

1979

The Diplomatic Relations Act of 1978

Barry Cohen

Follow this and additional works at: <https://scholarship.law.edu/lawreview>

Recommended Citation

Barry Cohen, *The Diplomatic Relations Act of 1978*, 28 Cath. U. L. Rev. 797 (1979).

Available at: <https://scholarship.law.edu/lawreview/vol28/iss4/7>

This Comments is brought to you for free and open access by CUA Law Scholarship Repository. It has been accepted for inclusion in Catholic University Law Review by an authorized editor of CUA Law Scholarship Repository. For more information, please contact edinger@law.edu.

COMMENTS

THE DIPLOMATIC RELATIONS ACT OF 1978

A long overdue attempt to reform the United States' antiquated diplomatic immunity laws culminated in the recent enactment of the Diplomatic Relations Act of 1978.¹ The Act brings our nation's immunity laws into accord with accepted international diplomatic practice and establishes a mechanism to compensate American citizens for personal injury suffered or property damaged in automobile accidents with diplomatic personnel. In place of absolute immunity previously conferred upon all diplomatic personnel regardless of rank or function,² the new legislation adopts degrees of diplomatic immunity based on rank and duty, as provided in the 1961 Vienna Convention on Diplomatic Relations.³

The Act increases civilian protection by requiring insurance coverage for all members of the diplomatic community operating motor vehicles.⁴ Additionally, it authorizes direct action against insurance carriers. Furthermore, insurers are prohibited from raising diplomatic immunity as a defense to avoid liability.⁵ This revision of federal diplomatic immunity law for the first time in two centuries permits judicial recourse by American citizens for acts committed by previously immune diplomatic personnel.

Prompted by the loss of diplomatic immunity by many embassy employees, the District of Columbia has restructured its traffic laws to bring these individuals within its jurisdiction.⁶ Thus, the combination of federal and local legislation significantly addresses the problems caused by moving and parking violations as well as by automobile accidents. However, in areas of citizen involvement with the diplomatic community such as con-

1. 22 U.S.C.A. §§ 254a to 254e, 28 U.S.C.A. §§ 1364, 1351, 1251 (West Supp. 1979).

2. Ch. 9, §§ 25-27, 1 Stat. 117-18 (1790) (current version at 22 U.S.C.A. §§ 254a to 254e, scattered sections of 28 U.S.C.A. (West Supp. 1979)).

3. Opened for signature April 18, 1961, 23 U.S.T. 3229 T.I.A.S. No. 7502, [1972] [Convention provisions hereinafter cited as Articles]. See text accompanying notes 94-109 *infra* for a discussion of the Convention.

4. Diplomatic Relations Act, 22 U.S.C.A. § 254e (West Supp. 1979).

5. 28 U.S.C.A. § 1364 (West Supp. 1979).

6. District of Columbia Traffic Adjudication Act of 1978, D.C.L. No. 2-104 (1978), [1978] D.C. Code Legis. & Admin. Serv. 212. See text accompanying notes 176-181 *infra* for a discussion of the Act.

tracts for personalty, the sale of real property and personal torts, the impact of the Diplomatic Relations Act is still in doubt. The deference historically accorded diplomatic immunity may serve to inhibit solutions despite the creation of legal mechanisms designed to insure a just adjudication of these claims. Moreover, by creating new classifications entitled to immunity, the new law substantially offsets the number of individuals stripped of diplomatic privileges and immunities.⁷

Due to the large number of embassy personnel living and working within the Washington metropolitan area, the Diplomatic Relations Act is important to District of Columbia residents. This article will examine the history and application of United States law to diplomatic practice and evaluate the likely impact of this new legislation on several areas of local concern.

I. HISTORICAL EVOLUTION OF DIPLOMATIC PRIVILEGES AND IMMUNITIES

A. *Underlying Principles*

The concept of diplomatic privileges and immunities stems from an ancient and substantially unaltered recognition of the need for unfettered channels of communications between nations.⁸ Because the diplomat personifies his sovereign in a representative capacity and since the sovereign cannot, by its very nature, be subject to another's jurisdiction, the sovereign historically has demanded complete inviolability for its agents.⁹ Two major theories have influenced the evolution of diplomatic inviolability.

7. Over 7,000 family members of the administrative and technical staff who had no immunity under judicial interpretation of the 1790 Statute are granted immunity from criminal jurisdiction under the Diplomatic Relations Act. Conversely, approximately 4,000 individuals have, depending on their official status, lost varying degrees of both civil or criminal immunity. *Hearings on H.R. 7819 Before Senate Comm. on Foreign Relations*, 95th Cong., 2d Sess. 27 (1978) [hereinafter cited as *Senate Hearings*]. For a discussion of the classifications contained in the Vienna Convention and adopted by the Diplomatic Relations Act, see text accompanying notes 98-108 *infra*.

8. See IV G. HACKWORTH, DIGEST OF INTERNATIONAL LAW 513-14 (1942).

Now, *ambassadors . . . are necessary instruments* for the maintenance of that *general society*, of that *mutual correspondence* between nations. But their ministry cannot effect the intended purpose, unless it be invested with all the prerogatives which are capable of insuring its legitimate success, and of enabling the minister freely and faithfully to discharge his duty in perfect security.

E. DEVATTEL, THE LAW OF NATIONS 471 (4th ed. J. Chitty trans. 1835) (emphasis in the original) [hereinafter cited as VATTEL]. See generally D. MICHAELS, INTERNATIONAL PRIVILEGES AND IMMUNITIES 7-11 (1971).

9. The concept of inviolability implies immunity from "jurisdiction" in the law enforcement activities of the receiving state and imposes a special duty of protection for foreign diplomatic agents on the receiving state. E. DENZA, DIPLOMATIC LAW 149 (1976).

The "extraterritoriality" theory states that property held for the benefit of the sending state represents an extension of that sovereign's territory. According to the "representative character" theory, the diplomatic mission personifies the sovereign, and therefore members of the mission are entitled to diplomatic privileges and immunities.¹⁰ To the extent that the diplomat represents "his master in the first degree,"¹¹ any assertion of jurisdiction by the receiving state over the person or property of the diplomat is repugnant to the concept of sovereign independence of nations.

Powerful sanctions have customarily insured that diplomatic privilege will be internationally protected. Fear of war or other reprisals deters the breach of international law.¹² Less severe sanctions, however, are usually sufficient to protect diplomatic practice. States recognize that they function more effectively if the world community conducts itself according to certain generally accepted standards of performance. Mutuality and reciprocity¹³ give rise to justified expectations in the preservation of diplomatic inviolability and reinforce the effect of "moral sanctions" when these expectations are not satisfied.¹⁴ Ultimately, the reciprocal and mutual recognition of diplomatic inviolability averts interference with sensitive diplomatic missions which could impede international communication.¹⁵

B. The 1790 Act

The concept of diplomatic inviolability was embedded in American law in 1790 when Congress codified then existing diplomatic practice.¹⁶ The

10. II Y.B. INT'L COMM'N 94-95 (1958). Diplomatic inviolability derives from the obligations imposed upon sovereigns to consent to "those things, without which it would be impossible for nations to cultivate the society that nature has established among them, to keep up a mutual correspondence, to treat of their affairs, or to adjust their differences." VATTEL, *supra* note 8, at 471.

11. VATTEL, *supra* note 8, at 477-78.

12. In the ancient world, total war could be premised on lack of respect accorded a sovereign's emissary. King David ordered an army to destroy the Ammonites after his courtiers, sent to "comfort" King Hanun over his father's death, were subjected to indignities. *Chronicles* 19:1-19. See also C. RHYNE, INTERNATIONAL LAW 9 (1971).

13. Each nation is both a sending and a receiving state. To the extent that a state has representatives abroad who may be held hostage subject to its treatment of a receiving diplomat, it has substantial interest in reciprocity. DENZA, *supra* note 9, at 2. For a classic example of the hostage technique of reprisal, popular in the sixteenth century, see VATTEL, *supra* note 8, at 481.

14. See RHYNE, *supra* note 12, at 9.

15. For example, under the pretext of a civil action, "[t]he ambassador might be often molested in his ministry, and the state involved in very disagreeable quarrels, for the trifling concerns of some private individuals, who might, and ought to have taken better precautions of their own security [sic]." VATTEL, *supra* note 8, at 489.

16. Ch. 9, §§ 25-27, 1 Stat. 117-18 (1790) (current version at 22 U.S.C.A. §§ 254a to 254e, scattered sections of 28 U.S.C.A. (West Supp. 1979)).

1790 legislation was fundamentally a restatement of the Diplomatic Privileges Act of 1708,¹⁷ a statute promulgated in Great Britain during the reign of Queen Anne. An historical overview of this English statute aids in understanding the development of American law on diplomatic practice.

The English law was triggered in 1708 when the Russian Ambassador to the Court of St. James, Matteuof, was forcibly dragged from his carriage and detained for several hours by irate creditors.¹⁸ In response to the Tsar's protests, Parliament declared all civil writs and processes against an ambassador or his servant null and void and made any attempt to prosecute a civil action itself a criminal offense. By affording complete protection for the entire diplomatic entourage, including the private personal servants of diplomatic agents, Parliament may have overreacted to the Matteuof incident.¹⁹ Nonetheless, the Act did not address diplomatic immunity from criminal prosecution,²⁰ and failed to render diplomatic agents liable in private actions related to the sale of real property and to commercial activities. These exceptions to civil immunity were discussed by early authorities and were already developing in other jurisdictions.²¹ Despite these shortcomings, English and American courts repeatedly invoked the Statute of Anne as declaratory of the unalterable law of nations.²²

By 1790, the Statute of Anne was so enshrined as the law of nations that Congress adopted it almost intact.²³ The United States law went further

17. 7 Anne c. XII (1708). See *Trost v. Tompkins*, 44 A.2d 226, 228 (D.C. 1945).

18. *Case of Matteuof*, 88 Eng. Rep. 598 (Q.B. 1710).

19. It appears that the Tsar was highly insulted by the incident since his ambassador was not immediately released and the creditors were not put to death. When it became apparent that the Tsar would not be mollified by the punishment of the creditors, Parliament enacted the legislation "as an apology and humiliation from the whole nation. It was sent to the Czar, finely illuminated, by an ambassador extraordinary, who made excuses in a solemn oration." *Triquet and Others v. Bath*, 97 Eng. Rep. 936, 937 (K.B. 1764).

20. At that time, criminal proceedings were under the control of the Crown rather than Parliament.

21. Columbia, Egypt, India, Norway, Poland, Switzerland, and South Africa expressly provided for civil jurisdiction over actions arising from lucrative activities which were incompatible with diplomatic functions. U.N. LAWS AND REGULATIONS pp. 65, 112, 167, 224, 243, 308, 330. DENZA, *supra* note 9, at 165. Furthermore, English law, outside of admiralty, made no distinction between real and personal actions.

22. *Taylor v. Best*, 139 Eng. Rep. 201, 205, 487, 495 (Q.B. 1854); *Magdalena Steam Navigation Co. v. Martin*, 121 Eng. Rep. 36, 44 (K.B. 1859). The Statute of Anne "was declaratory simply of the law of nations, which Lord Mansfield observed . . . the act did not intend to alter and could not alter." *In re Baiz*, 135 U.S. 403, 420 (1890). The fact that the Statute of Anne was primarily emergency legislation and not necessarily a comprehensive restatement of diplomatic practice was not judicially recognized in America until *Trost v. Tompkins*, 44 A.2d. 226, 228 (D.C. 1945).

