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Privileges and immunities



Foreign service employees and family members serving abroad need to understand the scope and limitations of the privileges and immunities that flow from their diplomatic or consular status, and the obligations and liabilities that their status imposes upon them.

Privileges and immunities are almost always spelled out precisely in treaties. The discussion below can provide only a general understanding. When seeking further guidance, be sure that it comes from someone who demonstrates a full understanding of the modern treaties that address the subject. The applicable treaties should always be available for inspection from the post library or the administrative office.

The discussion below addresses the situation of U.S. Government employees of the foreign affairs agencies and also applies to employees of other U.S. agencies who are formally accepted by a receiving state as officers or staff of a U.S. diplomatic or consular

post abroad. It does not, however, address the situation of U.S. personnel assigned to U.S. missions to international organizations abroad. Note also that AID employees generally receive their privileges and immunities pursuant to the bilateral economic assistance agreement between the United States and the particular country to which the employee is assigned. AID employees can determine their status at a particular post by talking with the Regional Legal Advisor or the Executive Officer.

Some Comments About Status

Centuries ago, sovereign states discovered that it was not possible to maintain useful diplomatic relations with other nations if their respective diplomatic envoys had to live in fear of being thrown into a dungeon for carrying unfavorable opinions to the host government or for other real or imagined offenses to the host state. When these early diplomats began to reside in the host state, it was realized that they needed security in their persons, homes, and official papers in order to accomplish the work that both the sending and receiving states agreed (during moments when tempers were cool) that they should accomplish. Over time, a body of customary international law developed to provide abroad range of privileges and immunities for diplomats, eventually including some degree of similar protection for members of their staffs and families. The Vienna Convention on Diplomatic Relations, concluded in 1961, reflects the customary international law (refined and brought up-to-date) with respect to diplomats and is now adhered to almost universally by the nations of the world.

Consular representatives were traditionally considered quite apart from diplomats. Historically, consular functions consisted of assisting in the resolution of problems involving the consul's own countrymen present in the host state for business or pleasure, and of issuing travel documents. These were held to be matters not warranting special privileges and immunities. Over time, however, consular functions became more sophisticated. States came to realize that at least a limited degree of protection was necessary for their consuls. Many nations, including the United States, entered into bilateral agreements with their principal allies and trading partners to provide for certain consular privileges and immunities. (The Vienna Convention on Consular Relations reflects the rules that were developed in earlier bilateral consular agreements and is also broadly adhered to. In special circumstances, modern bilateral consular agreements have

been concluded to provide privileges and immunities for consular personnel almost identical to those accorded diplomats.) However, these consular privileges and immunities are markedly less than those afforded diplomats.

The same U.S. Government employee may be accorded diplomatic immunities during one tour at an embassy and quite different (and lesser) immunities during a subsequent assignment to a consulate separate from the embassy. This is because entitlement to privileges and immunities stems from the status accorded a particular individual when he or she is formally accepted in a particular capacity by the receiving state. Status is not determined, in this context, by any professional designation, rank, or title that the sending state may assign.

Possession of a diplomatic passport alone affords its holder no privileges or immunities of any kind. The advantages that the diplomatic passport does afford are only courtesies that are not defensible under international law and should not be relied upon.

Similarly, a person accredited to a particular country is entitled to the privileges and immunities that correspond to his or her specific status only in that particular country (and, to a limited extent, when in transit to or from that country); not everywhere s/ he may go on personal leave or even on official TDY. The receiving state grants the status and has the power to withdraw it at any time.

Diplomatic Immunity (Embassy Assignments)

While all official U.S. employees at embassies abroad share certain protection (e.g., inviolability of official papers and correspondence and freedom from search and seizure for any reason), there is a functional distinction between diplomatic agents (engaged primarily in diplomatic intercourse between the two states) and members of the administrative and technical staff (engaged primarily in the support of the former category). Both categories are entitled to total immunity from the criminal jurisdiction of the receiving State. However, diplomatic agents enjoy more extensive immunity from the civil and administrative jurisdiction of the receiving state than do members of the administrative and technical staff.

