
THE EXCEPTIONALISM OF FOREIGN RELATIONS NORMALIZATION

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It is difficult — if not impossible — to look at the bevy of recent Supreme Court decisions addressed by Professors Ganesh Sitaraman and Ingrid Wuerth in *The Normalization of Foreign Relations Law*¹ and dispute the authors' basic premise — that, as viewed through these recent opinions, foreign relations “[n]ormalization is the new normal.”² After all, even a cursory perusal of the Court's rulings in foreign relations cases over the past twenty-five years reveals a commitment to substantive judicial decisionmaking radically at odds with the far more deferential approach that characterized the “foreign relations exceptionalism” that emerged after and in light of *Curtiss-Wright*.³

Indeed, it is objectively undeniable that, for each of the three classic “pillars” of foreign relations exceptionalism — justiciability, federalism, and executive dominance⁴ — there are any number of significant Supreme Court rulings in recent years militating decisively in the opposite direction. Thus, as a study of the foreign relations law that appears in the *United States Reports*, *The Normalization of Foreign Relations Law* is — and ought to be — the definitive account, and its defense of the *virtues* of such normalization a must-read for scholars, commentators, and the Justices themselves.

And yet, nearly all of the Supreme Court decisions held out by Sitaraman and Wuerth as examples of the “normalization” of foreign relations law over the past quarter-century involved reversals of lower court rulings that had squarely rested on justiciability, federalism, or executive dominance in turning away potentially meritorious claims by plaintiffs — that is, cases that epitomized foreign relations exceptionalism. Of course, it would be easy to view these reversals as only vindicating the thesis of Sitaraman and Wuerth's article. But there are dozens of *other* examples of foreign relations exceptionalism in recent lower court decisions. Critically, these decisions have been wholly undisturbed by the Supreme Court, which has done nothing more in virtually all of those cases than deny certiorari without com-

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¹ Ganesh Sitaraman & Ingrid Wuerth, *The Normalization of Foreign Relations Law*, 128 HARV. L. REV. 1897 (2015).

² *Id.* at 1906.

³ *United States v. Curtiss-Wright Exp. Corp.*, 299 U.S. 304 (1936).

⁴ *See* Sitaraman & Wuerth, *supra* note 1, at 1903.

ment or dissent. The Justices, in other words, have been willing to *promote* foreign relations normalization, but largely unwilling to *enforce* it.

Thus, for every *Boumediene*,⁵ there have been multiple circuit-level cases like *Janko*⁶ upholding jurisdiction-stripping statutes as applied to Guantánamo-related damages claims;⁷ for every *Medellín*,⁸ there have been numerous rulings like *Generali*,⁹ where federal judges have displaced state law solely to protect amorphous and ill-defined “foreign policy” interests;¹⁰ and for every *Zivotofsky I*,¹¹ there has been an array of decisions like *Carmichael*,¹² in which ordinary tort suits against military contractors have been thrown out on political question grounds.¹³ Insofar as these lower court holdings are only part of larger patterns of foreign relations exceptionalism, they suggest that the courts of appeals haven’t yet gotten the message with respect to the normalization of foreign relations law. And insofar as these decisions have been left intact by the Supreme Court, they suggest that the Justices may not be as committed to the project of normalization as, perhaps, they ought to be — and as Sitaraman and Wuerth suggest they have been.

But whether the current state of affairs is a product of intransigence on the part of the lower courts or indifference on the part of the Justices (or some combination of both), the result produces the same critique of Sitaraman and Wuerth: Although they are exactly right that the Supreme Court’s merits docket shows every sign of “foreign relations normalization,” foreign relations exceptionalism in contemporary U.S. litigation is alive and well everywhere else. The harder question, the one that Sitaraman and Wuerth raise but do not answer, is whether the normalization of the Supreme Court’s foreign relations jurisprudence is, in fact, exceptional — or whether it’s only a matter of time before, thanks to either the Justices’ intervention or their own evolution, the lower courts follow suit.

