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United States v. Deaver: Implied and Express Waivers of Diplomatic Immunity

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NOTES AND COMMENTS

UNITED STATES v. DEAVER: IMPLIED AND EXPRESS WAIVERS OF DIPLOMATIC IMMUNITY

I. INTRODUCTION

On June 22, 1987, the United States District Court for the District of Columbia issued a Memorandum Opinion and Order denying a motion for an order directing issuance and service of trial subpoenas upon the Ambassador of Canada to the United States, or his wife.[1] The trial subpoenas were sought by the Independent Counsel in connection with the prosecution for perjury of former White House Deputy Chief of Staff Michael K. Deaver. A legal issue of first impression was presented by this proceeding as the subpoenas were sought on theories of express and implied waiver of diplomatic immunity.

Two broad issues are raised by this opinion. First, whether the authority to decide the validity of a claim of diplomatic immunity resides exclusively in either the executive or judicial branch, or initially in the executive branch with Article III court review. Second, if the judiciary

1. United States v. Deaver, Crim. No. 87-0096 (D.D.C. June 22, 1987). Testimony was sought with reference to conversation at a dinner attended by Mr. Deaver, his wife, Ambassador Allan Gotlieb, and his wife. The Independent Counsel acknowledged the duplicative nature of Mrs. Gotlieb's testimony which was considered only as an alternative. Memorandum in Opposition to Motion to Quash Subpoenas at 1, *Deaver* (Crim. No. 87-0096).

is involved in the waiver determination, what standards should the court apply.

Parts I and II of this Note examine the authority of the courts to determine who is entitled to diplomatic immunity, who may waive that immunity, and the limits within which the courts must operate in determining the validity of the waiver. Part III explores the constitutional and interpretive support for the position propounded by the Justice and State Departments. These departments allege that the executive branch holds exclusive authority to determine diplomatic status and waiver of immunity. Part IV reviews the District Court's refusal to find an express waiver in a Canadian diplomatic note which offered the Ambassador's assistance in the investigation that preceded the indictment in this case. The Note then evaluates the Canadians' actual participation in the investigation as an alternative basis for waiver.

II. BACKGROUND

On May 29, 1986, the Special Division of the United States Court of Appeals for the District of Columbia issued an order appointing Independent Counsel to investigate possible violations of the Ethics In Government Act by former White House Deputy Chief of Staff Michael K. Deaver.[2] The order directed an investigation into Mr. Deaver's activities on behalf of the Government of Canada in connection with a controversy about United States action concerning acid rain.[3] Mr. Deaver undertook the questioned activities pursuant to a contractual agreement signed by Ambassador Allan Gotlieb, as agent for the Government of Canada.[4]

Using State Department diplomatic channels, the Independent Counsel sought cooperation from the Canadians in the investigation.[5] The Government of Canada responded through the same channels in July, 1986 with a note entitled "TALKING POINTS," agreeing to cooperate and to "request the cooperation" of Ambassador Gotlieb.[6]

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2. Order Appointing Independent Counsel (D.C. Cir. May 29, 1986). The special counsel was appointed by the Court pursuant to 28 U.S.C. § 593(b) (1982 & Supp. IV 1986).

3. Order Appointing Independent Counsel, *supra* note 2, at 2.

4. Declaration by Whitney North Seymour, Jr., at Exhibit "L," annexed to Memorandum In Opposition to Motion to Quash Subpoenas, *Deaver* (Crim. No. 87-0096) [hereinafter Declaration II].

5. Declaration of Whitney North Seymour, Jr., at 2, annexed to Motion of Independent Counsel for Order Directing the Issuance and Service of a Trial Subpoena on Allan Gotlieb, *Deaver* (Crim. No. 87-0096) [hereinafter Declaration I].

6. *Id.* at Exhibit "C."

