal; (2) discussing how the Article I tribunal is superior to Article III courts; and (3) discussing how the Article I tribunal is superior to the military commissions.

A. Structure and Constitutionality

1. Structure of the Proposed Article I Tribunal

As noted, much of the following analysis will be speculative, as Congress has never created an Article I tribunal to prosecute terrorism cases. However, as Part III indicated, Congress has wide latitude to specify the jurisdiction, rules of evidence, rules of procedure, and personnel of the court.[108] Moreover, Congress has the inherent ability to establish the tribunal in a specific location.[109] Further, Congress can control various aspects of the Article III appellate review afforded to the Article I court.[110]

First, Congress—and the Bush Administration[111]—would likely have created a tribunal with similar subject matter jurisdiction to the military commissions.[112] That is to say, the Article I tribunal would be

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[106] *See supra* Introduction.

[107] There has been little academic discussion on this topic. Specifically, the author found only one other academic who has suggested that Article I tribunals could be used in lieu of military commissions. *See* Pfander, *supra* note 19, at 757–60 (indicating that military commissions *might* be justified under the Article I tribunal framework).

[108] *See supra* Part III.C.

[109] *See supra* Part III.C.

[110] *See supra* Part III.C.

[111] It is important to note that the Bush Administration would have had wide latitude in influencing the creation of Article I tribunals to prosecute terrorists. In part, this is because modern presidents have become extremely involved with the legislative process. As such, it is safe to assume that many aspects of the Bush Administration's November 13 Military Order would have been used in an Article I tribunal.

[112] Congress has the authority to specify the jurisdiction of its courts. *See supra* notes 65–68 and accompanying text.

responsible for trying terrorists who violated the laws of war.[113] This makes logical sense; after all, the military commission's primary purpose was to prosecute terrorists for violations of the laws of war.[114] It, therefore, follows that the solution to military commissions would contain the same subject matter jurisdiction.

Second, Congress would likely have constituted the courts with at least some military personnel.[115] This is because uniformed military attorneys have significant experience with international humanitarian law ("IHL"), its application in the law, as well as the particular evidence used to prosecute a defendant in an IHL case (i.e., military documents, terminology, etc.).[116] However, it is possible that Congress would have created a court with both uniformed military lawyers and civilian attorneys.[117] One way Congress may have done this is by having uniformed military attorneys represent both the government and the defendant, while appointing civilian federal judges as the presiding officers. Similarly, Congress could have used juries that contained both civilian and military elements.

Third, Congress would likely have used its power to establish the Article I tribunals in non-densely populated areas. As noted in Part I, prosecuting terrorists incurs high security risks. One of the major concerns of trying terrorists in the Southern District of New York was that other extremists may take advantage of the forum and attack the densely populated New York City.[118] By putting the courts in a desolate area, Congress could limit these security concerns and decrease the potential effect of an attack.

Fourth, due to the sensitive nature of the subject matter jurisdiction—as well as the specific evidence to be used in these cases—Congress likely would have created specific rules of evidence and procedures to deal with these issues.[119] Specifically, Congress would have created a process to close the hearings to the public, as well as limit the type of evidence

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[113] *See* Military Order of Nov. 13, 2001, *supra* note 8, at 57833.

[114] *See id.*

[115] Congress has the authority to determine what personnel will serve in its courts. *See supra* Part III.C.

[116] *See* Michael A. Newton, *Modern Military Necessity: The Role & Relevance of Military Lawyers*, 12 ROGER WILLIAMS U. L. REV. 877, 887–90 (2007) (discussing the lex specialis principle and the military lawyer).

[117] If Congress was concerned about appearances of impropriety, Congress may have chosen to involve civilian attorneys who are not directly responsible to the federal government.

[118] *See* Scott Shane & Benjamin Weiser, *U.S. Drops Plan for a 9/11 Trial in New York City,* N.Y. TIMES (Jan. 29, 2010), https://www.nytimes.com/2010/01/30/nyregion/30trial.html.

