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If It's Mandatory, Is it Still Voluntary?

by Barbara Sheehan

The idea of mandating volunteerism by teens made news headlines last year when Acting Governor Richard J. Codey, who was then a state senator, proposed a bill that would require all New Jersey high school seniors to complete a minimum of 15 hours of community service as a condition of their graduation. Since then, the bill has been amended to propose a pilot community service program for high school juniors.

If passed, the amended bill would require the commissioner of education to establish within the New Jersey Department of Education a three-year community service pilot program beginning in the 2005-2006 school year. Pursuant to the legislation, the commissioner of education would select 30 schools to participate in the pilot program.

Juniors in those schools would be required to complete at least 15 hours of community service, unless the board of education found that doing so would pose an undue hardship for the student. Exceptions would also be considered if volunteering would interfere with the Individual Education Plans of special education students.

Feedback about the program from the commissioner would be due back to the state legislature by December 2008, in accordance with the bill. At that time, the legislature would consider expanding the program to all New Jersey high schools.

Mutual benefit

New Jersey Senator Joseph Coniglio, who cosponsored the bill along with Governor Codey, says that he and the governor had been talking about this idea for a long time and share the belief that volunteerism provides a mutual benefit to the community and the students who participate. In addition to the obvious benefits

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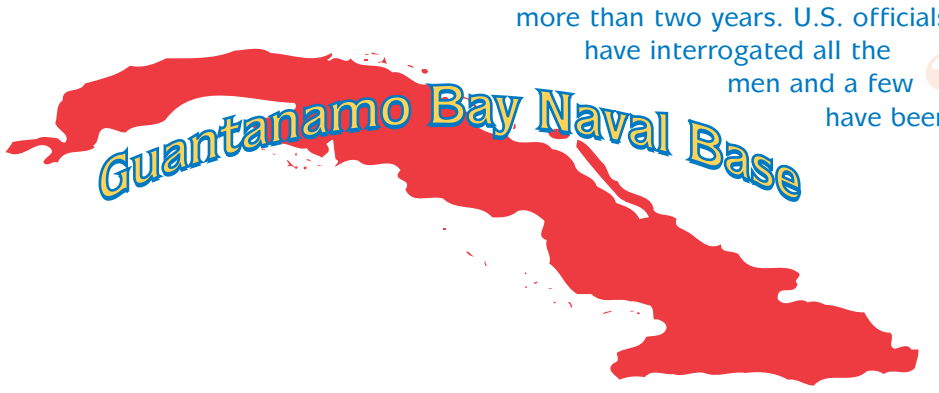
Petitioning for Habeas Corpus: Who's Entitled?

by Robert K. Glassner, Esq.

On September 11, 2001, our country was devastated by an unspeakable act of terrorism. America responded with attacks on camps in Afghanistan and Pakistan where the Al Queda militants who launched the 9/11 attacks were trained.

U.S. forces captured more than 600 suspected male terrorists from approximately 40 different countries. The government considered these men "enemy combatants" and they were imprisoned at the Guantanamo Bay Naval Base in Cuba.

Most of the detainees have been held at the Cuban military base prison in near secrecy for more than two years. U.S. officials have interrogated all the men and a few have been set free. The remaining detainees have not been charged with a specific crime, have not been allowed to speak to an attorney and have had no contact with anyone outside the base, including their families.



The prisoners' petition

A number of lawyers, former judges, retired military officers, representatives of civil rights groups and family members protested the legality of the detainees' confinement and isolation. The lawyers argued that U.S. constitutional law demands that every prisoner, American citizen and non-citizen alike, must either be charged with a crime, given access to a defense

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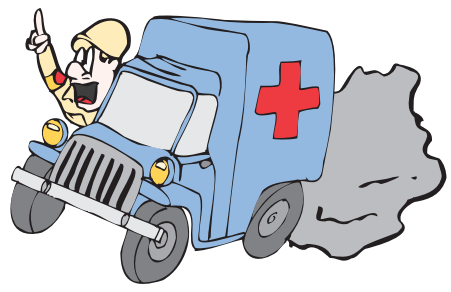
Military Families Battle Feres Doctrine

by Dale Frost Stillman

Imagine your son is taken to a hospital where he is first treated for the wrong injury, then misdiagnosed and ultimately declared brain dead before you can even reach his side. Now imagine being told that you cannot hold accountable those responsible for your son's death because a 55-year-old law, called the Feres Doctrine, protects them.



