

September 18, 2009

To: Human Rights Workshop
From: John Witt
Re: "Jacksonian Soldiers and Learned Pufendorffs"

Thanks so much for inviting me to participate in your session on Sep. 24, which I am very much looking forward to. I'd like to take up with you the historical problem I am now wrestling with in my work.

The question is this: How should we think about the history of the law of nations (and in particular, the laws of war, which made up far and away the predominant part of the law of nations) in the early American republic? It seems like a straightforward enough kind of question. But there is stunningly little serious historical scholarship that addresses it.

I am attaching to this cover memo two documents, each of which offers (in its own way) alternative approaches to the material. The first is a short excerpt from Jane Mayer's recent book on the Bush Administration war on terror. I take it to offer up the conventional liberal view of America's historical relationship to international law and the laws of war. The second is a more scholarly chapter by international lawyer Mark Janis, which presents a version of the history of the law of nations in the early 19th century U.S.

At our session I'll talk about the alternative way of telling the story that I have begun to work through. I'll be especially interested in your thoughts on the following two questions:

- (1) Is the history of international law usefully told as an exercise in intellectual history? Or, put differently, does Janis's account of the history of the law of nations in the early republic adopt a defensible view of what counts as the relevant historical record?
- (2) The Mayer story implicitly adopts a very different view of the relevant historical record. And it has become widely influential because it seems extraordinarily useful in debates today about what the U.S. posture should be toward international law commitments in the area of armed conflicts. But

what if the better version of this historical record is far less rosy? Is a more critical account of the history inevitably subversive of efforts to get the United States to take international law seriously?

Look forward to seeing you on Thursday.

jfw