



Habeas Corpus

by John D. Whitaker

I remember an old Dan Hicks And The Hot Licks tune which was titled "How Can I Miss You If You Won't Go Away?" I have a feeling that the people who are cheering the suspension of Habeas Corpus in this country may feel this way. As Americans we have a tendency to take a lot of the freedom we enjoy for granted. It is almost incomprehensible to think that in this country we could be arrested and held by the government indefinitely without any right to a hearing to determine if the detention was lawful. The reason this is incomprehensible is because it is also probably unconstitutional.

Let's start by defining what Habeas Corpus is. Habeas Corpus is an age-old procedure whereby a person being restrained by the government can ask a court to evaluate the lawfulness of the confinement. The term "habeas corpus" is a Latin term that literally means "deliver the body." If after considering the government evidence and arguments the court determines that the confinement is unlawful, it has the power to order that the person be immediately released.

The concept of creating a barrier to arbitrary arrest dates back to the Magna Carta in 1215. The framers of the American Constitution thought the right so important that it was included in our Constitution. The United States Constitution Article 1 Section 9 expressly provides: "The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it." In October of this year President Bush signed the Military Commissions Act of 2006 which gives the President or Secretary of Defense acting through military commissions the power to deny people suspected of terrorist acts the right to use the Geneva Convention to challenge their confinement. Supporters of this new law argue that it does not apply to American Citizens, and therefore it is a necessary and lawful procedure to protect the country. Critics argue that some of the language in the Act is not restricted to aliens, and that it



therefore allows American citizens to be denied the right of Habeas Corpus.

The Act was passed in response to Hamdan v. Rumsfeld, a recent United States Supreme Court decision which held that the military did not have authority to try the detainees held in Guantanamo by using military commissions. The Court decided that the Uniform Code of Military Justice and the Geneva Conventions did not permit such trials.

Suspension of this right has occurred before. Probably the most famous instance was when President Lincoln suspended the right of Habeas Corpus during the civil war. Shortly after the at-

tack on Fort Sumpter dozens of prominent secessionists in Maryland were arrested and the President succeeded their right to file habeas petitions to challenge their arrests and confinement. They filed the case in a Federal District Court in Maryland and Chief Justice Roger Taney ruled that only Congress, not the President, had the authority to suspend the right. President Lincoln ignored the Court's order and thousands of people were arrested and held without charges during the war. According to Presidential Historian Geoffrey Perret in his book "Lincoln's War," President Lincoln delegated the authority to Secretary of State William Seward to decide who was to be arrested and held. Apparently, Secretary Seward enjoyed this power and it was said that he boasted to Lord Lyons, the British Ambassador, "I have a little bell on my desk. I need only to touch that bell and any citizen from New York to Ohio may be arrested and held for as long as I wish. Can the Queen of England do as much my lord?"

Terrorism has made us all a little paranoid, and justifiably so, but I can't help thinking that the ends do not justify the means on this issue. The presumption of innocence and right to confront and cross examine witnesses against us in a fair hearing are rights the United States Constitution refers to as the "blessing[s] of liberty. Too many people have died defending these blessings for us to be scared out of them by some fanatical murderous coward like Osama bin Laden.

The Wyoming State Bar does not certify any lawyer as a specialist or expert. Anyone considering a lawyer should independently investigate the lawyer's credentials and ability, and not rely upon advertisements or self-proclaimed expertise. This informative column is brought to you by John Whitaker who practices personal injury and criminal law throughout Wyoming. He can be reached at JDWTL@aol.com or by calling his office in Casper at 265-6204.