[119] Congress established special evidentiary procedures for FISA courts, and alternative procedural rules for bankruptcy courts. *See supra* Part III.C.

available to civilians. Congress also would have relaxed some of the rules regarding chain of custody to make it easier for the government to admit evidence obtained on the battlefield. However, Congress would likely not have limited the defendant's access to exculpatory evidence because Congress would have anticipated Article III review[120] and recognized that such a standard would be reversed under the Sixth Amendment.[121]

Last, Congress would likely have established internal and Article III appellate review.[122] Based both on Supreme Court precedent[123] and Congress's own history in creating Article I courts,[124] Congress almost always provides for some time of appellate and Article III review. Congress likely would have established an internal appellate review system similar to the Court of Military Commission Review that exists today.[125] Additionally, Congress likely would have provided for some type of limited Article III review before the D.C. Circuit.[126]

2. Constitutionality Analysis

Under the Court's categorical approach in *Commodity Futures*, the suggested Article I court described above would be presumptively constitutional.[127] This is because the tribunal would fit squarely into one of the protected categories already articulated by the Court: military tribunals.[128] However, under the Supreme Court's balancing regime in *Commodity Futures*, the outcome is less certain.[129]

Under the *Commodity Futures* balancing test, a reviewing court would balance the congressional interest in an efficient alternative to Article III courts with the federal courts' interest in an independent judiciary.[130] On the one hand, the Article I interest in efficiency is immense. As

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[120] *See* Commodity Futures Trading Comm'n v. Schor, 478 U.S. 833 (1986).

[121] *See* Brady v. Maryland, 373 U.S. 83, 87 (1963).

[122] This is what Congress provided for with the FISA courts. *See* 50 U.S.C. § 1803.

[123] *See Commodity Futures*, 478 U.S. 833; Pfander, *supra* note 19, at 651, 723.

[124] *See* discussion *supra* Part III.A.

[125] 10 U.S.C. § 950f.

[126] Under the Military Commissions Act, Congress provided for a similar, limited appellate review to the D.C. Circuit. *See id.* § 950g. Because Congress believed this review was appropriate for military commissions, it is likely that Congress would have adopted this standard for their courts.

[127] *See Commodity Futures*, 478 U.S. 833.

[128] *See* Northern Pipeline Const. Co. V. Marathon Pipe Line Co., 458 U.S. 50, 66 (1982) (discussing courts martial as a protected class of legislative courts created by Congress). *See also* Madsen v. Kinsella, 343 U.S. 341, 348 (1952) (extending courts martial jurisdiction to civilians via military tribunals).

[129] *See Commodity Futures*, 478 U.S. at 846–50.

[130] *Id.*

was noted in Part II, Article III courts have proved insufficient in prosecuting terrorists.[131] As such, Congress has an interest in creating an Article I court with the expertise and resources necessary to prosecute terrorists. Further, much like the FISA Court, Congress has a strong national security interest in prosecuting terrorists. As such, Congress has a sufficient interest to create Article I courts such as those described above.

However, as the past two decades have informed, the federal judiciary's interest in independence and, in particular, Article III review in this area is likewise substantial. *Hamdi*, *Hamdan*, and *Boumediene* all inform that, when a domestic tribunal attempts to skirt Article III review in any way, the Article III judiciary's independence is threatened.[132] It is also evident that alternative tribunals may nonetheless co-exist with the Article III judiciary so long as some amount of real appellate review to the Article III courts is permitted.[133]

Because the proposed Article I court system in this Essay provides for Article III appellate review, the balancing test under *Commodity Futures*—and the concerns in *Hamdi* and its progeny—will be satisfied.

