The Save Our State Amendment and SCOTUS: Why We Go to Miami

Notes from the President

This fall, our Executive Council meeting, with a substantive program added, will be held in Miami. Cries of concern go up across the land, “But why?” There are many reasons for ASIL to meet outside of DC for its fall meeting. This column emphasizes one reason. But to get to that point, I need to connect two recent developments.

The Oklahoma Save Our State Amendment and SCOTUS in Abbott v. Abbott.

On November 2nd, Oklahoma voters will consider a ballot initiative to amend their state constitution. The amendment, entitled “Save Our State” (“SOS”), would require courts to rely on federal or state laws and prohibit them from using foreign law, international law or Sharia law when issuing rulings. This past spring, six justices of the U.S. Supreme Court citing to a treaty and to court decisions of Canada, France, Australia, England, Germany, South Africa, Scotland, and Israel held in Abbott v. Abbott that a minor was taken to Texas from Chile wrongfully under the Convention on International Child Abduction. The case now returns to Federal Court in Texas for further action. What do these two developments say to each other?

What does Abbott v. Abbott teach us about the SOS Amendment?

First, Abbott teaches us that all judges believe – at least sometimes – that they should look to foreign law or INSIDE

Important Information Regarding Upcoming Transition to E-Periodicalcal

Starting in January 2011, ASIL’s three top periodicals – the American Journal of International Law, International Legal Materials, and the Annual Meeting Proceedings – will be published online, simultaneously with their traditional print counterparts. This major advancement in ASIL publications is the result of a new partnership between the Society and JSTOR, the well known not-for-profit organization that electronically archives scholarly journals and aims to increase access to them as widely as possible. Through this new relationship, JSTOR will host the electronic versions of the above three titles and make them available to ASIL members and subscribing institutions throughout the world. ASIL members will also be pleased to know that, as part of this agreement, these publications, in their electronic form, will be free to JSTOR subscribing institutions in Africa. This new publications arrangement will offer member access to ASIL’s most sought after content in a way that is faster and more generous than ever before. Rather than waiting for delivery of the paper version of the Journal, members will be able to read the online version as soon as an issue goes to print. Additionally, starting next year, members will have online access to current issues of

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international law. The majority in Abbott, a decision written by Justice Kennedy, included Justices Alito, Roberts, and Scalia — three justices associated popularly with the cause of remaining silent about foreign or international law. Yet no question was raised – not even in a footnote – of not referencing the Hague Convention, the records of the international organization that hosted the negotiations for the treaty, or the laws and cases of at least eight foreign jurisdictions. Indeed, it appears they only stopped at eight because apparently only eight countries were argued to have considered the question. Moreover, the dissent (an unusual lineup of Justices Stevens, Breyer, and Thomas) cited the same sources without question as well, disagreeing only as to the conclusion but not as to the actual sources.

Second, Abbott reminds us that judges look to international and foreign law, not because international or foreign law tells them to, but rather because U.S. law does so. In some ways Abbott is an easy case in this respect. The statute that implemented the treaty at issue instructs courts to "decide the case in accordance with the Convention." As far as looking to the interpretations of other countries, the Supreme Court observed that under U.S. case law regarding treaty interpretation, such foreign decisions "are 'entitled to considerable weight,'" and that that "principle applies with special force here, for Congress has directed that 'uniform international interpretation of the Convention' is part of the Convention's framework." And although Abbott is particularly clear because of the statute, it is always U.S. law that instructs judges to consider international or foreign law. In some instances, this instruction to the courts is said to emanate from the U.S. Constitution; in others, statutes or case made law. This is not to suggest that the content of some of these instructions to courts is not contested, but I will come back to this point.

Third, Abbott reminds us that there are good reasons why U.S. law may instruct judges to look to international or foreign law. Indeed, in Abbott, both the Department of State and some state attorneys general indicated their stake in streamlined child recovery efforts, made possible by uniform mechanisms such as the Hague Convention, that promote American citizens’ safety and welfare.

