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Detaining the 'Enemy,' Diluting the Law

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The Supreme Court has agreed to review the case of Yaser Esam Hamdi, a U.S. citizen captured during the war in Afghanistan. The Bush administration designated Hamdi an "enemy combatant." Enemy combatant status, according to the administration, allows it to hold Hamdi in solitary confinement indefinitely and without the procedural protections afforded to criminal suspects and prisoners of war. It's time for the high court to set this straight. Based on an overly broad understanding of executive war powers, the enemy combatant label is an attempt to evade the clear constitutional mandate that Hamdi be tried for treason. The Constitution empowers the president to act as commander in chief of the military, but few cases have defined the limits of the president's role.

In the Prize Cases, a Civil War-era Supreme Court upheld the power of the president to impose a blockade on the Southern states without a formal declaration of war from Congress. In *Ex Parte Quirin*, a World War II-era court upheld the use of a military commission to try a group of accused Nazi saboteurs, two of whom were U.S. citizens. A rather grim history surrounds this case, however, involving dubious communications between President Franklin D. Roosevelt and the court, and a full opinion written only after six of the accused had been executed. These cases, according to the Bush administration, establish an executive branch power to lawfully treat Hamdi without regard to any constitutional limitations. Such an interpretation of the Constitution is a wild stretch even if the text were silent on the issue of disloyal citizens. The truth is, however, that the Founders foresaw the possibility of citizens turned enemies and provided for both the crime and a procedure for its prosecution. The crime is treason. Article III, Section 3 of the Constitution states: "Treason against the United States, shall consist only in levying war against them, or in adhering to their enemies, giving them aid and comfort. No person shall be convicted of treason unless on the testimony of two witnesses to the same overt act, or on confession in open court." The government would have little trouble prosecuting Hamdi for treason, provided that its accusations are accurate and supported by evidence. Hamdi is accused of fighting alongside Taliban and al Qaeda forces and engaging in combat against the U.S. military. Hamdi thus probably committed an overt act that provided aid and comfort to our enemies, and in doing so showed an intent to betray our country. Given the hundreds detained along with Hamdi and the presence of military personnel at his arrest, the government should have little trouble finding two witnesses to testify to his activity. At the least, the treason provision of the Constitution underscores the limits on the executive branch and the active role that the judiciary should play in matters involving disloyal citizens. The Constitution instructs us that even if Hamdi's activities can be distinguished from treason on other grounds, the close similarity to the crime of treason requires that similar constitutional safeguards apply. Even in the Nazi saboteur case, the accused were afforded representation by Army lawyers and some opportunity to defend themselves at trial before the commission. If the courts accept the administration's argument, even this paltry degree of procedural protection would be denied, carving out unprecedented constitutional powers for the executive branch. The enemy combatant label also denies Hamdi the chance for judicial review of the president's actions. To be sure, the courts have been reluctant to second-guess the executive branch on issues such as its war tactics. The manner in which a citizen is detained and prosecuted, however, is more squarely a question of law enforcement, an area in which the

judiciary takes an active oversight role. The judiciary's function in reviewing law enforcement activity should not be diluted simply because of the war on terrorism. With great foresight, the Framers included checks on the political branches to reflect the dynamics of a nation at war. With regard to the crime of treason, the Constitution explicitly maintains an active role for the judiciary, calling for a proceeding in court. Ironically, those championing the use of the enemy combatant designation are frequently the same ones who condemn judicial activism, the stretching of law beyond its plain text meaning. The plain text of the Constitution provides a clear framework for prosecuting citizens who take up arms against our country. The enemy combatant label circumvents this mandate, stretching weak case law in an attempt to dilute the principles of fairness and rule of law. Let the Supreme Court remember it is these constitutional values that distinguish us from the terrorists we face in battle. D. Mark Jackson is a lawyer in San Francisco.

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