University of Michigan Journal of Law Reform

Volume 12

1978

Reforming the Laws and Practice of Diplomatic Immunity

Paul F. Roye
University of Michigan Law School

REFORMING THE LAWS AND PRACTICE OF DIPLOMATIC IMMUNITY

By custom and long-standing federal statute, diplomatic agents of foreign nations sent to the United States have been accorded liberal immunities from local civil and criminal jurisdiction.[1] Until recently, approximately 19,000 persons, including family members, were entitled to such diplomatic immunity in Washington, D.C. alone.[2] The privilege of diplomatic immunity has sometimes been abused. Traffic accidents resulting in uncompensated property damage and personal injuries, unpaid parking tickets, and ignored contracts obligations are several of the types of abuses spawned by this immunity.[3]

As a result of public criticism and increasingly strained relations between diplomatic communities and local communities, Congress recently enacted legislation that dramatically changes United States diplomatic immunity law.[4] This legislation eliminates the complete immunity from criminal and civil law proceedings that was afforded most foreign diplomats and their staffs, and establishes the rules of the Vienna Convention on Diplomatic Relations[5] as the measure of diplomatic immunity in the United States.[6] This article will examine the theoretical justification for diplomatic immunity and its application in the United States. The manner in

---

[1] Diplomatic agents have been generally immune from arrest or imprisonment and exempt from criminal and civil suit in the host country. C. FENWICK, INTERNATIONAL LAW 563 (4th ed. 1965). Under former United States law, any judicial process initiated against a foreign diplomat was deemed null and void. 22 U.S.C. § 252 (1976)(repealed 1978). See notes 19-22 and accompanying text *infra*.

[2] *Diplomatic Privileges and Immunities: Hearings and Markup Before the Subcommittee on International Operations of the Committee on International Relations of the House of Representatives*, 95th Cong., 1st Sess. 64-65 (1977) [hereinafter cited as *Diplomatic Privileges and Immunities Hearings*] (letter from Douglas J. Bennett, Jr., Assistant Secretary for Congressional Relations to the Hon. Joseph L. Fisher, Chairman, Subcommittee on International Operations). Additionally, there are concentrations of diplomatic personnel in other United States cities, particularly in New York.

[3] *See, e.g., Diplomatic Privileges and Immunities Hearings*, *supra* note 2, at 48; NEWSWEEK, Aug. 8, 1977, at 42; Detroit Free Press, Jan. 18, 1978, at 1A, col. 3. It is clear that past diplomatic immunity laws shielded diplomatic personnel from the consequences of acts which would result in arrest, trial, and punishment if committed by Americans.

[4] H.R. 7819, 95th Cong., 1st Sess., 123 CONG. REC. 7877 (1977) passed the House of Representatives July 27, 1977. An amended version of H.R. 7819 passed the Senate August 17, 1978. 124 CONG. REC. 13695 (1978). The Senate amendments were agreed to by the House. 124 CONG. REC. 10004 (1978). The President approved the legislation Sept. 30, 1978. This act, The Diplomatic Relations Act of 1978, Pub. L. No. 95-393, 92 Stat. 808 (1978), is discussed at pp. 100-10 *infra*.

[5] 23 U.S.T. 3227, T.I.A.S. No. 7502. *See* text accompanying notes 42-63 *infra*.

[6] Diplomatic Relations Act of 1978, Pub. L. No. 95-393, § 3, 92 Stat. 808 (1978).

which the recently enacted legislation alters United States diplomatic immunity law, as well as the reasoning and possible impact of such law reform, also will be discussed.

I. RATIONALE FOR DIPLOMATIC IMMUNITY

The concept of diplomatic immunity is one of the oldest and most universally recognized principles of international law and is embodied in international custom, practice, and agreements.[7] Although its application in practice varies among nations, diplomatic immunity may be defined broadly as "the freedom from local jurisdiction accorded under international law by the receiving state to duly accredited diplomatic officers, their families and servants."[8] Until recently, the United States has granted complete immunity to all foreign nationals in the employ of an embassy who are not permanent residents and are assigned the proper nonimmigrant visa status. By special statutes, diplomatic immunity is enjoyed by the permanent representatives of country missions to the United Nations and the Organization of American States as well as by the top officials of the United Nations.[9]

Diplomatic officers are generally accorded certain privileges with respect to such matters as exemptions from customs duties and local taxation. Although often associated with diplomatic immunity, such privileges are not embraced in that term and are not discussed in this note.[10]

Three theories commonly have been proposed to justify the historical practice of according diplomats certain immunities.[11] The theory of personal representation considers the diplomatic envoy to be the personification of the state he represents. Because the

---

[7] 4 G. HACKWORTH, DIGEST OF INTERNATIONAL LAW § 400 (1942); M. OGDON, JURIDICAL BASES OF DIPLOMATIC IMMUNITY 2 (1936); H. RIEFF, DIPLOMATIC AND CONSULAR PRIVILEGES, IMMUNITIES AND PRACTICE 6 (1954); Barnes, *Diplomatic Immunity From Local Jurisdiction: Its Historical Development Under International Law and Application in United States Practice*, 43 DEP'T STATE BULL. 173 (1960); Preuss, *Capacity for Legation and the Theoretical Basis of Diplomatic Immunities*, 10 N.Y.U.L.Q. REV. 170 (1932-33).

[8] Barnes, *Diplomatic Immunity From Local Jurisdiction: Its Historical Development Under International Law and Application in United States Practice*, 43 DEP'T STATE BULL. 173 (1960).

[9] *See* Convention on Privileges and Immunities of the United Nations, Feb. 13, 1946, 21 U.S.T. 1418, T.I.A.S. No. 6900; 22 U.S.C. § 288 (g) (1976) (provision extending certain immunities to representatives of member states of the Council of the Organization of American States).

[10] *See* 26 U.S.C. § 893 (1976) regarding exemption from federal income tax for alien employees of foreign governments. For postal privileges, see 39 U.S.C. § 4168 (1976). United States customs regulations provide for the extension of custom courtesies and free entry privileges to foreign diplomatic personnel, if reciprocal privileges are granted by the foreign government to United States personnel of comparable status. *See* 19 C.F.R. §§ 148.86-.90 (1977).