⁵ *Boumediene v. Bush*, 553 U.S. 723 (2008).

⁶ *Janko v. Gates*, 741 F.3d 136 (D.C. Cir. 2014), *cert. denied*, 135 S. Ct. 1530 (2015).

⁷ *See, e.g., id.* at 137.

⁸ *Medellín v. Texas*, 552 U.S. 491 (2008).

⁹ *In re Assicurazioni Generali, S.p.A.*, 592 F.3d 113 (2d Cir.), *cert. denied*, 131 S. Ct. 287 (2010).

¹⁰ *See, e.g., id.* at 115.

¹¹ *Zivotofsky ex rel. Zivotofsky v. Clinton*, 132 S. Ct. 1421 (2012).

¹² *Carmichael v. Kellogg, Brown & Root Servs., Inc.*, 572 F.3d 1271 (11th Cir. 2009), *cert. denied*, 130 S. Ct. 3499 (2010).

¹³ *See, e.g., id.* at 1275.

I. FOREIGN RELATIONS EXCEPTIONALISM IN THE LOWER FEDERAL COURTS

In their article, Sitaraman and Wuerth cogently document the myriad recent Supreme Court decisions in foreign relations cases characterized by ordinary application of ordinary doctrinal rules — what they (correctly, in my view) describe as “normalization.” But as this Part briefly documents, the volume and frequency of recent circuit-level decisions militating in the opposite direction, combined with the Supreme Court’s apparent willingness to leave these rulings intact even after handing down “normalizing” decisions in other cases, gives rise at least to the appearance that foreign affairs exceptionalism is still the norm — and normalization still the exception — outside the Supreme Court.

In other writings, I have sought to document the exceptionalism that has come to characterize numerous decisions of the courts of appeals in civil litigation challenging post-September 11 counterterrorism policies. These include the D.C. Circuit’s efforts to give a narrow compass to the Supreme Court’s decision in *Boumediene* in the Guantánamo habeas litigation¹⁴ and the various courts of appeals’ more general willingness to rely upon expansive understandings of justiciability doctrines, other procedural obstacles, or immunity defenses in order to avoid reaching the merits of national security- (and foreign relations-) related civil disputes.¹⁵ Some of these decisions are based upon transsubstantive doctrines of general applicability, but many are not — and instead manifest one (or several) of the three elements of classic foreign relations exceptionalism that Sitaraman and Wuerth identify:

Justiciability. Sitaraman and Wuerth seize upon the Court’s rulings in *Zivotofsky I* and *Bond I*¹⁶ (and, to a lesser extent, *Boumediene*) as examples of the Supreme Court opening courthouse doors to disputes the resolution of which foreign relations exceptionalism would previously have foreclosed.¹⁷ In fact, however, the lower courts have slammed shut the courthouse doors in two major classes of contemporary foreign relations cases — and the Supreme Court has said nary a word on the subject.

Thus, in the context of damages suits against private military contractors arising out of torts committed in foreign combat zones, at least four courts of appeals have relied upon the political question doctrine

¹⁴ Stephen I. Vladeck, *The D.C. Circuit After Boumediene*, 41 SETON HALL L. REV. 1451 (2011).

¹⁵ Stephen I. Vladeck, Essay, *The New National Security Canon*, 61 AM. U. L. REV. 1295 (2012).

¹⁶ *Bond v. United States*, 131 S. Ct. 2355 (2011).

