

INTRODUCTION:  
GLOBAL ORDER OF THE COURT

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For worse, not better, we live in a time when evidence, expertise, even reality itself, matter less than uniformed assertion. Just repeat a baseless claim often enough and sooner or later it must be true. It sadly goes without saying that this technique provides a ticket to the White House and the Executive Branch more generally. It should, however, more often be said that the Supreme Court is not above the practice. This indulgence would be bad enough in itself, especially for an institution whose legitimacy is based upon reasoned fidelity to the law rather than a majority of ballots. Yet merely repeating an assertion without more is doubly problematic when the Court does so to sidestep its duty to check misconduct of an Executive Branch that pushes past the borders of legality—including and especially in foreign affairs.

The Supreme Court did just this at just about the same time the papers for this symposium were being delivered. The case was *Hernández v. Mesa*.<sup>1</sup> It arose when Jesus Mesa, a US Border Patrol agent, shot dead Sergio Adrián Hernández Güereca, a fifteen-year-old Mexican national. At the time, Mesa was standing in US territory while Hernández had just run across the border to Mexico. Members of the slain teenager's family brought a civil action seeking damages in US District Court under *Bivens v. Six Unknown Federal Narcotics Agents*,<sup>2</sup> alleging that Mesa violated Hernández's Fourth and Fifth Amendment rights. In *Bivens*, the Court had held that a person claiming to be the victim of an unlawful arrest and search could bring a Fourth Amendment claim

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1. *Hernandez v. Mesa*, 589 U.S. \_\_ (2020).  
2. *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U. S. 388 (1971).

for damages against the responsible agents even though no federal statute authorized such a claim. Later decisions extended *Bivens* to claims under the Fifth<sup>3</sup> and Eighth<sup>4</sup> Amendments. The issue in *Mesa* came down to applying *Bivens* not to additional constitutional amendments, but rather to the “new”<sup>5</sup> context of alleged cross-border extrajudicial murder. Or as Justice Ginsburg put it in dissent, “[i]s a *Bivens* remedy available to non-citizens (here, the victim’s parents) when the U. S. officer acted stateside, but the impact of his alleged wrongdoing was suffered abroad?”<sup>6</sup>

The Court answered no. Justice Alito’s majority opinion offered several reasons. Consider them in ascending order of judicial self-abnegation. First, Congress in related areas has declined to provide for a cause of action for such ostensibly extraterritorial conduct. Such inaction, moreover, must be given additional weight given the issue involved “national security,” and judicial intervention might undermine protection of the nation’s borders, “[w]hen foreign relations are implicated.”<sup>7</sup> Next, the case involved “national security.”<sup>8</sup> Judicial intervention in the matter of an alleged rogue federal agent in the United States shooting an unarmed teenager in Mexico could well undermine the protection of the nation’s borders. Third and more broadly, *Mesa* involved foreign affairs. In the majority’s words, “[t]he political branches, not the Judiciary, have the responsibility and institutional capacity to weigh foreign-policy concerns.”<sup>9</sup> Indeed, the Court had previously “said that matters relating ‘to the conduct of foreign relations . . . are so exclusively entrusted to the political branches of government as to be largely immune from judicial inquiry or interference.’”<sup>10</sup>

Determined to repeat the theme until it became true, Justice Alito concluded that in sum, these preceding factors, “can all be condensed to one concern—respect for the separation of powers.” And for him, that meant nothing less than that “[f]oreign policy and national security decisions are ‘delicate, complex, and involve

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3. *Davis v. Passman*, 442 U. S. 228, 248-49 (1979).

4. *Carlson v. Green*, 446 U. S. 14, 19-25 (1980).

5. *Hernandez v. Mesa*, No. 17-1678, slip op. at 1, 8 (Feb. 25, 2020).

6. *Id.* at 1-2 (Ginsburg, J., dissenting).

7. *Id.* at 14.

8. *Id.* at 12.

9. *Id.* at 9 (citations omitted).