Two sets of questions were submitted to and answered by the Ambassador.[7]

Before Mr. Deaver was indicted for perjury for his responses before a federal grand jury with reference to his activities on behalf of Canada, the Government of Canada asserted its immunity to prevent the Ambassador from testifying at trial.[8] The Independent Counsel then filed a motion for an order directing the issuance and service of a trial subpoena to compel the Ambassador's testimony.[9]

Anticipating a suggestion of diplomatic immunity,[10] the Independent Counsel asserted that the Ambassador's right to diplomatic immunity had been waived by the language of the Talking Points.[11] Also at issue as a potential waiver of the immunity was the Canadian participation in the investigation, by virtue of the Ambassador's response to questions propounded in accordance with Canadian requests.[12] In addition, the forum-selection clause of Deaver's personal services contract was mentioned to support a finding of waiver.[13]

In a Memorandum Opinion and Order, the District Court assumed, without deciding the issue, that it had jurisdiction to decide the issue of waiver of diplomatic immunity.[14] The Court then held that the Talking Points "neither expressly nor by any fair implication" constituted a waiver.[15] Neither the Canadians' participation in the investigation nor the contract forum-selection clause was mentioned in the opinion.[16]

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7. *Id.* at Exhibits "A" and "B." Because of the sensitive nature of the contents and the uncertain nature of the proceedings, both sets of responses, entitled "Aide Memoirs," were treated as classified and submitted as sealed exhibits. *Id.* at 2.

8. Declaration I, *supra* note 5, at 4.

9. Motion of Independent Counsel for Order Directing the Issuance and Service of a Trial Subpoena on Allan Gotlieb, *Deaver* (Crim. No. 87-0096).

10. The Diplomatic Relations Act of 1978, 22 U.S.C. § 254d (1982), provides that:

> Any action or proceeding brought against an individual who is entitled to immunity with respect to such action or proceeding under the Vienna Convention on Diplomatic Relations, under section 254b or 254c of this title, or under any other laws extending diplomatic privileges and immunities, shall be dismissed. Such immunity may be established upon motion or *suggestion by or on behalf of the individual*, or as otherwise permitted by law or applicable rules of procedure.

(Emphasis added).

11. Declaration I, *supra* note 5, at 6.

12. *Id.* at 7.

13. Declaration II, *supra* note 4, at 7.

14. Memorandum and Order at 5, *Deaver* (Crim. No. 87-0096).

15. *Id.*

16. The forum-selection clause provides that the "contract shall be interpreted in

III. JURISDICTION TO DETERMINE STATUS AND WAIVER

Article 31 of the Vienna Convention on Diplomatic Relations[17] provides that, with certain exceptions, a diplomatic agent shall be immune from the criminal and civil jurisdiction of the receiving state's courts, and shall "not [be] obliged to give evidence as a witness."[18] Article 32 states that this immunity may be waived by the sending state, but that the waiver must always be express.[19] The United States Departments of State and Justice took the position in this case that the executive branch holds an exclusive prerogative to determine the merits of a claim of diplomatic immunity.[20] Since the issue has never been squarely decided by any court, there is only limited, qualified, support for this position.

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accordance with the laws of the District of Columbia." Declaration II, *supra* note 4, Exhibit "L" at 3, *Deaver* (Crim. No. 87-0096). This reflects a willingness to submit to United States jurisdiction with respect to legal disputes arising from the contract.

Despite the fact that the contract is subscribed by Ambassador Gotlieb, there are no words of express waiver of diplomatic immunity. Even if there had been, the investigation may have involved negotiations leading up to the signing of the contract and activities by Mr. Deaver in performance of the contract, but it did not arise from the contract per se.

17. The Vienna Convention on Diplomatic Relations, April 18, 1961, 23 U.S.T. 3227, T.I.A.S. No. 7502, 500 U.N.T.S. 95 (ratified by the United States in 1972) [hereinafter the "Vienna Convention"].

18. *Id.* Article 31 states:

> 1. A diplomatic agent shall enjoy immunity from the criminal jurisdiction of the receiving State. He shall also enjoy immunity from its civil and administrative jurisdiction, except in the case of:
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> (a) a real action relating to private immovable property situated in the territory of the receiving State, unless he holds it on behalf of the sending State for the purposes of the mission;
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> (b) an action relating to succession in which the diplomatic agent is involved as executor, administrator, heir or legatee as a private person and not on behalf of the sending state;
>
> (c) an action relating to any professional or commercial activity exercised by the diplomatic agent in the receiving State outside his official functions.
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> 2. A diplomatic agent is not obliged to give evidence as a witness.