¹⁷ See Sitaraman & Wuerth, *supra* note 1, at 1925–29.

to hold that such claims are categorically nonjusticiable so long as the military contractor was operating under the plenary control of the military, entirely because of the unique national security and foreign relations concerns such suits would otherwise raise.¹⁸ The merits of these decisions aside, they are paradigmatic examples of the very foreign relations exceptionalism that Sitaraman and Wuerth claim that the Supreme Court has rejected. And yet, each time the Justices have been presented with an opportunity to review one of these lower court decisions, they have denied certiorari without comment or dissent.¹⁹

One can also find deep and recurring strains of foreign relations exceptionalism in circuit-level decisions rejecting damages suits by individuals claiming that they were the victims of abusive governmental conduct. Thus, the Second, Fourth, Seventh, and D.C. Circuits have separately invoked foreign relations exceptionalism overtly or implicitly, as a “special factor[.]”²⁰ counseling against the recognition of a cause of action for damages under *Bivens*;²¹ and the Ninth and D.C. Circuits have upheld a jurisdiction-stripping statute that bars former Guantánamo detainees from pursuing damages claims — without even resolving whether those claims might be meritorious — largely by reference to the uniquely “foreign” status of the plaintiffs.²² In all of these cases, the concerns that Sitaraman and Wuerth suggest the Supreme Court has relegated to the historical dustbin were front and center — resulting in the insulation of the Executive Branch (and those acting on its behalf) from any meaningful liability in the sphere of foreign relations law. And, again, in all of these cases, the Supreme Court, when petitioned, denied certiorari without comment or dissent.

Although it is difficult to argue that the lower courts are failing properly to heed the Supreme Court in the *Bivens* context,²³ the political question cases are a bit trickier, especially in light of the Justices’

¹⁸ See, e.g., *Carmichael*, 572 F.3d 1271; see also *Harris v. Kellogg Brown & Root Servs., Inc.*, 724 F.3d 458 (3d Cir. 2013), *cert. denied*, 135 S. Ct. 1152 (2015); *Taylor v. Kellogg Brown & Root Servs., Inc.*, 658 F.3d 402 (4th Cir. 2011); *Lane v. Halliburton*, 529 F.3d 548 (5th Cir. 2008).

¹⁹ See also *El-Shifa Pharm. Indus. Co. v. United States*, 378 F.3d 1346 (Fed. Cir. 2004) (relying on the political question doctrine to dismiss a takings suit arising out of the destruction of a Sudanese pharmaceutical plant because it had been identified, albeit erroneously, as “enemy property”), *cert. denied*, 545 U.S. 1139 (2005).

²⁰ *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388, 396 (1971).

²¹ See *Vance v. Rumsfeld*, 701 F.3d 193 (7th Cir. 2012) (en banc), *cert. denied*, 133 S. Ct. 2796 (2013); *Doe v. Rumsfeld*, 683 F.3d 390 (D.C. Cir. 2012); *Lebron v. Rumsfeld*, 670 F.3d 540 (4th Cir.), *cert. denied*, 132 S. Ct. 2751 (2012); *Arar v. Ashcroft*, 585 F.3d 559 (2d Cir. 2009) (en banc), *cert. denied*, 130 S. Ct. 3409 (2010).

²² See *Janko v. Gates*, 741 F.3d 136 (D.C. Cir. 2014), *cert. denied*, 135 S. Ct. 1530 (2015); *Hamad v. Gates*, 732 F.3d 990 (9th Cir. 2013), *cert. denied*, 134 S. Ct. 2866 (2014); see also *Al-Zahrani v. Rodriguez*, 669 F.3d 315 (D.C. Cir. 2012).

²³ See *Vladeck*, *supra* note 15, at 1312–17.

forceful admonition in *Zivotofsky I* that such a justiciability bar is to be narrowly applied.²⁴ Thus, these cases raise but don't settle whether the pervasiveness of foreign relations exceptionalism in the lower courts is better traced to those courts refusing to follow the Justices, or the Justices refusing to more clearly define their intentions. Either way, though, the Supreme Court's own normalization appears increasingly exceptional in its own right.

