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Diplomatic Immunity: Implementing the Vienna Convention on Diplomatic Relations

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RECENT DEVELOPMENTS

DIPLOMATIC IMMUNITY: IMPLEMENTING THE VIENNA CONVENTION ON DIPLOMATIC RELATIONS.

Diplomatic immunity has long been accepted as a basic element of international law. The freedom of a diplomat in a receiving country to perform his duties without hindrance from law suits or criminal prosecution has traditionally been considered an absolute necessity. In the United States this type of total diplomatic immunity has been the law of the land since 1790.¹ So widespread was the acceptance of the doctrine that in 1906 Secretary of State Elihu Root declared that "the immunities of diplomatic agents exist by virtue of the law of nations . . ." and that for such "universally accepted principles no authority need be cited."²

As early as 1815, however, the nations of the world were making attempts to formulate the conventional law of diplomatic relations.³ This effort culminated in 1961, when the representatives of forty-five States signed the Vienna Convention on Diplomatic Relations.⁴ Article 31 of the Convention grants foreign diplomats complete immunity from all criminal jurisdiction, but stipulates three exceptions to immunity from civil and administrative jurisdiction. These are:

- a) real actions relating to immovable property located in the receiving State, unless held on behalf of the sending State and for the purposes of the mission;
- b) actions concerning succession, where the agent is involved as executor, administrator, heir or legatee as a private person; and

¹ Act of Apr. 30, 1790, PUB. L. NO. 1-112, §§ 25-27 (codified at 22 U.S.C. §§ 252-54).

² Letter from Secretary of State Elihu Root to the Secretary of Commerce and Labor, March 16, 1906, *reprinted in* 4 G. HACKWORTH, DIGEST OF INTERNATIONAL LAW 513 (1963).

³ Garrestson, *The Immunities of Representatives of Foreign States*, 41 N.Y.U. L. REV. 67 (1966).

⁴ U.S. DEPT OF STATE, PUB. NO. 7289, UNITED NATIONS CONFERENCE ON DIPLOMATIC INTERCOURSE AND IMMUNITIES 51 (1961).

- c) proceedings relating to some private, professional or commercial activity of the agent.⁵

This is a significant departure from the immunity granted under 22 U.S.C. §§252-54, which have been interpreted to accord "complete immunity from both criminal and civil jurisdiction to diplomatic agents and their families and to members of the administrative and technical staff."⁶

Although approved by the Senate in 1965⁷ and ratified by the President in 1972,⁸ the Vienna Convention has never been effective in the United States because the broader 1790 statutes have remained on the books. Regular attempts have been made to correct this anomaly but none have succeeded thus far. However, it appears that this year at least one of several proposals may become law. Congress, recognizing that the United States, while granting total immunity to foreign diplomats, receives no reciprocity for its diplomats abroad, as well as the fact that foreign countries require visiting diplomats to carry liability insurance, is now moving to create a system which will put the United States on equal footing with the rest of the Convention members.

The bill which has made the most impressive progress to date is H.R. 7819, which was introduced on June 16, 1977 by Representatives Fascell, Diggs, Buchanan, Fisher, Wolff, Ryan, Meyner and Solarz,⁹ passed by the House on July 27, 1977¹⁰ and referred to the Senate Foreign Relations Committee on July 29, 1977.¹¹ Hearings on the bill were originally scheduled for February, but were cancelled, as were all committee meetings in March, to allow the Senate to devote its full energies to the debate on the Panama Canal Treaties. The bill, called the Diplomatic Relations Act, contains provisions to: 1) repeal the old immunity provisions, 22 U.S.C. §§ 252-54; 2) extend Vienna Convention privileges and immunities to diplomatic personnel from countries which have not ratified the Convention; 3) allow the President to grant

⁵ Simmonds, *The Vienna Convention on Diplomatic Relations*, 105 SOLICITORS' J. 1118 (1961).

⁶ *Letter from Secretary of State Dean Rusk To President of the Senate Hubert Humphrey: Hearings on Vienna Convention on Diplomatic Relations Before the Subcomm. of the Senate Comm. on Foreign Relations*, 89th Cong., 1st Sess. 80 (1965).

⁷ 111 CONG. REC. 22985 (daily ed. Sept. 14, 1965).

⁸ 67 DEPT STATE BULL. 743 (1972).

⁹ 123 CONG. REC. H6074 (daily ed. June 16, 1977).

¹⁰ 123 CONG. REC. D1144 (daily ed. July 27, 1977).

¹¹ 123 CONG. REC. D1162 (daily ed. July 29, 1977).

immunities more favorable than those specified in the Convention and 4) direct dismissal of any action brought against immune personnel but require such personnel to carry liability insurance.¹²

One of the drawbacks of the bill is that it fails to provide an adequate system to make insurance proceeds available to victims of diplomatic personnel. This deficiency is covered, however, by some of the other bills which have been introduced this term by members of both the Senate and the House. One of these is S. 478, introduced by William D. Hathaway (D.-Me.), on January 26, 1977.¹³ In addition to requiring the United States itself to make compensation for any injuries caused by immune diplomats, S. 478 would establish an Assistant Secretary for Claims Against Foreign Ministers and Diplomats within the Department of State, who could award such compensation.¹⁴ S. 478 is one of three related bills (S. 476, 477, 478) proposed by Senator Hathaway to collectively repeal the 1790 statutes, make the United States liable for damages caused by persons with diplomatic immunity if a judgment against such a person is deemed void by reason of the immunity, and require the United States to make just compensation to be delivered through the newly created Assistant Secretary. Corresponding to S. 477 and S. 478 are two bills introduced in the House of Representatives by Mr. Solarz, H.R. 1535 and H.R. 1536. These relate to the liability of the United States and the delivery of compensation through the Assistant Secretary for Claims Against Foreign Ministers and Diplomats.