B. The Article I Tribunal is Superior to Article III Courts

Article I tribunals are better suited for handling terrorist prosecutions than Article III courts for three reasons. First, there are reduced security concerns for the Article I tribunal. As noted above, Congress would have established the Article I tribunal in non-densely populated area. As a result, there would be reduced concerns about civilian safety in the community.[134] Further, by limiting the size of a potential target, the likelihood of an extremist plot is reduced.[135] Additionally, by using mostly uniformed servicemembers as court personnel and jury members, the costs for providing security would be drastically reduced.[136] Moreover, Congress could

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[131] *See supra* Part II.

[132] *See* Boumediene v. Bush, 533 U.S. 723, 783 (2008); Hamdan v. Rumsfeld, 548 U.S. 557, 587–88 (2006); Hamdi v. Rumsfeld, 542 U.S. 507, 535 (2004) (plurality opinion).

[133] *See* Pfander, *supra* note 19, at 765.

[134] *See N.Y. Officials: Sept. 11 Terror Trial in NYC 'Unlikely,' Obama Considering New Location*, *supra* note 41.

[135] *See id.*; Helen Regan, *These Are the Cities Most Likely to be Hit by a Terrorist Attack*, TIME (May 21, 2015, 5:27 AM), https://time.com/3891981/terrorist-attack-cities-greatest-risk/.

[136] The cost of the military commissions for a period of six years was only about $600 million. Zak Newman, *$600 Million and Counting: GTMO's Military Commissions*, ACLU (Oct. 24, 2013), https://www.aclu.org/blog/national-security/600-million-and-counting-gtmos-military-commissions. Compare this with the estimated $727.7 million spent on court security for Article

use existing military infrastructure, such as military police and installations, to provide necessary security for the courts.

Second, in an Article I tribunal, the government would likely have more flexible evidentiary standards.[137] As noted in Part II, the government is faced with a litany of challenges when it comes to admitting evidence during an Article III prosecution.[138] This is particularly true with regard to the chain of custody, since ordinary servicemembers are not usually adequate custodians of physical evidence.[139] But, in Article I courts, Congress likely would have legislated around this problem and provided for alternative methods to certify various objects admitted to evidence.

Third, the theoretical dilemmas raised by AUSA McCarthy are also solved under the Article I model. Recall that AUSA McCarthy was concerned with trying enemy combatants in Article III courts.[140] McCarthy argued that, by so doing, the Article III process would gradually erode, detrimentally affecting civilian criminal defendants.[141] This concern does not exist with Article I tribunals. Unlike standing Article III courts, Article I tribunals exist independent of the federal judicial system.[142] Trying enemy combatants in Article I courts, therefore, would not have an adverse impact on the federal judiciary generally or the civilian criminal process specifically.

C. The Article I Tribunal is Superior to the Military Commissions

As indicated in the Introduction, military commissions have been the subject of controversy and failure.[143] Much of the controversy surrounding military commissions stemmed from the commissions' lack of appropriate Article III review.[144] Making matters worse, however, the commissions also severely limited traditional evidentiary rules without modern

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III courts in 2022. *Funding and Budget - Annual Report 2022*, U.S. CTS., https://www.uscourts.gov/statistics-reports/funding-and-budget-annual-report-2022 (last visited Dec. 5, 2023).

[137] *See supra* Part III.C.

[138] *See* discussion *supra* Part I.

[139] *See* Yoo, *supra* note 43, at 87.

[140] *See* McCarthy, *supra* note 16, at 521–22.

[141] *See id.* at 521.

[142] *See* Pfander, *supra* note 19, at 697–98.

[143] *See Legal Issues Regarding Military Commissions and the Trial of Detainees for Violations of the Law of War: Hearing Before the S. Comm. on Armed Servs.*, 111th Cong. 2 (2009) (statement of Sen. Carl Levine, Chairman, S. Comm. on Armed Servs.).

