

## Con Law I

October 20, 2009

### Notes and Discussion Questions

1. Justice Sutherland's view of the President's foreign affairs powers is unusual, compared to the Civil War-era cases, in that he seems to look beyond an Act of Congress authorizing Presidential action, and even beyond Article II. What sources of executive authority does he rely upon?
2. Are you persuaded at all by the notion of inherent Article II power, as was contemplated in *Curtiss-Wright*? The President's counsel in the lower courts in the *Steel Seizure Case* argued that the remedy to stop the President from acting was "accountable only to the country"? What did that mean?
3. The War Power is an amalgamation of authority shared by the President and Congress. Does the President or Congress have the greater responsibility and authority in the exercise of war powers? Which textual provisions of the Constitution support either position?
4. Justice Black's majority opinion in *The Steel Seizure Case (Youngstown Sheet and Tube)* isn't particularly well known or respected. What is his holding? What is his reasoning?
5. Justice Jackson's concurring opinion in *The Steel Seizure Case* is very well known and respected? What is his preferred reasoning?
6. What is Justice Douglas's preferred reasoning in *The Steel Seizure Case*?
7. In *Quirin*, the Court creates a distinction between "lawful combatants" and "unlawful combatants." Why is that distinction important?
8. The *Quirin* Court also notes that American citizenship might have import as well. Why is American citizenship important?
9. 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.
10. 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 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.