Justice Talking
Radio Transcript

Writ of Habeas Corpus in Wartime—Air Date: 4/24/06

In late March, the Supreme Court heard arguments in Hamdan v. Rumsfeld, in which Salim Ahmed Hamdan, a Yemeni national detained at Guantanamo Bay, challenged the fairness and legitimacy of the military commissions set up by President Bush after 9/11. On this edition of Justice Talking, we'll look at the larger questions raised by this case, including the ability of Congress to suspend the writ of habeas corpus during wartime. Can Congress deny prisoners the right to challenge their detentions as unlawful in federal court?

MARGOT ADLER: I'm Margot Adler. On today's show, the rights of detainees held at Guantanamo Bay. Do they and should they have the same rights as U.S. citizens? An important case currently before the Supreme Court could change the way our government is prosecuting the war on terrorism.

UNIDENTIFIED MALE: …the president, and not Congress, defining the content of the law, the criminal law, under which a person will be tried. Isn't there a separation of powers problem there?

UNIDENTIFIED MALE: I sure hope not Justice Brier, because that's been the tradition for over 200 years.

UNIDENTIFIED MALE: The writ is the writ. There are not two writs of habeas corpus for some cases and for other cases.

UNIDENTIFIED MALE: And so what the framers of the Geneva Convention recognize, is that they were dealing with a group of people that were uniquely vulnerable. So they went to great pains to make sure there were mechanisms to enforce their rights.

MARGOT ADLER: More on the Supreme Court case Hamdan vs. Rumsfeld after the news.

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MARGOT ADLER: This is Justice Talking. I'm Margot Adler. Salim Ahmed Hamdan, a man from Yemen, has been in the news a lot lately. He is challenging the military tribunal set up by the Bush administration. The challenge has made it all the way to the Supreme Court, and may be one of the most important cases being heard by the Court this term. The case is Hamdan vs. Rumsfeld, and it brings up major issues about the power of the president, the ability of the courts to hear cases from Guantanamo detainees, and whether enemy combatants have the right to challenge their detentions through habeas corpus petitions. The Hamdan case and the issues surrounding it are complex, so on today's Justice Talking, we're going to deconstruct the significant Supreme Court case, and we'll tell you what's at stake. Then we'll wrap up the show with a conversation about whether Justice Antonin Scalia should recuse himself from this case as some are suggesting.

The arguments in Hamdan vs. Rumsfeld were heard in late March. Before we get into our debate about the issues that the case raises, I wanted to talk with someone who had heard the case argued at the Supreme Court and can give us a first-hand account of what happened there. So I called Lyle Denniston. Lyle is a reporter for SCOTUSblog, a Web log about the Supreme Court. Lyle, first off, tell us who Salim Ahmed Hamdan is.

LYLE DENNISTON: Well, Salim Ahmed Hamdan is a Yemeni national, and was captured by Afghani militiamen in Afghanistan in 2001, not very long after the terrorist attacks and after the U.S. began responding with an attack on Afghanistan.

MARGOT ADLER: And is he classified as an enemy combatant?

LYLE DENNISTON: Well, he was originally classified as a terrorist subject to military commission. When the president in July of 2003 found him to be a part of Al Qaeda, which set him up for a military tribunal, he then was charged with war crimes, and basically it's a conspiracy to engage in hostile acts against the United States. Up to that point he had never been designated an enemy combatant. However, after the Supreme Court's decision in 2004, the military set up a system of different kinds of tribunals at Guantanamo to review the status of the prisoners there. And it was at that point that what's called a combat status review tribunal, determined that he was, in fact, an enemy combatant. So he's both an enemy combatant and he is a defendant in a military commission or a military tribunal war crimes proceeding.

MARGOT ADLER: Now, now you mentioned 2004. Is that the Supreme Court case on Rasul vs. Bush?

LYLE DENNISTON: Yes. There were actually two decisions that year, one that affected people like Hamdan who are foreign nationals. And in that decision the Supreme Court said that foreign nationals being held in the Cuba base are entitled to file in federal court, in Washington, a challenge to their detention. The Court did not specify at that point what kind of ultimate remedy they could get for their capture and detention, but did say that they had a right to challenge it. And that's what Hamdan has been doing.

MARGOT ADLER: So he filed a petition for writ of habeas corpus in Federal District Court. Why don't you tell us what Hamdan's case is really about?