Criminal Immunity. Total immunity from criminal jurisdiction means that a person may not be detained or arrested or subject to a body search and may not be prosecuted or required to give evidence as a witness absent a waiver of immunity. It does not

mean that the receiving state authorities are precluded from interrupting criminal actions (e.g., stopping a diplomat who is driving dangerously or disarming a diplomat who is waving a gun in the streets). Nor does it mean that the receiving state is without recourse with respect to foreign diplomats who commit crimes in its territory. What it does mean is that the foreign service employee serving abroad need not perform duties under the threat of being treated as a common criminal by the law enforcement and judicial authorities of the receiving state.

Civil and Administrative Immunity. Civil and administrative actions are those in which a person or business files a complaint (usually seeking money damages) against another person before the civil or administrative authorities of the receiving state. Diplomatic agents enjoy comprehensive immunity in this connection, with three exceptions: actions connected with real property in the receiving state; actions where the diplomat is an executor or beneficiary of an estate in the receiving state; and actions relating to professional or commercial endeavors engaged in by the diplomat outside the scope of official functions. In general, members of the administrative and technical staff of embassies are only afforded civil and administrative immunity with respect to actions relating to the performance of their official functions. (Special bilateral agreements with some countries grant immunities identical to those of diplomatic agents to members of the administrative and technical staff. Check with your post management officer for the status of a specific country.)

For example, a member of the administrative and technical staff would probably be immune from a suit for breach of contract in connection with a contract that the employee negotiated with a local vendor for services to be provided to the embassy. On the other hand, a member of the administrative and technical staff would ordinarily have no immunity from a private lawsuit for failure to pay personal debts or for compensation for damage to the property of a local citizen.

Diplomatic Immunity and Family Members

The preceding paragraphs refer to the immunities of the employee. The fundamental notion of privileges and immunities is to protect the employee in the performance of official functions. The sovereign states discovered some time ago, however, that the employee could not be effectively protected without extending

certain protection to the members of the employee's immediate family who reside with him or her. Today, family members of most diplomatic personnel are also accorded extensive immunities. However, cohabiting partners of foreign service personnel or any family members not on the employee's orders are not accorded any of the privileges described below.

Non-citizen spouses of the members of U.S. diplomatic staffs are entitled to precisely the same treatment as spouses or other family members who are U.S. citizens, with one exception. Under the Vienna Convention, family members who are nationals of the host country (when the sponsor is a diplomatic agent) or nationals or permanent residents (when the sponsor is a member of the administrative and technical staff) do not receive the normal privileges and immunities. For example, a spouse of French nationality would not receive the normal privileges and immunities in France but, when posted to any other country, would receive precisely the same privileges and immunities as would a spouse of U.S. nationality.

The criminal immunities of family members of diplomatic personnel are the same as those to which the sponsoring employee is entitled—that is, total criminal immunity for the families of both diplomatic agents and members of the administrative and technical staff.

The civil and administrative immunities of families also correspond to those accorded both categories of sponsors. However, members of the administrative and technical staff (the sponsors) themselves enjoy only "official functions immunity" against civil and administrative actions. Family members do not generally have official functions. Thus, family members of administrative and technical staff employees enjoy no civil or administrative immunity (except in specific countries where a bilateral agreement might exist).

Waiver of Diplomatic Immunity

The right to waive immunities for any of its diplomats, staff employees, or family members resides in the government of the sending state. The individual who ultimately benefits from the immunity has no power to waive such immunity, even in cases where s/he believes that it would be in his or her personal or commercial interest to do so. Rather, the sending state may waive immunity when it judges that to do so is in the national interest. An individual whose immunity is waived has no standing to protest this determination.

The Department of State requests waivers of immunity from criminal jurisdiction in almost all cases

involving foreign personnel accredited to the United States to ensure that the proper course of justice proceeds. On this basis, the United States Government may seriously consider waiving the criminal immunity of its employees, especially in cases where it is believed the employee would receive a fair trial and the interests of the United States would not be harmed.