[144] *See* Hamdi v. Rumsfeld, 542 U.S. 507, 529–37 (2004) (plurality opinion) (indicating that Article III courts could hear habeas challenges); Rasul v. Bush, 542 U.S. 466, 485 (2004) (holding the same).

precedent.[145] As a result of both problems, the military commissions quickly lost both institutional and public support.[146] More than this, the increased scrutiny from the public and intensified Article III review severely limited the commissions' effectiveness in successfully prosecuting terrorists.[147]

Alternatively, Article I courts would not have incurred these problems. First, Article I courts would have included limited Article III review from the beginning. In this way, the courts would not have come under intense Article III scrutiny at their genesis. This would have served two purposes: (1) ensuring that public and institutional support for the courts was not unnecessarily eroded; and (2) ensuring that the structure of the tribunals was not weakened by Article III review. Second, similar to the military commissions, Article I courts would have limited some evidentiary standards; however, these limitations would be supported by modern Supreme Court and congressional precedent.[148] Third, without the problems associated with Article III review and the evidentiary standards, public support likely would not have faded. Further, Article I courts inherently have more institutional and public support due to their prevalence in our legal society.[149]

1. Article III Review

The November 13 Order explicitly limited review of military commissions to internal appeals.[150] Presumably, this is because the government wanted to limit Article III interference with the prosecutions. However, as time would inform, the Article III judiciary was not satisfied with this limited, internal review system.[151] After granting a series of habeas corpus petitions, the Supreme Court began to reign in the military commissions.[152] Not only did these Supreme Court cases limit the functionality

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[145] Military Order of Nov. 13, 2001, *supra* note 8, at 57834 (the only precedent that supported this standard was *Ex Parte* Quirin); *see* Philbin Memorandum, *supra* note 5, at 1–11.

[146] *See* Keith A. Petty, *Beyond the Court of Public Opinion: Military Commissions and the Reputational Pull of Compliance Theory*, 42 GEO. J. INT'L L. 303, 319–25 (2011).

[147] *See, e.g.*, Boumediene v. Bush, 553 U.S. 723, 797–98 (2008); *Hamdi*, 542 U.S. at 530–35 (plurality opinion).

[148] *See* discussion *supra* Parts III.A, C.

[149] *See, e.g.*, *Table F-5A—Bankruptcy Filings,* U.S.CTS., https://www.uscourts.gov/statistics/table/f-5a/bankruptcy-filings/2023/09/30 (last visited Dec. 5, 2023) (depicting the caseload of Article I bankruptcy courts for Sept. 2023).

[150] Military Order of Nov. 13, 2001, *supra* note 8, at 57835.

[151] *See supra* notes 121–24.

[152] *See supra* notes 121–24 and accompanying text.

of the military commissions, they also painted the commissions in a negative light to the public.[153]

Article I courts would have provided for some limited Article III review, thus avoiding this problem. As noted in Part III, Article I courts must be subject to some kind of Article III judicial scrutiny.[154] As a result, the Supreme Court would not have had a basis to overturn the Article I tribunals like they did for the military commissions in *Rasul*, *Hamdi*, and *Boumediene*.[155] Without these early defeats, the Article I tribunals might have maintained both public and political support.

Additionally, Article III review of Article I tribunals can be limited. As congressional precedent informs, Article III review need not be absolute.[156] For instance, the FISA Court was established with a limited review procedure, permitting only the Supreme Court—under seal—to address limited subject matter appeals.[157] Bankruptcy courts may also escape absolute Article III review through the use of equity powers.[158] Not only would Article I tribunals avoid early defeats in the Supreme Court by providing for some review, but that limited review would also still have served the government's interests in limiting the judiciary's interference in the system. In this way, Article I tribunals are the "best of both worlds:" they keep the Supreme Court at bay by providing for constitutionally required review but also severely limit Article III review to avoid judicial interference.