23. The legislative history of the 1790 Diplomatic Immunity Law was not recorded be-

than the Statute of Anne, however, by voiding all criminal as well as civil writs issued against any diplomat or members of his official staff who had been received by the President.²⁴ Family members of the diplomatic staff enjoyed the same immunities. Any attempt to serve a writ on an immune individual was considered an offense against international law and subjected the violator to a monetary fine and imprisonment for up to three years.²⁵

The 1790 law also differed from the Statute of Anne by distinguishing between American and foreign servants in a diplomatic entourage. United States citizens in diplomatic employment were not immune from suit for debts contracted prior to entering service.²⁶ Implicitly, process could be served on a U.S. citizen after the termination of his diplomatic employment for acts committed during his immunized period of service.²⁷ The Act further restricted the immunity of domestic servants to only those whose names had been registered in the State Department and were posted in the District of Columbia Office of the United States Marshall.²⁸ Once their names were registered, members of the service staff and private ser-

cause the Senate convened behind closed doors until February 1794. J. BENTON, 1 ABRIDGEMENT OF THE DEBATES OF CONGRESS 9, n* (1857).

24. Ch. 9, §§ 25-27, 1 Stat. 117-18 (1790) (current version at 22 U.S.C.A. §§ 254a to 254e (West Supp. 1979)).

25. *Id.* On November 27, 1935, two policemen jumped on the running board of the car of the Iranian Ambassador near Elkton, Maryland, and arrested the Minister and his chauffeur for speeding. The Minister was handcuffed for resisting arrest and the car and its occupants were taken to the police station. Charges were dropped upon proof of the Minister's identity. After diplomatic protest, the arresting officers were prosecuted, fined, and removed from duty. The Governor of Maryland and the Secretary of State apologized to Iran and expressed their regrets. The Minister was subsequently recalled. *See* Reeves, *The Elkton Incident*, 30 AM. J. INTL. L. 95 (1936); and HACKWORTH, *supra* note 8, at 515. *See also* Hellenic Lines Ltd. v. Moore, 345 F.2d 978 (D.C. Cir. 1965) (a United States Marshall could not be compelled to serve a summons through mandamus on the Ambassador of Tunisia since he would thereby subject himself to possible criminal sanctions under 22 U.S.C. §§ 252, 253 (1976)).

26. Ch. 9, § 27, 1 Stat. 117-18 (1790) (current version at 22 U.S.C.A. §§ 254a to 254e (West Supp. 1979)).

27. Until 1978, a United States inhabitant entering into the service of a diplomatic mission and supplying his name to the Department of State enjoyed the same rights of extraterritoriality as did other members of the mission. Upon leaving service, his extraterritorial relationship was terminated and he was liable for all civil or criminal actions committed during his service, subject to statutes of limitation. *District of Columbia v. Paris*, 33 AM. J. INT'L L. 787 (D.C. Police Ct. 1939) (former butler for the Japanese Embassy held liable for ten traffic violations incurred during his employment).

28. *Haley v. State*, 200 Md. 72, 88 A.2d 312 (Md. Ct. App. 1952) (American citizen serving as personal servant to Swedish attache could not assert immunity when criminally charged for performing unnatural and perverted sexual practices since his name did not appear on the White List and no official notification of his status was given to the State Department). *See generally* 7 M. WHITEMAN, DIGEST & INTERNATIONAL LAW, 110-15

vants received the same immunities granted diplomatic personnel. Family members of administrative and technical personnel, service staff, and private servants enjoyed no immunity under the statute.²⁹

C. *Historical Bases for Granting Blanket Immunity*

The congressional grant of total immunity in the 1790 statute is easily justified when viewed in its historical context. Not only did English law provide statutory precedent, but practical considerations warranted indulgent treatment of the diplomatic community. Diplomatic prestige and the extravagant lifestyle of envoys from the sixteenth through eighteenth centuries required heavy personal expenditures.³⁰ Sending states made little or no allowance for support. The diplomat was forced to incur debts or engage in commercial activities in order to sustain the mission and maintain an appropriate standard of living.³¹ Consequently, no distinctions developed in British or American law between obligations undertaken on behalf of the mission and debts contracted in a private or commercial capacity.³²

In nations where process could be initiated through distraint of goods and personal suit was unnecessary, creditors could obtain and execute judgments against a diplomat's property if the act of seizure did not infringe upon diplomatic inviolability.³³ Since this procedure was unavailable in the United States under the 1790 law, wronged creditors had few avenues of recourse. The diplomat's sovereign could be sued for property

(1970) (discussing the need for obtaining proper verification from State Department of Status as a precondition for raising diplomatic immunity).

29. The accepted modern classification of members of the diplomatic mission is found in the Vienna Convention, *supra* note 3, at Article 1.

30. DENZA, *supra* note 9, at 252.

31. *Id.* See *Magdalena Steam Navigation Co. v. Martin*, 121 Eng. Rep. 36 (K.B. 1859). The ambassador of Guatamala and New Granada was sued for contributions owed for unpaid shares he held in a liquidating corporation. In a seminal decision dismissing the action, Lord Campbell held that "a public minister duly accredited to the Queen by a foreign state is privileged from all liability to be sued here in civil actions . . ." *Id.* at 44.

32. *Taylor v. Best*, 139 Eng. Rep. 201 (C.B. 1854). "If an ambassador violates the character in which he is accredited to our court by engaging in commercial transactions . . . he does not thereby lose the general privilege which the law of nations has conferred upon persons filling that high character. . . ." *Id.* at 241. As recently as 1977, diplomatic immunity from civil jurisdiction was successfully invoked for the purpose of abrogating a fully executed contract to sell Washington real estate owned by a diplomat for commercial investment purposes. *Hearings and Markup on Diplomatic Privileges and Immunities Before the Subcomm. on Int'l Operations of the House Comm. on Int'l Relations*, 95th Cong., 1st Sess. 188-90 (1977) (letter of Rep. Joshua Eilberg to Office of Protocol) [hereinafter cited as *House Hearings*].

33. See DENZA, *supra* note 9, at 164.

purchased as part of the envoy's official function.³⁴ However, sovereign immunity barred these actions in the absence of consent.³⁵ If the debts were contracted by the immune individual in his private capacity, a creditor could theoretically attempt to sue in the foreign jurisdiction upon the defendant's termination of service and return home. Until the recent enactment of the Diplomatic Relations Act, however, a creditor's only reasonable recourse was to sustain the loss and demand surety or other legally enforceable assurances in future commercial dealings with the immune individual.³⁶

The 1790 Act also accorded blanket immunity from civil jurisdiction to the entire diplomatic entourage for the commission of tortious acts. The same principles underlying immunity from criminal jurisdiction justified this freedom from liability for intentional torts.³⁷ Viewed in the context of the eighteenth century, the concept of total immunity from liability for negligent conduct was not outrageous. Relatively small diplomatic staffs served the diplomatic missions to foreign governments. Staff members rode horses or drove carriages. In contrast to the horrific and frequent damage caused by today's automobile, accidents occurring in horse-drawn carriages caused relatively minor damages.³⁸

The 1790 Act's grant of blanket immunity from criminal jurisdiction was both a restatement and expansion of international law as developed

34. *Magdalena Steam Navigation Co.*, 121 Eng. Rep. at 44; H. GROTIUS, II DE JURE BELLI ET PARIS 217 (W. Whewell abridged trans. 1853).

35. See *United States ex rel Cardashian v. Synder*, 44 F.2d 895, 896 (D.C. Cir. 1930) (petition for a writ of mandamus to compel the United States Marshall to serve process on the Turkish ambassador quashed in an action to recover \$20,000 for services rendered the government of Turkey on grounds that Turkey did not consent to be sued). See also *Hellenic Lines Ltd. v. Moore*, 345 F.2d 978 (D.C. Cir. 1965). Today, suit against foreign governments for the tortious or commercial wrongs of a diplomatic agent acting within the scope of his duties can be maintained under the Foreign Sovereign Immunities Act of 1976, 28 U.S.C.A. §§ 1605 to 1611 (West Supp. 1979). See notes 110-16 and accompanying text *infra* for a discussion of the Act.

36. The inconveniences creditors faced in their business relationships with members of the diplomatic community were made abundantly clear in the *Mattueof* affair, see note 18 and accompanying text *supra*. Lord Campbell could only admonish the creditor to refuse to supply an untrustworthy immune individual in the absence of a surety capable of being sued on his behalf. Alternatively, the creditor could complain to the sending state. See *Magdalena Steamship Navigation Co.*, 121 Eng. Rep. at 44. Refusal to supply goods or services to diplomatic personnel as a class would, under United States law, subject the creditor to possible liability for discriminatory practices.

37. See text accompanying notes 39-44 *infra*.

38. *Hearings on S. 477, S. 478, S. 1256, S. 1257 and H.R. 7819 Before the Subcomm. on Citizens' and Shareholders' Rights and Remedies of the Senate Comm. on the Judiciary*, 95th Cong., 2d Sess. 20 (1978) (testimony of Senator Mathias) [hereinafter cited as *Senate Hearings*].

from the sixteenth century. The Mendoza affair resolved the question of whether crimes against the receiving sovereign³⁹ were grounds to strip the diplomat of immunity from criminal sanctions.⁴⁰ In 1584, the English government accused the Spanish Ambassador, Don Bernardino de Mendoza, of conspiring to depose Elizabeth I and to liberate Mary Queen of Scots.⁴¹ Because of his ambassadorial status, the authorities never brought Mendoza to trial. The concept thereafter evolved that the diplomat enjoys immunity from criminal process, subject only to a state's right to employ self-defense against a diplomat's overt act of violence.⁴² Such action by a state is not in itself considered an exercise of criminal jurisdiction. Consequently, the only reasonable method by which an accredited state can show its displeasure is by inducing the sending state to recall its envoy or declare the diplomat *persona non grata* and terminate official relations with him.⁴³

No legislative history exists explaining Congress' extension of broad criminal immunity to the entire diplomatic entourage. While agency principles exhibited in the civil immunity context were similarly applied to grant diplomatic immunity from criminal jurisdiction, there was no legislative precedent for immunizing the entire diplomatic mission. Immunity from criminal jurisdiction, however, has been continually considered an aspect of diplomatic inviolability.⁴⁴ Although lower level diplomatic personnel have lost this protection, the immunity remains intact for the diplomatic and administrative and technical staffs in the Diplomatic Relations Act of 1978.

39. The use of envoys in receiving states as agents provocateurs became notorious in the sixteenth century. DENZA, *supra* note 9, at 149.

40. E. M. SATOW, 1 *DIPLOMATIC PRACTICE* 390 (1917).

41. VATTEL, *supra* note 8, at 475.

42. GROTIUS, *supra* note 34, at 207-12. Grotius, writing in the sixteenth century, believed that "punishment may be had through his means who sent the ambassador; and if he will not afford it, may be demanded by war of him as the approver of the crime." *Id.* at 208. The distinction between judicial measures for punishment and measures to protect the public health and safety and prevent one possible injury to persons and property is discussed in WHITEMAN, *supra* note 28, at 413 (letter of Assistant Legal Advisor for Diplomatic and Consulting Affairs, Oct. 28, 1953). See text accompanying note 65, *infra*.

43. "Hence, if there be any delict which can be treated lightly, either it is to be overlooked, or the ambassador ordered beyond the borders. . . ." GROTIUS, *supra* note 34, at 209. *Persona non grata* is a term employed in cases in which the envoy, having been accredited in the receiving state as the diplomatic agent, has "given such offence to the Government to which he was accredited, as to induce them to ask for his recall." SATOW, *supra* note 39, at 370. See Article 9 of the Vienna Convention restating this principle.