That is the situation facing the family of Marine recruit Justin Haase who died in December 2001 at the age of 18 after contracting a severe case of bacterial meningitis at a Marine boot camp on Parris Island, South Carolina. Military doctors treated Haase with penicillin despite an allergy to the medication.

Compounded errors

Because of his allergy to penicillin, Haase was suppose to receive a substitute drug for the dose of antibiotics that is routinely given to new recruits to prevent infections. He did not. According to newspaper accounts, as his time at boot camp continued, Haase suffered from severe headaches and vomiting. A military medic did not take his temperature and did not contact a doctor. Instead, the medic instructed Haase to sit in a van where he cried in pain. He was then ordered to stay in bed, but when he awoke Haase was incoherent. His drill instructor sent him back to bed and called a senior drill instructor, who then called 911 but incorrectly reported that Justin had "taken a spill on the obstacle course."

Haase was finally taken to a naval hospital where he was initially treated for a head injury. The doctor suspected a bacterial infection because of Justin's temperature, but did not take appropriate tests or begin antibiotic treatment right away. It would be two hours before Haase would receive the correct test that determined he was suffering from bacterial meningitis, which is when he was given penicillin. He suffered severe brain trauma and was pronounced brain dead before his family arrived.

Because Haase was in Marine boot camp, his family is unable to sue for the **negligence** that caused his death. The Feres Doctrine prevents military service members and their families from suing the military, even for non-combat related deaths.

LeRoy Wulfmeier, the attorney for the Haase family, told *People*

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While you're there, check out other interesting and fun stuff in our Students' Corner. There is also useful information for teachers about other Foundation school-based programs.

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to the community, Coniglio says a key objective of the bill is also to give students "valuable experiences and lessons that will be critical in life choices they make after high school."

In accordance with the proposed bill, students may not complete service requirements during school hours, only in the evenings, on weekends or during the summer. Also, students may not be compensated for their service. The bill provides a range of settings in which students can volunteer, such as non-profit organizations, public agencies and institutions, health care facilities and any other community organizations the commissioner deems appropriate.

"My hope is that students focus on helping those who can truly benefit from the energy and fresh ideas that young people can bring to the table," says Coniglio. "I think that young people's specific skills can best be utilized in activities like tutoring and mentoring, extending a helping hand to the elderly or comforting and providing for the less fortunate. Whether it is in a soup kitchen, a hospital, a daycare facility or a senior center, the community service will provide a boost for those who need it most."

Princeton program already underway

Coniglio asserts that, while Maryland is the only state he is aware of that mandates community service for students in public high schools, more states, such as Virginia, are considering making similar community service requirements. Some local school districts in New Jersey have already made volunteerism part of their curriculum.

As part of a Career Awareness/Community Service program, students at Princeton High School are required to complete 50 hours of community service during their sophomore year, according to Andrea Dinan, director of the school's Service Learning and School Career Programs.

Dinan, who has been involved with the program for the past nine years, attributes part of the program's success to the fact that, while it is not optional, it is flexible, allowing students to volunteer in a way that coincides with their individual and career interests.

