

Waging War, Deciding Guilt: Trying the Constitutionality of the Military Tribunals

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In this paper, we argue that President Bush's recent Military Order, which directs his Defense Department to detain any of an ill-defined class of individuals, potentially indefinitely, and to try them in military tribunals, jeopardizes the separation of powers today and charts a dangerous course for the future. Our Constitution's structure mandates that fundamental choices, in times of peace as well as war, are to be made not by one person or one branch, but by the three branches of government working together. Approval by Congress is a necessary, but by no means sufficient, precondition before the tribunals can be entertained as constitutional. We also explain why the present circumstances differ decisively from those at issue in the Supreme Court's body of decisions regarding military tribunals during the Civil War and World War II. We further explain why the specter of civilian habeas review will necessitate legislative involvement, and detail the significant equal protection problem with the Military Order.

Read "Waging War, Deciding Guilt: Trying the Constitutionality of the Military Tribunals"

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