[11] *See* M. OGDON, *supra* note 7, at 63-94, 105-65, 166-94.

representative is endowed with the sovereignty of the state, he is given special immunity from the jurisdiction of the courts of the receiving state.[12] The theory of exterritorality explains immunity by considering the diplomat to be on the soil of his native country. Thus, the diplomatic agent is said not to be subject to local law because, within the contemplation of law, he is not present in the host country.[13]

Rather than relying on the legal fictions of these two theories, the modern justification for diplomatic immunity is grounded in the theory of functional necessity.[14] This theory suggests that diplomats must be granted a privileged status affording freedom of movement and communication if they are to fulfill their functions in foreign states and thereby facilitate relations between nations.[15] The effective performance of diplomatic functions is only possible if diplomatic representatives are uninhibited by harassment or intimidation.[16]

The theory of functional necessity is more pragmatic and realistic than the other theories justifying diplomatic immunity,[17] yet it does present some difficulties. Grants of immunity under the functional necessity theory can be justified only if the exercise of particular diplomatic functions requires the extension of such immunity. Consequently, it is necessary to identify both the functions essential to the accepted practice of diplomacy and the degree of immunity necessary to facilitate the performance of those functions.[18]

---

[12] This legal fiction is recognized in Bergman v. De Sieyes, 71 F. Supp. 334 (S.D.N.Y. 1946) where the court observed *inter alia* that "a foreign minister is immune from the jurisdiction, both criminal and civil, of the courts in the country to which he is accredited, on the ground that he is the representative, the alter ego, of his sovereign who is, of course, entitled to such immunity." *Id.* at 341.

[13] *See* United States v. Wong Kim Ark, 169 U.S. 649 (1898); Wilson v. Blanco, 56 N.Y. Super. Ct. 582, 4 N.Y.S. 714 (1889).

[14] *See* C. WILSON, DIPLOMATIC PRIVILEGES AND IMMUNITIES 20 (1967).

[15] This view is expressed in the frequently quoted letter from Secretary of State Elihu Root to the Secretary of Commerce and Labor, March 16, 1906:

> The reason of the immunity of diplomatic agents is clear, namely: that Governments may not be hampered in their foreign relations by the arrest or forcible prevention of the exercise of a duty in the person of a governmental agent or representative . . . . It likewise follows from the necessity of the case, that the diplomatic agent must have full access to the accrediting state, else he cannot enter upon the performance of his specific duty, and it is equally clear that he must be permitted to return to the home country in the fulfillment of official duty.

4 G. HACKWORTH, DIGEST OF INTERNATIONAL LAW § 400, at 513 (1942).

[16] RESTATEMENT (SECOND), FOREIGN RELATIONS LAW OF THE UNITED STATES § 73, Comment at 229-30 (1965).

[17] The theory of functional necessity finds support in the case law. *See* Hellenic Lines, Ltd. v. Moore, 345 F.2d 978 (D.C. Cir. 1965); United States *ex rel.* Casanova v. Fitzpatrick, 214 F. Supp. 425 (S.D.N.Y. 1963).

[18] C. WILSON, *supra* note 14, at 22.

II. AMERICAN DIPLOMATIC IMMUNITY LAW PRIOR TO THE DIPLOMATIC RELATIONS ACT OF 1978

A. The 1790 Statute

In 1790, the United States enacted laws[19] which were declaratory of international law and designed to give the principle of diplomatic immunity local application.[20] The 1790 statute effectively guaranteed diplomatic agents freedom from the civil and criminal jurisdiction of the United States or any state. Foreign diplomatic personnel accredited to the United States government were immune from arrest or imprisonment and their property could not be seized or attached. Any writ or process issued against such persons was null and void.[21] Persons who obtained or executed a writ or process against diplomatic personnel were subject to fines and up to three years imprisonment.[22]

The courts broadly construed the immunity provision. The immunity which it provided was not confined to those actions which had as a direct objective the seizure or attachment of goods or chattels.[23] Moreover, this statute had been interpreted to provide absolute immunity from criminal and civil jurisdiction not only for the diplomatic agent but also for members of his immediate family and members of the diplomat's administrative, technical, and service staff.[24] This immunity also extended by statute to private servants in the household of the diplomat, provided they were foreign nationals with proper visa status.[25] American citizens registered with the Department of State who were in the service of foreign diplomatic missions were also exempt from judicial process, except for suits arising out of debts contracted before they entered upon such service.[26]

---

[19] 22 U.S.C. §§ 252-54 (1976) (repealed 1978).

[20] United States v. Melekh, 190 F. Supp. 67 (S.D.N.Y. 1960).

[21] 22 U.S.C. § 252 (1976) (repealed 1978). This section was derived from an act of Parliament passed in 1708, 7 Anne, c. 12 (1708), when diplomatic relations between Great Britain and Russia were jeopardized by the arrest for debt of the Russian Ambassador to London. Trost v. Tompkins, 44 A.2d 226, 228 (1945).

[22] 22 U.S.C. § 253 (1976) (repealed 1978). In Hellenic Lines, Ltd. v. Moore, 345 F.2d 978 (D.C. Cir. 1965), the court held that a United States Marshall was justified in refusing to serve a summons on a Tunisian Ambassador because the ambassador's diplomatic immunity would be violated by the service of process. The court stated: "For although courts will not allow a marshall to avoid his duty to serve process merely because he notices the availability of a defense to the suit, they must protect him if service would violate international law and might subject him to the criminal law of the United States." *Id.* at 979.

[23] Bergman v. De Sieyes, 71 F. Supp. 334 (S.D.N.Y. 1946).

[24] Herman v. Apetz, 130 Misc. 618, 224 N.Y.S. 389 (1927); Carbone v. Carbone, 123 Misc. 656, 206 N.Y.S. 40 (1924).

[25] 22 U.S.C. § 254 (1976) (repealed 1978).

[26] 22 U.S.C. § 254 (1976) (repealed 1978).

Under the 1790 statute, diplomatic agents, however, were not totally exempt from the restraints of United States law. By initiating a law suit, an individual entitled to diplomatic immunity effectively waived his immunity and subjected himself to counterclaims directly connected with the original claim.[27] The waiver of immunity arising as a result of suit, however, did not constitute a waiver of immunity from execution of resulting judgments.[28] Diplomatic immunity also could be waived by the embassy or foreign government involved.[29] However, even when such immunity had been waived, there was a reluctance to sue because anyone who wrongfully sued or criminally prosecuted a diplomat could be fined or sent to jail.[30]

Diplomats immune from judicial process, however, were still subject to extra-judicial sanctions. A formal complaint could be submitted to the offending diplomat's government, or an official request made for his recall. Alternatively, the federal government could declare him *persona non grata* and order the offender to leave the country.[31] These sanctions were sparingly employed, however, and were reserved for the most outrageous circumstances.[32] Moreover, removal of foreign officials did not compensate residents of the United States who may have been seriously injured by the unlawful or negligent actions of the offending diplomatic official. The Department of State often intervened and, in appropriate cases, attempted to bring disputes to the attention of the diplomat's embassy with a request that it promote a just settlement.[33] However, a number of United States citizens have been unable to obtain compensation or satisfactory resolution of disputes despite the efforts of the Department of State.[34]

In providing broad protection for all diplomatic personnel, the 1790 statute was designed to meet the conditions of diplomacy in the eighteenth century. At that time, there were only small numbers of diplomats in this country and most were directly engaged in actual diplomatic functions with the United States. Given the greatly expanded staffs of current diplomatic missions, the extensive immunity granted in 1790 is not justified, since many such personnel do not perform diplomatic functions and the immunity is

---

[27] RESTATEMENT (SECOND), FOREIGN RELATIONS LAW OF THE UNITED STATES § 79, at 248 (1965).