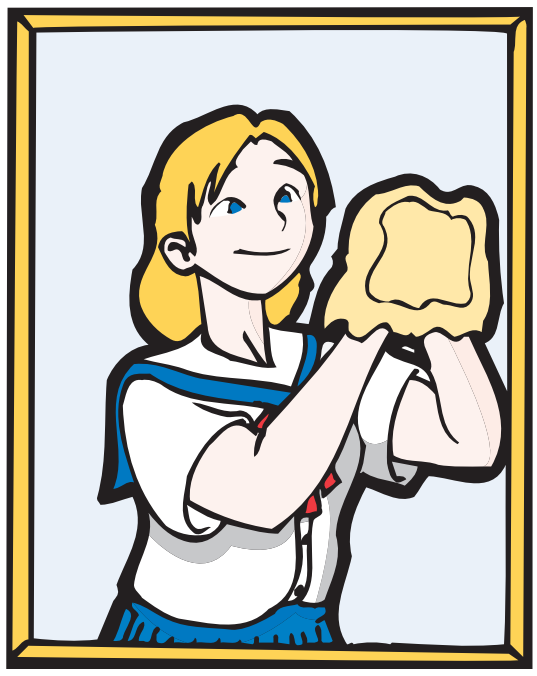
For example, a student who is interested in dance might volunteer at a dance school, teaching young children, Dinan says. Or, a student who has a full load of extracurricular activities during the school year and cannot readily fit community service into a busy schedule might work with his or her church or synagogue in the summer to fulfill the volunteer requirements. She also notes that incorporating the program into students' sophomore year provides extra time to make up the requirement if a student for some reason is not able to complete it on schedule.

That said, both Dinan and Princeton High School Principal Gary Snyder agree that students have not had trouble completing the 50 hours but rather have seized the opportunity to take their classroom learning into the real world. According to Dinan, the program may be expanded throughout the district.

"I don't see our students just doing work to satisfy the hours," Snyder observes. "They are seeing themselves as part of the community and trying to make it better."

A nationwide theme

Community service has become an integral part of many schools' curricula nationwide, according to



a study conducted in the spring of 1999 by the U.S. Department of Education's National Center for Education Statistics (NCES). Called the *National Student Service Learning and Community Service Survey,* the study found that 64 percent of all public schools, including 83 percent of public high schools, had students participating in community service activities recognized by and/or arranged through the school.

The study distinguished community service from another related, volunteer-based initiative called "service learning," which it noted "takes community service one step further by incorporating the service experiences of students directly into their school work." According to the NCES study, 32 percent of all public schools organized service learning as part of their curriculum, including nearly half of all high schools.

Volunteerism or servitude?

While many agree that community service by teens offers inherent benefits, all do not agree that mandating this kind of volunteerism is the right thing to do. In fact, a North Carolina family brought a lawsuit against a Chapel Hill high school, arguing that the school's mandatory community service requirement resulted in "unpaid servitude" and hindered the rights of parents to guide their child's education.

The family took their case as high as the Fourth Circuit Court of Appeals, which held that the state of North Carolina has the right "to direct the **secular** education of a child" and that right "is superior to the rights of the parents as long as it is rationally related to a legitimate governmental interest." The U.S. Supreme Court refused the family's request to hear the case, so the decision of the lower court stands.

In Michigan, like New Jersey, some school districts require a certain amount of community service from students in order to graduate. A bill introduced in February 2005 in the Michigan Legislature would prohibit mandatory volunteerism as a requirement for graduation. Opponents of the mandatory community service requirement in Michigan argue that mandating volunteering will deter students from volunteer work in the future because they will see it as a chore.

An article in *Psychological Science,* a journal of the American Psychological Society supports that logic. "Students who are not willing or not ready to volunteer—but who are required by their school—may be less likely to volunteer again in the future," the article said.

Back to New Jersey

Here in New Jersey, not everyone agrees that mandatory volunteerism is necessary. An editorial published last year in the *Home News Tribune*, while commending Governor Codey's "noble idea," contended that legislators should not be telling youth what to do with their free time.

"Nor," the editorial went on to say, "should they be legislating curriculum, a task best left to professional educators and school boards."

That same editorial suggested that the proposed community service bill, while benefiting some teens, might actually turn others off to volunteering and questioned whether all teens have time for this extra load.

"Trenton would do better by encouraging school districts to implement stronger civics education as part of the school day," the editorial concluded.