44. See text accompanying notes 99-102 *infra*. Article 31(1) of the Vienna Convention is absolute in its prohibition of criminal jurisdiction over the diplomatic agent.

D. Enforcement of the 1790 Act

In responding to the use of immunity as a defense to either civil or criminal jurisdiction, courts recognized that sensitive issues of diplomatic practice were political and therefore vested in the Executive Branch.⁴⁵ State Department procedures resulting from the registration requirements of the 1790 Act reinforced this judicial deference.⁴⁶ According to these regulations, courts would automatically quash service of process on an accredited diplomat whose name appeared on a State Department's "Blue List"⁴⁷ once a motion for dismissal was made.⁴⁸ Similarly, courts afforded deference to claims of immunity by lower level administrative and service personnel who were registered on the State Department's "White List."⁴⁹ In contrast to the immunities automatically attaching to Diplomatic Blue List personnel upon their arrival in this country for service, registration on the White List was and still is a precondition to the grant of immunity for lower level embassy personnel.⁵⁰ Theoretically, since only the sovereign or his agent, the ambassador, could expressly waive diplomatic immunity for all lower level personnel, refusal to waive immunity implied assertion of the privilege as an affirmative defense.⁵¹ Separate waiver was, and still is,

45. See, e.g., *Trost v. Tompkins*, 44 A.2d 226 (D.C. 1945).

46. Ch. 9, §§25-27, 1 Stat. 117-18 (1790) (current version at 22 U.S.C.A. §§ 254a to 254e, scattered sections of 28 U.S.C.A. (West Supp. 1979)).

47. Individuals named on the Blue List are exempted from the requirement of notifying the State Department of their official status. 22 C.F.R. § 4.2 (1978).

48. A typical illustration is the case of the son of a highranking Pakistani Embassy official who was charged in two cases of automobile theft and petit larceny. Charges were dropped when it was learned that he was immune from prosecution due to his familial relationship. Groom, *Judge Asks Action on Diplomatic Son*, Wash. Star News, March 13, 1974 § A, at 3, col. 1, reprinted in *Senate Hearings*, supra note 38, at 134.

49. The White List was posted in the United States Marshal's office pursuant to section 252 of the 1790 statute. Embassies furnished names, addresses, and employment descriptions at the State Department's request. If the served defendant's name appeared on this List, the action was usually dismissed. *United States v. Lafontaine*, 26 Fed. Cas. 832 (C.C.D.C. 1931) (No. 15,550) (indictment against domestic servant of Swedish Charge d'affaires for assault and battery quashed upon submission of letter informing court of servant's registration with State Department and his position as the diplomat's cook).

50. *Haley v. State*, 200 Md. 72, 88 A.2d 312, 316-17 (1952). Embassies must continue to notify the State Department of the official status of mission members, family members, private servants, and American citizens employed at the mission and entitled to privileges and immunities pursuant to Article 10 of the 1961 Vienna Convention. See Article 10, supra note 3, at 3234. Furthermore, a State Department regulation requires missions to report deletions, additions, and alterations of diplomatic status on a "Notification of Status" form within 30 days after the foreign official's arrival in the United States or after a change from a nonofficial to an official status. 22 C.F.R. §§ 4.3-4.6 (1978).

51. *Kunglig Jarnvagsstyrelsen v. Dexter & Carpenter, Inc.*, 300 F. 891, 893-94 (S.D.N.Y. 1924).

necessary for an execution of judgment.⁵² To prevent confusion over whether immunity had to be asserted or whether silence implied an absence of waiver, a defendant sometimes presented a letter informing the court of his employment at the embassy and his registration with the State Department.⁵³ In the absence of such a letter or other compelling evidence, the fact that a lower level embassy employee was not registered on the White List,⁵⁴ or was served after his name no longer appeared on the List,⁵⁵ was presumptive of amenability to suit.

The United States Supreme Court had original and exclusive jurisdiction over suits against diplomatically immune individuals.⁵⁶ Since the 1790 statute made all service of process against such individuals void, it is difficult to comprehend when jurisdiction could have been successfully invoked. Only one person has ever attempted to bring an original action in the Supreme Court against a foreign ambassador,⁵⁷ and no one has successfully invoked the jurisdictional clause in its 180 years' existence.

Federal court jurisdiction against immune personnel could be invoked in spite of these obstacles in certain circumstances. For example, the diplomat could consent to be sued in the local jurisdiction. This method necessitated waiver of immunity by the sending country, however, since

52. See Article 32, *supra* note 3, at 3241; text accompanying notes 168-69, *infra*.

53. According to Whiteman, "there is no one procedure to be followed to establish to an American Court's satisfaction that a person is entitled to diplomatic immunity under sections 252 to 254 of title 22 of the United States Code . . ." WHITEMAN, *supra* note 29, at 116. It is sufficient that an ambassador has requested immunity for a lower level embassy employee and that the State Department has recognized that the individual for whom immunity was requested is entitled to it, and that the Department's recognition has been communicated to the court. *Carrera v. Carrera*, 174 F.2d 496, 497 (D.C. Cir. 1949) (Czechoslovakian ambassador requested and was granted immunity for Ecuadorean national permanently residing in the United States who was registered as a domestic, in an action brought by similarly employed wife for custody, maintenance, and support of their child).

54. *Haley v. State*, 200 Md. 72, 88 A.2d 312 (1952). See note 28 *supra*.

55. *District of Columbia v. Paris*, 33 Am. J. Int'l L. 787 (D.C. Police Ct. 1939). *But see Shaffer v. Singh*, 343 F. 2d 324 (D.C. Cir. 1965). In *Shaffer*, a member of the Indian Embassy in Washington, D.C. was served with process in India under the District of Columbia Non-Resident Motorist Act, D.C. Code § 40-423 (1973) after he left service and returned home. While the D.C. Court agreed that he normally would have been subject to suit after his name was removed from the State Department's White List, it nevertheless dismissed the suit because he had immunity at the time of the accident and came within an exception to the D.C. statute. *Id.* at 326.

56. 28 U.S.C. § 1251(a)(2) (1976). See note 124 and accompanying text *infra*.

57. *Founding Church of Scientology v. Lord Cramer*, No. 51 (Oct. 1971), *motion for leave to file bill of complaint denied*, 404 U.S. 933 (1971). In *Ex Parte Gruber*, 269 U.S. 302 (1925), the only other reported case invoking the original jurisdiction of the Supreme Court in suits affecting diplomats, the Court held that American diplomats accredited to foreign governments were not covered by this jurisdictional grant.

immunity is theoretically held on behalf of the sovereign.⁵⁸ The immune agent could also submit to jurisdiction by affirmatively bringing an action himself.⁵⁹ Furthermore, the institution of legal proceedings by a diplomatic agent traditionally has been regarded as an implied waiver of immunity with respect to counterclaims arising from the same transaction.⁶⁰ While waiver of immunity must be express, the institution of proceedings by the diplomatic agent filing a counterclaim would seem to preclude the invocation of immunity out of basic considerations of equity and fairness to the original plaintiff.⁶¹ As recently as 1976, however, an Arlington, Virginia court dismissed a tort action against a secretary from the Brazilian embassy despite the filing of a counterclaim by the named defendant.⁶² Once discovery disclosed the weakness of the defendant's case, she asserted diplomatic immunity and the case was dismissed.⁶³

Suits involving real property other than that owned by or held for the benefit of the sending country have, in America, been considered the exclusive jurisdiction of the state in which the property is located.⁶⁴ Thus, a

58. SATOW, *supra* note 40, at 252. Express waiver of diplomatic immunity from jurisdiction by the sending state is presently codified in the Vienna Convention on Diplomatic Relations. See Article 32(1) and (2), *supra* note 3, at 3241. Waiver of immunity from civil or administrative proceedings does not imply waiver of immunity from execution of judgment for which a separate and express waiver is necessary. Article 32(4), *supra* note 3, at 3241.

59. 28 U.S.C. §1251(b)(1) (1976).

60. SATOW, *supra* note 40, at 252. The Vienna Convention on Diplomatic Relations codified this exception in Article 32(3), *supra* note 3, at 3241, which provides: "The initiation of proceedings by a diplomatic agent or by a person enjoying immunity from jurisdiction under Article 37 shall preclude him from invoking immunity from jurisdiction in respect to any counterclaim directly connected with the principle claim." *Id.*

61. *Harmon v. Yeager*, 134 P.2d 695 (Utah 1943). "A counterclaim is viewed as an original action, instituted by the defendant against the plaintiff and is tested by the same tests and rules as a complaint." *Id.* at 696. "The institution of legal proceedings by a diplomatic agent has long been regarded as a waiver of immunity with respect to a counterclaim arising out of the same subject matter." WHITEMAN, *supra* note 27, at 433 (letter from Assistant Legal Advisor for Diplomatic and Consular Affairs, Apr. 1964).

62. *Lynn v. Mendes*, No. 17712 (Arl. Cir. Ct., April 14, 1976), *appeal dismissed*, 217 Va. cxii (1977). The plaintiff argued that the secretary's counterclaim constituted a waiver of immunity since it amounted to the initiation of proceedings under Article 32(3) of the Vienna Convention and customary international law. The trial court rejected the argument and dismissed the case pursuant to the 1790 Statute. For a discussion of this case see text accompanying notes 153-57, *infra*.

63. See Brief for Appellant at 4, *Lynn v. Mendes*, No. 17712 (Arl. Cir. Ct., April 14, 1976), *reprinted in Senate Hearings*, *supra* note 38, at 118.

64. SATOW, *supra* note 40, at 252. "It is axiomatic that real property other than that owned by the sending state and used for diplomatic purposes is within the exclusive jurisdiction of the State in which it is located." WHITEMAN, *supra* note 27, at 407 (quoting Department of State instructions to its delegation to the 1961 United Nations Conference in Vienna).

bank could bring foreclosure proceedings in local courts against property owned by an immune individual despite the 1790 Statute. Property used as a primary residence or connected with a mission function, however, could escape execution of judgment through diplomatic inviolability.⁶⁵ Process could not be served in a suit for deficiency judgment since the 1790 Statute made all personal service null and void.

A complete understanding of judicial deference in immunity cases requires an appreciation of the difference between the use of immunities as a defense to jurisdiction and the duty of diplomatic personnel to obey local law. Under the theory of diplomatic immunity, an immune individual is not freed from the restraints imposed by law or exempt from the duty to observe them.⁶⁶ He remains legally responsible for personally incurred obligations. Diplomatic immunity insures, however, that the punitive power of the state cannot be employed against the immune individual to punish him for his failure to respect either the law or his own obligations.⁶⁷ Diplomatic immunity has never been granted for the benefit of the individual recipient, but rather to foster improved international relations.⁶⁸ The 1790 Statute reflected a desire to avoid petty interferences with the diplomatic mission which could trigger reciprocal sanctions by the sending state, or upset sensitive diplomatic relations. In order to accommodate these political interests, courts narrowly construed exceptions to the 1790 law and sometimes even granted immunity to individuals no longer legally entitled to the privilege.⁶⁹ In view of the severe historical and legislative restrictions circumscribing judicial activity in the area of diplomatic practice, the judiciary was an inadequate forum for resolving diplomatic problems.

E. State Department Policy Regarding Disputes with the Diplomatic Community

The primary avenue of recourse under the 1790 Statute was not the courts, but rather the Office of Protocol in the State Department. In ap-

65. *Bryne v. Herron*, 1 Daly 344, 78 Am. Dec. 698 (N.Y. County C.P. 1863) (action to foreclose mechanic's lien on house owned by, but not private residence of, the Granada Ambassador). "[I]mmovable property possessed by a foreign Minister does not change its nature in consequence of the character conferred on its owner, but continues subject to the jurisdiction of the State in which it lies If, however, the Ambassador [or any member of the mission] lives in a house of his own, that house is excepted from the rule." *Id.* at 345.