10. *Id.* (citations omitted).

large elements of prophecy' for which 'the Judiciary has neither aptitude, facilities[,] nor responsibility.'"<sup>11</sup>

Justice Ginsburg, writing for three dissenters, challenged the majority's inaction based on foreign affairs. First, a tort action for a cross-border shooting hardly represented an intrusion on the province of the political branches to make foreign policy. Second, in any event "the Court, in this case, cannot escape a 'potential effect on foreign relations,' by declining to recognize a *Bivens* action."<sup>12</sup> Among other things, "recognizing a *Bivens* suit here honors our Nation's international commitments."<sup>13</sup> Displaying her demonstrated familiarity with international law, Justice Ginsburg pointed to the International Covenant on Civil and Political Rights ("ICCPR") to which the United States acceded in 1992.<sup>14</sup> In particular, she cited Article 9(5) of which provides that "[a]nyone who has been the victim of unlawful arrest or detention shall have an enforceable right to compensation."<sup>15</sup> All told, Justice Ginsburg makes a compelling case.

Yet that case could be more compelling still. Such a case would and should challenge directly the oft-repeated but rarely justified mantra that "matters relating 'to the conduct of foreign relations . . . are so exclusively entrusted to the political branches of government . . . as to be largely immune from judicial inquiry or interference.'"<sup>16</sup>

The present symposium arises out of the Author's recent book that refutes this refrain. *Restoring the Global Judiciary: Why the Supreme Court Should Rule in Foreign Affairs* aims to reinvigorate the increasingly marginalized case for robust judicial role in cases such as *Mesa*.<sup>17</sup> Its argument is straightforward. The Supreme Court and the federal judiciary have not only the power, but also the duty to apply the law, including international law, in cases properly before them without deference to the political branches.

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11. *Id.* at 19 (citations omitted).

12. *Id.* at 10 (Ginsburg, J., dissenting).

13. *Id.*

14. International Covenant on Civil and Political Rights, Dec. 19, 1966, S. Treaty Doc. No. 95-20, 999 U. N. T. S. 176; *see also* 1676 U. N. T. S. 544 (entered into force Sept. 8, 1992).

15. International Covenant on Civil and Political Rights, art. 9(5).

16. *See Hernandez, supra* note 5, at 9.

17. *See generally* MARTIN S. FLAHERTY, *RESTORING THE GLOBAL JUDICIARY: WHY THE SUPREME COURT SHOULD RULE IN FOREIGN AFFAIRS* (2019).

This argument proceeds in four parts. The first focuses on the expectations of the Founding. This part holds that the Constitution's designers and supporters were committed to a balance among the three branches of government as much—if not more—in foreign as in domestic affairs. They were further markedly *internationalist*, with the corollary that the judiciary should play a prominent role in matters implicating both international law and foreign relations, especially in relation to individual rights. Much of the impetus for the Federal Convention came from the nation's impotence in upholding its international obligations. The Constitution's Federalist supporters also favored adherence to the *law of nations* as a safeguard for a new, weak republic in the face of European superpowers. The Constitution, therefore, strengthened the national government's ability to conduct foreign relations in several regards. One key component was a national judiciary that would have jurisdiction over self-executing treaties, original jurisdiction over cases involving diplomats, and the authority to implement customary international law. Reflecting this commitment, the early Supreme Court numbered a striking selection of prominent diplomats among its members, including John Jay and John Marshall. The Court accordingly tended to accord the other branches zero deference when it came to cases involving international law or foreign relations.<sup>18</sup>

The book's second part explains how this Founding conception eroded as the United States developed from a fledgling republic to a global superpower. Over time the Founding framework went from a balanced system with an active judicial role to our current constitutional construct in which the Executive claims to near-plenary foreign affairs power appear plausible. The change occurred largely as a result of America's emergence on the world stage. As the nation went from world power to superpower to hegemon, the almost inevitable result was an accretion of power to the Executive. Evolving constitutional custom has long been an important source of doctrine in the foreign affairs realm. When, however, custom moves from illegitimate challenge to the established order is another matter. This part argues that much of the shift in power to the President is of questionable legitimacy in