'Not too much to ask'

Coniglio points out that the amendments to the original legislation took into account some of the criticisms of the bill. To students who say they don't have time to volunteer, he says that he understands many students have busy schedules and that extracurricular activities, college preparation and family obligations can be very time consuming.

"We took these factors into consideration when we asked students to dedicate 15 hours to the program. The 15 hours breaks down to about one hour every 24 days," Coniglio said. "I am sure most young people would agree that an hour almost once a month is not too much to ask for the betterment of their community."

As for the likelihood of the bill becoming law, Coniglio asserts that the legislation has the support of the Governor and the leadership within the legislature. He also noted that the bill has received support from the New Jersey Center for Character Education.

Military Families Battle Feres Doctrine

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magazine "If he was civilian and he went into a non-military hospital, he would have one hell of a lawsuit."

Origin of the Feres Doctrine

The Feres Doctrine is named after Lt. Rudolph Feres, who died in a barracks fire in 1947. Feres' widow attempted to sue the Army, claiming negligence because it allowed her husband to be quartered in an unsafe barracks. The barracks had a defective heating plant and authorities failed to maintain an adequate fire watch, she claimed. The doctrine also encompasses two other cases from that time period. One involved an Army serviceman who sued for damages after an 18-x-30 inch towel had to be removed from his abdomen. The towel, which was stamped "Medical Department of the U.S. Army," was left behind after an abdominal surgery that was performed at an Army hospital eight months previously. The other case also involved medical malpractice where the patient, an active duty officer in the Army, died at the hands of what the lawsuit alleged was "an unskilled Army surgeon."

With the Feres Doctrine, the U.S. Supreme Court declared in 1950 that active duty servicemen and their estates could not recover money against the U.S. government. As a result, all three of the pending cases were dismissed.

The Feres Doctrine is an exception to the Federal Tort Claims Act of 1946, which states that the United States is liable for personal injuries and medical malpractice "in the same manner as a private individual under like circumstances." According to the Feres Doctrine, the Federal Tort Claims Act "did not apply to servicemen," because the government is not liable for injuries to servicemen where the injuries "arise out of or are in the course of activity incident to their service in the Armed Forces."

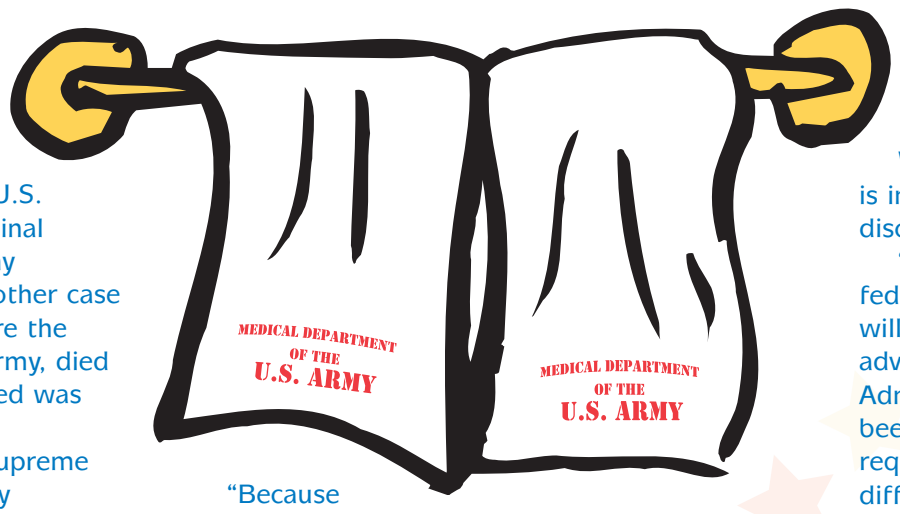
Challenge to Feres

With the protection of total **immunity**, the Feres Doctrine has been surrounded by controversy since its inception. The primary objection is that as a result of Feres a member of the armed services loses many rights that non-military citizens enjoy, such as the right to seek **redress** of grievances or compensation, which is guaranteed in the U.S. Constitution. Because of the Feres Doctrine, service members who have been injured while on the job are not eligible to sue their superiors for negligence or malpractice. Under current law, the families of honorable servicemen like Justin Haase have no recourse against what some consider the incompetence of superiors.

