AGORA: REFLECTIONS ON *ZIVOTOFSKY V. KERRY*
SPEAKING WITH ONE VOICE ON THE RECOGNITION OF STATES

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At first blush, the recent judgment of the U.S. Supreme Court in *Zivotofsky v Kerry (Zivotofsky II)*[1] reads as a strikingly American affair concerning the enduring force of the separation of powers under a written Constitution. Finding that the President has the exclusive power to recognize foreign states and their territory, the Court holds that a statute of Congress encroaches upon this power and declares it unconstitutional. The reasoning of both the Court and the minority justices is largely a narrative of U.S. Constitutional history. So one might ask: does this decision really have anything to say of significance outside the U.S. context about the scope of the executive function in foreign relations?

This essay argues that *Zivotofsky v. Kerry* can be linked in important ways with practice in English law. Its significance as a common law precedent lies in the carefully limited way in which the majority articulates the rationale. So, far from being a ringing endorsement of the executive voice in foreign affairs, *Zivotofsky II* is in fact *all* about the executive function of recognition. Understanding why the executive exercises a decisive role on questions of recognition within a national constitution is important because it also highlights the limits of the principle found in both English and American law that the Nation must "speak with one voice" on foreign affairs.

Part I of this essay briefly describes the relevant aspects of the Court's approach in *Zivotofsky II* and the contrary views of the minority. Part II sets this within a larger common law frame by exploring the connection between the so-called one voice principle and recognition of states in English law.[2] It draws from this the argument that recognition is properly a matter on which the Executive's voice is entitled to prevail. Part III contends that *Zivotofsky II* does not imperil the balance of power on wider issues of foreign relations through the import of pre-independence British constitutional thought, as the minority opinions would variously have it. The requirement to speak with one voice on recognition does not support an Executive unbound in foreign relations.

I. Reasoning in Zivotofsky II

Zivotofsky sought to enforce Section 214(d) of the Foreign Relations Authorization Act,[3] which states that for "purposes of the registration of birth, certification of nationality, or issuance of a passport of a United States citizen born in the city of Jerusalem, the Secretary shall, upon the request of the citizen or the citizen's

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[1] Zivotofsky ex rel. Zivotofsky v. Kerry, 135 S.Ct. 2076 (2015) (hereafter Zivotovsky II).

[2] CAMPBELL MCLACHLAN, FOREIGN RELATIONS ch. 10 (2014).

[3] Foreign Relations Authorization Act, Fiscal Year 2003, Pub. L. No. 107-228, 116 Stat. 1350 (2002).

legal guardian, record the place of birth as Israel." The Executive branch demurred, citing its long-standing policy not to recognize any state as having sovereignty over Jerusalem. The Court had to decide whether Section 214(d) was unconstitutional as contradicting the Executive's exclusive power to recognize foreign states and their title to territory.

The *Zivotofsky II* Court, in its opinion delivered by Justice Kennedy, finds that the recognition of a foreign state carries legal consequences at both international law and within the national legal system. It locates the President's recognition power within Article II of the Constitution as a "logical and proper inference" from his power to receive ambassadors.[4] It then holds that "[r]ecognition is a topic on which the Nation must 'speak . . . with one voice.'"[5] Acknowledging that the Constitution also gives Congress important foreign relations functions, the Court holds nevertheless that the recognition power resides exclusively with the President.[6] The Court finds that Section 214(d) directly contradicts the Executive's position in a manner that is consistent only with Congress seeking to claim for itself the recognition power. The Court thus holds the section invalid.

The minority opinions present very different and contrasting views. Justice Thomas concurs in the Court's decision as regards passports, but finds no such vice in the inclusion of the same designation in a consular report of birth abroad. That, in his view, falls within the specific power of Congress in relation to naturalization. The wider import of his opinion lies in his extended articulation of a conception of a broad grant of residual foreign relations power to the Executive as derived from Locke's "federative function."[7] It is this power that renders Section 214(d) unconstitutional. In "Anglo-American legal tradition," the Executive retains the power to issue passports[8] and the enumerated powers of Congress in this field do not support Section 214(d).

Justice Scalia (with whom Chief Justice Roberts and Justice Alito join) reaches exactly the opposite opinion. In his view Congress was entitled to enact Section 214(d) even if it directly contradicts the President's policy decision. He contrasts the position on the foreign affairs power in English law prior to American independence with that adopted in the U.S. Constitution.[9] He distinguishes the formal legal act of recognition on the international plane from the "prosaic function" of Section 214(d).[10] Criticizing the Court's endorsement of the one voice principle,[11] he opines that its adoption will systematically favor the President over Congress in foreign affairs.