The only instance in which the action of an individual can directly cause the partial loss of immunity occurs when an employee entitled to civil and administrative immunity initiates a civil suit in the local courts. In that case, the Vienna Convention bars the individual from asserting immunity from counterclaims with respect to the same subject matter.

Even in a case where everyone agrees that it would be in the interest of the U.S. Government for a certain immunity to be waived (e.g., an embassy employee is the sole, disinterested witness to a crime and, as a "good citizen," wishes to testify as a witness at the trial), authorization for a limited waiver of immunity must be sought from the Department of State by the embassy. If granted, it must be expressly communicated to the foreign ministry of the receiving state before the employee takes any action. (A limited waiver might, for example, be devised to permit a diplomat to testify regarding an automobile accident that he or she witnessed, but leave completely protected the diplomat's immunity from the jurisdiction of the receiving state in all other respects.)

The Family Liaison Office in the Department of State negotiates bilateral employment agreements with other states to increase the opportunities for family members of official U.S. Government employees to obtain employment in the state to which their sponsor has been assigned. As of 1996, 62 bilateral agreements had been concluded, and negotiations with additional countries are continuing.

The Vienna Convention on Diplomatic Relations contemplates the possibility that a receiving state may permit local employment by diplomatic family members and provides rules regarding consequential restrictions on the immunities of family members when they are permitted to undertake local employment. The agreements acknowledge these rules, including the lack of civil and administrative (but not criminal) immunity for family members who take up such employment, but only to the extent that such civil or administrative action would be related to the employment.

This means that an employed family member continues to enjoy the privileges and immunities to which he or she would otherwise be entitled unless a

suit is brought to recover money damages (or other civil remedy) for an act by the employed family member that is determined by a local court to be connected to his or her employment. For instance, immunity would probably not exist in the case of a suit by the family member's employer for recovery of lost profits resulting from the employee's having offended an important client.

Is Diplomatic Immunity a "License to Steal?"

Persons enjoying diplomatic privileges and immunities are, at least in a literal sense, "above the law" of the receiving state. All states that enter into diplomatic relations with other states accept this encroachment on their sovereignty as a necessary cost of being a member of the world community. However, the immunity concept would never have endured if its application left the receiving state helpless to react to the commission of serious crimes in its territory or without recourse when the civil law rights of its citizens are abused by foreign diplomats. In order to understand that some control must be retained, one need only recall the sense of outrage expressed by U.S. citizens whenever diplomatic immunity thwarts prosecution of a serious crime by a diplomat assigned to the United States. For this reason, the principle developed that all persons enjoying privileges and immunities also have the obligation and duty to respect the laws and regulations of the receiving State.

In addition, the receiving state has the right to declare any person entitled to diplomatic privileges and immunities to be *persona hors grates* (PNG) at any time and without stating a reason. When declared PNG, a person has a certain period of time to depart the country before being divested of all privileges and immunities. Failing such departure, the person faces any pending legal actions (civil or criminal) with only the defenses available to an ordinary citizen. In extreme cases, the receiving state will designate a very short time within which departure must take place or even formally expel the person.

The PNG procedure is sometimes employed for purely political purposes. It is also used by the host state to rid itself of diplomatic personnel who have committed serious crimes or who have shown themselves to be generally disrespectful of the local law. Family members may not be declared PNG since their privileges and immunities are derivative, stemming from their status as family members. Therefore, in order to rid itself of one family member whose depart

ure it desires, the receiving State may resort to declaring the sponsor PNG, thereby divesting the entire family of protected status. The PNG procedure is harsh and abrupt, but receiving states do not hesitate to use it in dealing with unacceptable behavior.

Further, immunity from the criminal jurisdiction of the receiving State is not a pardon of criminal behavior; it simply creates a bar to the exercise of jurisdiction over the behavior by the receiving State for the period during which the individual has diplomatic status. Diplomatic immunity continues after the termination of diplomatic status only in respect of actions relating to the official acts of the employee. A person with diplomatic privileges and immunities who commits a crime may, after the completion of that tour, have to be concerned with extradition attempts by the country where the crime was committed, or with the existence of an outstanding warrant for arrest that effectively bars return to the country in question.