66. IV J. MOORE, INTERNATIONAL LAW DIGEST § 669 (1906).

67. *Id.*

68. *House Hearings*, *supra* note 32, at 62 (prepared statement of Chief of Protocol Evan S. Dobbelle).

69. *Shaffer v. Singh*, 343 F.2d 324 (10th Cir. 1965).

propriate cases, Protocol notified the employing embassy and attempted to promote a just settlement of the dispute.⁷⁰ The office also would attempt to persuade the embassy to waive the individual's immunity in civil claims.⁷¹ In some cases, the Office of Protocol prevailed upon the parent foreign government to make an *ex gratia* payment, that is, one based on humanitarian grounds and implying no legal liability on the part of the foreign government.⁷² If the offense charged was serious, threatening to declare the offending individual a *persona non grata* was normally sufficient to result in his withdrawal from service.⁷³

By limiting the judiciary's role to primarily procedural jurisdictional issues, the 1790 Act left substantive issues of liability to be resolved by the executive department. A universal propensity to limit judicial activity in the area of diplomatic practice continues to be reflected in current State Department policy concerning American diplomatic personnel abroad. Embassy employees are expected to obey local laws and are prohibited by State Department regulations from invoking immunity to avoid payment of just obligations. At the same time, Departmental immunity from civil process is waived only if circumstances warrant the action and judicial process in the receiving state can be expected to be fair. It is not general Departmental policy to waive criminal immunity; if the offense for which the individual is charged is grave enough, he will usually be withdrawn from his foreign post by the government.⁷⁴

II. GROWING DISSATISFACTION WITH THE 1790 LAW

Many factors have influenced the growing disenchantment with the 1790 law over the past several decades. An increase in the size and number of diplomatic missions based in Washington has occurred concomitant with the United States' growing status in international affairs.⁷⁵ The creation of the United Nations, based in New York, resulted in a sizeable population of diplomatically immune representatives and their families in that city.⁷⁶

70. *House Hearings, supra* note 32, at 212 (State Department responses to subcommittee questions concerning Department policies).

71. *Id.* The waiver is expressly limited to civil claims.

72. *Id.*

73. A survey of United States government declarations of *persona non grata* can be found in SATOW, *supra* note 40, at § 418. The declaration has been employed almost exclusively in political contexts. Incidents include a Salvador envoy who published remarks disparaging President McKinley in order to influence an election, and a British minister who was unjustifiably dismissed as a result of sabotage by a Republican Party prankster.

74. *House Hearings, supra* note 32, at 213.

75. Approximately 18,809 individuals comprise the Washington diplomatic community. H.R. REP. NO. 1410, 95th Cong., 2d Sess. 7 (1978).

76. Since the United Nations established its headquarters in New York in 1946, the

Moreover, since 1945, both cities have welcomed many diplomatic missions representing newly independent third world nations, some of which lack experience in diplomatic practice. Increasing contact between the diplomatic corps and their American communities has often resulted in friction.⁷⁷

Reflecting a trend of less deference towards diplomatic immunity, several judicial opinions from the post World War II period attempted to narrow the scope of the 1790 statute. In *Agostini v. DeAntuono*,⁷⁸ a New York state court assumed jurisdiction in a proceeding to recover the leased premises of a diplomatic envoy. Characterizing the suit as a proceeding *in rem*, the court ruled that real property held by a diplomatic officer in a receiving state and not pertaining to his diplomatic status was properly subject to local laws. Had the court interpreted the suit as a breach of contract, the diplomat would have remained immune from process. Despite the court's characterization of the action, the decision suggests that had the apartment been his primary residence and therefore related to his status, the property would have remained inviolable and immune from execution under an *in rem* judgment.⁷⁹

An attempt to limit the scope of immunity by close judicial scrutiny of White List personnel was made in *Trost v. Tomkins*.⁸⁰ The District of Columbia Municipal Court ruled that registration on the List and the State Department's duty to publish names of embassy employees were purely ministerial functions intended to give notice to unsuspecting individuals who might inadvertently incur criminal liability for unintentional violations of the Act.⁸¹ Consequently, the White List alone did not serve as sufficient evidence of diplomatic status. In the absence of executive action, a defendant's claim to diplomatic immunity was deemed a proper subject

population of diplomatically immune individuals in that city has increased to almost 5,000 people representing approximately 150 nations. *Id.*

77. The New York City Parking Violation Bureau estimates that approximately 250,000 unpaid tickets totalling about \$5 million of lost revenue per year are issued to the diplomatic community in New York. *House Hearings, supra* note 32, at 49 (prepared statement of Rep. Stephen Solarz).

78. 199 Misc. 191, 99 N.Y.S. 2d 245 (1950).

79. The question of whether a leased apartment is a principal residence pertaining to diplomatic status is primarily a question of fact. Under present United States law, Article 31(3) of the Vienna Convention clearly protects a diplomatic agent's residence from measures of execution. Article 31(3), *supra* note 3, at 3241. While a local court today may obtain jurisdiction over an *in rem* action since it is the only forum in which the suit can be brought, judgment could not be executed due to the inviolability of the premises until the tenant terminated his employment with the mission.

80. 44 A.2d 226 (D.C. 1945).

81. *Id.* at 229.

of judicial inquiry. While recognizing the Executive Department's prerogatives in diplomatic practice,⁸² the court found that the registration mechanism did not amount to executive action or certification of diplomatic immunity for White List personnel. Although the defendant was registered on the List and used embassy offices, the court found that he was not engaged in traditional diplomatic functions deserving of immunity.

A. Community Discontent with the 1790 Statute

The problems under the 1790 law drawing the greatest attention involved traffic accidents, parking and traffic violations, realty disputes, and nonpayment of bills.⁸³ Since the majority of contacts between the diplomatic and domestic communities occurred in the District of Columbia metropolitan area,⁸⁴ this community naturally was predominant among those seeking revision of the law on diplomatic relations. Traffic accidents caused by members of the diplomatic community in which extensive personal injury or property damage occurred were of particular concern, since often the victims were left without compensation or remedy.⁸⁵

In one such accident in April 1974, the Panamanian Cultural Attache negligently ran a red light and collided with the car in which Dr. Halla Brown, Professor of Medicine and Chief of the Allergy Clinic at George

82. Executive action with respect to diplomatic status is based on reciprocal agreements or customs between nations. For example, the Diplomatic Relations Act of 1978 permits the President, on the basis of reciprocity, to extend more or less favorable treatment than is provided in the Vienna Convention. 22 U.S.C.A. § 254c (West Supp.1979). See also Article 47, *supra* note 3, at 3248-49; *Senate Hearings, supra* note 7, at 27-30.

83. At the time of the State Department's testimony before the House Subcommittee, 55 claims or complaints made by United States citizens or businesses, against foreign diplomatic personnel between 1974 and 1977 were unresolved. This list of claims, which does not include parking complaints, appears in *House Hearings, supra* note 32, at 214.

84. The estimated population of the diplomatic community in the Washington community as of 1978 is:

Diplomats accredited to the United States	2,309
Family Members (estimated)	5,772
Members of the technical and administrative staff	2,877
Family Members (estimated)	7,192
Members of the service staff	273
Domestic servants	606
Diplomats of missions to the Organization of American States	233
Family Members (estimated)	582
Total	19,844

See *Senate Hearings, supra* note 7, at 27.

85. While the State Department sought repeal of the 1790 law in every Congress since 1965, Congress failed to act because of House inaction. S. REP. NO. 95-958, 95th Cong., 2d Sess. 2, *reprinted in* [1978] U.S. CODE CONG. & AD. NEWS 1935 [hereinafter cited as SENATE REPORT].

Washington University, was riding.⁸⁶ Dr. Brown was rendered a quadraplegic and incurred expenses totalling over \$200,000 for treatment. The Panamanian Embassy and Government refused to make any indemnification until October 1977 when it settled the dispute with an *ex gratia* payment of \$100,000.⁸⁷

Traffic and parking violations exacerbated the friction between the diplomatic and local communities. The absence of adequate parking facilities in embassy occupied districts resulted in clogged streets and double parking. The threat of parking or moving violation fines failed to deter the diplomatic community since these violations were entirely within the city's criminal jurisdiction and the diplomatic corps was fully aware of its immunity from prosecution. In 1976 alone, 52,830 parking tickets were issued to automobiles bearing diplomatic tags of which only 20 per cent were paid. Nearly a million dollars of city revenue was lost.⁸⁸

Aside from inadequate parking facilities and the absence of meaningful deterrence for diplomatically immune scofflaws, lax enforcement of city laws reflected State Department fears that strict enforcement of local traffic laws would trigger reprisals by foreign governments.⁸⁹ While State Department policy requires United States Foreign Service personnel and their families stationed abroad to satisfy obligations arising from traffic violations, the general policy of most foreign capitals is to either not issue tickets or cancel them because of immunity.⁹⁰

Civic groups, such as the Kalorama Citizens Association and the Citizens' Committee on Diplomatic Immunity, were increasingly vocal advocates for reform of the domestic law and city practices.⁹¹ Citizen outrage was grounded partially in the recognition that reciprocity between nations no longer justified the blanket protections afforded by the 1790 law. As of July 1977, 122 nations were parties to the 1961 Vienna Convention on

86. See *House Hearings*, *supra* note 32, at 80-81.

87. Dr. Brown also claimed damages for loss of income and for pain and suffering. *Id.* at 81. See text accompanying note 70 *supra*.

88. *House Hearings*, *supra* note 32, at 42. These figures do not take into account the thousands of ticketable violations which were ignored or the revenue which was wasted in writing the tickets (prepared statement of District of Columbia Representative Walter Fauntroy). For a breakdown of outstanding tickets by embassy, see *id.* at 194.

89. Bowman, *Many Embassy Aides to Lose Parking Immunity*, *Wash. Post*, Jan. 13, 1979, § C, at 1, col. 3.

90. In Rome, diplomats are exempt from fines. Diplomats stationed in Paris are given "lenient treatment." Soviet authorities do not normally cite diplomats for traffic violations, and unpaid tickets in London are cancelled because of immunity. *Senate Hearings*, *supra* note 7, at 55-56 (prepared State Department statement).

91. See *House Hearings*, *supra* note 32, at 191 (statement of Kalorama Citizen's Association); *id.* at 192-97 (statement of Citizens' Committee on Diplomatic Immunity).

Diplomatic Relations which substantially limited the scope of diplomatic immunity. In light of that fact, incidents posing increased dangers to United States Foreign Service personnel abroad⁹² and the growing abuse of diplomatic immunity in this country, have enhanced the incongruity of a double standard.⁹³

B. The Vienna Convention

As public tolerance of diplomatic abuses dwindled, international support developed for a reexamination, in light of post World War II conditions, of the body of diplomatic practice and law which had developed since the eighteenth century. In 1952, the United Nations General Assembly requested the International Law Commission to prepare draft articles on diplomatic intercourse and immunities.⁹⁴ In 1959, the General Assembly convened the Vienna Convention to formulate a comprehensive body of uniform rules governing diplomatic functions and relations. These rules govern the rights, privileges, and obligations of the diplomatic entourage, the mission itself, and the state in which territory diplomatic functions are performed.⁹⁵ The United States was among the forty-five nations originally signing the Vienna Convention on Diplomatic Relations⁹⁶ in 1961.⁹⁷

In stark contrast to the blanket immunities afforded the diplomatic community under the 1790 American Statute, the Vienna Convention adopted a functional approach towards diplomatic privileges and immunities.⁹⁸ In its most highly visible and relevant change, the Vienna Convention divided members of the diplomatic missions into four categories: diplomatic

92. One heavily publicized incident was the discovery, in 1978, of Soviet microwave bombardment of the American Embassy in Moscow and the resulting fear of increased cancer risks to the personnel working and living in the mission.