LYLE DENNISTON: Well, Hamdan's case is basically a challenge to President Bush's authority to set up these war crimes tribunals or, as they are formerly called, military commissions. Hamdan claims that the president does not have the power under the U.S. Constitution to set up these commissions at all. He claims that Congress has not authorized the president to do so, and he claims that the commission, as it is presently constituted, is not just a violation of the American Constitution, but also a violation of the laws of war, the kind of generalized legal concepts that govern combat and war operations. And he claims that his detention and his impending trial before a military commission would violate the Geneva Convention, a 1949 treaty that deals with the rights of prisoners of war.

MARGOT ADLER: Now, I know that the District Court initially granted Hamdan's habeas petition. Then the Circuit Court of Appeals reversed that. So how did Hamdan's case get to the Supreme Court?

LYLE DENNISTON: Well, actually, it's been to the Supreme Court twice. Now, I mean, it's there as a second trip. After the District Court ruled in his favor, Hamdan then asked the Supreme Court to get involved immediately and take the case before it went through the Circuit Court. The Supreme Court refused to do that. So it then went ahead and his case appeared before a three-judge panel of the D.C. Circuit Court in Washington. And that court ruled, by a unanimous vote on almost all points, not all, that the president did have the authority to create these commissions, that Hamdan did not have any right to bring a challenge under the Geneva Convention because he's not a prisoner of war. And in any event, the president has decided that the Geneva Convention does not apply to members of Al Qaeda. Interestingly, a member of that panel was Circuit Judge John G. Roberts, Jr. who, of course, has since been elevated to become the chief justice of the United States. And as a consequence of his having sat on the lower court, he has disqualified himself from participating in the case now as it awaits a decision from the Supreme Court.

MARGOT ADLER: Lyle, you were at the Supreme Court to hear the arguments in the Hamdan case. How did the justices react?

LYLE DENNISTON: Well, there were very strong reactions from some of the more liberal members of the Court. But all of us were keeping our eyes primarily on Justice Anthony

Kennedy because with an eight person court, Kennedy is probably the only one who's going to make a difference between whether the Court is split 4-4 or whether it goes 5-3 in one direction or the other. So Kennedy is in a position to cast what clearly would be the decisive vote here. And Kennedy was very troubled by the government's argument that Hamdan should not even be able to challenge the make-up of the tribunal until after he had gone through the proceedings and been convicted.

MARGOT ADLER: Thank you so much for talking with me today.

LYLE DENNISTON: Thanks, Margot.

MARGOT ADLER: Lyle Denniston is a reporter for SCOTUSblog and WBUR in Boston.

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MARGOT ADLER: We've just heard about the Supreme Court case Hamdan vs. Rumsfeld. One of the issues raised by this case involves the constitutional right to file a writ of habeas corpus. Jonathan Hafetz joins me now to help explain what habeas corpus is and why it matters. He is a lawyer at the Brennan Center for Justice at New York University School of Law. He's written extensively about this constitutional protection. Jonathan, what is the writ of habeas corpus?

JONATHAN HAFETZ: The writ of habeas corpus is an ancient writ that goes back centuries, really to the 1300s. Habeas corpus is a Latin word meaning "you have the body." And what the writ is, in it's more modern formulation, is a command that when an individual is in detention being held by the government, that he has to be brought to court and there has to be a basis given to a judge for holding him.

MARGOT ADLER: And so did the idea for habeas corpus come from English law, the Magna Carta?

JONATHAN HAFETZ: It stems all the way back to the Magna Carta, and then it evolved over the centuries to become the foremost protection of liberty in the Anglo-American system. The writ took on its form as the great safeguard of individual liberty over 300 years ago in a very famous case called Darnell's case, in the early 1600s, when the king imprisoned five individuals who he believed were aligned with the enemy. They refused to contribute to his military campaign. And what the king did was to essentially imprison them in the tower without giving them a trial and without allowing them to come before a court. And they sued out for writs of habeas corpus, demanding that they be brought before English judges, and that a basis be given for their detention, and the judges determine whether that detention and imprisonment was lawful or not.

MARGOT ADLER: Now how are habeas corpus petitions generally used in our judicial system?

JONATHAN HAFETZ: Until recent times, and particularly until September 11, the writ was more commonly known in its sort of more modern formulation, where individuals who had been convicted of crimes would use the writ to challenge the conviction. This was, for example, used in the South during, you know, struggles for civil rights, where individuals might be appealing convictions that were obtained based on coerced evidence, or there was improper influence or racism among the jury. But these were people who had trials and they sued out writs of habeas corpus, saying my trial wasn't fair. What happened after September 11 is that you have a return to this core notion of habeas corpus. That is, the core notion that goes back to the 1600's that I mentioned earlier, where the individuals are being detained by the executive without a trial. We see this in the cases of the Guantanamo detainees. We also see it, for example, in the case of Jose Padilla, where the executive is holding people without giving them a trial. So it really stretches back centuries to this core notion of habeas corpus and the right of a court to inquire into the basis for the executive's confinement of an individual.