19. *Id.*, Article 32 states:

> 1. The immunity from jurisdiction of diplomatic agents and of persons enjoying immunity under Article 37 may be waived by the sending State.
>
> 2. Waiver must always be express.
>
> 3. The initiation of proceedings by a diplomatic agent or by a person enjoying immunity from jurisdiction under Article 37 shall preclude him from invoking immunity from jurisdiction in respect of any counter-claim directly connected with the principal claim.

20. United States' Reply to Memorandum in Opposition to Motion to Quash Gotlieb Subpoenas at 3, *Deaver* (Crim. No. 87-0096).

There are two essential steps to this consideration. First, whether the subject possesses the status entitled to immunity; and second, whether that entitlement has been waived. The inquiry at this stage focuses on the competence of the courts to make either determination.

A. *Jurisdiction to Determine Diplomatic Status*

The Diplomatic Relations Act of 1978 authorizes immunity from suit, not from jurisdiction.[21] Jurisdiction and immunity are separate concepts.[22] If jurisdiction does not obtain, then immunity need not be considered.[23] Ambassador Gotlieb's presence in the United States is all that is required in order to subject him to the personal jurisdiction of the federal district court as a witness.[24] Once jurisdiction obtains, the issue is whether jurisdiction should be "relinquished in conformity to an overriding principle of substantive law."[25] The determination may be by way of a simple deference to a State Department finding,[26] or by a hearing on the factual circumstances attendant to a party's claim of

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21. 22 U.S.C. §§ 254a-254e (1982 & Supp. III 1985).

22. Ex Parte Republic of Peru, 318 U.S. 578, 587 (1943).

23. *See, id.*

24. Fed. R. Crim. P. 17(e). Notice, however, that personal jurisdiction in matters where a diplomat is intended as a party must be accomplished by personal service of process. This could present a problem which would require that the determination of status and immunity take place in conjunction with a hearing with reference to refusal of service. *See infra* note 50.

25. *Ex Parte Peru*, 318 U.S. at 588.

26. *See, e.g.*, Carrera v. Carrera, 174 F.2d 496, 497 (D.C. Cir. 1949). Virtually every case that defers to State Department certification of an ambassador's status, including *Carrera*, relies on In re Baiz, 135 U.S. 403 (1890). The Court in *Baiz* had before it several documents between the State Department and Baiz purporting to indicate the diplomatic nature of his occupation. *Id.* at 406-13. Among these was a letter in which State clearly stated that it did not regard Baiz' position to be one to which diplomatic status attached. *Id.* at 413. The Court found no entitlement to diplomatic immunity:

> [W]e do not assume to sit in judgment upon the decision of the executive in reference to the public character of a person claiming to be a foreign minister, and therefore have the right to accept the certificate of the State Department that a party is or is not a privileged person, and cannot properly be asked to proceed upon argumentative or collateral proof.

Id. at 432. The Court based this deference on three cases: United States v. Liddle, 26 F.Cas. 936 (C.C.D.Pa. 1808) (No. 15,598); United States v. Ortega, 27 F.Cas. 359 (C.C.E.D.Pa. 1825) (No. 15,971); and United States v. Benner, 24 F.Cas. 1084 (C.C.E.D.Pa. 1830) (No. 14,568); each of which held that a certificate by the Secretary of State attesting to the subject's receipt as a foreign minister was the *best evidence* of his diplomatic character. *See Baiz* at 421-22.

immunity.[27]

Opinions of the State Department as to diplomatic status of an individual have generally been accepted by courts as conclusive.[28] It is remarkable, however, that in most cases, the courts have reviewed the basis upon which the State Department's conclusion rested.[29] The subject of review was the validity of the evidence on which the State Department based its recognition of diplomatic status. In at least one case, the court found that the status was improperly determined.[30]

The basis for the assertion that the executive has the authority to determine status and waiver rests on the executive's exercise of power to conduct foreign affairs, make treaties, and specifically, to "receive Ambassadors and other public Ministers."[31] This blanket authority is generally accepted by the courts when the executive determines that a foreign government is entitled to immunity.[32] However, in response to

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27. *See, e.g.*, United States v. Kostadinov, 734 F.2d 905 (2d Cir. 1984).