[28] *Id. Cf.* Herman v. Apetz, 130 Misc. 618, 224 N.Y.S. 389 (1927).

[29] *Id. See also* United States v. Butenko, 384 F.2d 554 (3rd Cir. 1967), *vacated on other grounds sub nom.* Alderman v. United States, 394 U.S. 165 (1968); United States v. Arizti, 229 F. Supp. 53 (S.D.N.Y. 1964).

[30] *See* 22 U.S.C. § 253 (1976) (repealed 1978).

[31] Barnes, *supra* note 8, at 177.

[32] *Diplomatic Privileges and Immunities Hearings, supra* note 2, at 217.

[33] *Id.* at 216.

[34] *See* note 3 *supra.*

subject to abuse. Accordingly, a systematic reduction of diplomatic immunity would not interfere with diplomatic efforts, would reduce abuse of the immunity, and is consistent with the functional necessity theory, which has been adopted by most other countries.[35]

B. Abuses of Diplomatic Immunity

Through diplomatic immunity, governments ensure that diplomatic personnel can carry out their legitimate functions. However, the benefits of improved international relations derived from these grants of immunity must be balanced against the obligation of the receiving government to protect the interests of its citizens. Although most members of the diplomatic community are respectful of United States laws and regulations, abuses of diplomatic immunity result in needless personal hardship to innocent American citizens and strained relations with local governments. As a result of these abuses, the media coverage and local opinion, particularly in New York and Washington, D.C., have become increasingly critical of diplomatic immunity.[36]

Some of the most frequent problems raised in connection with diplomatic immunity involved disobedience of local laws and regulations, particularly those relating to the use of automobiles. For example, in New York City alone diplomats are responsible for over 200,000 parking tickets annually. Only one percent of the parking tickets are ever paid, so that the city loses approximately five million dollars a year.[37] In the District of Columbia diplomatic personnel were accountable for 37,905 unpaid parking tickets between January 1, 1976 and March 31, 1977. This represents $1,070,000 in fines and penalties.[38]

Unsatisfied tort claims, primarily those resulting from automobile accidents, result in the denial of compensation to injured United States citizens.[39] Disputes arising out of contracts, including broken apartment leases, bad checks, unhonored personal contracts, and other similar transactions present similar problems of

---

[35] Over one hundred nations have signed the Vienna Convention on Diplomatic Relations, Apr. 18, 1961, 23 U.S.T. 3227, T.I.A.S. No. 7502, which provides a narrower grant of diplomatic immunity than does the 1790 statute. *See* notes 42-63 and accompanying text *infra*.

[36] NEWSWEEK, Aug. 8, 1977, at 42.

[37] *Diplomatic Privileges and Immunities Hearings, supra* note 2, at 48-49.

[38] *Id.* at 49.

[39] *See* NEWSWEEK, Aug. 8, 1977, at 42. In April 1974 a George Washington University professor was injured by a cultural attache of the Panamanian Embassy in an automobile accident. The former professor is now a quadriplegic and will require full-time nursing for the remainder of her life. The Panamanian was not insured and suit could not be brought because of the official's diplomatic immunity.

innocent parties unfairly suffering financial loss.[40] The Department of State has been notified less frequently of claims made by United States citizens against diplomatic personnel involving divorce and non-support, disorderly conduct, and theft.[41]

While relatively few people or communities are adversely affected by claims of diplomatic immunity, these abuses emphasized the need for the United States to bring its laws into conformity with generally accepted international practice as codified in the Vienna Convention.

III. VIENNA CONVENTION ON DIPLOMATIC RELATIONS

Although United States law formerly extended full diplomatic immunity from criminal and civil jurisdiction to all foreign nationals employed by a foreign embassy, many nations long ago curtailed their grant of a similar blanket immunity. Well over one hundred of these nations are signatories of the Vienna Convention on Diplomatic Relations,[42] a comprehensive international codification of the immunities extended to members of permanent diplomatic missions and their families.[43] The Vienna Convention adopts the functional approach to diplomatic immunity in that it accords varying degrees of immunity from civil and criminal jurisdiction to various categories of embassy functionaries and their family members.[44] The Vienna Convention confers immunity only where necessary to ensure that the diplomatic personnel of foreign governments can carry out their functions free of unreasonable restraints imposed by local authorities. Under a functional necessity analysis, blanket immunity for diplomatic agents, their families,

---

[40] *See Diplomatic Privileges and Immunities Hearings, supra* note 2, at 48. For example, the wife of the late dean of the White House Press Corps rented a home to a legal attache at the French Embassy. She alleged that the diplomat caused $11,000 worth of damage to the house, but she could not collect because of diplomatic immunity.

A New York landlord sold a four story building to the Congo as headquarters for the African nation's mission to the United Nations. The Congolese refused to make the quarterly payments on their $400,000 mortgage. The landlord attempted to foreclose on the Congolese and have them evicted, but they claimed that diplomatic immunity prohibited their eviction. *See* Detroit Free Press, Jan. 18, 1978, at 1A, col. 3.

[41] *Diplomatic Privileges and Immunities Hearings, supra* note 2, at 214-15.

[42] 23 U.S.T. 3227, T.I.A.S. No. 7502.

[43] In drafting its provisions, the Convention examined the entire body of law and practice of diplomatic intercourse and immunities since 1815. International Law Commission Report, 13 U.N. GAOR, Supp. (No. 9) 11-27, U.N. Doc. A/3859 (1958), *reprinted in* 53 AM. J. INT'L L. 230, 253-91 (1959).

[44] The Convention "does at least formulate rules relating to status, privilege and immunities with consistent regard to what is reasonable and necessary between sovereign states." Simmonds, *The Rationale of Diplomatic Immunity*, 11 INT'L & COMP. L.Q. 1204, 1210 (1962).

employees, and domestic servants cannot be justified as it was under earlier practice and theory.

The Vienna Convention differs in several respects from the repealed statutory law of the United States. Under the 1790 statute, diplomatic agents duly accredited to the United States, and members of their immediate families residing with them, and members of the diplomat's administrative, technical, and service staff were accorded full civil and criminal immunity from the jurisdiction of the United States.[45] Under the Vienna Convention, diplomatic agents[46] and their families,[47] and most members of the embassy staff are fully exempt from criminal jurisdiction, but immunity from civil process is limited to reflect the functional requirements of different positions.[48] This reduction of the traditionally extensive diplomatic immunity can be attributed to the increasing acceptance of the functional necessity theory, which is recognized in the Vienna Convention. The Convention's preamble states that the purpose of diplomatic privileges and immunities is "to ensure the efficient performance of the functions of diplomatic missions as representing states."[49]

The Vienna Convention gives diplomats and their immediate families full immunity from criminal and civil prosecution.[50] Administrative and technical staff[51] of an embassy have full immunity from criminal jurisdiction, but are exempted from civil process only for their official acts.[52] The families of such staff members are immune from criminal prosecution but are not granted any civil immunity.[53] Members of the service staff[54] are granted civil and

---

[45] Herman v. Apetz, 130 Misc. 618, 224 N.Y.S. 389 (1927); Carbone v. Carbone, 123 Misc. 656, 206 N.Y.S. 40 (1924). *See* text accompanying notes 24-26 *supra*.