MARGOT ADLER: Now Article I, Section 9 of the U.S. Constitution says "the privilege of the writ of habeas corpus shall not be suspending unless when in cases of rebellion or invasion, the public safety may require it." Now, this raises two questions. First of all, who has the power to suspend habeas corpus? The president? Congress?

JONATHAN HAFETZ: Congress can only suspend the writ of habeas corpus, as the suspension clause that you just read states, in time of rebellion or invasion, where the public safety may require it. Habeas corpus has been suspended only four times in the history of the United States.

MARGOT ADLER: And in this phrase, rebellion or invasion, has the Supreme Court defined what that means?

JONATHAN HAFETZ: The Supreme Court has never defined the terms under which the writ may be suspended. The text of the suspension clause and the 100 years of history of the writ, shows that it's a power that's done very sparingly, that it's done only in time of true emergency, when the civilian courts are not able to provide the inquiry into a person's confinement, when it's essentially a time of grave necessity in the ordinary processes that we rely on for the rule of law are not working.

MARGOT ADLER: Jonathan, thank you so much for talking with me today.

JONATHAN HAFETZ: Thank you for having me on the show.

MARGOT ADLER: Jonathan Hafetz is a lawyer at the Brennan Center for Justice at New York University's School of Law. Coming up, a former military prosecutor and a lawyer who filed a brief in support of Hamdan, debate the issues raised by the case. Don't go away.

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MARGOT ADLER: This is Justice Talking. I'm Margot Adler. On today's show we are looking at some of the issues raised by Hamdan vs. Rumsfeld, a case being considered by the Supreme Court. We'll talk about the various implications of this case, from the limits on executive power to the rights of detainees at Guantanamo Bay. Joining me to debate these issues are Jack Einwechter and Peter Rubin. Jack Einwechter is a retired Army lieutenant colonel and a former military prosecutor. He is now a lawyer in private practice in Washington, D.C. Peter Rubin is a law professor at Georgetown University who specializes in constitutional law. He wrote a brief in support of Hamdan. Let's get right to it. What's at stake in the Hamdan case? Jack?

JACK EINWECHTER: Well, I think, you know, the issues have been thoroughly briefed before the Supreme Court, but the primary issue is whether the president has legislative authority to convene and conduct military war crimes trials before the military commissions, and also whether the Geneva Conventions constrain that power in any way.

MARGOT ADLER: Peter, what would you say is at stake?

PETER RUBIN: Well, I think Jack has it basically right, but I think it's a broader and deeper issue than that. I think the real question here is whether the president has unconstrained authority to go around traditional separation of powers principles that were so important to the founders of our country and the framers of the Constitution. Whether he's able to set up a so-called justice system for trying people for war crimes where there is no review by independent neutral judges ultimately of the vertex of these cases, at least with respect to certain important issues that may apply to these prosecutions, and whether he needs to comply with all of the traditional American principles of justice that have guided American civil and military justice over our history. So I think it's a profoundly important question and it's part of a latticework of questions about executive authority that this administration has really put at the forefront in the war on terror.

MARGOT ADLER: Just so we're on the same page, help us with some definitions. Jack, what's a military commission and who has the power to set them up?

JACK EINWECHTER: The Supreme Court in Madsen v. Kinsella in 1952 called military commissions our common law war courts. And American military law has always recognized the place of military commissions as the appropriate form for the trial of war crimes and to have, since 1916, concurrent jurisdiction over those kinds of cases with general court marshal. So they are one forum that is established by law in the Uniform Code of Military Justice, and other federal statutes. And they have a deep tradition in American law and American military law. They are part now of the president's war policy in the global war on terror, and his chosen forum for…as a way to hold accountable members of Al Qaeda and the Taliban who have violated the laws of war.

MARGOT ADLER: So it's the president who has the power?

JACK EINWECHTER: Yes, under the Uniform Code of Military Justice enacted in 1950, Congress continued a statutory policy of recognizing the president's power to conduct

military commissions as a way to hold war crimes trials. And Article 21 of the UCMJ expressly recognizes that. The Supreme Court called Article 21 both sanction and approval for the president's power to conduct war crimes trials through military commissions.

MARGOT ADLER: Now Peter, how is being tried by a military commission different than being tried under the Uniform Code of Military Justice, what we just said was UCMJ.