The assertion of diplomatic immunity, even in routine cases, does not occur without visibility in the embassy and the Department of State. To illustrate, a teenage diplomatic dependent is apprehended in an act of vandalism, identifies him or herself as a person entitled to diplomatic immunity, and is thus released. Within a short time, the local authorities will bring the incident to the attention of the host country foreign ministry that will in turn send a note to (or, in extreme cases, call in) the U.S. Ambassador to remind him or her in pointed terms of the obligation of all diplomatic personnel to respect the law of the host state and to ask that all necessary steps be taken to prevent such occurrences in the future. Sometimes the host country will ask for a waiver of immunity. The Ambassador may feel obliged to apologize personally to the victims of such activity. Involvement of the embassy's front office will almost certainly prove embarrassing to the employee and the family involved.

The Department of State has, as a matter of policy, directed that personnel at posts abroad pay their traffic fines promptly, regardless of whatever privileges and immunities they enjoy. The Department of State wants its personnel abroad to drive safely and comply with local traffic laws, and considers hiding behind immunity in this connection to be inappropriate.

Department of State regulations prohibit diplomatic or consular personnel from taking advantage of their privileges and immunities for improper objectives or to evade the settlement of just obligations. Violations of this prohibition would almost certainly have a negative effect on the individual's career.

Consular Immunity

Consular immunity today proceeds from the same conceptual basis as diplomatic immunity. Therefore, much of what is said above about status, duty to respect local law, and PNG also pertains to consular immunity. With a few states, the United States has special bilateral consular conventions that grant consular immunities that are essentially identical to diplomatic immunity. The terms of these special consular agreements differ; some provide more extensive immunity only to the employee, not to family members. Consular personnel should always confirm their status at a specific post.

Persons assigned to consular sections of U.S. embassies are members of the mission, not consular officers and employees, and accordingly are granted diplomatic status. In general, consular privileges and immunities are dramatically less than those afforded diplomats, particularly with respect to immunity from the jurisdiction of the receiving state. Consular officers and other employees at consulates have criminal, civil, and administrative immunity only with respect to acts performed in the exercise of consular functions. The family members of consular employees have essentially no immunity from the jurisdiction of the host state.

In the discussion above, reference is made to immunity linked to a particular function - "official acts" immunity. In agreeing to give certain classes of foreign personnel "official acts" immunity, sovereign States have retained for their own courts the power to make the factual determination of whether the circumstances complained of actually constitute an "official act" (or "consular function"). This means that in the face of criminal charges or a civil action, a consular officer or employee must always appear in court (personally or through legal counsel) and assert his or her affirmative defense that "official acts" immunity governs in the circumstances of the case (even when common sense appears to make it obvious that immunity must be found - for example, a civil suit for the denial of a visa or a criminal charge for measures taken in the consulate in self-defense against physical assault by an aggrieved visa applicant).

The Department of State is not aware of any instances in which the courts of other States have behaved irresponsibly in these determinations. This is probably because those courts are mindful of the fact that their state also has personnel abroad who enjoy only "official acts" immunity. Procedures exist for obtaining U.S. Government payment for legal repre

sentation of U.S. personnel in circumstances where the U.S. Government is satisfied that the case involves an official act. Therefore, if one is entitled only to "official acts" immunity, it should not cause inordinate concern. But this form of immunity must not be confused with more absolute forms enjoyed in connection with assignment to a U.S. diplomatic mission.

In conclusion, the best approach when you are serving at a post abroad is to study the local customs and commercial practices carefully and pursue the same "good citizen" style of life followed at home. If you nonetheless run afoul of the law of the host country, your privileges and immunities will protect you to the extent outlined above. Your ability to demonstrate your "good faith" approach to the situation causing the difficulty will probably serve to blunt any further negative consequences.



Sources of Information

Office of the Legal Adviser Office of
Special Functional Problems Department of
State Washington, DC 20520

Administrative Officer at Post
AID Regional Legal Advisor or
Executive Officer

Resources

Vienna Diplomatic Convention, articles 29-42
Vienna Consular Convention, section 2.2,
articles 40-47