[46] A "diplomatic agent" is defined in the Vienna Convention on Diplomatic Relations, Apr. 18, 1961, art. 1, 23 U.S.T. 3227, 3231, T.I.A.S. No. 7502, as the head of the diplomatic mission or a member of the diplomatic staff of the mission.

[47] The Convention provides complete civil and criminal immunity for members of the family of the diplomatic agent forming part of his household. Vienna Convention on Diplomatic Relations, Apr. 18, 1961, art. 37, 23 U.S.T. 3227, 3244, T.I.A.S. No. 7502.

[48] *See* Vienna Convention on Diplomatic Relations, Apr. 18, 1961, art. 31, 23 U.S.T. 3227, 3240, T.I.A.S. No. 7502; art. 37, 23 U.S.T. 3227, 3244, T.I.A.S. No. 7502.

A review of the debate and consideration of amendments to the Vienna Convention indicates that there was support for significant limitations on diplomatic immunity. *See* Kerley, *Some Aspects of the Vienna Conference on Diplomatic Intercourse Immunities*, 56 AM. J. INT'L L. 88 (1962).

[49] 23 U.S.T. 3227, 3230, T.I.A.S. No. 7502.

[50] *See* Vienna Convention on Diplomatic Relations, Apr. 18, 1961, art. 31, 23 U.S.T. 3227, 3240, T.I.A.S. No. 7502; art. 37, 23 U.S.T. 3227, 3244, T.I.A.S. No. 7502.

[51] The administrative and technical staff includes archivists, clerks, secretaries, stenographers, messengers, and interpreters. Vienna Convention on Diplomatic Relations, Apr. 18, 1961, art. 1, 23 U.S.T. 3227, 3230, T.I.A.S. No. 7502.

[52] *See* Vienna Convention on Diplomatic Relations, Apr. 18, 1961, art. 37, 23 U.S.T. 3227, 3244, T.I.A.S. No. 7502.

[53] *Id.* These family members were fully subject to criminal and civil jurisdiction under the 1790 statute. 22 U.S.C. §§ 252, 254 (1976) (repealed 1978).

[54] The Convention defines members of the service staff as those in the domestic service of

criminal immunity only for their official acts,[55] and their families are fully subject to the civil and criminal jurisdiction of the receiving state.[56] Private servants[57] of diplomatic agents are not accorded any immunity.[58]

The United States signed the Vienna Convention in 1961, and it entered into force with respect to the United States in 1972.[59] Since the Vienna Convention is self-executing, no legislation is needed to implement the treaty. By virtue of the supremacy clause of the United States Constitution, treaties confirmed by the Senate, along with the Constitution and acts of Congress made pursuant thereto, are "the supreme law of the land."[60] Generally, when there is a conflict between a treaty and an act of Congress the last expression of the sovereign will controls.[61] However, despite the fact that immunity standards set forth in the treaty are more restrictive than those incorporated in the 1790 statute, the statute continued to govern the availability of diplomatic immunity where the Convention did not apply. This result was consistent with the Convention, for article 47 clearly states that a broader conferral of immunity may be granted by the receiving state despite the narrower scope of immunity provided in the Convention.[62] Both the Department of Justice and the Department of State indicated that the Vienna Convention, while it became the law of the land, did not impliedly re-

---

the mission. Vienna Convention on Diplomatic Relations, Apr. 18, 1961, art. 1, 23 U.S.T. 3227, 3230, T.I.A.S. No. 7502.

[55] Vienna Convention on Diplomatic Relations, Apr. 18, 1961, art. 37, 23 U.S.T. 3227, 3244, T.I.A.S. No. 7502.

[56] *Id.* Families of service staff were not accorded any immunity under the 1790 statute. 22 U.S.C. §§ 252, 254 (1976) (repealed 1978).

[57] The Convention defines a private servant as a person who is in the domestic service of a member of a mission and who is not an employee of the sending state. Vienna Convention on Diplomatic Relations, Apr. 18, 1961, art. 1, 23 U.S.T. 3227, 3230, T.I.A.S. No. 7502.

[58] Vienna Convention on Diplomatic Relations, Apr. 18, 1961, art. 37, 23 U.S.T. 3227, 3244, T.I.A.S. No. 7502. Such servants were entitled to full criminal and civil immunity regardless of their nationality under the 1790 statute. 22 U.S.C. §§ 252, 254 (1976) (repealed 1978).

[59] The Convention was signed on behalf of the United States June 29, 1961 and ratified by the U.S. Senate on November 8, 1972. Ratification was deposited with the United Nations Secretary General on November 13, 1972 and the Convention entered into force with respect to the United States on December 13, 1972. *See* H.R. REP. No. 526, 95th Cong., 1st Sess. 2 (1977); S. REP. No. 958, 95th Cong., 2d Sess. 2 (1978).

[60] U.S. CONST. art. VI, § 2.

[61] Chae Chan Ping v. United States, 130 U.S. 581 (1889).

[62] Article 47 disallows discrimination between states in the application of the Convention, but it does make allowance for reciprocity and finds no illegitimate discrimination

> where the receiving State applies any of the provisions of the present Convention restrictively because of a restrictive application of that provision to its mission in the sending State; [or] . . . where by custom or agreement States extend to each other more favourable treatment than is required by the provisions of the present Convention.

Vienna Convention on Diplomatic Relations, Apr. 18, 1961, art. 47, 23 U.S.T. 3227, 3249, T.I.A.S. No. 7502.

peal the 1790 domestic law of immunity.[63] Consequently, the sweeping diplomatic immunity provided by the 1790 statute continued to be effective. Repeal of the 1790 statute was necessary to allow the United States to apply the immunity provisions of the Vienna Convention and bring United States law into line with those of other countries.

IV. THE DIPLOMATIC RELATIONS ACT

The Diplomatic Relations Act (DRA) of 1978 was signed into law on September 30, 1978,[64] repealing the 1790 statute and leaving the Vienna Convention on Diplomatic Relations as the sole basis for diplomatic immunity in the United States.[65] It also establishes a mandatory liability insurance requirement for all embassy personnel and their families who operate motor vehicles, vessels, or aircraft in the United States.[66] The President is granted discretion to extend, on a reciprocal basis, more favorable or less favorable treatment to diplomatic personnel than the Convention specifies.[67] The Act also provides a mechanism for dismissal of actions by a judicial tribunal where immunity is found to exist,[68] and grants federal district courts jurisdiction of civil actions against diplomatic personnel.[69]

A. Repeal of the 1790 Statute

The DRA ends the broad immunity extending beyond that granted by the Vienna Convention and brings our domestic law into conformity with the law of the other nations that have signed the Convention. Additionally, the Act stipulates that the Convention shall apply to the representatives of all nations irrespective of whether a nation has ratified it, thus providing uniform treatment for all members of the diplomatic community.[70]

---

[63] The Department of Justice memorandum was published in [1973] DIGEST OF UNITED STATES PRACTICE IN INTERNATIONAL LAW 143, and the State Department ruling was published in [1975] DIGEST OF UNITED STATES PRACTICE IN INTERNATIONAL LAW 242.

