

## Con Law I

October 27, 2009

### Notes and Discussion Questions

1. In *Quirin*, the Court creates a distinction between “lawful combatants” and “unlawful combatants.” Why is that distinction important?
2. The *Quirin* Court also notes that American citizenship might have import as well. Why is American citizenship important?
3. Conversely, sovereign governments also possess police powers, a key component of which is the power to enforce the criminal laws. State governments are the first responders to normal crime, but the federal government, of course, has jurisdiction over crimes on federal property and against the federal government. A terrorist attack on American soil might be an act of war, or it might be a crime. One assumes it is for Congress to decide in exercising its War Powers, especially the power to declare war. But does the President have the ability to treat such an attack as a crime? Or as an act of war? The problem with terrorism, generally, is that there is no *foreign nation* with which to wage war.
4. Yale law professor Bruce Ackerman proposes an “emergency constitution” that would apply in times of great national emergencies such as wars or in times immediately following a 9/11-type attack. *E.g.*, Ackerman, *Terrorism and the Constitutional Order*, 75 *FORDHAM L. REV.* 475, 475-76 (2006). He makes a number of controversial arguments, but for our purposes, he argues that the war on terror is not a “war” at all. *Id.* at 477 (“Terrorism is merely the name of a technique: the intentional attack on innocent civilians. But war is not a technical matter; it is a life-and-death struggle against a particular enemy. We made war against Nazi Germany, not the V-2 rocket. Once we allow ourselves to declare war on a technique, we open up a dangerous path, authorizing the government to lash out at amorphous threats without the need to define them. There are tens of millions of haters in the world, of all races and religions. All are potential terrorists, and all the rest of us are at risk of being linked to one or another terrorist band.”). As such, the President’s strongest war powers should not kick in.
5. How does American citizenship matter in *Johnson v. Eisentrager*?
6. Were the petitioners in *Johnson* “lawful” or “unlawful” combatants?
7. Would the location where the petitioners in *Johnson* were apprehended matter?
8. Does the Court suggest any practical reasons why “enemy aliens” should be treated this way?
9. Know the AUMF, as described in *Hamdi*. Does the Court assume that the President’s powers to fight the GWOT are contained entirely in the AUMF? Or are there other sources of power? What discretion did Congress give the President in the AUMF?

10. *Hamdi* left open many questions: “But the *Hamdi* decision leaves open at least as many questions as it answers, including: the scope of the definition of ‘enemy combatant’; how long the government can hold a detainee before it affords him access to counsel and a hearing; what precisely such hearings should look like; the degree to which military hearings are sufficient; whether noncitizen detainees are entitled to the same type of hearing as citizen detainees; and how long ‘enemy combatant’ detainees in the ‘war on terrorism’ may be held. These questions will have to be answered in the course of future litigation.” Jenny Martinez, 98 AM. J. INT’L L. 782, 785 (2004).