Freehold attorney Michael Detzky, a former chair of the New Jersey State Bar Association's Military Law and Veteran's Affairs Committee, believes physicians practicing in military hospitals should be held to the same standards as private citizens, but he noted that the courts are reluctant to get involved in military decisions, that would include overturning the Feres Doctrine.

"Soldiers should not feel as if they are second-class citizens," Detzky maintains. "Many restrictions are placed on soldiers that the private citizen does not have to endure. If they use foul language in the military, they are subject to court-martial and they can't just quit if they feel like it. Yet they don't have the same recourse as private citizens if they are wronged," said Detzky, who has served in the U.S. Naval Reserves for 22 years and is a captain.

The Feres Doctrine was last challenged and reviewed by the U.S. Supreme Court in 1987 in *United States v. Johnson*. That case involved Lt. Commander Horton Johnson, a helicopter pilot for the U.S. Coast Guard, who was killed during rescue mission. Because of poor weather conditions, Lt. Johnson requested radar assistance from the Federal Aviation Administration (FAA). The FAA assumed radar control over the helicopter, and shortly after, it crashed into a mountain. His widow sued the U.S. government on the grounds that the FAA, a civilian agency of the federal government, was negligent and caused the death of Lt. Johnson and his flight crew. The U.S. Supreme Court reaffirmed the Feres Doctrine with a 5-4 vote in the *Johnson* case.



"Because Johnson was acting pursuant to standard operating procedures of the Coast Guard, the potential that this suit could implicate military discipline is substantial," U.S. Supreme Court Justice Lewis Powell wrote in his **majority opinion**. "The circumstances of this case thus fall within the heart of the Feres Doctrine as it consistently has been articulated."

In his **dissenting opinion**, Supreme Court Justice Antonin Scalia wrote, "Had Lt. Commander Johnson been piloting a commercial helicopter when he crashed into the side of a mountain, his widow and children could have sued and recovered for their loss. But because Johnson devoted his life to serving in his country's Armed Forces, the Court today limits his family to a fraction of the recovery they might otherwise have received." Justice Scalia went on to say, "Feres was wrongly decided and heartily deserves the widespread, almost universal criticism it has received."

Other challenges/other families

There continue to be challenges to the Feres Doctrine today. In August 2002, Pfc. Jeremy Purcell was killed when a Marine sergeant shot him with live ammunition during a routine training exercise at Camp Pendleton, California. The sergeant received a one-year sentence in jail for **negligent homicide** and also received a bad-conduct discharge from the Marines. An investigation of the incident revealed problems with the way ammunition was handled during training exercises.

Purcell's parents are intent on holding the military accountable for their son's death. Jon Purcell, Jeremy's father and a 20-year Navy veteran who will represent himself, charges gross negligence and seeks a reversal of the Feres Doctrine. Purcell, according to an article in *Marine Corps Times*, believes " the finding of negligence removes the Marine Corps' protection under Feres."

Most recently, in February 2005, another Marine recruit at Parris Island, Jason Tharp, drowned during the combat water survival training phase of boot camp. The day before he died, footage of Tharp's drill instructor physically abusing him was shot by a local NBC affiliate. The footage was shown on the *Today Show* 10 days after his death. The drill instructor was suspended as a result of the incident along with four other Marines who had knowledge of the incident but did not report it. Pending further investigation by the Navy, John Tharp, Jason's father, is considering filing a wrongful death suit against the Marines.

Fighting for reform

Congressman Barney Frank of Massachusetts introduced legislation in the U.S. House of Representatives in 2001 that would amend the Feres Doctrine to allow military families to seek redress for medical malpractice, making military doctors accountable for their actions when not in wartime. Frank has introduced this legislation many times and the bill has always died in the U.S. Senate.