PETER RUBIN: Well that's a great question. Jack is right that military commissions have been used at various times throughout American history. But these military commissions set up by the Bush administration are not authorized by the Uniform Code of Military Justice and, in fact, are set up in a way that is at dramatic variance with those that we've had in the past. Under the Uniform Code of Military Justice, it's true that there can be military commissions set up. It seems as though Congress has authorized that in some circumstances. In the past, and traditionally, military commissions have had to follow the essential procedural formula also used by general courts marshal, which as Jack explained, have concurrent jurisdiction over these same kinds of crimes or offenses against the laws of war. But what the president has done here is that he has set up military commissions that don't follow the basic precepts under which courts marshal have to operate, that can frequently exclude the defendant, for example, from his own trial, from seeing the evidence against him, which is contrary to the way in which the Uniform Code of Military Justice says that courts marshal have to operate. He has eliminated any federal court review, civilian court review, of the determinations of these commissions. So he's put in his hands these military commissions, the power to be prosecutor, law giver, prosecutor and judge, in a way that is contrary to American principles of separation of powers that are designed themselves to protect the liberty of individuals and to ensure that justice is done.

MARGOT ADLER: Now I'd love Jack to respond to that argument because I've always thought that the Uniform Code of Military Justice gives the people being tried an enormous number of rights. What about that Jack?

JACK EINWECHTER: Well, that's true that it does. And since its enactment in 1950 it has moved more and more in the direction of civilians' courts and the way they operate. But to respond to Peter, I think it's important to recognize that those who are interested could examine the rules for military commissions, which are openly published on DOD websites, and they would find that there are more similarities than differences between military commissions and courts marshal. It's also not true, as Peter asserted, that military commissions are in any way required to follow the rules of court marshal. There is nothing in the statute that requires that, and traditionally it's been recognized that the president should have the flexibility to adapt rules of jurisdiction and procedure and evidence to the circumstances. And the Supreme Court said that neither the jurisdiction nor the rules of procedure of military commissions are prescribed by statute, and that's because Congress chose not to prescribe them for military commissions. They have intensively regulated courts marshal, of course, and the UCMJ, but in Article 21 and

Article 36, which authorized military commissions, the president is given wide latitude and discretion.

MARGOT ADLER: And what about Peter's argument that the defendant doesn't have the right to see evidence that's presented against him?

JACK EINWECHTER: The rules state that the accused will have access to evidence presented against him except in circumstances where national security precludes that. But in such cases, which in my experience at the commissions will be relatively few and narrow, the accused military defense counsel and his civilian counsel, if he has the proper security clearance, will have access to that evidence, will be able to cross examine witnesses presenting such evidence, and will be able to present rebuttal evidence. Remember that these are war courts in the course of an ongoing war, and that imposes certain common sense national security concerns and considerations that ordinarily don't attend the prosecution of the regular common law crimes and courts marshal or federal courts.

MARGOT ADLER: Peter, how does being tried by a military commission differ from being tried in a federal court?

PETER RUBIN: Well, there are enormous differences, and I think Jack's answer, that there are more similarities than differences between, even between military commissions and courts marshal, really points up how important the differences that there are between these military commissions and even courts marshal, never mind federal courts, are. You've asked about the different between this and a regular federal criminal trial, and recently we've seen a federal criminal trial of a terrorist, Zacarias Moussaoui, who is more clearly an Al Qaeda operative than anyone we've heard about in Guantanamo Bay, and he's had all the protections of the criminal process. And that process seems to be working in a manner that is both consistent with American norms of justice and that doesn't prevent the government from, in fact, going so far as to seek to have him put to death for his crimes.

MARGOT ADLER: So let me ask Jack at this point, given what you said about Moussaoui, why shouldn't the Guantanamo detainees have the same constitutional protections as criminal defendants in the United States?

PETER RUBIN: Well, it's well established in law that alien enemy combatants captured and detained outside the United States can't claim constitutional protections in the United States. The law doesn't support the proposition is the short answer. Even prior to the Detainee Treatment Act, no prosecutor at the military commissions would introduce evidence derived from torture. Why? Because evidence derived from torture, coercion, is inherently unreliable evidence, and the first question that we would always ask when building a case was, if there is a statement involved, how was it derived, who obtained it, what were the circumstances. If there's a question and, let face it, it's not always a bright line, what may be coercion in one persons' eyes might not be coercion in others, the defense will be free, of course, to make the case before the commission that the statement

presented was derived under circumstances that amounted to coercion and was not reliable.