Other proposals include the Diplomatic Immunities Act, introduced by Senator Charles Mathias (D.-Md.) as S. 1256 and by Mr. Fisher *et al.* in the House as H.R. 1484. This Act does not specifically repeal the basic immunity statute (22 U.S.C. §252) but takes the more indirect route of voiding any suit or judicial or administrative process against a person entitled to immunity under the Vienna Convention, and then making Presidential determinations of entitlement to immunity binding on governmental authorities. Sections 253 and 254 of Title 22, which create criminal penalties for wrongful suit against immune persons and also create certain exceptions to suits against servants in the employ of diplomatic personnel, are specifically repealed by the Act.

Senator Mathias' bill, which was introduced on April 6, 1977,¹⁵ has

¹² H.R. 7819, 95th Cong., 1st Sess. (1977).

¹³ 123 CONG. REC. S1441 (daily ed. Jan. 26, 1977).

¹⁴ 123 CONG. REC. S5622 (daily ed. Apr. 6, 1977).

¹⁵ S. 1256, 95th Cong., 1st Sess. (1977).

a companion bill, the Diplomatic Insurance Protection Act. This Act would require every member of the diplomatic community to maintain insurance on any vehicles he owns or operates, and it would create a direct cause of action against the insurer who would be estopped from asserting the defense of diplomatic immunity.¹⁶ The Act also establishes an Office for Claims Against Members of the Diplomatic Community in the Department of State to compensate persons injured within five years of its enactment and a Claim Against Members of the Diplomatic Community Fund for such purpose.

An example of a bill aimed directly at insurers is H.R. 7679, introduced by Rep. George Danielson on June 8, 1977.¹⁷ It would permit actions in Federal court against liability insurers of diplomatic personnel and their families, notwithstanding any defense that the insured is immune from liability, is an indispensable party or absent certain circumstances, has violated a term of the contract.

Finally, a bill introduced by Mr. Solarz on July 15, 1977 as H.R. 8364, would allow anyone with a damage claim against an individual entitled to diplomatic immunity to bring an action in the Court of Claims for recovery of such damages from the United States.¹⁸

Obviously no single proposal has incorporated all the necessary or desirable elements to effectively implement the Vienna Convention in the United States. The perfect bill, in this writer's opinion would: 1) repeal the old statutes; 2) create authority in the President to modify immunity in individual cases when necessary; 3) extend Vienna Convention treatment to nonsigners; 4) establish both a requirement of insurance coverage and a delivery system to adequately compensate victims; 5) establish procedures for victims to follow in initiating suit; and 6) make the United States itself liable for claims against those with full immunity.

At least one day of hearings has already been held to consider some of these proposals. On February 6, 1978, Senator Howard Metzenbaum (D.-Ohio), Chairman, and his Judiciary Sub-committee on Citizen and Shareholder Rights and Remedies, heard testimony on the substance of S. 476, 477, 478, 1256, and H.R. 7819 from Senators

¹⁶ Many members of the diplomatic community already carry insurance but their insurers may plead the diplomatic immunity defense. *See, e.g.*, *Lynn v. Mendes*, No. 761040 (Cir. Ct. Arlington County, Va. 1976), *cert. denied*, Va. Sup. Ct. (Mar. 7, 1977) (insured employee of the Brazilian embassy pleaded diplomatic immunity through her insurance company.)

¹⁷ 123 CONG. REC. H5626 (daily ed. June 8, 1977).

¹⁸ 123 CONG. REC. H7250 (daily ed. July 15, 1977).

Mathias and Hathaway, Rep. Fisher, representatives of the Department of State and Justice, and representatives of both insurance companies and victims of immune diplomats.¹⁹

At this point there is general optimism that some form of at least one of these bills, and most probably a hybrid of two or more, will pass in Congress this year. No one opposes the measures in principle, although insurance companies are not particularly pleased with the mandatory nature of the liability coverage or the fact that a victim faced with an immunity defense may be able to move directly against the insurer.²⁰ These objections seem less significant, however, than the United States obvious and continuing disadvantage among its fellow signers of the Vienna Convention.²¹

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¹⁹ 124 CONG. REC. D95 (daily ed. Feb. 6, 1978).

²⁰ The writer appreciates information and assistance provided by Mr. Keith O'Donnell, a member of the staff of the Sub-committee on Citizens and Shareholders Rights and Remedies, Washington, D.C.

²¹ On September 30, 1978, President Carter signed into law the Diplomatic Relations Act, P.L. No. 95-393, which was essentially H.R. 7819, *as amended* by the Senate to provide for direct causes of action against insurers of immune personnel.