2. Evidentiary and Due Process Concerns

The military commissions also attempted to limit traditional evidentiary standards without modern precedent. While the Bush Administration believed that *Ex Parte Quirin* justified the military commissions,[159] the *Quirin* precedent was half a century old by 2001.[160] Using this outdated precedent, the November 13 Order dramatically curtailed various

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[153] *See, e.g.*, Lakhdar Boumediene, *My Guantanamo Nightmare*, N.Y. TIMES (Jan. 7, 2012), http://www.nytimes.com/2012/01/08/opinion/sunday/my-guantanamo-nightmare.html.

[154] *See supra* Parts III.A, C.

[155] *See* Boumediene v. Bush, 553 U.S. 723, 733 (2008); Hamdan v. Rumsfeld, 548 U.S. 557, 567 (2006); Hamdi v. Rumsfeld, 542 U.S. 507, 509 (2004) (plurality opinion).

[156] *See* CONG. RSCH. SERV., R43746, CONGRESSIONAL POWER TO CREATE FEDERAL COURTS: A LEGAL OVERVIEW (last updated June 1, 2015).

[157] 50 U.S.C. §§ 1803(b), 1804.

[158] *See, e.g.*, *In re* Roberts Farms, 652 F.2d 793, 798 (9th Cir. 1981) (holding that the equitable mootness doctrine can be applied by bankruptcy courts, therefore disposing of a case on its merits without Article III review).

[159] *See* Philbin Memorandum, *supra* note 5.

[160] *Ex Parte* Quirin, 317 U.S. 1 (1942).

evidentiary standards, including traditional chain of custody rules and limiting access to classified evidence.[161] With appropriate precedent, alterations to the traditional rules may not have posed a problem. However, without modern precedent, the military commissions were subject to both judicial and public scrutiny.[162]

Alternatively, Congress consistently alters procedures and rules of evidence when creating Article I tribunals.[163] As such, there is modern precedent to support altering rules, especially when doing so improves efficiency in the system. This is not to say, however, that Article I tribunals would have been able to limit a defendant's *Brady* protections.[164] Again, as discussed above, Congress would not have attempted to limit a constitutionally guaranteed protection knowing that the tribunals would be subject to Article III review.

3. Legitimacy and Public Support

As a result of the aforementioned problems, the military commissions lost institutional, political, and public credibility.[165] When the Supreme Court began to limit the military commissions, those rulings received national attention.[166] As public opinion began to swing away from the commissions, so too went political support.[167] Making matters worse, however, was an aesthetic problem for the commissions. Military commissions sound foreign to the average American, and using only uniformed personnel can create a negative public relations image.[168] Contrarily, Article I tribunals are a common legal entity. Many Americans, for instance, have either heard of or been to a bankruptcy court.[169] Additionally, Article I tribunals could escape the negative public relations image by providing for some civilian personnel.

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[161] *See* Military Order of Nov. 13, 2001, *supra* note 8, at 57833, 57835.

[162] *See* Petty, *supra* note 146, at 319–25.

[163] *See supra* Part III.C.

[164] Brady v. Maryland, 373 U.S. 83, 87–88 (1963).

[165] *See, e.g.*, *A Rebuke to Military Tribunals*, N.Y. TIMES (June 18, 2015), https://www.nytimes.com/2015/06/18/opinion/a-rebuke-to-military-tribunals.html.

[166] *See, e.g.*, *id.*

[167] *See, e.g.*, Kristina Wong, *Obama's Last Hope on Gitmo: John McCain?*, THE HILL (May 17, 2015, 7:00 AM), http://thehill.com/policy/defense/242290-obamas-last-hope-on-gitmo-john-mccain.

[168] This is because uniformed defense counsel appear to be biased to the untrained eye.

[169] *Just the Facts: Consumer Bankruptcy Filings, 2006-2017*, U.S. CTS., https://www.uscourts.gov/news/2018/03/07/just-facts-consumer-bankruptcy-filings-2006-2017 (last visited Dec. 5, 2023).