Fourth, the three previous points suggest that the primary legal consequence of the SOS amendment if adopted will be increased court costs, increased delay, and possibly undesirable outcomes. Given that federal law (and its instructions to judges to refer to international or foreign law) will have supremacy over inconsistent state law in many situations and given that even under Oklahoma law it will be arguable that a state court judge is not violating the SOS amendment — because he or she is in fact only applying federal or state law that instructs him or her to use foreign or international law — a primary consequence of the SOS amendment may simply be increased litigation and consequent costs and delay. To the extent that the amendment is given effect in purely state law matters, one can imagine numerous outcomes.

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Election of Board Members to the American Journal of International Law

At the 2010 Annual Meeting, the Board of Editors of the American Journal of International Law elected four members, Christine M. Chinkin of the London School of Economics, John R. Crook, editor of the Journal's section on Contemporary Practice of the United States Relating to International Law, Laurence R. Helfer of Duke University School of Law, and Ruth Wedgwood of the Johns Hopkins University School of Advanced International Studies.

John R. Crook  Ruth Wedgwood  Laurence R. Helfer
(not pictured: Christine M. Chinkin)
undesirable from a policy perspective. For example, suppose an Oklahoma resident injures a foreign national while driving abroad and that foreign national then files an action in Oklahoma. What law applies to the merits? Suppose that the plaintiff would prevail under Oklahoma law but not under the law of the country in which the incident took place. What law applies to the damages? Suppose that Oklahoma law would award categories of damage not available under the law of the foreign national.

What does the SOS Amendment teach us about Abbott v. Abbott?

First, the SOS amendment suggests that the sophisticated arguments along the line of the lessons from Abbott are in some respects beside the point to the backers of the proposal. It could be argued that the SOS amendment is really about broader political disputes in the U.S. that have little to do with international law. This may be true in part, but the amendment also did not randomly hit upon the application of international and foreign law. Rather, the amendment likely is an echo of and resonates with foreign law. Rather, the amendment is really about broader political concerns of a constituency. For ASIL to promote international and international organization be secondary consequences of, swept along with, attitudes regarding domestic questions.

Third, if it is correct that a distrust of the use of international and foreign law by our courts lies at the core of the SOS amendment, then a very substantial project of engagement with the American public is required.

Why Go to Miami?

Throughout my career, I have heard speeches and read articles saying that “but for Senator [insert your choice], the U.S. would do [insert your choice].” But the truth is that although a particular senator may do something that seems unfathomable to a particular group, there is a remarkable constancy to the wary eye cast by some portions of the U.S. Senate (and House) toward international law and international organizations. A reason for this constancy is that they often mirror a distrustful tendency in their constituencies. For ASIL to promote international relations based on law and justice, it needs to engage not only with the policy communities in Washington, but also with communities nationwide that will set the boundaries within which policy will take place. And it is arguable that our Society has done a better job of reaching out abroad than in the United States.

So, if it is important to engage with the nation more broadly, what is to be done? What is a first step? In my view, it is important that our spring annual meeting remain in Washington, DC. The traditional leadership meeting of our Executive Council held in Washington in the fall is another matter, however. This meeting, usually held on a Saturday in November, brings together our leaders from around the nation. It is not important to the Society that this gathering be held in Washington, but it could be very important to hold it elsewhere. Hence, we meet outside of Washington this fall. The choice of Miami, FL, in particular was easy: a leading city and state, the site of many law schools, and home to a leader of our Society and Journal – Bernie Oxman.

Going to a different location this fall is only a part of giving ASIL a greater nationwide presence. For some of us, the Society can seem like the spokes of a wheel— we all look toward Washington. Members from the same state often see each other at the Annual Meeting, rather than at home. ASIL-Midwest and ASIL-West are first steps toward building nodes of community elsewhere in the United States. Washington, DC, will remain our center, but there can be other points as well. Betsy and I would welcome seeing ASIL member dinners twice a year in cities throughout the United States. American attitudes toward international law and organization at any given time are grounded in communities across the nation. A worthy task for the Society and its members is to better engage with those communities and to foster the measure of trust implicit in, and necessary to, the lessons of Abbott.

David Caron