93. *House Hearings, supra* note 32, at 196 (statement of Citizens' Committee on Diplomatic Immunity).

94. 1958 U.N.Y.B. 386.

95. *House Hearings, supra* note 32, at 96.

96. [1972] 23 U.S.T. 3229, T.I.A.S. 7502, 1961 U.N.Y.B. 517-18. The United States was initially a reluctant participant in the codification of diplomatic practice. It argued that the subject was sufficiently governed by custom and usage and that regulation by convention would "introduce an unnecessary element of rigidity." 1958 U.N.Y.B. 386.

97. As of July 1977, 63 nations had signed the Vienna Convention, 59 had signed and ratified it, four states had signed but not ratified, and 63 nations had acceded or succeeded to the Articles. One hundred twenty-two out of 147 eligible nations were parties to the Convention as of 1977. *House Hearings, supra* note 33, at 200.

98. The concept that different categories of embassy personnel should enjoy varying degrees of immunity was by no means established when the Conference first met in 1958. The Special Rapporteur of the Conference initially gave identical privileges and immunities to all members of the mission since they had all been traditionally considered essential to the embassy suite. See U.N. Doc. A/CN. 4/91 Art. 24.

staff, administrative and technical staff, service staff, and private servants.⁹⁹ Under Article 31 of the Convention, ambassadors, high ranking members of the mission in the first category, and their families, retain absolute immunity from criminal jurisdiction. They possess absolute civil immunity subject to three exceptions: civil suits regarding privately owned real estate,¹⁰⁰ personal actions relating to succession and other estate matters,¹⁰¹ and personal actions relating to professional or commercial activities carried on in the receiving state outside the scope of their official functions.¹⁰² Members of the diplomatic staff qualifying as nationals or as permanent residents in the receiving state receive only official functions immunity unless the state extends additional privileges and immunities.¹⁰³ All lower level embassy staff who are receiving state nationals or permanent residents enjoy only those privileges and immunities a receiving state chooses to extend.¹⁰⁴

The second category, comprising administrative and technical staff and their families, is granted absolute immunity from criminal jurisdiction. Immunity from civil and administrative jurisdiction is available for this group only with respect to acts performed in the course of official duties. Family members are fully subject to civil and administrative jurisdiction.¹⁰⁵

No immunity is available for service staff members in the third category

99. Article 1. Historically, there had never been distinctions between these categories inasmuch as they were all deemed to be essential to the embassy "suite." Since all personnel were afforded the same degree of immunity, the distinctions were not of legal importance. Sending states employed whatever criteria they pleased in classifying their personnel. DENZA, *supra* note 9, at 12.

100. Article 31(1)(a), *supra* note 3, at 3240-41. If the private immovable property owned by the diplomatic agent is not held on behalf of the mission or is not his primary residence, the defense of inviolability could not be raised to defeat execution. *See* note 78 *supra*.

101. Article 31(1)(b), *supra* note 3, at 3240.

102. Article 31(1)(c), *supra* note 3, at 3241. The International Law Commission's Commentary on the 1958 draft of Article 29 stated, "activities of these kinds are normally wholly inconsistent with the position of the diplomatic agent and . . . one possible consequence of his engaging in them might be that he would be declared a *persona non grata*." 2 Y.B. Int'l L. Comm'n 98 (1958). Since such cases inevitably occurred, however, the Commission believed that "persons with whom the diplomatic agent had commercial or professional relations cannot be deprived their ordinary remedies." *Id.*

103. Article 38(1), *supra* note 3, at 3245.

104. Article 38(2), *supra* note 3, at 3245.

105. Articles 1(f), 37(2), *supra* note 3, at 3231, 3244. Under the 1790 Act, family members of the administrative and technical staff were not allowed immunity from criminal or civil jurisdiction. This category is the only one, because of the Convention's grant of criminal immunity, which enjoys broader protections today than it did under the 1790 Act. For a chart succinctly comparing the provisions of the Vienna Convention with those of the 1790 Act, see SENATE REPORT, *supra* note 85, at 2, 1936.

who are nationals or permanent residents of the receiving state. Foreign service staff members enjoy immunity from civil and criminal jurisdiction only in respect to acts performed within the course of their duties.¹⁰⁶ Private servants in the fourth category who are not nationals of the receiving state are exempt from domestic employment taxes as are individuals in the other three categories. They do not enjoy immunity from civil or criminal jurisdiction unless expressly provided for by the receiving state.¹⁰⁷

With its sliding scale of immunity entitlement, the Vienna Convention preserves traditional notions of extraterritorial sovereignty of the diplomatic staff while recognizing the need for some degree of legal accountability over lower level embassy employees and nationals serving on mission staffs.¹⁰⁸ By explicitly prohibiting diplomatic agents from engaging in professional or commercial activity and permitting maintenance of personal suit for obligations arising from these activities, the Convention also resolved a major issue which had been a subject of continual abuse in England and the United States.¹⁰⁹

The Vienna Convention's provisions became effective in the United States in 1972, but because Congress failed to repeal the antiquated 1790 law until 1978, the diplomatic community in the United States continued to enjoy far greater protection than that provided by international law.

C. *The Foreign Sovereign Immunities Act of 1976*

Although the 1790 law continued to protect the diplomatic staff from personal suit until passage of the Diplomatic Relations Act of 1978, Congress opened a potential avenue of recourse through enactment of the Foreign Sovereign Immunities Act of 1976.¹¹⁰ The Act codified the "restrictive" principle of sovereign immunity by limiting the immunity of a foreign government to suits involving that state's public acts (*jure imperii*). Under the Act, a foreign government is not immune from suits based on its commercial or private acts (*jure questionis*).¹¹¹ The Act transferred the re-

106. Articles 1(g), 37(3), *supra* note 3, at 3244.

107. Articles 1(h), 37(4), *supra* note 3, at 3244.

108. The commentary written by the International Law Commission characterized the different levels of immunity as "the 'functional necessity' theory, which justifies privileges and immunities as being necessary to enable the mission to perform its functions." 2 Y.B. Int'l L. Comm'n 95 (1958).

109. See notes 31-32 and accompanying text *supra*.

110. 28 U.S.C. §§ 1602 to 1611 (1976).

111. H.R. REP. NO. 1487, 94th Cong., 2d Sess. 7, reprinted in [1976] U.S. CODE CONG. & AD. NEWS 6604, 6605 [hereinafter cited as HOUSE REPORT]. The Act permits recovery for obligations arising out of commercial activities carried on in the United States by a foreign government or its instrumentality. See *United Euram v. U.S.S.R.*, 461 F. Supp. 609 (S.D.N.Y. 1978) (Soviet Union is liable for breach of contracts signed pursuant to cultural

sponsibility for sovereign immunity determinations from the executive to the judicial branch, thus relieving the State Department of the foreign policy implications of immunity determinations.¹¹² Moreover, the Act provided a statutory basis for obtaining *in personam* jurisdiction over the foreign state without necessitating attachment of a government's property. In contrast to past immunity from execution, the Act assured judgment creditors some remedy if, after a reasonable period, the foreign state or its enterprise failed to satisfy a final judgment.¹¹³

As one of several exceptions to the jurisdictional immunity of a foreign state, the law established suits for monetary damages when tortious acts or omissions of its officials or employees are alleged.¹¹⁴ The statute allowed recovery when the defense of sovereign immunity, as distinguished from diplomatic immunity, had legally barred recovery in the past. The torts alleged must have been committed by representatives while performing their official duties. The foreign state remained immune from actions arising from the discretionary functions of its employees.¹¹⁵ Finally, the law permitted execution against any insurance policies held by a foreign government covering accidents caused by its agents in the performance of their duties. There was no requirement, however, that insurance be obtained.¹¹⁶

III. THE DIPLOMATIC RELATIONS ACT OF 1978

In order to update our diplomatic laws and fill the interstices created by the 1976 law on sovereign immunity, Congress enacted the Diplomatic Relations Act of 1978.¹¹⁷ The law repeals the 1790 Statute and substitutes the Vienna Convention on Diplomatic Relations as United States law on diplomatic practice.¹¹⁸ Section 2 of the new law defines the categories of diplomatic personnel and family members who are entitled to privileges and

exchange agreement under which State Concert Society of the U.S.S.R. agreed to provide performing artists for U.S. concert tours).

112. HOUSE REPORT, *supra* note 111, at 6606.

113. *Id.*

114. 28 U.S.C. § 1605(a)(5) (1976).

115. *Id.* at § 1605(a)(5)(A).

116. See *House Hearings, supra* note 32, at 14 (statement of Senator Mathias). Apparently, an injured party may seek recovery under either the Diplomatic Relations Act or the Foreign Sovereign Immunities Act when the act alleged occurred in the course of the diplomatic employee's official duties. *Id.*

117. 22 U.S.C.A. §§ 254a to 254e, 28 U.S.C.A. §§ 1364, 1351, 1251 (West Supp. 1979) [hereinafter referred to as 1978 Act].

118. 22 U.S.C.A. § 254b (West Supp. 1979).

immunities, incorporating definitions from the Vienna Convention.¹¹⁹ Section 2(3) of the Act expands the Convention concept of mission to include missions representing foreign governments collectively. In past United States practice, such collective missions have been extended the same privileges and immunities as missions representing individual governments.¹²⁰ As a result, the United Nations, the Organization of American States, the Commission of European Communities, and their staffs continue to enjoy diplomatic status under the new law.¹²¹ Section 4 of the Act grants the President the discretion to extend more or less favorable treatment to missions, mission members, families and diplomatic countries on a reciprocal basis.¹²² This provision permits the President to restrict Vienna Convention privileges and immunities in those hardship cases where certain nations restrict the privileges of Foreign Service personnel abroad. While it serves as an important tool in implementing foreign policy, such discretion must be employed on a reciprocal basis with the nations involved. Section 5 provides for dismissal of judicial or administrative actions brought against individuals entitled to immunity. Application for dismissal may be made by or on behalf of the individual by a "motion or suggestion . . . or as otherwise permitted by law or applicable rules or procedures."¹²³ Section 8 of the new law vests federal district courts with original jurisdiction over all civil actions and proceedings against diplomatic personnel.¹²⁴ Section 1251(a)(2) of Title 28, which

119. *Id.* at § 254a; Articles 1 and 37, *supra* note 3, at 3230-31, 3244. For an enumeration of the categories used in the Vienna Convention, see text accompanying note 99 *supra*.

120. 22 U.S.C.A. § 254a (West Supp. 1979).

121. See SENATE REPORT, *supra* note 85, at 4.

122. 22 U.S.C.A. § 254c (West Supp. 1979). This provision reflects Article 47 of the Convention allowing such practices. Article 47, *supra* note 3, at 3248-49.

123. 22 U.S.C.A. § 254e (West Supp. 1979).