JACK EINWECHTER: The information that is used in these proceedings may come from foreign intelligence services, we don't know where it all comes from. And the detainee isn't entitled to see it. In addition, the rules that are in place are not binding rules at all. They are an ever changing kaleidoscope of rules that have changed even in the middle of, just to take the Hamdan case, even in the middle of his case. And the rules themselves say they are not enforceable and don't create any rights. So the question that you asked, Margot, at the beginning I think is the great one. Why does the administration need to use this system that is inconsistent with traditional notions of justice and due process. Why do they need to use this when, first of all, there are courts marshal available if they want to use military justice, and second of all, they have tried other terrorist suspects like Zacharias Moussaoui in the criminal courts. Why not comply with the traditional norms of military commissions, have civilian review, have the defendant be present, have rules that are binding and can't be changed in the middle if you don't like how things are coming out. And I think most people can understand why that's not a just system.

PETER RUBIN: Right. Congress set it up in the UCMJ and we, of course, have always had military commissions. The why is because it's always been believed to be appropriate to try war crimes in special war crimes tribunals. And the reason is because of the nature of the evidence. Some of these, most of these cases could not be tried under the regular rules of evidence because the nature of the evidence would not allow admissibility. It's that simple.

MARGOT ADLER: Peter, what rights does the Geneva Convention afford in this, and are the Guantanamo detainees protected in any way by the Geneva Conventions?

PETER RUBIN: Well, this is a terrific question, Margot, because military commissions operate under the laws of war. And the government has itself conceded that the Geneva Conventions are now part of the law of war. In this case, just to take the Hamdan case, he asserts that he is, in fact, a prisoner of war. He was captured, apparently, although he was captured by a third party force in Afghanistan and turned over to the American Army, so he was captured apparently in an area of conflict in Afghanistan. And he argues that he is entitled to treatment as a prisoner of war. Again, here the administration has failed to follow the basic precepts of the Geneva Conventions that have been applied in every war since it was adopted, including the Vietnam and Gulf War, and have not given him what's called an Article 5 hearing to determine his prisoner of war status. And so what we have here is another kind of playing fast and loose with the law where they say, well, they're being tried under the laws of war, but somehow we aren't bound by the laws of war in determining whether they can be tried in this way, and before they can be tried by military commission, that's a determination that would have to be made. If he is entitled to POW status, he can be tried for war crimes, but he has to be tried by the same authority under which we try our own soldiers, which is to say courts marshal.

MARGOT ADLER: So, Jack, are we in a war, not in a war? And if we're in a war, do the Geneva Conventions apply? If we are, why not?

JACK EINWECHTER: We're very clearly in a war. We're in a global war of terror. Congress has authorized the president to use all appropriate and necessary force against nations, organizations and persons who perpetrated 911, or aided and abetted. And we are, indeed, in a war. But the entire structure of the law of war is designed to create incentives to engage in lawful combat and to hold people responsible under the law when they don't engage in lawful combat. Therefore, the Geneva Conventions draws distinctions between lawful and unlawful combatants. And the principle consequence of being an unlawful combatant is that you don't qualify as a prisoner of war. To qualify as a prisoner of war and lay claim to the full panoply of rights that prisoners of war have under the Geneva Conventions, one must meet certain criteria. And those are contained in the Geneva Conventions themselves. Critics of the administration want the Geneva Conventions to do things that the Conventions themselves don't offer. And that is to extend protections of prisoner of war status to every single person regardless of their status or the way that they entered the conflict. So, you know, Hamdan wants to claim prisoner of war status and the question is, okay, but does he meet the criteria set forth in Geneva?

MARGOT ADLER: Jack, do you believe there is any limit to what the president can do in this situation?

JACK EINWECHTER: Well, in what situation?

MARGOT ADLER: Well, as far as, you know, clearly some of the president's critics are saying that in the situation in the war on terror that he's, in some cases, you know, abusing executive authority, going against the system of checks and balances…

JACK EINWECHTER: Yeah, okay, I understand. And the question answers itself. Can the president engage in the abuse of power or the violation of separation of powers principles. Well, obviously no, he can't. There are limits to presidential power. They're established by Congress. In this case, Congress has expressly authorized him to conduct military commission in Article 21 and 36 of the UCMJ, in the authorizations for use of military force and in the Detainee Treatment Act of 2005. So it's idle, it's almost frivolous, really, to say that the president doesn't have congressional authorization to conduct military commissions. Indeed, the unanimous appeals court decision in the case of Hamdan, which ruled against Hamdan on every point, said it's impossible to see how one could assert that the president lacks legislative power to conduct military commissions here. Now if Congress wants to legislate in this area, they certainly can. They have the power under Article I. And the way that they have chosen to approach this, historically, is to give the president the latitude to fashion military commissions in a way that are adapted to the circumstances of the war.