[64] *See* note 4 *supra*.

[65] Diplomatic Relations Act of 1978, Pub. L. No. 95-393, § 3, 92 Stat. 808 (1978). *See* notes 70-76 and accompanying text *infra*.

[66] *Id.* § 6. *See* notes 77-103 and accompanying text *infra*.

[67] *Id.* § 4. *See* notes 104-09 and accompanying text *infra*.

[68] *Id.* § 5. *See* notes 110-15 and accompanying text *infra*.

[69] *Id.* § 8. *See* notes 116-23 and accompanying text *infra*.

[70] *Id.* § 3.

The DRA extends the diplomatic immunity provided by the Convention to all embassy and mission personnel in the United States, and to all United Nations personnel in New York, as well as to their families.[71] By fully embracing the Convention, the Congress has effectively adopted the functional analysis and reduced the blanket immunity which many diplomats enjoyed and some abused.[72] Senior diplomatic personnel retain their comprehensive immunity, while lower level personnel retain their immunity only while they are engaged in official embassy business. Arguably, the remaining immunity is necessary to the exercise of the diplomatic function and to the protection of the channels of diplomatic intercourse.

Repeal of the 1790 statute remedies the overwhelming majority of problems which Americans have encountered in their relations with members of the diplomatic community. The DRA terminates civil immunity for many lower echelon officials and their families. In Washington, D.C., for example, there were approximately 6,000 embassy personnel, excluding family members, who were immune from civil action. Under the Act, approximately 4,000 of these officials are subject to normal civil suit for their unofficial acts.[73] Thus, this measure is a significant step in providing legal relief for United States citizens involved in civil disputes with embassy personnel.

Although the DRA allows diplomatic agents, administrative and technical staff, and their families full immunity from the criminal jurisdiction of the United States, members of the service staff only have immunity from the criminal jurisdiction for their official acts, and private servants no longer have any criminal immunity.[74]

---

[71] The DRA defines mission as follows: "The term mission includes missions within the meaning of the Vienna Convention and any missions representing foreign governments, individually or collectively, which are extended the same privileges and immunities, pursuant to law, as are enjoyed by missions under the Vienna Convention . . . ." *Id.* § 2.

This expansive concept of mission includes any permanent or special diplomatic mission accredited or recognized by the United States, such as the Commission of the European Communities. Since they perform the essential functions of diplomatic missions they receive the same kind of treatment.

Additionally, several statutes or agreements require the granting of diplomatic immunities to personnel of various organizations similar to diplomatic missions that are accredited to the United States. The Convention on Privileges and Immunities of the United Nations, Feb. 13, 1946, 21 U.S.T. 1418, T.I.A.S. No. 6900, and the provision extending certain immunities to representatives of member states of the Council of the Organization of American States (OAS), 22 U.S.C. § 288(g) (1976), read in conjunction with the Diplomatic Relations Act, make it clear that United Nations and OAS delegations are considered part of the diplomatic community and are entitled to immunity under the Vienna Convention.

[72] During the hearings on the DRA, Evan V. Dubelle, Chief of Protocol, Department of State, criticized the 1790 statute for its failure to reflect the functional approach: "[T]here is a clear need to limit the application of diplomatic immunity to the purpose for which it has historically been intended, namely, to ensure the legitimate, unimpaired conduct of official relations betwen a diplomatic mission as representative of the sending country and the host country . . . ." *Diplomatic Privileges and Immunities Hearings, supra* note 2, at 62.

[73] *Id.* at 6.

[74] *See* notes 46-58 and accompanying text *supra*.

Thus, passage of the DRA offers a deterrent to these members of the diplomatic community from engaging in criminal actions. As the DRA ends civil immunity for a large number of lower echelon embassy officials and their families, efforts could be made to transfer parking violations from the local criminal codes to the civil code, as has been done in New York.[75] Jurisdiction would thereby be established over a great portion of the diplomatic community, providing a solution to problems of unpaid parking tickets.[76]

B. Requirement of Liability Insurance

Under former diplomatic immunity law no adequate mechanism existed to compensate individuals injured by the negligent use of automobiles or by other tortious actions committed by diplomatic personnel. Although repeal of the 1790 statute exposes significant numbers of diplomatic personnel to civil liability, there are still many diplomats and their families who are completely immune from civil or criminal proceedings. Thus, an American citizen who is injured by the negligent action of an individual enjoying diplomatic immunity, would still be unable to bring suit to collect damages under the DRA.

In 1976, Congress took a step toward remedying this problem by enacting the Foreign Sovereign Immunities Act (FSIA).[77] The Act allows recovery against foreign nations for most tortious acts committed by their officials and employees while acting within the

---

[75] *See* H.R. REP. No. 526, 95th Cong., 1st Sess. 10 (1977); S. REP. No. 958, 95th Cong., 2d Sess. 4 (1978).

[76] During the hearings prior to passage of the DRA in the House of Representatives some Congressmen suggested that various municipalities be compensated by the federal government for revenue lost as a result of unpaid parking tickets of the diplomatic community. Congressman Solarz expressed his support for such a provision:

> Parking violations involve problems of safety, of unpaid bills to jurisdictions that badly need the money, of police time spent making out such tickets, and of interference with the conduct of local business. If the United States picks up the cost of hosting visiting foreign dignitaries, as it often does, I believe that making restitution for diplomatic parking tickets should likewise be considered a cost of foreign policy that the federal government should bear. At a minimum, the adoption of this provision will force the State Department to be more vigilant in the effort to force foreign diplomats to pay up.

Diplomatic Privileges and Immunities Hearings, supra note 2, at 49.

Although the DRA eliminates diplomatic immunity in civil cases for two-thirds of the foreign diplomats in this country, the compensation fund approach would provide a mechanism for reimbursing municipalities for the remaining damage done by those diplomats retaining comprehensive immunity. *See* notes 36-38 and accompanying text *supra*. However, such a provision was not included in the bill ultimately passed by the Congress.

[77] 28 U.S.C. §§ 1602-1611 (1976). For legislative history and purpose of the Foreign Sovereign Immunities Act, *see* [1976] U.S. CODE CONG. & AD. NEWS 6604.

scope of their duties,[78] and it permits execution against any insurance policy held by the foreign nation covering such accidents.[79] While this measure provides some remedy for American citizens it does not guarantee compensation, because a foreign nation is not required under the FSIA to have or obtain insurance. Moreover, the FSIA does not cover situations where the injurious acts are committed outside the scope of the agent's or employee's duties or during the exercise of a discretionary function.