Both minority opinions invoke English constitutional thought on the primacy of the Executive voice in foreign relations to diametrically opposite effect. The Court itself invokes the importance of that principle, applying it specifically to recognition. How, then, has English law itself treated the link between the idea of speaking with one voice and the power to recognize states within the domestic polity?

II. Recognition of States in English Law

It is sometimes said in England that "[o]ur state cannot speak with two voices on such a matter, the judiciary saying one thing, the executive another."[12] Lord Wilberforce famously (but irrelevantly) invoked this principle

[4] Zivotovsky II, 135 S.Ct. at 2085.

[5] *Id.* at 2086, citations omitted.

[6] *Id.* at 2090.

[7] *Id.* at 2097-9 (Thomas, J, concurring).

[8] *Id.* at 2101-2 (Thomas, J, concurring).

[9] *Id.* at 2116 (Scalia, J., dissenting).

[10] *Id.* at 2119 (Scalia, J., dissenting).

[11] *Id.* at 2123 (Scalia, J., dissenting).

[12] The Arantzazu Mendi, [1939] A.C. 256 (H.L.) 264 (U.K.).

in the *Westinghouse* anti-trust litigation.[13] More recently it has been mooted as the basis for the British act of state doctrine.[14] If such a principle were given unqualified scope it could license unbridled executive power in foreign affairs. But closer examination suggests that the principle originated in the specific context of the recognition of states, where it is properly to be confined.

Some of the early cases appear quite unpalatable to modern taste. The practice of the courts relying upon the Executive as to the recognition of foreign states may be traced to the judgments of Lord Eldon, who posed the rhetorical question, "What right have I, as the King's Judge, to interfere upon the subject of a contract with a country which he does not recognize?"[15] Eldon had only to ask such a question to answer it in the negative. He was, after all, also Lord Chancellor, a powerful presence in the cabinet and a favored advisor of the King. The early judgments gave effect to conservative British policies that initially refused to recognize either the Helvetic Republic or the newly independent states of Latin America. The courts insisted on relying upon executive recognition as decisive as to the status of a foreign sovereign, even where the Executive's position might otherwise have been distinctly debatable.[16]

But the strength of this rule does not make executive recognition *constitutive* of the domestic personality of the foreign state.[17] The legal personality and territory of states is defined by international law. In most cases this status is not in doubt and no reference to the executive is required to determine it. No other organ of state need refer to the executive in order to determine whether, for example, France or the United States is a sovereign state.

Reference to the Executive is only necessary in cases of doubt. Even in such cases, the Executive will not always wish to state a definitive position. Lord Curzon declined to take a position as to the date on which the Soviets gained control of Russia.[18] More recently, the Canadian Department of Foreign Affairs simply refused to issue a certificate as to the statehood of Taiwan in a claim of state immunity.[19] In such situations, the court must determine the question for itself.

But where the Executive has stated a clear position, the other organs of state are bound to follow it (as is confirmed by decisions on the unrecognized status of the "Turkish Republic of Northern Cyprus").[20] In contemporary British practice, the recognition of states remains an important executive function. It is carried out "in accordance with common international doctrine."[21] Whilst that practice is not wholly removed from the policy sphere, nevertheless the general British policy is that recognition should follow the criteria for statehood prescribed by international law.[22]

The position is substantially the same in relation to the sovereign territory of foreign states. In cases where territorial boundaries are in doubt or dispute, it may well be that the Foreign Office will decline to take a position

[13] Rio Tinto Zinc Corp v. Westinghouse Electric Corp (Nos 1 & 2), [1978] A.C. 547 (H.L.) 617 (U.K.).

[14] Al-Jedda v. Secretary of State for Defence [2010] EWCA Civ 758, [2011] 773 Q.B. [212] (Eng.), but see now Serdar Mohammed v. Secretary of State for Defence [2015] EWCA Civ 843, 354 (Eng.), discussed *infra*.

[15] Jones v. Garcia del Rio, (1823) 1 Turn & R. 297, 299 (U.K.).

[16] Mighell v. Sultan of Johore, [1894] 1 Q.B. 149 (U.K.).

[17] *Contra,* Geoffrey Marston, *The personality of the foreign state in English law*, 56 C.L.J. 374 (1997).

[18] White, Child & Beney Ltd v. Eagle Star and British Dominions Insurance Co, (1922) 38 T.L.R. 367 (Eng.).

[19] Parent v. Singapore Airlines Ltd, 133 I.L.R. 264 (Can. Que. S.C., 2003).

[20] R (Yollari) v. Transport Secretary [2010] EWCA Civ 1093, [2011] 1 Lloyd's Rep. 274 (Eng.).