Federalism. Many of the recent tort suits against private military contractors have also revealed deep tension between the narrative of the Supreme Court offered by Sitaraman and Wuerth²⁵ (in which the Court has "taken significant steps to normalize federalism analysis in both statutory interpretation and executive preemption cases"²⁶), and what's actually transpiring in the lower courts. Thus, in an ever-widening range of cases, different circuits have relied upon expansive readings of both a 1988 Supreme Court decision²⁷ and the Federal Tort Claims Act²⁸ to displace state tort law as applied to military contractors — even in cases in which those claims are *not* barred by the political question doctrine.²⁹ And, once again, the rhetoric in these cases epitomizes foreign relations exceptionalism — and the (controversial) claim that unique foreign relations concerns justify the federal courts' (as opposed to Congress's) insulation of federal military policy from state law.³⁰

Even outside the context of battlefield tort suits, foreign relations exceptionalism continues to pose challenges to ordinary principles of federalism. Consider, in this regard, the Second Circuit's decision in the *Generali* case, which barred state law suits concerning Holocaust-era claims against an Italian insurance company on the ground that they were preempted by an executive branch policy that favored resolution of such claims before an international commission.³¹ Of course, it's not unusual for a federal court to hold that a state law is preempted by especially strong executive branch foreign policy interests,³² but what makes *Generali* unique is that the international commission at

²⁴ See *Zivotofsky ex rel. Zivotofsky v. Clinton*, 132 S. Ct. 1421, 1428 (2012).

²⁵ See Sitaraman & Wuerth, *supra* note 1, at 1927–30.

²⁶ *Id.* at 1928.

²⁷ *Boyle v. United Techs. Corp.*, 487 U.S. 500 (1988).

²⁸ 28 U.S.C. §§ 1346(b), 2671–2680 (2012).

²⁹ See, e.g., *Salah v. Titan Corp.*, 580 F.3d 1 (D.C. Cir. 2009), *cert. denied*, 131 S. Ct. 3055 (2011); see also *In re KBR, Inc., Burn Pit Litig.*, 744 F.3d 326 (4th Cir. 2014), *cert. denied*, 135 S. Ct. 1153 (2015); *Harris v. Kellogg Brown & Root Servs., Inc.*, 724 F.3d 458 (3d Cir. 2013), *cert. denied*, 135 S. Ct. 1152 (2015).

³⁰ See Vladeck, *supra* note 15, at 1317–21.

³¹ *In re Assicurazioni Generali, S.p.A.*, 592 F.3d 113, 115 (2d Cir.), *cert. denied*, 131 S. Ct. 287 (2010).

³² See, e.g., *Am. Ins. Ass'n v. Garamendi*, 539 U.S. 396 (2003).

issue had no jurisdiction over Italy.³³ The displacement of state law was thus in favor of *no* remedy whatsoever, and served only to vindicate the Executive Branch's undifferentiated foreign relations interests. In other words, the lower court in *Generali* took a marginally exceptionalist Supreme Court ruling (*Garamendi*), and applied it expansively to encompass a fact pattern materially different from that upon which the Justices had relied in the earlier case. Such an expansive application of precedent was warranted, the Second Circuit concluded, entirely because of foreign relations concerns.³⁴

Executive Dominance. Examples also abound of contemporary circuit-level decisions embodying what Sitaraman and Wuerth describe as “executive dominance”³⁵ — the idea that the Executive is afforded special deference in interpreting foreign relations statutes and in making foreign policy judgments more generally. One especially poignant case in point for the latter is the en banc Ninth Circuit's 2012 decision in *Trinidad y Garcia v. Thomas*,³⁶ in which a noncitizen had sought to block his extradition to the Philippines on the ground that he credibly feared torture there.³⁷ As such, he argued that his removal was barred by the 1998 statute in which Congress implemented the United States' obligations under the U.N. Convention Against Torture.³⁸ Of the ten judges who believed the Court of Appeals had jurisdiction over Trinidad's claims,³⁹ seven concluded that those claims were doomed by the Secretary of State's unreviewable declaration that, in her view, the petitioner would not be tortured.⁴⁰ Even though that statute appeared to create a substantive right against removal if it

³³ *Generali*, 592 F.3d at 118.

³⁴ See *id.* at 119 (“[T]o erase any such doubt [about whether *Garamendi* applied], we solicited the advice of the Secretary of State (in two administrations) on the foreign policy of the United States.”).