The DRA attempts to fill a portion of this gap by requiring members of the diplomatic community to carry liability insurance.[80] Specifically, the DRA requires liability insurance to cover risks arising from the operation of any motor vehicle, vessel, or aircraft in the United States.[81] This requirement is applicable to members of missions, their families, and the missions themselves. The adoption of this requirement makes United States law similar to most European countries, which require that members of the diplomatic community possess auto insurance as a condition of entry into the country.[82]

Under the DRA, the President is required to establish regulations to specify liability insurance requirements.[83] To guarantee compliance with these requirements, the President is authorized to "take such steps as he may deem necessary to insure that each mission, members of the mission and their families . . . comply with the requirements established."[84]

Various approaches could be taken by the State Department, acting on behalf of the President, to enforce the compulsory insurance requirement. For example, the approach utilized in European countries could be employed, whereby a diplomat must show evidence of insurance before he is issued a license plate for his car or registration for his aircraft or vessel.[85] If a person seeking diplomatic status failed to comply with the insurance requirement, the Department of State could invoke such administrative actions as *persona non grata* proceedings, requiring the individual to leave the

---

[78] 28 U.S.C. § 1605(a)(5) (1976).

[79] *See* 28 U.S.C. § 1610(a)(5) (1976). Subject to existing international agreements, 28 U.S.C. § 1609 (1976) provides generally that the property in the United States of a foreign state shall be immune from attachment, arrest, and execution. The provision reflects the traditional view in the United States that the property of foreign states is absolutely immune from execution. *See* Dexter & Carpenter, Inc. v. Kunglig Jarnvagsstryelsen, 43 F.2d 705 (2d Cir. 1930); Weilamann v. Chase Manhattan Bank, 21 Misc. 2d 1086, 192 N.Y.S.2d 469, 473 (1959). However, 28 U.S.C. §§ 1610, 1611 (1976) modify this rule and set forth various exceptions to this immunity from attachment and execution.

[80] Diplomatic Relations Act of 1978, Pub. L. No. 95-393, § 6, 92 Stat. 809 (1978).

[81] *Id.*

[82] *Diplomatic Privileges and Immunities Hearings, supra* note 2, at 15.

[83] Diplomatic Relations Act of 1978, Pub. L. No. 95-393, § 6, 92 Stat. 809 (1978).

[84] *Id.*

[85] *Diplomatic Privileges and Immunities Hearings, supra* note 2, at 120. However, the Act

country.[86] Alternatively, compliance with the insurance requirement could be checked at the point of accreditation or acceptance, when the official status of various diplomatic personnel is recognized by the United States.[87] This last approach is undoubtedly preferable; it ensures that all diplomatic personnel entering the country will comply with the insurance requirement, yet it avoids the extreme action of *persona non grata* proceedings. However, the *persona non grata* approach could be employed where diplomats obtain insurance only to enter the country and subsequently allow their policies to lapse.

With the DRA ensuring that all missions possess motor vehicle, vessel, or aircraft liability insurance, the FSIA can become an effective measure allowing a person injured by certain tortious acts to sue the foreign state directly and execute on the insurance which it is required to carry. Thus, when diplomatic personnel inflict tortious injures with an auto while acting within the scope of their official duties, liability can be imposed upon the foreign state itself.[88] Repeal of the 1790 statute and adoption of the DRA subjects lower echelon officials to legal process in all civil matters.[89] Consequently, the compulsory insurance requirement of the DRA can ensure that Americans injured by the tortious acts of such officials committed while driving will receive adequate compensation regardless of whether the officials were acting within the scope of their duties. However, if a senior diplomat, retaining comprehensive civil and criminal immunity but possessing liability insurance, tortiously injuries an American citizen in an auto accident while engaged in his private affairs, the victim is precluded from suing and attaining redress because of the diplomat's civil immunity.[90] Additionally, because the insurance company is subrogated to all the rights of the insured diplomat, the company could plead diplomatic immunity as a defense if sued directly.[91] Thus, compulsory auto liability insurance in this situation would not provide a com-

---

specifies that the insurance must cover operation of motor vehicles and not merely their ownership, so that this approach would be incomplete.

[86] *See* text at note 31 *supra*.

[87] *Diplomatic Privileges and Immunities Hearings*, *supra* note 2, at 129. The Department of State can attach conditions to the acceptance of diplomatic personnel into this country, so long as the conditions do not unduly interfere with the efficient functioning of the mission. *See* RESTATEMENT (SECOND), FOREIGN RELATIONS LAW OF THE UNITED STATES § 74, Comment b at 235 (1965).

[88] 28 U.S.C. § 1605 (1976). *See also* [1976] U.S. CODE CONG. & AD. NEWS 6619-20.

[89] Diplomatic Relations Act of 1978, Pub. L. No. 95-393, § 3, 92 Stat. 808 (1978).

[90] As indicated above, senior diplomats retain their complete civil and criminal immunity under the Vienna Convention on Diplomatic Privileges, Apr. 18, 1961, art. 31, 23 U.S.T. 3227, 3240, T.I.A.S. No. 7502. *See* note 50 and accompanying text *supra*.

[91] It is well recognized that the insurer can take nothing by subrogation but the rights of the insured. Hartford Fire Ins. Co. v. Chicago, Milwaukee & St. Paul Ry., 175 U.S. 91 (1899); Wager v. Providence Ins. Co., 150 U.S. 99 (1893).

prehensive solution, since injured parties cannot successfully sue senior diplomats in order to obtain compensation. The DRA reaches an adequate solution to this problem by avoiding the common law rule requiring a negligently injured party to assert a damage claim against the tortfeasor personally.[92] The measure provides for direct enforcement of the policy against the insurer in the federal courts when the insured diplomat enjoys immunity from suit.[93] Such an approach is presently being utilized by a number of European countries.[94] Similar direct actions against insurers are utilized by numerous states[95] and such actions have been upheld by the Supreme Court.[96]

Since a direct cause of action against insurers of diplomats is based on the DRA, it is available even in those jurisdictions where state law does not create a direct cause of action against insurers. This is significant, as none of the jurisdictions in which the problem of traffic accidents caused by foreign diplomats is most pronounced (District of Columbia, Maryland, New York, and Virginia) has a direct action statute.

The DRA prevents the insurer from asserting the diplomatic immunity of the insured as a defense against any claim covered by the policy.[97] Additionally, the DRA prohibits the defense that the insured diplomat is an indispensable party and prohibits the insurer from asserting a defense based on breach of contract in certain circumstances.[98] The principal purpose of the direct action statute, to establish the superiority of the rights of the injured over the rights of the insurer or insured, would be emasculated if technical defenses were allowed. Thus, a claimant under a direct action statute asserts an independent right and does not claim as a successor in interest of either party to the original contract of insurance.