124. *Id.* at § 8, amending 28 U.S.C. § 1351 (1976). Section 1251(b)(1) of title 28 was amended to conform with section 1351 by vesting original jurisdiction in the federal district courts. 28 U.S.C.A. § 1251(b)(1) (West Supp. 1979). Section 1351 vested federal district courts with original jurisdiction only over actions and proceedings against consuls and vice consuls of foreign states until its amendment in the Diplomatic Relations Act. The 1978 amendment also rectifies an inadvertant prohibition on the exercise of criminal jurisdiction by state courts over foreign consuls which occurred during the 1949 revision of the Judiciary Code. Prior to 1949, federal district courts had exclusive jurisdiction over all "civil actions" against foreign consuls. In 1949 the words "all actions and proceedings" were substituted in place of the previous "civil action" language. This modification had the unfortunate effect of granting foreign consular officers *de facto* immunity from state criminal law jurisdiction in the situations where they would be subject to liability under existing international treaties such as the Vienna Convention on Consular Relations, T.I.A.S. 6820, 21 U.S.T. 77, Article 41. Consequently, until the 1978 revision, consular officers were fortuitously immune from criminal actions solely cognizable under state law. See note 164 *infra*.

vested exclusive jurisdiction of such actions in the United States Supreme Court, was repealed.

A. Mandatory Liability Insurance

The Diplomatic Relations Act comprehensively addressed the problem of automobile accidents caused by members of the diplomatic community. Section 6 authorized the President, by regulation, to establish liability insurance requirements to be met by missions, mission members, and their families for risks arising from the operation of motor vehicles, vessels, or aircraft.¹²⁵ The amount of coverage to be required has been determined by final regulations promulgated by the State Department.¹²⁶

Compulsory liability insurance laws are well established in international diplomatic practice. As of February 1978, 89 countries had mandatory liability insurance measures. Of 27 nations which did not, seven required diplomatic personnel to insure their vehicles before approval of registration or issuance of license plates.¹²⁷ The State Department requires all foreign service personnel with personally owned vehicles at foreign posts to carry liability insurance whether or not required by local law.

In spite of the prevalence of these programs internationally, similar congressional proposals were met with open hostility by the insurance lobby.¹²⁸ Among the lobby's objections to mandatory insurance was its belief that the diplomatic community was a poor insurance risk and that the diplomatic immunity issue was essentially a social and political problem rather than an insurance one. The insurance lobby supported proposals providing for government compensation to injured parties through a general tax fund to be administered by a bureau of claims in the Depart-

125. 22 U.S.C.A. § 254e (West Supp. 1979).

126. 44 FED. REG. 29,450-52 (1979) (to be codified in 22 C.F.R. § 151.5). The State Department recommends minimum liability limits of \$100,000 per person, \$300,000 per incident for bodily injury, including death, and \$50,000 per incident for property damage. *Id.* at 29451 (to be codified in 22 C.F.R. § 151.5). While these are only suggested minimum limits, the insurance must "provide not less than the minimum limits of liability specified in the financial responsibility, compulsory insurance or other law in the jurisdiction where the motor vehicle is principally garaged." *Id.* (to be codified in 22 C.F.R. § 151.4).

127. *Senate Hearings, supra* note 38, at 103-118 (State Department analysis of mandatory liability coverage in 116 nations). The amount of coverage required varies widely from \$11.5 million per accident in Sweden to nominal sums in many Latin American and African nations. *Id.* at 103. All cars registered by diplomats, permanent missions to the United Nations, and top U.N. officials are subject to local compulsory insurance laws. *House Hearings, supra* note 32, at 218.

128. *See, e.g., Senate Hearings, supra* note 38, at 47-50 (prepared statement of Stacy L. Williams, Assistant Vice President and Associate Legislative Counsel, Government Employees Insurance Company, accompanied by John Nangle, Washington Counsel, National Association of Independent Insurers).

ment of State. An alternative proposal would have deemed the United States liable in cases where courts could not levy judgment due to the diplomat's immunity from suit.¹²⁹ Statistics offered by independent insurance agents indicating that diplomats were a profitable risk compared to other segments of the population undercut these proposals.¹³⁰

Insurance companies generally have opposed compulsory insurance and other legislative tools which shift the primary purpose of insurance from protecting the tortfeasor to compensating the injured victim for the negligence of financially irresponsible motorists.¹³¹ Despite industry hostility, however, compulsory insurance has gained increasing legislative and judicial favor.

To compel insurers to protect the insured in the event that the driver at fault is uninsured or his coverage is not effective because of breaches in policy terms, many states have enacted unsatisfied judgment funds or mandatory uninsured motorist coverage statutes. These laws have filled gaps in state insurance law's omnibus clauses¹³² and financial responsibility laws¹³³ caused by valid assertions of policy defenses by the insurer against the insured. The District of Columbia is notorious for being one of the few jurisdictions without some form of uninsured motorist coverage.¹³⁴

The existence of state uninsured motorist coverage, however, has been insufficient to counteract diplomatic immunity defenses raised by insurers to defeat liability. While many state legislatures and courts have, in the public interest, drastically curtailed state-created immunities,¹³⁵ federal

129. *Id.* at 47. S. 477, 95th Cong., 1st Sess. (1977) would have made the Government liable for damages levied by a court against an immune member of the diplomatic community. S. 478, 95th Cong., 1st Sess. (1977) provided for a Bureau of Claims presided over by an Assistant Secretary of State.

130. The total average loss ratio for diplomats during a four-year period ending in 1977 was 12.5%. Permissible loss ratios by insurance companies for automobile coverage is 50-55%. Loss ratio is the ratio of the premiums collected to the claims paid out. *Id.* at 54 (statement of Fred Bruney, Executive Vice President, Pennamco Insurance Service, Inc.).

131. *Id.* at 60 (prepared statement of Howard B. Clark, Former Special Assistant Federal Insurance Administration). See generally 7 D. BLASHFIELD, AUTOMOBILE LAW AND PRACTICE § 272 (1966).

132. These provisions require that all coverage afforded the insured extend to any person who uses the automobile with his permission. BLASHFIELD, *supra* note 131, at § 315.1-16. For an example of this provision, see 7 VA. CODE § 46.1-504(b) (1978 Supp.).

133. Security deposit financial responsibility laws provide that any automobile owner or driver involved in an accident must post security in an amount sufficient to cover any possible judgment if he fails to furnish adequate insurance or risk losing his registration and license.

134. *Senate Hearings, supra* note 38, at 61.

135. Examples include statutory or judicial curtailment of sovereign, charitable institution, interspousal, and interfamilial immunities from liability.

preemption precludes state restrictions on the use of diplomatic immunity as a defense in personal actions. Uninsured motorist statutes entitle the victim to collect only those amounts which, but for defenses or lack of insurance, he would be legally entitled to recover from the other party.¹³⁶ Since a state could not enforce legal obligations arising from an accident against a diplomatically immune individual, the victim's own insurer was under no legal duty to make its client whole.¹³⁷

While the compulsory insurance mechanism created in the Diplomatic Relations Act will help insure that injured or damaged victims obtain some compensation, practical problems remain. Although the State Department has suggested that the diplomatic corps insure itself in amounts much higher than those presently required in local jurisdictions,¹³⁸ there is no such legal requirement. Department regulations establishing minimal policy coverage limits may reflect an institutional bias in favor of the diplomatic community. The regulations require those subject to the Act to purchase only the minimal insurance coverage specified in the financial responsibility, compulsory insurance, or other law in the jurisdiction in which the automobile is principally garaged.¹³⁹

The District of Columbia's financial responsibility law requires the posting of sufficient security to satisfy any judgment for damages resulting from automobile accidents, or,¹⁴⁰ in the alternative, motor vehicular insurance in minimum amounts of \$10,000 per bodily injury or death, \$20,000 per accident, and \$5,000 for property damage.¹⁴¹ Suspension of driving privileges is the sanction for failure to post security.¹⁴² Under the State Department regulations, members of the diplomatic community who garage their automobiles principally in the District would be required to purchase these minimal amounts. Arguments that the diplomatic corps should not be discriminated against by regulations requiring certain cover-

136. *Senate Hearings, supra* note 38, at 61-62.

137. *Lynn v. Mendes*, No. 18621 (Arlington Cir. Ct. Oct. 27, 1976) (insurer's motion for dismissal granted in action brought by the insured under Virginia's uninsured motorist statute due to prior dismissal of a suit brought by insured against a diplomatically immune tortfeasor). *See* text accompanying notes 154-57 *infra*.

138. In Virginia, automobile owners must insure themselves in minimum amounts of \$25,000 per person for bodily injury including death, \$50,000 per accident involving two or more persons, and \$10,000 for property damage. 7 VA. CODE § 46.1-504 (1978 Supp.). In Maryland, insurance must be obtained or security posted in minimum amounts of \$20,000, \$40,000, and \$5,000 for the above categories. MD. TRANSP. CODE ANN. § 17-103 (1977).

139. *See* note 126 *supra* for proposed State Department regulations.

140. D.C. CODE §§ 40-432, 433 (1973).

141. *Id.* at § 40-435. Security required after an accident is reported cannot be in excess of the insurance limits specified. *Id.* at § 40-436.

142. *Id.* at § 40-437.

age limits regardless of the jurisdictions in which cars are located appear unpersuasive. In contrast to the normal situation in which the tortfeasor may be held personally liable despite the absence of insurance or may be sued for amounts over and above policy limits if he is insured, insurance proceeds may be the only compensation a party will receive if injured or damaged by a diplomatically immune individual. The decision to treat District residents and the diplomatic community alike can only be considered nondiscriminatory in those situations in which the diplomatically immune tortfeasor is so destitute as to be considered judgment proof, since the victim would be foreclosed from further recovery despite the tortfeasor's privileged status. While regulations providing only minimal compensation for grievously injured parties seriously undermine the remedial policies of the Act, the regulations are a vast improvement over the 1790 Statute.¹⁴³

Other implementation problems flaw the Act. Despite the minimal coverage requirements, insurance companies may hesitate to insure immune mission members.¹⁴⁴ To protect themselves from perceived vulnerability, they may set unrealistically high rates or place insured diplomatic personnel in assigned risk pools. Insurers could also impose preconditions, such as requiring previous domestic driving experience, which would effectively bar those most likely to cause injury from coverage. Insurer reluctance to fully insure the diplomatic corps at reasonable rates, however, is unjustified. The community subjected to the Act's compulsory insurance coverage is relatively small when compared with the number of individuals protected under state compulsory insurance laws. Background, education, and professional responsibilities and restraints distinguish the diplomatic corps from the average cross-section of the larger domestic community. Once insurers have had experience in writing policies under the provision, insurer hostility or discrimination will undoubtedly dissipate.¹⁴⁵

B. Direct Action Against Insurers

United States common law requires the plaintiff in a negligence action to assert his or her claim directly against the negligent tortfeasor and does not afford the opportunity to directly reach the proceeds under an insur-

143. Enactment of a national no-fault insurance plan could of course directly address the problem of judgment proof tortfeasors.

144. Interview with Mr. Horace F. Shamwell, Jr., Office of Protocol, Department of State, Washington, D.C. (Feb. 8, 1979).

145. Telephone conversation with Mr. David Stewart, Office of Protocol, Department of State, Washington, D.C. (March 27, 1979).

ance contract between the tortfeasor and a third party.¹⁴⁶ Compulsory insurance is in itself inadequate to guarantee the injured victim compensation since the defense of diplomatic immunity could still be raised to defeat jurisdiction.

In order to make the mandatory insurance coverage provision meaningful, Congress included a direct action clause in the Diplomatic Relations Act.¹⁴⁷ Section 7 of the Act creates a substantive right on the part of the injured or damaged victim to proceed directly against the insurer of a diplomatically immune individual. In providing for direct action, the Act requires a nonjury "bench" trial and prohibits the insurer from raising its client's diplomatic immunity to avoid liability. It also bars the defense that the insured is an indispensable party under Rule 19 of the Federal Rules of Civil Procedure and prohibits the insurer from invoking breach of contract to defeat recovery in the absence of fraud or collusion.