³⁵ Sitaraman & Wuerth, *supra* note 1, at 1930.

³⁶ 683 F.3d 952 (9th Cir. 2012) (en banc) (per curiam), *cert. denied*, 133 S. Ct. 845 (2013).

³⁷ *Id.* at 955.

³⁸ Foreign Affairs Reform and Restructuring Act of 1998, Pub. L. No. 105-277, div. G, § 2242, 112 Stat. 2681-761, 2681-822 to -823 (codified as amended at 8 U.S.C. § 1231 (2012)).

³⁹ Then-Chief Judge Kozinski would have held that the Court of Appeals lacked jurisdiction to entertain the Petitioner's claim. See *Trinidad y Garcia*, 683 F.3d at 1009-15 (Kozinski, C.J., dissenting in part); see also *id.* at 989 n.4 (Berzon, J., concurring in part and dissenting in part).

⁴⁰ See *id.* at 957 (majority opinion) (holding that “the court's inquiry shall have reached its end” if it receives a declaration and “determine[s] whether it has been signed by the Secretary”); see also *id.* at 960-62 (Thomas, J., concurring) (“[W]e cannot review the merits of the Secretary's internal extradition review” *Id.* at 961.); *id.* at 962 (Tallman, J., dissenting) (“A majority of us agree that the Rule of Non-Inquiry applies and precludes . . . judicial review of the substance of the Secretary's decision.”). Only Judges Pregerson, William Fletcher, and Berzon would have afforded the Petitioner with an opportunity to rebut the Secretary's declaration. See *id.* at 997-1002 (Berzon, J., concurring in part and dissenting in part) (“I would hold . . . that . . . a habeas court must be able to inquire in some manner into the substance of the determination” *Id.* at 998.); *id.* at 1002-09 (Pregerson, J., concurring in part and dissenting in part) (arguing that the plaintiff “is entitled to meaningful review,” *id.* at 1002).

were “more likely than not” that the petitioner would be tortured, Judge Thomas explained that, unlike ordinary immigration cases, “[o]ur role in reviewing the Secretary’s extradition determinations is far different because the surrender of a person to a foreign government is within the Executive’s powers to conduct foreign affairs and the Executive is ‘well situated to consider sensitive foreign policy issues.’”⁴¹ As with the other categories discussed above, one need not look far for additional examples of similar reasoning.⁴²

To their credit, Sitaraman and Wuerth freely concede that “there are still outliers and there is still much unfinished business.”⁴³ But both the volume and frequency of the circuit-level decisions described above, combined with the Supreme Court’s apparent willingness to leave them intact even after handing down “normalizing” decisions in other cases, gives rise at least to the appearance that foreign affairs exceptionalism is still normal — and normalization still exceptional — outside the Supreme Court.

II. THE CONSEQUENCES OF NORMALIZATION’S EXCEPTIONALISM

More significantly, the Supreme Court’s unwillingness to entertain any of the cases described above (or countless other additional examples of foreign relations exceptionalism) also undermines at least to some degree the claim that the Justices *themselves* are committed to the project of normalization — and that lower courts should therefore anticipate such moves when presented with disputes that have previously implicated foreign relations exceptionalism. After all, although it is axiomatic that denials of certiorari have no precedential value, it is inevitable that lower courts will read into *systematic* denials of certiorari a lack of appetite on the Justices’ part to revisit not just individual rulings in specific cases, but wholesale approaches to doctrinal accommodations in particular areas.⁴⁴

Thus, with one equivocal exception,⁴⁵ the Court has not taken a single Guantánamo case since it decided *Boumediene* (even as commentators have accused the D.C. Circuit of subverting the Justices’

⁴¹ *Id.* at 961 (Thomas, J., concurring) (quoting *Munaf v. Geren*, 553 U.S. 674, 702 (2008)).