28. *E.g.*, *Ex Parte Peru*, 318 U.S. at 589 ("This practice is founded upon the policy, recognized by both the Department of State and the courts, that our national interest will be better served in such cases if the wrongs to suitors, involving our relations with a friendly foreign power, are righted through diplomatic negotiations rather than by the compulsion of judicial proceedings"); In re Baiz, 135 U.S. 403 (1890); Abdulaziz v. Dade County, 741 F.2d 1328, 1331 (11th Cir. 1984); United States v. Arlington, 669 F.2d 925 (4th Cir.), *cert. denied*, 459 U.S. 801 (1982); Carrera v. Carrera, 174 F.2d 496 (D.C. Cir. 1949); Republic of Philippines v. Marcos, 665 F.Supp. 793 (N.D.Cal. 1987).

29. *See e.g.*, *Marcos*, 665 F. Supp. at 799; In re Baiz, 135 U.S. at 425-26; *Arlington*, 669 F.2d at 930; *United States v. Fitzpatrick*, 214 F.Supp. 425 (S.D.N.Y. 1963).

30. In *Vulcan Iron Works, Inc. v. Polish Amer. Mach. Corp.*, 479 F.Supp. 1060 (S.D.N.Y. 1979), the Department of State accepted the Polish Commercial Counselor (the "PCC") as a recognized official office of the Polish Peoples Republic in the United States. In a Statement of Interest to the Court, full diplomatic status was extended to the employees of the Counselor's office, and the Court was informed that the employees were not subject to deposition subpoenas. The Court reviewed the method by which the Department of State had been informed of the PCC's operations, and found that notification was improper under Article 10 of the Vienna Convention. *Id.* at 1067. The Court held that the status recognized by State was unfounded and the employees were ordered to comply with the subpoenas. *Id.* at 1068.

In *United States v. Kostadinov*, 734 F.2d 905 (2d Cir. 1984), no State Department suggestion of immunity was involved. A member of Bulgaria's New York trade office, indicted for espionage, raised diplomatic immunity as a defense. The Second Circuit reversed the District Court's dismissal of the action.

31. Statement of Interest of the United States at 7, *Deaver* (Crim. No. 87-0096) (quoting U.S. CONST. art. II, § 3. *See generally* United States v. Pink, 315 U.S. 203, 229 (1942); United States v. Curtis-Wright Export Corp., 299 U.S. 304, 319 (1936) ("The President is the sole organ of the nation in its external relations."); Jones v. U.S., 137 U.S. 202, 213 (1890).

32. *See, e.g.*, *Ex Parte Peru*, 318 U.S. at 588. This deference to executive deter-

concerns that executive determinations may reflect political, rather than legal considerations,[33] Congress enacted the Foreign Sovereign Immunities Act[34] and "transfer[ed] the determination of sovereign immunity from the executive branch to the judicial branch."[35] While this applies to sovereign immunity and does not directly affect the immunity of the diplomat, it severely undercuts a broad claim of absolute executive authority in this area of foreign affairs.

Although the executive has a clear constitutional grant of authority to receive ambassadors, it seems equally clear that the status of a person as ambassador could be put in issue ancillary to his receipt as such.[36] If the status is found valid, then the person's receipt as ambassador could not be further challenged without doing clear violence to the Article II mandate.

Diplomatic immunity arises not under the Constitution, but under the Diplomatic Relations Act of 1978 ("Act")[37] and the Vienna Convention.[38] The Constitution is, however, the judicial power that extends "to all Cases . . . arising under . . . the Laws of the United States, and Treaties [and] . . . to all Cases affecting Ambassadors . . . ."[39] Therefore, the courts have jurisdiction over proceedings concerning diplomatic immunity[40] because they arise under the Act and the Vienna

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mination does not, however, stand on Constitutional grounds. In The Schooner Exchange v. M'Faddon, 11 U.S. (7 Cranch) 116, 136 (1812), Chief Justice Marshall suggested that sovereign immunity is a matter of grace and comity, rather than one of Constitutional imperative. Since the executive branch is primarily responsible for foreign affairs generally, judicial deference to executive suggestion on whether the U.S. should take jurisdiction over actions against foreign sovereigns and their instrumentalities was a natural consequence. *See Ex Parte Peru*, 318 U.S. at 588-89.

33. Verlinden B.V. v. Central Bank of Nigeria, 461 U.S. 480, 487-88 (1983).

34. 28 U.S.C. §§ 1602-1611 (1982 & Supp. IV 1986) [hereinafter FSIA]

35. H.R. REP. No. 1487, 94th Cong., 2d Sess. 7, *reprinted in* 1976 U.S. CODE CONG. & ADMIN. NEWS 6604.

36. *Vulcan Iron Works*, 479 F.Supp. at 1067.