By permitting direct suit against the insurer, the measure avoids the necessity of initiating legal proceedings against diplomats, thus respecting their personal inviolability. The direct action device is necessary to complete the statutory framework to enable the citi-

---

[92] Diplomatic Relations Act of 1978, Pub. L. No. 95-393, § 7, 92 Stat. 809 (1978).

[93] *Id.*

[94] The European Convention on Compulsory Insurance Against Civil Liability in Respect of Motor Vehicles of April 20, 1959, 720 U.N.T.S. 119 (1970), is in force in many European countries. This multilateral convention requires each signatory state to enact domestic legislation providing for mandatory insurance and a right in the injured party to proceed directly against insurers.

[95] *Diplomatic Privileges and Immunities Hearings, supra* note 2, at 102. *See also* 12 G. COUCH, CYCLOPEDIA OF INSURANCE LAW § 45:816 (2d ed. 1964).

[96] Watson v. Employers Liability Assurance Corp., 348 U.S. 66 (1954). In this case a unanimous Supreme Court upheld the Louisiana direct action statute.

[97] Diplomatic Relations Act of 1978, Pub. L. No. 95-393, § 7, 92 Stat. 809 (1978).

[98] *Id.*

zens of the United States to obtain redress in the courts against officials of foreign states.[99]

A particular weakness of the DRA is that it does not provide for the compensation of injury resulting from torts or abuses of diplomatic immunity other than those involving use of motor vehicles, aircraft, or vessels. In the House hearings held prior to passage of the DRA, a proposal was considered which might have remedied this deficiency.[100] This proposal involved the establishment of an insurance fund financed by the federal government to compensate personal injury or financial loss occasioned by the actions of foreign officials protected by diplomatic immunity. The measure would have created a Bureau of Claims within the Department of State to award compensation in such cases.

The rationale suggested for such a federally financed insurance fund was that the federal government, by granting diplomatic immunity as a matter of national policy, has an obligation to compensate its citizens injured as a result of that policy. However, this approach met resistance in the hearings and was not included in the final bill reported out of committee. The Department of Justice advocated compulsory insurance coverage coupled with the Foreign Sovereign Immunities Act as the best approach[101] and opposed the creation of a fund, indicating that there was no precedent for such a measure in Anglo-American civil, or international law.[102] Compulsory insurance avoids the need for new administrative machinery for the handling of tort claims and imposes the obligation to satisfy tort claims on the tortfeasor, not on the American public. Additionally, the financed insurance fund would provide little incentive for the foreign diplomat to exercise care, since a negligent official would not be required to compensate his victim.[103]

---

[99] It should be pointed out that the direct action device creates problems for the insurance industry. After the DRA becomes law, the Vienna Convention on Diplomatic Relations governs diplomatic immunity in the United States. Pursuant to Article 31 of the Vienna Convention, no diplomatic agent can be obliged to give evidence as a witness. Accordingly, the diplomat would be free to refuse to cooperate in the defense of the action by the insurer. Further, the standard cooperation clause in automobile liability policies could be ignored by the diplomat. The diplomat could even neglect to report the accident to the insurance company in contravention of the standard insurance contract.

[100] *See* H.R. 7309, 95th Cong., 1st Sess. (1977) (establishes within the Department of State a Bureau of Claims Against Foreign Diplomats with responsibility for awarding full and just compensation to persons injured by foreign diplomats and for reimbursing local governments for revenues lost because of their liability to collect parking fines from foreign diplomats).

[101] *Diplomatic Privileges and Immunities Hearings, supra* note 2, at 94-95.

[102] *Id.*

[103] *Id.* at 87.

C. Authority to Extend More Favorable or Less Favorable Treatment to Members of Diplomatic Missions

The United States acted cautiously in reforming the law of diplomatic immunity because it has sizeable diplomatic missions throughout the world. Diplomatic immunity is an area in which governments are expected to reciprocate in the extension of immunities, and a quid pro quo may be granted or inflicted. Thus, overly restrictive limitations on diplomatic immunity in the United States might result in a reciprocal loss in the broad immunity enjoyed by United States diplomatic agents in some countries. Numerous attempts in Congress have been made to restrict diplomatic immunities more severely than does the DRA.[104] All these efforts failed, in part, because Congress likely felt it would be unwise to radically narrow immunities, since such action could result in unfavorable repercussions for the United States personnel abroad. As a consequence, United States law remained fundamentally unchanged since 1790.

Passage of the DRA, making the Vienna Convention the sole basis of diplomatic immunity in the United States, brings United States law into line with that of most other countries. Accordingly, the repercussions for United States diplomatic personnel abroad will not be as significant as would result from the adoption of more restrictive limitations. Moreover, the DRA gives the President the authority to extend or circumscribe the immunities of various diplomatic missions on a reciprocal basis.[105] Such a provision is necessary in part because many governments may accord American diplomats greater immunity from local jurisdiction than is required by the Vienna Convention. In order to retain this greater degree of immunity, the United States must have the flexibility to provide a reciprocal degree of immunity to foreign diplomats in this country. Moreover, greater protection must be provided for foreign diplomats from non-democratic countries that are not signatories to the Vienna Convention to ensure protection of United

---

[104] *See* H.R. 8, 69th Cong., 1st Sess. (1925) (to provide relief for the state of New York); S. 3964, 71st Cong., 2d Sess. (1930) (to amend the traffic laws of Washington, D.C., eliminating immunity for violations of such laws connected with foreign legations); H.R. 3977, 77th Cong., 1st Sess. (1941) (to abolish diplomatic immunity); H.R. 10988, 84th Cong., 2d Sess. (1956) (to establish United States liability for injuries to persons and property caused by the negligent or wrongful act of an individual granted diplomatic immunity by the United States).

[105] Diplomatic Relations Act of 1978, Pub. L. No. 95-393, § 4, 92 Stat. 809 (1978) provides:

> The President may, on the basis of reciprocity and under such terms as he may determine, specify privileges and immunities for members of the mission, their families, and the diplomatic couriers of any sending state which result in more favorable treatment or less favorable treatment than is provided under the Vienna Convention.

States diplomatic personnel from harassment and arbitrary application of local law.[106] In the Soviet Union, for example, United States diplomatic personnel are accorded full diplomatic immunity which is broader than the immunity provided in the Convention. According to the Vienna Convention, the Soviet Union can restrict such immunities on a reciprical basis if immunities of Soviet personnel in the United States are similarly restricted.[107] As the President is granted authority to extend greater immunity than that required by the Vienna Convention, this situation can be remedied.[108]

Permitting less favorable treatment than the Convention provides is also necessary to secure protection of United States diplomats abroad. Where certain nations restrict the immunities of United States diplomatic personnel, similar action may be taken by the President. Although the DRA specifically states that the provisions of the Vienna Convention shall apply to nonratifying nations,[109] thus expressing the intent that provisions of the Convention be applied uniformly to all nations, some flexibility is needed. Although administering different standards for various countries might prove difficult and possibly result in discriminatory and arbitrary applications, it is clear that the need to ensure proper protection of diplomatic personnel abroad requires presidential discretion in this area.