MARGOT ADLER: Coming up, more of our debate with Jack Einwechter and Peter Rubin. They don't disagree about everything, but they strongly disagree about whether Congress

has, in fact, suspended the writ of habeas corpus for Guantanamo detainees. Also, should Supreme Court Justice Antonin Scalia recuse himself from this case?

UNIDENTIFIED MALE: I absolutely do believe that he ought to recuse himself.

UNIDENTIFIED MALE: I had a son on that battlefield and they were shooting at my son. And I am not about to give this man, who was captured in a war, a full jury trial. I mean, it's crazy.

UNIDENTIFIED MALE: Your job is to take all the sides of the argument seriously, rather than saying before you've even heard the arguments. I think that's crazy.

MARGOT ADLER: Don't go away.

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MARGOT ADLER: This is Justice Talking. I'm Margot Adler. On today's show: the writ of habeas corpus in wartime. Can Congress suspend the guaranty of liberty? So far we've tackled the concerns over the separation of powers, military commissions set up by the president, and whether the Geneva Conventions apply in the war on terrorism. Peter Rubin and Jack Einwechter are with me to talk about these and other issues raised by the Supreme Court case Hamdan vs. Rumsfeld. Peter Rubin is a law professor at Georgetown University who specializes in constitutional law. Jack Einwechter is a retired Army lieutenant colonel, and a former military prosecutor. Let's get back to the debate. The Detainee Treatment Act, or DTA, was passed at the end of 2005. The Act strips the federal courts of their ability to hear habeas corpus petitions from detainees at Guantanamo. First of all, does this Act suspend habeas corpus? Peter?

PETER RUBIN: Well that's a great question, and the Supreme Court in the oral argument in Hamdan spent a lot of time on it. If it is read as the government would have it be read, to completely eliminate the possibility of any federal court hearing any habeas petition of any claim brought by anyone who is detained in Guantanamo, then, yes, it would seem to suspend the writ of habeas corpus. The problem with that is that that would be unlawful. Congress clearly has the power to suspend the writ of habeas corpus in times of rebellion or invasion of the United States, in order to protect the public safety. It's only done this four times in its history. It is one of the gravest acts, suspending the great writ, that Congress can undertake. And the circumstances that are necessary before it can be taken, which is rebellion or invasion, and to protect the public safety, are simply not present here, four, five years after these people were captured in Afghanistan, when the civilian courts of the United States are open and functioning.

MARGOT ADLER: Jack, do you think that Congress has the right to suspend the writ of habeas corpus during the war on terror? Can you read rebellion and invasion that way?

JACK EINWECHTER: Well, I think you have to look at how the Detainee Treatment Act is applied. It doesn't suspend the writ of habeas corpus in the United States for U.S.

citizens in any way. It regulates how and when foreign enemy combatants can have access to U.S. courts to challenge, first of all their detention, and secondly their conviction by military commission. This Act does give them access to the courts, but it requires first that they have what's called a combatant status review tribunal on the issue of their detention, which far exceeds anything required by Geneva Conventions under Article 5 of the Geneva Conventions.

MARGOT ADLER: So I just want to be clear. Jack, you're saying that the Detainee Treatment Act does not suspend habeas corpus?

JACK EINWECHTER: No. The question in Hamdan was whether or not it deprived Hamdan of habeas corpus at this point in the proceedings. There is no question that should he be convicted at a military commission that's subsequent to that, and after his conviction became final through the review process provided in the rules, that in that case, then he would be able to challenge that in the Federal District Court in the District of Columbia.

PETER RUBIN: There is a judicial review part of the Detainee Treatment Act. There is certain limited review permissible on certain questions of convictions before a military commission…

MARGOT ADLER: So, let me just be clear here. Do you think that the Detainee Treatment Act applies to Hamdan, first of all, or only to future cases? And what, in fact, does it do to the Hamdan case?

PETER RUBIN: I think it's quite clear from the text of the DTA that it applies not to pending cases, but only to later filed ones, and that it therefore doesn't affect the Hamdan case. And that is because there is one provision that talks about, which says it shall apply to pending cases of a certain kind. And then there's the regular provision which says it shall come into force on the day it's enacted. The government has argued that that day of enactment means that it immediately strips all federal courts of the power to continue hearing cases that are before them. That's one of the questions in the Hamdan case that the Supreme Court will have to decide. And in the lower courts that question is also pending. I think that even if it were ambiguous, there are certain rules that courts have to follow about avoiding grievous constitutional questions, like whether this is an appropriate suspension of the writ of habeas corpus, that will likely push courts, and at least the Supreme Court in Hamdan, to say no, this doesn't apply to Hamdan's own case.