These credibility problems were only made worse by the fact that the military commissions lacked legal legitimacy. Professor Pfander argues that military commissions lack essential legality because the commissions never garnered an institutional—or congressional—mandate.[170] As such, the commissions were nothing more than Article II courts. While Article I courts are legally—if not constitutionally—justified, Article II courts are far less legitimate in the legal community.[171] Naturally, Article I tribunals would not have been subject to this problem.

VI. CONCLUSION

The War on Terror presented the government with unique difficulties for criminally prosecuting terrorists. While Article III courts posed significant problems to the government, military commissions were and continue to be an abject failure. Article I tribunals, on the other hand, provide a variety of benefits to the government, while also solving many of the difficulties of military commissions.[172] Specifically, Article I courts provide wide latitude to Congress to create a tribunal which can decrease security concerns, legally limit certain evidentiary standards, and create a constrained Article III review process. Taken together, these factors solve many of the issues inherent in both Article III courts and the military commissions.

This approach, however, is not without its fair share of criticism.[173] As a result of this criticism, some scholars have suggested other alternatives to the military commissions, namely using courts martial[174] or international criminal tribunals.[175] However, both of these methods have significant problems and would not be viable solutions to military commissions. Specifically, courts martial are subject to most of the concerns posed to Article III tribunals because courts martial procedures are

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[170] *See* Pfander, *supra* note 19, at 757–60.

[171] *See id.*

[172] *See* Lucinda M. Finley, *Article III Limits on Article I Courts: The Constitutionality of the Bankruptcy Court and the 1979 Magistrates Act*, 80 COLUM. L. REV. 560, 580–587 (1980).

[173] Some scholars contend that all Article I tribunals are *prima facie* unconstitutional. *See, e.g.*, *id.* at 583–89, 592. This is because the literal text of the Constitution does not provide for Article I courts. *See* U.S. CONST. art. I. However, the Supreme Court has never held that Article I courts are unconstitutional; rather, the Court routinely upholds congressional courts. *See supra* Part III.A.

[174] Neal Katyal, *Now Can We Try Using Courts-Martial for Enemy Detainees?*, SLATE (July 11, 2006, 4:41 PM), http://www.slate.com/articles/news_and_politics/jurisprudence/2006/07/invent_this_wheel.html.

[175] *See, e.g.*, Anton L. Janik, *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, 523–28 (2002).

nearly identical with Article III proceedings.[176] Evidentiary and security problems, therefore, would likely be prevalent in courts martial. Additionally, international tribunals would not be a valid option for a plethora of reasons, including similar security and evidentiary issues reviewed for Article III courts,[177] as well as diplomatic issues inherent with using an international criminal tribunal.[178]

In sum, Article I tribunals provide the government with the latitude it requires to successfully prosecute and convict terrorists, while avoiding many of the issues inherent to military commissions. Additionally, Article I courts avoid many of the problems that arise from alternative solutions because Article I tribunals are not bound by strict evidentiary or process standards. Hence, Article I tribunals are the superior model for prosecuting terrorists.

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[176] *See* Langley, *supra* note 39; 10 U.S.C. §§ 836–854.

[177] *See, e.g.*, IBA INT'L CRIM. CT. PROGRAMME, EVIDENCE MATTERS IN ICC TRIALS 34–39 (Aug. 2016), file:///C:/Users/tnwar/Downloads/Evidence-Matters-in-ICC-Trials-August-2016-FULL.pdf.

[178] For instance, the United States is not a State's party to the Rome Statute. Therefore, the United States would be unable to refer cases to the International Criminal Court. *See* Rome Statute of the International Criminal Court (Rome, 17 July 1998) UN Doc. A/CONF. 183/9 of 17 July 1998, *entered into force* 1 July 2002, art. 14. Additionally, assuming the United States does not wish to become a State's party to the Rome Statute, there would likely be diplomatic backlash if the United States requests an international tribunal for terrorism, but likewise refuses to recognize the jurisdiction of the ICC.