D. Dismissal of Action Against Individuals Entitled to Immunity

The 1790 statute provided that the institution of an action against a diplomat would be deemed void.[110] The operation of this provision was unclear: a diplomat might have assumed that he must notify the Department of State, appear in court to present his defense, or simply do nothing. Appearing in court and presenting a defense on the merits could have proved detrimental to the diplomat, as in at least one case such action was deemed a waiver of diplomatic immunity.[111] The DRA clarifies the procedure for asserting the diplomatic immunity.

The DRA provides a specific mechanism for dismissal of actions by a judicial tribunal or administrative agency where diplomatic immunity is found.[112] Although the diplomat has an absolute legal

---

[106] H.R. REP. No. 526, 95th Cong., 1st Sess. 5 (1977); S. REP. No. 958, 95th Cong., 2d Sess. 5 (1978).

[107] *See* note 62 *supra*.

[108] *Diplomatic Privileges and Immunities Hearings, supra* note 2, at 215-16.

[109] Diplomatic Relations Act of 1978, Pub. L. No. 95-393, § 3, 92 Stat. 808 (1978).

[110] 22 U.S.C. § 252 (1976) (repealed 1978).

[111] Herman v. Apetz, 130 Misc. 618, 224 N.Y.S. 389 (1927).

[112] Diplomatic Relations Act of 1978, Pub. L. No. 95-393, § 5, 92 Stat. 809 (1978).

defense if suit is brought under circumstances not sanctioned by the Vienna Convention, it is the responsibility of the diplomat to assert that defense affirmatively, as permitted by law or applicable rules of procedure, to avoid a default judgment.[113] Thus, the burden is appropriately placed on the diplomatic community to seek dismissal of an action. It is the role of the Department of State simply to verify the status of each individual and not to stand as representative for the diplomatic community.[114]

Unlike the 1790 statute, the DRA does not subject any person who obtains or executes a writ or process against a diplomatic agent to fine or imprisonment.[115] Such a harsh approach, disregarding intent or knowledge of diplomatic status, is apparently not deemed necessary to prevent interference with the diplomatic function.

E. Amending the Judiciary Code

Under past law, the Supreme Court had original and exclusive jurisdiction in "all actions or proceedings against ambassadors or other public ministers of foreign states or their domestic servants."[116] The DRA extends the jurisdiction of federal district courts to encompass such actions.[117] The Supreme Court retains original jurisdiction, as required by article III, section 2 of the Constitution,[118] but the Act largely removes the burden of such litigation from the Court's docket.[119]

Federal district courts formerly had original jurisdiction, exclusive of state courts, over "all actions and proceedings against consuls or vice consuls of foreign states."[120] The DRA extends the jurisdiction of the district courts to suits involving members of a mission or members of their families.[121] Thus, this amendment

---

[113] *Id.*

[114] H.R. REP. NO. 526, 95th Cong., 1st Sess. 6 (1977). *See also* S. REP. No. 958, 95th Cong., 2d Sess. 5 (1978).

[115] *See* 22 U.S.C. § 253 (1976) (repealed 1978). However, few if any cases imposed fines or imprisonment for the violation of this statute.

[116] 28 U.S.C. § 1251(a)(2) (1976) (amended 1978).

[117] It has long been established that the Congress may not deny to the Supreme Court jurisdiction which is expressly granted to it by the Constitution. Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803). However, from the time of the Judiciary Act of 1789, inferior federal courts have been given concurrent jurisdiction over certain cases of which the Supreme Court has original jurisdiction, and such legislation has been consistently upheld. United States v. California, 297 U.S. 175 (1936); Ames v. Kansas, 111 U.S. 449 (1884); Bors v. Preston, 111 U.S. 252 (1884).

[118] U.S. CONST. art. III, § 2 in part provides that "[i]n all cases affecting Ambassadors, other public Ministers and Consuls . . . the Supreme Court shall have the original jurisdiction."

[119] H.R. REP. No. 526, 95th Cong., 1st Sess. 9 (1970).

[120] 28 U.S.C. § 1351 (1976) (amended 1978).

[121] Diplomatic Relations Act of 1978, Pub. L. No. 95-393, § 8, 92 Stat. 810 (1978).

provides a district court forum for suits against diplomatic personnel in all cases where such suits would be allowed under the DRA and the Vienna Convention. Additionally, the term "all actions and proceedings" appearing in the Code is qualified by the word "civil" which clarifies the jurisdiction of the federal district courts and removes the prohibition on the exercise of criminal jurisdiction by state courts.[122] The DRA thereby makes it clear that the state courts are not denied jurisdiction to enforce the criminal laws of the states against members of a mission and their families under circumstances where existing laws do not provide immunity from the criminal jurisdiction of the United States.[123]

V. CONCLUSION

The United States has taken a significant step toward modernizing its antiquated laws with respect to diplomatic immunity. This legislation will have the salutory effect of replacing the absolute immunity conferred upon all diplomatic personnel regardless of rank or function, with the provisions of the Vienna Convention on Diplomatic Relations, thus making the degree of immunity somewhat commensurate with the foreign representative's rank and responsibilities. Accordingly, considerable numbers of lower echelon embassy personnel will be held responsible for their wrongful conduct that injures American citizens or ignores local law.

While repeal of the 1790 statute restricts the scope of immunity conferred, it will not provide protection for an aggrieved victim of a tortious action or broken contract involving members of the diplomatic community in all circumstances. The DRA attempts to provide some measure of redress for Americans injured in certain accidents by requiring the members of the diplomatic community accredited to the United States to maintain motor vehicle, aircraft, and vessel insurance. This insurance provision becomes an effective tool through the mechanism for direct enforcement of the policy against the insurer. However, while liability insurance may ease some of the problems, particularly involving automobiles, it does not provide compensation damages due to other types of tortious acts committed by diplomats.

The Act provides for some necessary flexibility in the scope of immunity, for it empowers the President to extend on a reciprocal basis more or less favorable treatment than is required by the Vienna Convention. In countries where due process is unavailable and American diplomats need protection from the biases of

[122] 28 U.S.C. § 1351 (1976) (amended 1978).
[123] Diplomatic Relations Act of 1978, Pub. L. No. 95-393, § 8, 92 Stat. 810 (1978).

local law, the President should have discretionary authority to negotiate with such countries. The Act also confers upon the federal district courts concurrent jurisdiction with the Supreme Court to decide suits brought against key diplomatic personnel.

It is clear that the laws of the United States relating to diplomatic immunity were in need of amendment to bring them into line with the Vienna Convention and current international practice. The enactment of the DRA helps to assure meaningful results in this long-ignored, vital area.

–Paul F. Roye