In October 2002, Senator Arlen Specter of Pennsylvania chaired hearings on the Feres Doctrine before the U.S. Senate Judiciary Committee. While many people who spoke at the hearings made impassioned pleas for abolishing or modifying the Feres Doctrine, Rear Admiral Chris Weaver defended it. In his testimony, Admiral Weaver said that the Feres Doctrine is important for maintaining good order and discipline in the military.

"Allowing service members to bring suits in federal court against their chain of command will interfere with mission accomplishment and adversely affect our operational readiness," Admiral Weaver said. "The military has long been recognized as a 'specialized community' requiring demands and responsibilities far different from its civilian counterpart. The impact of litigation on this specialized community would undermine trust not only among individual service members, but also their superiors and officers throughout the chain of command," he added.

James Smith, a Metuchen attorney and member of the NJSBA Military Law and Veterans' Affairs Committee, also believes that the Feres Doctrine should remain as is, noting that service people are provided with a generous disability pension similar to workers' compensation if they are injured.

Will the pending cases have an impact on overturning the Feres Doctrine? Detzky said it is hard to predict what the U.S. Supreme Court will do, but so far they have declined to revisit the Feres Doctrine.

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lawyer and brought to trial or he or she must be released. Because this was a question of the legality of their continued imprisonment, attorneys representing the prisoners and their families filed a petition with the U.S. Supreme Court for a writ of habeas corpus.

Origin of habeas corpus

What exactly does writ of habeas corpus mean? The British word writ is simply the shortened form of a written order from a court. The exact translation of habeas corpus is from Latin and means "you may have the body." When you apply that to the law, a writ of habeas corpus becomes a written order from a judge to bring "the body" of a prisoner into court.

Habeas corpus dates back to medieval England. Responding to the abuse of detainment without legal authority, the English Parliament created the Habeas Corpus Act of 1679, which granted persons the right to appear before a court. Although not often used today in British courts, the right to habeas corpus was written into the original U.S. Constitution and is recognized as one of our legal system's great protections against unfair imprisonment.

Most often, a petition or request for a writ of habeas corpus is made on behalf of two types of prisoners. Those prisoners tried in court, found guilty and sentenced who believe they have grounds to prove they were imprisoned illegally are one type.

The other consists of those, merely suspected of being criminals, who assert their imprisonment is illegal because they are being held without having been charged with a specific crime. This second group includes the Guantanamo Bay prisoners who are being detained, or held, as "enemy combatants." In order to be able to appear before a federal judge to challenge the legality of their imprisonment or detention these prisoners must petition the court for a writ of habeas corpus.

Once a writ of habeas corpus is granted, the argument before the judge is not whether the prisoner is guilty or innocent of a crime, but whether he or she is being held unlawfully. While every prisoner and detainee has the right to file a petition, a writ of habeas corpus is issued only in cases of the most convincing evidence of the wrongful denial of individual freedom.

The issue for the U.S. Supreme Court to decide in the case of the Guantanamo Bay prisoners is whether they are entitled to habeas corpus because of their status as "enemy combatants" who are not U.S. citizens. Another question at issue is whether the Guantanamo Bay Naval Base, where the detainees are being held, is covered by U.S. **jurisdiction**. Cuba leased the base to the U.S. in 1903.

The Justice Department's position

The U.S. Supreme Court heard the prisoners' claims in April 2004. Solicitor General Theodore Olson presented the case for the Justice Department and argued that the detentions were legal because "American soldiers... are still engaged in armed conflict overseas..." and that the on-going questioning of the foreign prisoners yielded important information about terrorist activities and possible future threats to this country.

After oral arguments were completed, David Rivkin, a former Justice Department attorney, stated in television interviews, "It's absolutely, clearly, constitutionally permissible, as a matter of international law, for an enemy combatant...

detained in the course of open hostilities, to be held... for the duration of the conflict. You want to make sure he doesn't go back and pick up arms against you," he said.

U.S. Supreme Court ruling

In June 2004, the U.S. Supreme Court handed down its ruling and, with a 6-3 decision, granted the Guantanamo Bay prisoners the right to petition for a writ of habeas corpus.