⁴² Indeed, *Generalì* itself could also be viewed as a case focusing on “executive dominance,” see *supra* note 34 (noting how the court deferred to the Executive Branch’s advice with regard to the scope of a Supreme Court precedent in a foreign relations dispute). The Guantánamo litigation surveyed in Vladeck, *supra* note 14, is also replete with comparable episodes.

⁴³ Sitaraman & Wuerth, *supra* note 1, at 1979.

⁴⁴ See Steve Vladeck, *D.C. Circuit 1, Guantanamo Bar o?*, LAWFARE (June 11, 2012, 11:33 AM), <http://www.lawfareblog.com/2012/06/d-c-circuit-1-guantanamo-bar-o> [<http://perma.cc/N6KA-EQJK>].

⁴⁵ See *Kiyemba v. Obama*, 130 S. Ct. 1235 (2010) (per curiam); see also *Kiyemba v. Obama*, 131 S. Ct. 1631, 1631–32 (2011) (Breyer, J., respecting denial of certiorari).

work⁴⁶). It has not taken a single “battlefield tort” case (even though that entire line of cases turns on especially aggressive readings of both the political question doctrine and Justice Scalia’s 1988 opinion in *Boyle*). And the only *Bivens* case it has taken in the foreign relations sphere in the last twenty-five years was decided on the altogether different question of the applicable pleading standards.⁴⁷ My point is not that these denials prove the Court’s aversion to the normalization of foreign relations law; rather, they at least tend to suggest some schizophrenia on the part of the Justices with respect to foreign relations exceptionalism — with obvious implications for the work of the lower courts.

To be clear, I still think Sitaraman and Wuerth are on to something very important. There *is* a meaningful, significant trend toward normalization of foreign relations disputes in the opinions they summarize. And, at least among Supreme Court *decisions*, there are increasingly few outliers. Thus, Sitaraman and Wuerth are not wrong that, in the field of foreign affairs, “most of what [the Court] has said [in the past twenty-five years] is that foreign relations law is not so exceptional after all.”⁴⁸ It’s just that a different — and far more equivocal — message emerges when one looks beyond the Justices’ words.

The harder project, which is identified but not completed by Sitaraman and Wuerth, is to identify the *source* of the Justices’ foreign relations schizophrenia. One possibility is that the Justices on the whole (or the key Justices on their own) simply aren’t as committed to the project of normalization as Sitaraman and Wuerth think they are. This thesis, though, is difficult to reconcile with the aggressive approach the Justices have taken in the cases in which they *have* granted certiorari; if the Justices truly were ambivalent, one would reasonably expect more evidence of that ambivalence in the Court’s written product as well. Another possibility is that, as with so many other trends on the Court, the key lies not in the merits, but in the politics of certiorari — and so it may well be that efforts to identify a larger pattern in cases in which certiorari has been denied cannot account for the extent to which different coalitions of the Justices may be voting not to hear different sets of the cases described above. Alternatively, it could be, as I’ve suggested elsewhere, that the Justices — or, at least, a solid majority thereof — are committed to an altogether different principle, one that values assertions of judicial *power* over any particular view of the merits.⁴⁹ So construed, the patterns identified above would make

⁴⁶ See Vladeck, *supra* note 14, at 1453–54 (discussing criticism).

⁴⁷ See *Ashcroft v. Iqbal*, 556 U.S. 662, 666 (2009).

⁴⁸ Sitaraman & Wuerth, *supra* note 1, at 1979.

⁴⁹ See Stephen I. Vladeck, *The Passive-Aggressive Virtues*, 111 COLUM. L. REV. SIDEBAR 122 (2011).

sense as to federalism and executive dominance (which are merits-based) — albeit not as to justiciability.

But whatever the source of the Supreme Court's inconsistent approach to foreign relations disputes, the more important point for present purposes is its impact: lower courts are, in effect, receiving mixed signals from the Justices, which, depending upon how one reads those signals, can be (and have been) exploited, misunderstood, or altogether missed. So long as the signals from One First Street remain mixed, foreign relations exceptionalism will be able to flourish in the lower courts — whether by intent or inertia.