Direct action statutes are not novel. The United States Supreme Court, in *Watson v. Employer's Liability Assurance Corp.*,¹⁴⁸ upheld the constitutionality of a Louisiana direct action statute which allowed suits to be brought directly against insurance carriers. Direct action legislation is an internationally recognized and accepted insurance mechanism. Roughly one half of the 116 nations polled by the State Department permit claimants to bring an action directly against insurance carriers.¹⁴⁹ For almost two decades most European nations have been party to the European Convention on Compulsory Insurance Against Civil Liability in Respect of Motor Vehicles.¹⁵⁰ The Convention not only makes automobile liability insurance compulsory for all European drivers, but also requires participating nations to enact domestic direct action legislation. A proposed exception to diplomatic immunity, ultimately rejected by the Vienna Convention, would have permitted local jurisdiction over claims for damage and injury arising from traffic accidents unless the receiving state allowed for direct action against insurers. At least one commentator has

146. *Gorman v. St. Paul Fire Ins. Co.*, 210 Md. 1, 121 A.2d 812, (1956) (no direct action permitted against insurer in advance of judgment).

147. 28 U.S.C.A. § 1364 (West Supp. 1979).

148. 348 U.S. 66 (1954) (Louisiana's direct action statute did not violate either the due process clause of the fourteenth amendment or the full faith and credit clause by compelling a foreign insurance company to submit to direct action in a products liability case even though the out-of-state policy prohibited such direct actions, due to the insured manufacturer's (Gillette Co.) activities within the state and Louisiana's legitimate interest in safeguarding the rights of individuals injured within the state).

149. *Senate Hearings, supra* note 38, at 103-111. See also SENATE REPORT, *supra* note 85, at 6-7, 1944-45, for a list of nations permitting direct action against the insurance carrier.

150. 720 U.N.T.S. 119.

suggested that had the Convention convened several years later, the proposal would have gained wider acceptance.¹⁵¹

Despite its acceptance in international practice, the American insurance industry understandably reacted with greater hostility to the direct action provision than it did toward compulsory insurance. The fear of greater money damage awards from a "target defendant" is not unfounded. It was argued that the inability to assert policy defenses not only would be grossly discriminatory against insurers, but would result in closing voluntary markets to diplomats and in making them pay higher premiums by forcing them into assigned risk pools and other residual market mechanisms.¹⁵² Furthermore, only several states have enacted legislation allowing for direct right of action against insurers.¹⁵³ The lack of experience by many insurers in this area, the burdens perceived in defending direct action suits, and fear of the precedent such legislation could set, all contributed to the lobby's concerns.

C. *The Direct Action Provision in Practice*

A discussion of an actual situation which arose under the 1790 law clearly demonstrates the changes wrought in the automobile accident area by the enactment of the Diplomatic Relations Act. In November 1974, the automobile Mrs. Robin Lynn Blumberg¹⁵⁴ was driving was struck broadside by a car driven by a Mrs. Mendes. Blumberg was severely injured. The police report did not identify Mendes' employer or her own special status but did indicate that the car was insured by the Government Employees Insurance Company (GEICO). Blumberg sued Mendes after GEICO rejected Blumberg's claim for damages. Mendes filed a counterclaim alleging \$240,000 in damages.¹⁵⁵ Pretrial proceedings continued for a year and depositions were scheduled for a month before trial. When it became apparent that her case was weak, Mendes revealed that she worked as a secretary for the Brazilian Embassy, dropped her counterclaim, and, with the aid of GEICO counsel, asserted diplomatic immunity and moved for

151. DENZA, *supra* note 9, at 151-52. Unlike the limited exceptions to diplomatic staff immunity in Article 31, driving is often a necessary part of the diplomatic function and the Convention was undoubtedly reluctant to expand the exceptions to so great an extent. *Id.* at 152.

152. *Senate Hearings, supra* note 38, at 49.

153. *See, e.g.*, LA. REV. STAT. ANN. § 22:655 (West 1978); P.R. LAWS ANN. tit. 26, §§ 2001, 2003 (Supp. 1975); WIS. STAT. ANN. § 632.24 (Supp. 1978). *See also* R.I. GEN. LAWS ANN. § 27-7-2 (Supp. 1976).

154. *Lynn v. Mendes*, No. 17712 (Arl. Cir. Ct. April 14, 1976), *appeal dismissed* 217 Va. cxii (1977). *See Senate Hearings, supra* note 38, at 32 for a discussion of the case.

155. *See* note 62 and accompanying text *supra*.

dismissal.¹⁵⁶ The insurer argued that only the Supreme Court of the United States had jurisdiction to hear the case.¹⁵⁷ It further noted that the 1790 law nullified any personal suit against a diplomatically immune individual. Finally, GEICO argued that Blumberg was criminally liable under the 1790 Act for maintaining suit against a diplomatically immune individual. The court dismissed the suit despite Mendes' voluntary submission to jurisdiction by filing her counterclaim. Due to Mendes' diplomatic immunity, Blumberg received no compensation from her own insurer under Virginia's uninsured motorist statute. As a result, Mendes successfully used her immunity as both a sword and shield. She refrained from revealing her immunity as long as there was a chance of recovering from Blumberg. Once it became likely that she would be held liable for negligence, Mendes asserted diplomatic immunity to defeat the claim, aided by an insurer which had been collecting premiums from her all along.

The 1978 law would substantially alter the outcome of this case. As an embassy secretary, Mendes would be classified as a member of the administrative and technical staff within the meaning of Article 1(f) of the Vienna Convention.¹⁵⁸ Under Article 37(2), Mendes would enjoy immunity from civil and administrative jurisdiction only for acts performed within the course of her duties, thereby conditioning personal liability on the agency status that existed at the time of the collision.¹⁵⁹

Several areas of statutory interpretation, however, must be resolved before the statute can be applied with any degree of certainty. Application of the direct action provision becomes questionable when the served individual is a member of the administrative and technical staff or the service staff and enjoys only functional immunity. Direct action is to be used "against an insurer who by contract has insured an individual, who is a member of a mission (as defined in the Vienna Convention on Diplomatic Relations) or a member of the family of such a member of the mission. . . ."¹⁶⁰ The statute is silent with regard to the provision's applica-

156. *Senate Hearings, supra* note 38, at 42 (testimony of Stacy Williams, Assistant Vice President of GEICO). Mr. Williams testified that the insurance company would have been "absolutely foolish" to waive diplomatic immunity status since insurers are not in the business of paying moral obligations. *Id.* at 43.

157. Prior to the enactment of the Diplomatic Relations Act, 28 U.S.C. § 1251(a)(2) (1976) vested the United States Supreme Court with original jurisdiction in diplomatic immunity cases.

158. Section 9 of the 1978 Act provided a 90-day effective date for the legislation in order to give the State Department an opportunity to reclassify the members of the diplomatic community in accordance with the Vienna Convention categories. SENATE REPORT, *supra* note 85, at 8.

159. *See* note 104 and accompanying text *supra*.

160. 28 U.S.C.A. § 1364 (West Supp. 1979).

bility when the accident occurs while the administrative, technical, or domestic staff member is acting in a private capacity. A determination of the scope of the direct action provision in this area has yet to be resolved.

Various canons of statutory construction suggest conflicting results.¹⁶¹ Arguably, the provision is in derogation of the common law providing for personal suit and therefore should be strictly construed. Conversely, the policy behind the provision is to provide a remedy to compensate victims.¹⁶² The remedial character of the provision arguably justifies a liberal and expansive interpretation. A broad construction permitting direct action when the individual is in any event amenable to personal suit, however, may have the mischievous consequence of extending to the individual greater protections than those afforded in Article 37 of the Vienna Convention. In contrast to the diplomatic staff, lower level embassy employees are subject to fewer professional and political restraints and have traditionally abused their privileges more often by committing offenses or neglecting their obligations.¹⁶³ While an expansive interpretation of the direct action provision would allow for a simple compensation mechanism, it would substantially mitigate any deterrent effect personal suit against a lower level embassy employee might create as well as limit recovery to insurance proceeds.

If the direct action provision is employed regardless of whether the mission member has only functional immunity, several issues must be resolved: the rights of the insurer in those cases where the lower level mission is found to be acting in a private capacity; the right of plaintiff to join the individual as a party defendant; the effect of a dismissal of the direct action; and the effect of collateral estoppel with regard to final judgment.

Since diplomatic immunity would render compulsory insurance meaningless in the absence of a direct action provision, it is reasonable to assume that absent the immunity, a direct right of action against the insurer is unnecessary. A strict construction would limit a federal district court's jurisdiction over direct actions against insurers to those situations in which the court determines that the individual is in fact immune from personal suit. The insurer could allege that the functionally immune individual, acting in a private capacity, may be personally liable and move for dismissal of the direct action. A determination of the individual's agency status

161. See H. READ, J. MACDONALD, J. FORDHAM, W. PIERCE, *MATERIALS ON LEGISLATION* 904-07 (3rd ed. 1973).

162. H.R. REP. NO. 1410, 95th Cong., 2d Sess. 3 (1978).

163. DENZA, *supra* note 9, at 226.

at the time of the accident would be a necessary prerequisite for dismissal. A substantial degree of judicial deference regarding the individual's claim of functional immunity may evolve as a result of the traditional respect accorded diplomatic immunity.

Dismissal of the direct action on jurisdictional grounds would not preclude personal suit in federal court. Section 1351 of Title 28 vests exclusive jurisdiction in federal district courts over all "civil actions and proceedings against . . . members of a mission or members of their families (as such terms are defined in section 2 of the Diplomatic Relations Act)."¹⁶⁴ Since the defendant who enjoys only functional immunity status may in fact be personally liable if the negligent conduct occurred while he was acting in a private capacity, plaintiff should be permitted to join both the insured and the insurer as defendants.¹⁶⁵ If the direct action against the insurer was dismissed, the defendant would be obligated to defend the action personally. Many insurance policies, however, require the insurance company to defend any suits arising out of the negligent operation of the insured's automobile. Since the insurer would have the duty to defend regardless of the agency status of the insured at the time of the accident, the problems posed by the direct action provision are substantially lessened.

There are other compelling reasons for permitting joinder of parties. Since the embassy employee may have acted in a private capacity when the negligence occurred, plaintiff should be permitted to seek recovery beyond policy limits. If the plaintiff does so, an additional question is raised. Should the court in the direct action case ultimately conclude that despite the defendant's private status direct action must be employed, the collateral effect of the judgment against the insurer in a subsequent proceeding against the tortfeasor must be considered.¹⁶⁶ The theory of collateral estoppel is based on the assumption that some question of law or fact in

164. 28 U.S.C.A. § 1351(2) (West Supp. 1979). Section 1351(1) vests original jurisdiction for civil actions or proceedings against consuls or vice consuls of foreign states in the federal district courts. In contrast to the history of blanket immunities with regard to diplomatic agents, consular officers enjoy only functional immunity. See WHITEMAN, *supra* note 28, at § 12.

165. While many states have enacted statutes permitting joinder in an action in which both the tort liability of the insured and the contract obligations of the insurer are alleged, common law barriers may otherwise bar joinder since there are no allegations that the insurer participated in the tort or was in privity with the plaintiff. See 8 BLASHFIELD, *supra* note 131, at § 344.26; R. KEETON, *INSURANCE LAW* 534-35 (1978). Those states which have enacted direct action statutes expressly provide for joinder of parties. See note 153 *supra*. In contrast, 28 U.S.C.A. § 1364 (West Supp. 1979), does not address this issue.