[21] 408 PARL. DEB., H.L. (5th ser.) (1980) 1121-2WA (U.K.). The United Kingdom has discontinued the practice of recognizing *Governments*. This has become a question of fact: Republic of Somalia v. Woodhouse Drake & Carey (Suisse) SA [1993] Q.B. 54 (U.K.), save in exceptional cases: British Arab Commercial Bank plc v. National Transitional Council of the State of Libya [2011] EWHC 2274, 147 I.L.R. 667 (U.K., H.C., Q.B. Commercial Court, 2011).

[22] 160 PARL. DEB., H.C. (6th seri.) (1989) 494W (U.K.).

itself. Where the resolution of such a dispute between sovereign states is central to the court's decision, this may in exceptional cases lead to a decision that the case cannot be adjudicated domestically, because the matter is really an inter-state dispute that can only be determined on the plane of public international law.[23] But where the Executive *has* made a statement "as to the status and boundaries of foreign powers," the Court is bound to give effect to it as "a matter which is peculiarly within [the Executive's] cognizance."[24]

Why is the Executive's position on foreign statehood binding on the other organs of the state? The Executive is not deciding a question of fact. Rather, its ability to certify as to foreign statehood is limited to "what is or is not recognised by the Government."[25] This follows as a necessary internal consequence of the fact that recognition is an act that the Executive is solely competent to perform on the international plane. Since it lies within the competence of the Executive to conduct the state's diplomatic relations with foreign states, it must also be competent to inform the other organs of government as to the steps that it has taken on the international plane. The most basic such step, since it is the predicate to all other inter-state relations, is recognition of the foreign state and its territory.

Whether a state is or is not recognized by the home state is an act that ought to produce consistent effects within the domestic polity. Once a state is recognized important attributes flow from statehood within the domestic legal system. The foreign state may sue in English courts and, if sued, may also invoke the plea of immunity.[26] In this context it is quite understandable that the organs of government should speak with one voice. It would be likely to produce serious international repercussions if the other organs were to take a position different to that of the executive on so fundamental a question of foreign policy as recognition where the sovereign claim of a foreign state is directly in issue.

III. Implications of English Law for Zivotofsky II

How might this British practice illuminate our reading of *Zivotofsky II*? It can tell us little about the relations between the Executive and the Legislature. The Westminster Parliament is informed of major changes in Executive policy on recognition but has not laid claim to be entitled to take a contrary view. All of the practice cited above concerns the dispositive effect of an executive statement on recognition vis-à-vis the judiciary.

For all that, a comparison with English law serves to highlight the importance of the limitations in the rationale of *Zivotofsky II*. This was not a decision founded upon an expansive notion of unbridled executive power in foreign relations. The battle lines on the broader question of the scope of the executive power in foreign relations are instead drawn in the minority opinions. In each case, these opinions turn upon the extent to which the foreign affairs power in the U.S. Constitution represented continuity or discontinuity with what is represented as the prior English position.

Justice Thomas develops[27] a much more expansive view of the Executive's foreign affairs power, derived from Locke's conception of the federative power, as including "all the transactions with all persons and communities without the commonwealth."[28] He opines that "[t]hat understanding of executive power prevailed in

[23] Buttes Gas v. Hammer (No 3) [1982] A.C. 888 (U.K.).

[24] Duff Development Co Ltd v. Government of Kelantan [1924] A.C. 797 at 813 (U.K.).

[25] FRANCIS VALLAT, INTERNATIONAL LAW AND THE PRACTITIONER 54 (1966).

[26] State Immunity Act 1978, § 21 (U.K.).

[27] Zivotovsky II, 135 S.Ct. at 2097-98 (Thomas, J., concurring).

[28] 2 JOHN LOCKE, TWO TREATISES OF GOVERNMENT 146 (1690). For an assessment and critique of the influence of Locke's thinking on the common law conception of foreign relations see MCLACHLAN, *supra* note 2, at 2.06–2.30.

America," so as to justify his view that the powers of the President under Article II of the Constitution includes "the residual foreign affairs powers of the Federal Government not otherwise allocated by the Constitution."[29]

By contrast, Justice Scalia, writing the principal dissent, opens by contrasting what he claims (citing Blackstone) to have been the King's exclusive power over foreign affairs in England[30] with the deliberate decision of the framers of the U.S. Constitution to divide the foreign affairs power between the executive and the legislature. Building up to his "analytic crescendo," he turns his ire on the Court's deployment of the one voice principle, characterizing it as effective for a monarchy but not for a system of "separated powers that the People established for the protection of their liberty."[31]

The expansive notions of executive power in foreign affairs that Justice Thomas invokes and Justice Scalia pillories do not reflect the totality of the position under English law, nor do they assist in determining the proper allocation of powers on the recognition of states and their sovereign territory. It is true that the Glorious Revolution in England in 1688 did not fundamentally alter the balance between the Executive and Parliament on foreign affairs in the way that the framers of the US Constitution a century later consciously decided to do. The (highly significant) enlargement of the Constitutional role of the Westminster Parliament in foreign affairs is of much more recent vintage. But the minority judgments leave out of their account the significance of the work of Blackstone and Lord Mansfield in the eighteenth century in expounding a distinct foreign relations role for the judiciary vis-à-vis the Executive.

