

The following text may be printed, copy/pasted, or downloaded and emailed.

No justice in Guantanamo

Boston globe Editorial

March 30, 2003

THE BUSH administration and the US judiciary are creating a class of people who are outside the protection of any law - American or international, civil or military. The designation of some people as legal nonpersons insults the dignity of every human being and ought to be forestalled by Congress.

At issue are 16 men captured as Al Qaeda suspects in Afghanistan or Pakistan and flown to the US base at Guantanamo Bay, Cuba. Their case also applies to 600 others imprisoned at the base in the war against terrorism. These may be loathsome killers or innocent bystanders, but all deserve a hearing, at the very least, before a military tribunal where they can confront the government's accusations.

A special panel of the US Court of Appeals for the District of Columbia recently decided otherwise. "If the Constitution does not entitle the detainees to due process, and it does not, they cannot invoke the jurisdiction of our courts," the judges said.

The judges based their decision on the war powers granted to the president by the Constitution coupled with the reality that these prisoners never set foot on US soil. The military flew them from the middle of Asia to Guantanamo Bay.

The Constitution did not envisage a situation in which the United States would be waging a worldwide war against terrorists. The best precedent the judges could find was that of 21 Germans who were caught helping the Japanese in China in the four months between the surrender of Germany and the fall of Japan. The Supreme Court upheld their sentence by a military tribunal to prison in Germany.

Germany, though it had surrendered, was still in a state of war with the United States - and the Germans at least had their case heard before a tribunal. The 16 Guantanamo suspects, citizens of Kuwait, Britain, and Australia, are in a far more ambiguous situation. All deny being involved with Al Qaeda, but despite more than a year's captivity, they have yet to come before a military court.

The appeals panel made much of its concern that judicial rulings not interfere with the military. But this is not a question of setting up a court in a war zone. Once the prisoners were brought to tranquil Guantanamo, the argument for military necessity faded. Kuwait, Britain, and Australia ought to press the case for a formal hearing on behalf of their citizens. But their rights should not depend on interventions by their home governments.

The case could be appealed to the full Appeals Court bench or the Supreme Court, but both might be reluctant to get involved. It would be better if Congress and the president established special tribunals and appeals boards to hear these cases. The Constitution was not written to deal with every contingency of war, but its underlying message is that human rights are an essential expression of a common humanity.