Justice Sandra Day O'Connor wrote in the majority opinion for the Court, "as critical as the government's interest may be in detaining those who actually pose an immediate threat to the national security of the United States during ongoing international conflict, history and common sense teach us that an unchecked system of detention carries the potential to become a means for oppression and abuse of others who do not represent that sort of threat."

The Court noted in its decision that the government had admitted in its oral arguments before the Court that if a U.S. citizen were being held at Guantanamo Bay, the habeas corpus statute would apply. "The habeas statute," the Court said, "does not discriminate between U.S. citizens and foreign nationals, therefore, a foreign national being held at Guantanamo has just as much right to invoke the habeas corpus statute as a citizen of the United States."

As for the question of jurisdiction over Guantanamo Bay, the Court concluded that the original agreement between Cuba and the U.S., dating back to 1903, granted the U.S. "complete jurisdiction and control" over the naval base, permanently if the U.S. so desires.

Three members of the Court, Chief Justice William Rehnquist and Justices Antonin Scalia and Clarence Thomas dissented or disagreed with the majority opinion. "This detention falls squarely within the federal government's war powers and we lack the expertise and capacity to second-guess that decision," Chief Justice Rehnquist wrote in his dissenting opinion.

Michael Ratner, president of the Center for Constitutional Rights, responded to the Court's ruling by saying, "This is a major victory for the rule of law and affirms the right of every person, citizen or non-citizen, detained by the United States to test the legality of his or her detention in a U.S. court."

The government's response

In response to the writ of habeas corpus granted by the U.S. Supreme Court, the government established a combatant status review tribunal (CSRT), a panel of three military officers to hear the prisoners' challenge to their imprisonment and defense of their innocence.

For their appearance before the tribunal, the nearly 600 Guantanamo detainees were each represented by a military officer assigned to defend them, but were not given access to a lawyer. At the hearings, the "enemy combatants" learned of the charges against them, were provided with an interpreter and were permitted to testify in their own defense. According to *The New York Times*, 33 of the prisoners were let go as a result of those hearings.

Jeffrey E. Fogel, legal director of the Center for Constitutional Rights, objected to the denial of personal lawyers at the hearings.

"Without access to a lawyer, the Supreme Court's decision would be meaningless. The right of habeas corpus has always included the right to legal assistance," Fogel said in a statement.

After nearly all of the detainees' cases had been heard by the CSRT, a federal judge ruled them invalid under U.S. and international law. The Hon. James Robertson, of the U.S. District Court for the District of Columbia, said the CSRT was not a "competent court" and its determinations would not be approved in any U.S. court.

As a result, the Pentagon created administrative review boards to hear all the cases again. Capt. Eric Kaniut of the U.S. Navy, and chief administrator of both sets of hearings, told *The New York Times* that the new administrative review board is "just like a parole board." Capt. Kaniut said, "The bottom line we look at is whether they are a threat to the U.S."

Although more than 100 of the detainees have been represented by American lawyers, according to *The New York Times*, the new hearings share one thing in common with the CSRT. The detainees are not permitted to see the evidence against them, in some cases because the U.S. government has labeled it classified information. For this reason, civil liberties and human rights groups claim the hearings violate the prisoners' **due process rights**, specifically the right to know your accuser and the right to review all the evidence against you.

According to the Navy, the second set of hearings should be completed by the end of 2005. It remains to be seen whether these hearings will also be challenged through the courts.

GLOSSARY

dissenting opinion — a statement written by a judge that disagrees with the opinion reached by the majority of his or her colleagues.

due process rights — basic rights of fairness against government actions which threaten a person's right to life, liberty or property.

immunity — exempt from penalty.

jurisdiction — authority to interpret or apply the law.

majority opinion — a statement written by a judge that reflects the opinion reached by the majority of his or her colleagues.

negligence — the failure to use the care that a reasonable person would use.

negligent homicide — a criminal offense where a person's negligence caused the death of another.

redress — satisfaction, in the form of compensation or punishment, for an injury or wrong doing.

secular — not sacred or concerned with religion.