MARGOT ADLER: Jack?

JACK EINWECHTER: Remember, I'm not an administration spokesman here and, you know, my view of the DTA is that I tend to agree with Peter, that it should not be construed to strip the Supreme Court of jurisdiction in Hamdan. You know, that's my view based on general principles and I certainly hope that the Supreme Court reaches the merits in Hamdan. You know, you've got to remember the class of people we're dealing with here. These are people who can not lay claim to the constitutional right of habeas corpus. But as a general matter, enemy combatants captured on foreign battle fields do not have a

constitutional right to habeas corpus in federal courts. And the Court held so in Johnson v. Eisentrager. And in Rasul, they didn't overrule Johnson. They distinguished it and said look, as a matter of statute, we think it has to be extended at least to Guantanamo. What Congress did then is come in and say okay, we're dealing with a class of people who don't have a constitutional right to habeas corpus claims in courts, but yet we want to define the manner in which they will obtain juridical review and should obtain judicial review. And, of course, Congress has the power to define the jurisdiction of the federal courts. And what they've done is actually grant a class of potential petitioners here the right to judicial review from combatant status review tribunals and military commissions which they would otherwise not have, except in the narrow circumstances of Rasul.

MARGOT ADLER: This is Justice Talking. I'm Margot Adler. I've been talking about the controversial issues raised by the Supreme Court case Hamdan vs. Rumsfeld with Peter Rubin and Jack Einwechter. Peter, Jack, thank you both for joining me today.

PETER RUBIN: Thank you.

JACK EINWECHTER: Thank you.

MARGOT ADLER: Peter Rubin is a law professor at Georgetown University who specializes in constitutional law. He wrote a brief in support of Hamdan. Jack Einwechter is a retired Army lieutenant colonel and former military prosecutor. He is now a lawyer in private practice in Washington, D.C.

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MARGOT ADLER: The Supreme Court will make a decision in the Hamdan vs. Rumsfeld case in the next couple of months. It was mentioned earlier in the show that Chief Justice John Roberts recused himself from hearing the case because he was a judge on a lower court of appeals and ruled on the case there. In an interesting turn of events, some are now calling for Justice Antonin Scalia to recuse himself, but for very different reasons. David Luban joins me to talk about whether Justice Scalia should recuse himself from the case. David is a professor at Georgetown University. He is currently a visiting professor at Stanford University and has written about legal ethics.

On March 8, Justice Antonin Scalia spoke to an audience at a university in Switzerland where he made these statements.

JUSTICE ANTONIN SCALIA: But, listen. The Guantanamo phenomenon, I am astounded at the world reaction to Guantanamo. We are in a war. We are capturing these people on the battlefield. We never gave a trial in civil courts to people captured in war. We captured a lot of Germans during World War II and they were brought, not to Guantanamo, but to the soil of the United States. We didn't give them a trial to let them prove that actually I wasn't, you know, I wasn't in the German army. I mean, war is war, and it has never been the case that when you capture a combatant you have to give them a jury trial in your civil courts. It's a crazy idea to me.

I'm answering as, describing the reality and saying, in light of that reality, I am astounded at the, I would say, hypocritical reaction in Europe. As though the Europeans always gave trials to people that they captured on the battlefield. I mean, give me a break.

I had a son on that battlefield and they were shooting at my son. And I am not about to give this man, who was captured in a war, a full jury trial. I mean, it's crazy.

MARGOT ADLER: David, what's your reaction to Scalia's statements? Do you think that Justice Scalia should recuse himself based on his comments?

DAVID LUBAN: I absolutely do believe that he ought to recuse himself. First of all, it shows that he's really personalized this. I had a son on that battlefield; they're shooting at my son and I'm not going to give this man a full jury trial. So that already is showing lack of partiality. And then when Justice Scalia twice says that the position is crazy, the position that the person who's captured gets a jury trial, well, just a couple of weeks later he is hearing arguments in Hamdan vs. Rumsfeld which is raising exactly the issue about what kind of trial rights people in Guantanamo have, when he says two weeks earlier that's crazy. To me, crazy means I don't think this is a position that can even be taken seriously.

MARGOT ADLER: What are the guidelines, when it comes to whether a justice should recuse him or herself from a case?

DAVID LUBAN: Well, the basic statute is that the judge is supposed to disqualify himself if his impartiality might reasonably be questioned. And there are a bunch of situations in which the judge should obviously and unquestionably recuse himself. You know, a family member is one of the lawyers in the case or is a litigant, or the judge might lose money depending on who wins.