166. "Collateral estoppel, like the related doctrine of *res judicata*, has the dual purpose of protecting litigants from the burden of relitigating an identical issue with the same party or

dispute has been actively raised, litigated, and finally decided by a court of competent jurisdiction between identical parties or their privies.¹⁶⁷ Because of conflicting interests, it is doubtful whether the nonjoined party is in privity with the insurer in direct action cases. In the New York "Seider"¹⁶⁸ decisions construing judicially created direct action proceedings, the New York courts have stated that since personal jurisdiction was only present over the insurer and the policy, a judgment against the insurer would not foreclose the absent tortfeasor from relitigating the issue of liability in a subsequent action brought against him.¹⁶⁹ Since the insurer in diplomatic immunity direct action cases cannot raise defenses other than fraud, collusion, or the expiration of the contract in order to avoid liability, the rationale against extending the effect of judgment when the insured is not a party to the claim is self-evident. Since the insured may have acted in a private capacity and may be liable for amounts over and above policy limits, his interests and the insurer's interests are neither identical nor co-extensive. He therefore cannot be in privity with the insurer and should not be bound by a judgment against the insurer unless he was actively and personally involved with the defense. Refusal to permit joinder would put plaintiff to the expense of relitigating the entire issue of liability and could result in inconsistent verdicts. Moreover, plaintiff could be foreclosed from subsequently bringing suit if the applicable statute of limitations expired before personal suit was commenced.

Recovery is not assured even if judgment is rendered against a lower level staff member for amounts beyond policy limits. He may be destitute

his privity and of promoting judicial economy by preventing needless litigation." *Parklane Hosiery Co. v. Shore*, 99 S. Ct. 645, 649 (1979).

167. *See Hansberry v. Lee*, 311 U.S. 32 (1940) (state court decree estopping plaintiffs in second suit under *res judicata* from relitigating issue of restrictive agreement previously decided, violated the due process clause of the fourteenth amendment since they were not made parties in the original suit, were not adequately represented, and lacked identity of interest with original plaintiffs). *See also Biegelow v. Old Dominion Copper Co.*, 225 U.S. 111 (1912); *Litchfield v. Goodnow*, 123 U.S. 549 (1887).

168. *Seider v. Roth*, 17 N.Y.2d 111, 216 N.E.2d 312, 269 N.Y.S.2d 99 (1966) (injured New York plaintiff filed his tort action in a state where he could not obtain personal jurisdiction over the insured by attaching the insurer's obligation to defend as a debt). *Seider quasi in rem* jurisdiction has recently been held not to violate due process despite the absence of contacts between the insured and New York. *O'Connor v. Lee-Hy Paving Corp.*, 579 F.2d 194, 202 (2d Cir. 1978), *cert. denied*, 99 S. Ct. 638 (1979).

169. *Minichiello v. Rosenberg*, 410 F.2d 106, 111-12 (2d. Cir. 1968), *aff'd on rehearing en banc*, 410 F.2d 117 (2d. Cir.), *cert. denied*, 396 U.S. 844 (1969); *O'Connor v. Lee-Hy Paving Corp.*, 579 F.2d 194 (2d Cir. 1978), *cert. denied*, 99 S. Ct. 638 (1979). The effects of collateral estoppel in *Seider* cases are opposite to the direct action provision under consideration since in both cases it is solely the insurer who is conducting the defense. Issue preclusion may be, in the absence of personal jurisdiction over the tortfeasor, inconsistent with the requirements of due process.

and therefore judgment proof. In any event, Article 32(4) of the Vienna Convention requires a separate waiver of immunity in respect to execution of judgment. The scope of this Article has yet to be resolved.¹⁷⁰ If a court determined that the defendant's conduct was not immunized since he was acting in a private capacity under Article 37, and a waiver was still required, the judgment would be rendered meaningless. The sending state could theoretically refuse to allow execution of judgment against the defendant and foreclose plaintiff's recovery. Conversely, Article 32 may be construed to require waiver of immunity only in those situations where, but for the waiver, the individual involved and the conduct alleged continue to be fully protected by the immunity shield of the Vienna Convention.¹⁷¹ By removing the issue of waiver of immunity from political considerations through a narrow interpretation of Article 32, nations party to the Vienna Convention would more successfully restrain mission members from engaging in unprotected conduct. Recovery is also not guaranteed since plaintiff may have to seek execution of judgment abroad. The defendant may only have assets in the sending state. The foreign court may refuse to give binding effect to a judgment rendered abroad and so force plaintiff to relitigate the issues in controversy in a less sympathetic forum.¹⁷²

D. *Retroactive and Prospective Applications of the 1978 Act*

Whether the Diplomatic Relations Act is applicable to suits brought after the date on which the statute came into force but concerning acts committed before that date is still an open question. Section 9 of the law provided a ninety day effective period for the legislation in order to give the State Department time to notify the missions, reclassify the diplomatic community in accordance with the Vienna Convention provisions, and

170. While Article 32 appears to require waivers of immunity with respect to jurisdiction and execution of judgment unless a diplomatic staff member or lower level embassy employee is the one bringing suit, Articles 31 and 37 appear to provide for jurisdiction without regard to Article 32 waiver. See Articles 31, 32, 37, *supra* note 3, at 3240-41, 3244.

171. An illustration of Article 32 under this restricted interpretation was the recent discovery that the 15 year old son of a diplomat serving the Gambian Embassy was responsible for setting two school fires which resulted in thousands of dollars worth of damage. As a family member of a diplomatic agent, the boy enjoyed blanket immunity from jurisdiction. Arrest and prosecution could have only been accomplished through Article 32 waiver. See Wash. Post, May 4, 1979, § A, at 1, col. 4.

172. See, e.g., *Hilton v. Guyot*, 159 U.S. 113 (1895) (French judgment *in personam* against American citizens held to be *prima facie* evidence of the justice of the claim and was not conclusive of the merits of the controversy). For a discussion of all the suits involved in *Hilton v. Guyot*, see von Mehren, and Trautman, *Recognition of Foreign Adjudications: A Survey and Suggested Approach*, 81 HARV. L. REV. 1601 (1968).

promulgate necessary regulations. The law is silent with regard to its retroactive application.

The retroactivity of the Vienna Convention was considered by an English Court of Appeals in *Empsom v. Smith*.¹⁷³ An individual brought an action for a breach of a lease in an English county court against a diplomatically immune Canadian official in 1963. The officer was a member of the administrative and technical staff. The case was still pending when Parliament repealed the Statute of Anne and enacted the Diplomatic Privileges Act of 1964 which, like the 1978 American law, incorporated the Vienna Convention. Though originally subject to dismissal on immunity grounds, the *Empsom* court held that the new Act was applicable to suits brought after its enactment for actions arising prior thereto.¹⁷⁴

Analogizing to the 1978 Act, of like remedial nature, any suit or proceeding pending at the time the 1790 Statute was repealed should enjoy retroactive application of the new legislation to the extent it incorporates the Vienna Convention provisions. Because the direct action provision of the Diplomatic Relations Act creates a substantive and new right of recovery, however, it should be applied prospectively. The House Committee report expressly stated that the direct action provision should apply only to insurance contracts entered into or renewed after the bill's enactment.¹⁷⁵

IV. DISTRICT PARKING AND TRAFFIC ENFORCEMENT UNDER THE 1978 ACT

The blanket immunities from criminal and civil jurisdiction accorded the diplomatic community under the 1790 Statute resulted in that community's total nonaccountability for infractions of local parking and traffic laws since violations were entirely within the District's criminal jurisdiction.¹⁷⁶ Congressional enactment of the Vienna Convention was itself insufficient to effectively address this problem since, under Article 37, the diplomatic staff, the administrative and technical staff, and their families had blanket immunity from criminal prosecution.

To remedy this situation, the District of Columbia enacted the Traffic Adjudication Act of 1978.¹⁷⁷ The Act decriminalizes and provides for administrative adjudication of parking and minor traffic violations. The District of Columbia Council enacted the Act partially in anticipation of a revision of the immunity laws. Only members of the diplomatic staff and

173. 1 Eng. Rep. 426 (Q.B. 1966).

174. *Id.* at 437-38.

175. H.R. REP. No. 1410, *supra* note 162, at 5.

176. *See* notes 86-88 and accompanying text *supra*.

177. D.C.L. No. 2-104 (1978).

their families enjoy blanket immunity from administrative jurisdiction under the Diplomatic Relations Act. Because administrative adjudication shifts the focus from traditional punishment of traffic violations to reinforcing policies designed to relieve traffic congestion and encourage mass transit use, the Act is much more comprehensive in scope.¹⁷⁸ Administrative adjudication thus serves as a procedural tool by which the District can assert jurisdiction over traffic violators within the diplomatic community who have either no immunity or only functional immunity under the new law.

Extensive towing and booting have been employed by the District to implement this new administrative procedure. According to the D.C. Transportation Department, any automobile bearing diplomatic license plates (DPL) is subject to towing if it blocks traffic or causes a safety hazard even though the driver may be a diplomatic staff member who enjoys total immunity from administrative jurisdiction.¹⁷⁹ Administrative and technical staff personnel as well as members of the service staff are liable for payment of fines unless they can show by "sufficient evidence" that the fines were incurred while they were performing an authorized or official act. Hearing examiners will accept only individualized letters from high ranking staff members before granting official acts immunity.¹⁸⁰

These procedures pose several immediate problems. For example, is a statement from the mission that the charged individual was engaged at the time in an official function sufficient to meet the District Act's needs? To what extent, if any, can the hearing officer demand specific facts to support the defense that the individual was engaged in an official function? Is it within the hearing examiner's authority to reject the defense even while the mission insists that immunity bars administrative jurisdiction? Clearly, a large degree of deference must be accorded the mission if such disputes are to be avoided.

State Department officials fear possible reprisals by foreign governments in response to the new D.C. law and its enforcement procedures.¹⁸¹ As noted earlier in this comment, the concept of reciprocity underlies the practice of diplomatic relations. Fears of reprisals from capitals which do not now enforce traffic violations thus are not totally unfounded. Never-

178. Telephone conversation with Mr. Robert O.D. Thompson, Assistant Director of Motor Vehicles, Department of Transportation, Washington, D.C. (Feb. 8, 1979).

179. *Id.*

180. Wash. Post, Jan. 13, 1979, § C, at 1, col. 3. Form letters will not be accepted and letters must set out specific explanations of each case where "official acts immunity" is raised.
Id.

181. *Id.*

theless, because traffic violations are usually unrelated to diplomatic activities, strict enforcement of the District law should not be diluted in an attempt to foster better diplomatic relations.

V. CONCLUSION

Repeal of the 1790 diplomatic immunity statute and the enactment of the Diplomatic Relations Act of 1978 represents an extraordinary two hundred year leap in United States law on diplomatic practice. The issue of tortious automobile conduct is, aside from questionable regulations governing policy limits, almost completely resolved in the compulsory insurance and direct action provisions of the statute. The impact of the Vienna Convention categories and exceptions to privileges and immunities in the areas of criminal, contract, tort, and property law is potentially no less sweeping.

The extent of the Act's impact, however, will ultimately be determined by an almost matrix-like consideration of parties and claims. As the status of mission members or the implications of the particular controversy descend in importance, courts may actively assert jurisdiction by restrictively interpreting functional immunity. Conversely, a court must accord much greater deference to the defenses of an ambassador who is being sued since the threat of disrupting mission functions may have international repercussions. Even though the 1978 law provides for jurisdiction over many members of the diplomatic corps, the successful assertion of jurisdiction will often depend on judicial reflection over the immutable core of diplomatic privileges and immunities—reciprocity.

Barry Cohen