The adoption by Blackstone and Mansfield of international law into the common law constitutes the judicial role as the very antithesis of unbridled Executive power:

> In arbitrary states, this law wherever it contradicts or is not provided for by the municipal law of the country, is enforced by the royal power: but since in England no royal power can introduce a new law, or suspend the execution of the old, therefore the law of nations (wherever any question arises which is properly the object of its jurisdiction) is here adopted in its full extent by the common law, and is held to be a part of the law of the land.[32]

Such a judicial role imposes real limits on the one voice principle in foreign affairs. As the English Court of Appeal has very recently pointed out, departing from its earlier suggestion,[33] the principle does *not* justify a general restriction on the justiciability of the Executive's actions abroad based on act of state so as to defeat the assertion of a private law claim against the Executive.[34]

The true ground of distinction is between the Executive function to determine the nation's foreign policy and the judicial function to apply the law. In *Carl Zeiss* Lord Upjohn said:

> It has never been the practice of Her Majesty's Secretaries of State to express any views upon the law. While they constantly express views on recognition in answer to questions submitted to them by the courts, the legal consequences that flow from recognition is a matter which is always left to these courts.[35]

For this reason, the English courts have always treated the principles of state immunity (a legal right that is consequent upon statehood) as a question of law for the courts and not for the Executive. In *The Philippine*

[29] Zivotovsky II, 135 S.Ct. at 2099 (Thomas, J., concurring).

[30] *Id.* at 2116 (Scalia, J., dissenting).

[31] *Id.* at 2123 (Scalia, J., dissenting).

[32] 4 WILLIAM BLACKSTONE, COMMENTARIES *67.

[33] Al-Jedda, *supra* note 14.

[34] Serdar Mohammed, *supra* note 14, at 354.

[35] Carl Zeiss Stiftung v Rayner & Keeler Ltd (No 2), [1967] 1 A.C. 853 (H.L.) 950.

Admiral, Lord Cross, deprecating the (now abandoned) U.S. practice of relying upon executive suggestions in immunity cases said:[36]

> [I]f the courts consult the executive on such questions what may begin by guidance as to the principles to be applied may end in cases being decided irrespective of any principle in accordance with the view of the executive as to what is politically expedient.[37]

Nor does adherence to the Executive position on recognition necessarily preclude either Parliament or the courts in England from developing their ability to give effect to private rights between individuals *inter se* where no direct interest of the state is involved.[38] The issue in such cases is one to be decided according to the applicable law, as determined by private international law, not recognition. The International Court of Justice itself has accepted that a policy of nonrecognition of a state's claim to territory should not result in depriving the inhabitants of their legal rights.[39] The requirement to give effect to the Executive's position on the recognition of a foreign state or its sovereign title to territory applies only where sovereign interests are directly impleaded.

The significance of *Zivotofsky II* is as much for what the Court does *not* say as for what it does decide. By carefully limiting the rationale to the power to recognize states and their territory, the Court (rightly in my view) focuses on the particular considerations that justify allocation of exclusive competence on that question to the Executive. It eschews taking a position on the debate as to the wider questions of the balance to be struck between the organs of government in foreign affairs. In so doing, it also reaches a conclusion that is congruent with practice in other common law countries.

The state must speak with one voice on recognition. Inconsistent voices on such an issue would produce only discord and incoherence. Beyond this specific context, however, the one voice principle can assist but little in answering the many important questions of allocation of responsibility for the state's engagement on the international stage.

[36] [1977] A.C. 373 (P.C.) 399.

[37] A failure to make this basic distinction lies at the heart of the unfortunate decision in Democratic Republic of the Congo v. FG Hemisphere Associates LLC (No 1) [2011] 14 H.K.C.F.A.R. 95 (C.F.A.) (H.K.).

[38] Foreign Corporations Act 1991 (U.K.); Carl Zeiss, *supra* note 35 at 954 per Lord Wilberforce.

[39] Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276, Advisory Opinion, 1971 ICJ REP. 16, 125 (June 21).