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John Yoo responds to "Taming International Law with Presidential Supremacy"

Mr. Carpenter's review makes some excellent points, but I want to focus here on his two points of criticism of *Taming Globalization*. First, he says that the book is lacking because it spends too little time on the Bricker Amendment, which he suggests was not the initiative of southerners interested in protecting segregation from international human rights treaties. Second, he argues that federal courts, rather than the President, should have the primary say in interpreting customary international law (and he further implies that this conclusion in *Taming Globalization* is the product of my pro-executive views while serving in the Bush administration).

1. The Bricker Amendment. As a foreign relations scholar who has written about these subjects for almost two decades now, I feel odd being criticized for insufficient attention to the Bricker Amendment. The reason why is because I sought to defend the presumption against self-execution in a series of articles published in the Columbia Law Review in 1999 — a view that was heavily criticized at the time by other international law scholars. The Bricker Amendment, I argued, was not necessary if the Constitution was properly understood, because it codified a rule that was already supported by the constitutional structure.

I think that Carpenter is not correct to to suggest that protection of segregation was not the motive for the Bricker amendment. It is true that several of the Senators in support did not come from southern states. But this non-segregationist bloc of Senators, many of whom came from the Midwest, was allied with southern senators on a series of issues. They essentially log-rolled support of the Southern agenda on such things like the

Bricker Amendment in exchange for Southern support for their legislative interests. The interested reader could consult not just Duane Tananbaums' standard work on the Bricker Amendment, but also Robert Caro's Master of the Senate, which contains a lengthy description of southern maneuverings on the issue to protect segregation.

2. Presidential interpretation of customary international law. Unfortunately for Carpenter, presidential initiative in interpreting customary international law is not just my idiosyncratic view, but that of the Supreme Court, long supported by American constitutional practice. In the case of the Paquete Habana, for example, the Supreme Court said it would assume that customary international law was part of our law, but only subject to a controlling legislative or executive act. In other words, the President could modify what customary international law was or was not for purposes of our domestic law. That conclusion has been taken to extremes by the Court in recent cases such as Garamendi, where the Court allowed executive decisions on foreign relations to preempt inconsistent state law.

In these holdings, I think the Court not only recognizes the practical demands of the conduct of foreign relations, but remains true to our constitutional history. It was President Washington, after all, who decided that the United States would remain neutral in the British-French wars arising from the French Revolution — not the courts. In reaching that conclusion, President Washington interpreted our 1778 treaties with France as well as customary international law to decide whether the U.S. had an international obligation to France and what neutrality demanded. The interested reader can consult my 2010 book, *Crisis and Command*, for the story of Washington's decision. *Taming Globalization*, however, examines the question from a functional perspective: why it makes sense, as a matter of the competence of different branches of government, that the President interpret international law for the nation rather than the courts: because the courts are poor policymakers at a national level, and the special need for speed, flexibility, and resources in foreign relations, the Constitution as best understood vests the power in the President — as it has since Washington's time.