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18. *Id.* Part I.

light of the Founding commitment to separation of powers balance.<sup>19</sup>

The book's third part examines how modern international relations theory makes the Founding's commitment to balance all the more critical. A leading International Relations school developed by Joseph Nye, Robert Keohane, and Anne-Marie Slaughter emphasizes the erosion of traditional sovereignty through the emergence of the "disaggregated state."<sup>20</sup> On this understanding, nation-states no longer deal with one another as single units. Rather, sub-units of states interact directly with their counterparts to form "global networks" that pool information, undertake joint projects, and establish formal ties.<sup>21</sup> Innovative as this scholarship is, it does not ask the key question of which set of actors comparatively benefits. Here *Restoring the Global Judiciary* argues that the Executive far and away outpaces its rivals. A distant second is the judiciary. Hardly in the race at all are the legislators. The implications are troubling for any state with an ongoing commitment to separation of powers and the balance among the branches of government that the doctrine entails. It follows that when matters touch foreign relations, the courts should check, rather than defer.<sup>22</sup>

The final part of the book sets out how doctrine should develop in three sets of hotly contested areas. The first involves access to the courts to begin with, including standing, *political question* doctrine, and state secrets. The second group involves deference to the other branches with regard to treaties, the Constitution, and statutes. The last category addresses foreign affairs law doctrines that implicate international human rights, and among them are self-executing vs. non-self-executing treaties, delegation to foreign tribunals, and interpreting domestic law consistent with international law.<sup>23</sup>

All that said, the book's prescriptions do come with an ostensibly insurmountable flaw. It may seem simply too late to turn back. But it is not. Instead, the current situation recalls the same type of challenge that Justice Jackson addressed in his

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19. *Id.* Part II.

20. *Id.* at 137.

21. *Id.*

22. *Id.* Part III.

23. *Id.* Part IV.

celebrated concurrence in *Youngstown Sheet & Tube Co. v. Sawyer*.<sup>24</sup> That opinion also identified dangerous, anti-constitutional trends resulting from deeply entrenched political dynamics. Yet it also pointed a way forward. It suggested a solution first in identifying the problem. Then it offered tools for addressing it. It may appear that matters have proceeded too far. But as Justice Jackson also observed, “it is the duty of the Court to be the last, not first, to give . . . up” its responsibility to check assertions political power that undermine the Constitution and with it, free government under the law.<sup>25</sup>

Few things are more gratifying to the Author than spurring informed and thoughtful discussion, dialogue, and debate. First, not last, in this regard is the *Fordham International Law Journal's* present symposium issue on *the Judicial Power and US Foreign Affairs*. It brings together an impressive array of diverse, established, and rising scholars. Some agree with the arguments made in *Restoring the Global Judiciary*; others do not. Yet all of these written contributions, as well as the day's broader panel discussions, offer rigorous and thoughtful insights that buck the trend of merely repeating ungrounded assertions on display in the majority opinion in *Mesa*.

For this, special thanks are in order to the *International Law Journal's* editors and staff, in particular: Irene Xu, Rebecca Zipursky, Yon Jong Yoon, and Samantha Ragonesi. My gratitude as well to my exceptional colleagues, Pamela Bookman and Andrew Kent, who oversaw the event as it took shape, and to Tom Lee, who stole what time he could away from the Pentagon to take part. Finally, my gratitude to all of the participants. To these, I am happy to repeat a thought shared on the day. The first rule of public relations may be that there is no such thing as bad publicity so long as one's name is spelled correctly. The corollary for writing a book is that there is no such thing as unwanted criticism so long as all agree that everyone should go out and read it. All did—and for that I am particularly grateful.

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24. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 634-60 (Jackson, J., concurring) (1952).

25. *Id.* at 655.