MARGOT ADLER: Now, you talk about guidelines, you talk about even a federal statute. Justice Scalia continues to take part in the Hamdan case. He so far has made no public comments in response to the calls for his recusal. So who decides or enforces these ethical issues when it comes to the Supreme Court?

DAVID LUBAN: The justice himself. Nobody is higher. So he is the ultimate umpire. The customary form for asking a Supreme Court justice to recuse himself or herself is a letter to that justice, because that recognizes that there is no higher court. And the other justices don't really have a say in it either because they are co-equal to that justice. So it's really a letter to Justice Scalia, and that's about it. Nobody else can tell him whether to recuse himself. And in the past, in some cases, he has recused himself, in other cases he hasn't.

MARGOT ADLER: Now, he did recuse himself in one involving the pledge of allegiance, correct?

DAVID LUBAN: That's right.

MARGOT ADLER: And he did not in regard to Vice President Cheney after he had gone duck hunting with him, correct?

DAVID LUBAN: Yeah, and that was very interesting because in that one he issued a very eloquent opinion not only about why he did not have to recuse himself because he had gone duck hunting with the vice president, but that it would really be a default of his duty as a justice to not hear the case because in a lower court, a court of appeals, they could bring in another judge, but you can't bring in another justice. And I thought that was a completely plausible argument whether you agree with his reasons for not recusing himself or not. His reasons were basically the fact that I went duck hunting with him with a bunch of other people where we didn't discuss the case in no way predisposes me toward ruling in his favor. He's being sued as an official and, of course, high level officials of governments rub elbows with each other all the time.

The other case, the pledge of allegiance case, was more similar to this one. He had made a speech. It was a speech in front of a friendly audience, as I understand it. It was something in which he was talking about the pledge of allegiance case that was come up from the Court of Appeals, was going before the Supreme Court and he criticized the Court of Appeals case. And there he recused himself. He didn't issue a statement about why, but everybody knew why. It was because he realized that, you know, for a minute he had gotten the tongue bone disconnected from the judge bone and said something that showed that he had a predisposition on the case. And it seems to me that that is what he showed at the speech in Switzerland.

MARGOT ADLER: Earlier this year Justice Scalia skipped Chief Justice John Roberts swearing-in ceremony for a trip sponsored by the Federalist Society. Is it appropriate for a justice to align himself or herself with either a conservative or a liberal organization?

DAVID LUBAN: Well, the Justice shouldn't align themselves with an organization that is going to do something like intervene in cases that come before the Court. But, the Federalist Society is a pretty broad tent. It's conservative. Justice Scalia is conservative. That's not a secret. He was in the Federalist Society before he was a judge. And the Federalist Society is a group that's famous for inviting speakers who give all different points of view. I mean, that one doesn't trouble me. The fact that the justice tips his hand about what his overall judicial philosophy is is not that troubling. There was a very interesting case in the early 70s where somebody asked Justice Rehnquist to recuse himself from a case, and he declined and issued a very well-known opinion in which he said that if you had no idea if this judge even had a judicial philosophy, that's not a sign of impartiality, it's a sign that they're not qualified to be a justice of the Supreme Court.

MARGOT ADLER: Is there anything else you'd like to add, David, to this discussion?

DAVID LUBAN: Well, you know, I think that it's really interesting when you watch Justice Scalia giving this speech, and I've watched the entire videotape of the Swiss speech.

You know, he is somebody who really plays to a number of audiences. I mean, he's a master of the English language. He loves mixing it up. He loves saying things in the most unqualified way he can. He loves provoking people and, you know, bating his enemies, and giving comfort to his friends. I think this is one of the reasons that conservatives love to quote him so much, because you know, he's so good at articulating a point of view with zingers. And here I think he just got carried away. And there is something that is a little bit troubling about getting carried away too often. So much so that you're actually not just showing your judicial philosophy, but that you're actually opining about questions that are coming before the Court. It's something that, with all due respect, I think that the justice ought to control.

MARGOT ADLER: David, thanks for talking with me today.

DAVID LUBAN: Well, it's a real pleasure, Margot. Thanks for having me.

MARGOT ADLER: David Luban is a professor at Georgetown University. He is currently a visiting professor at Stanford University.

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MARGOT ADLER: Tell us what you think about the issues we've talked about on today's show. Do you think the president is overstepping his authority in prosecuting detainees caught in the war on terrorism? What role should the courts and Congress play in dealing with people held at Guantanamo? You can share your thoughts on our website, justicetalking.org. While there, you can also listen to past shows or sign up for our podcasting service. Thanks for joining me. I hope you'll tune in next week. I'm Margot Adler.

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