37. 22 U.S.C. §§ 254a-254e (1982 & Supp. III 1985).

38. Vienna Convention, *supra* note 17.

39. U.S. CONST. art. III, § 2.

40. The Constitution also provides that "[i]n all Cases affecting Ambassadors . . . the supreme court shall have original jurisdiction." *Id.* This jurisdiction is not exclusive by virtue of its original character. St. Lukes Hospital v. Barclay, 21 F.Cas. 212, 214 (C.C.S.D.N.Y. 1855) (No. 12,241). Exclusiveness may be provided or denied by Congress. Bors v. Preston, 111 U.S. 252 (1884); Ames v. Kansas, 111 U.S. 449 (1884); United States v. California, 297 U.S. 175, 187 (1936). *But see* Marbury v. Madison, 5 U.S. (1 Cranch) 137, 174-75 (1803). Indeed, the Supreme Court's original jurisdiction in this area was made exclusive by the Judiciary Act of 1789. Act of Sept. 24, 1789, ch. 20 § 9, 1 Stat. 73. More recently 28 U.S.C. § 1251, which was derived from the Judiciary Act of 1789, carried the exclusive qualifier until 1978, at which time the

Convention, or, as in the *Deaver* case, the subject's status as ambassador is not at issue.[41]

While it is probable that the State Department will involve itself in immunity matters, this is not always the case.[42] In such cases the courts have treated diplomatic status as a question of fact, and proceeded to reach a conclusion.[43]

The Act provides that diplomatic immunity "may be established upon motion or suggestion by or on behalf of [an] individual, or as otherwise permitted by law or applicable rules of procedure."[44] This clearly places the determination of right to diplomatic immunity within the province of the courts.

B. *Jurisdiction to Determine Waiver*

Once the ambassador's status is settled, either by deference to executive suggestion or by judicial determination, he is entitled to immunity. A separation of powers argument could be made at this point, alleging that subjecting the ambassador to jurisdiction to determine waiver is an interference with his receipt by the executive. While this has a certain theoretical attraction, it has no practical basis. If the ambassador and his sovereign do not acknowledge waiver, as in the *Deaver* case, attendance at a hearing cannot be compelled, and receipt is unaffected.

The ambassador's immunity extends to criminal and civil jurisdiction with certain exceptions, and from the obligation to give evidence as a witness in any case.[45] Waiver does not alter the status of the diplomat, it is a voluntary relinquishment of a known right. While the issue of waiver of diplomatic immunity has not previously been considered by the courts, the nature of waiver places it within the competency of the courts.

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district courts gained concurrent original jurisdiction. 28 U.S.C. § 1251 (1982).

41. The Independent Counsel continuously recognized Ambassador Gotlieb's status and acknowledged the original entitlement to immunity under Article 31 of the Vienna Convention. Memorandum In Opposition to Motion to Quash Subpoenas at 1, *Deaver* (Crim. No. 87-0096).

42. *See, e.g.*, United States v. Kostadinov, 734 F.2d 905 (2d Cir. 1984); Trost v. Tompkins, 44 A.2d 226 (D.C. Mun.Ct.App. 1945).

43. *Trost*, 44 A.2d at 230 (right to immunity is a political question, but absent executive determination as to a person's status, these are proper subjects for decision by trial court).

44. 22 U.S.C. § 254d (1982).

45. Vienna Convention, *supra* note 17, Article 31, para. 1 and 2 (text *supra* note 18). *See also, Vulcan Iron Works*, 479 F.Supp. at 1063 n.3.

The most straightforward example involves a strict compliance with Article 32, paragraph 2, of the Vienna Convention, which requires that waiver be express. Once the court determines that a person subjected to the court's jurisdiction is entitled to immunity,[46] that proceeding would be dismissed as a matter of course pursuant to the Act.[47]

To prevent dismissal of the action, the party seeking to proceed, or in the case of service of process the party seeking service, should bear the burden of alleging and proving waiver.[48] If an express waiver of immunity has been executed by the sending state, the document would serve as conclusive evidence. Because of the requirement that the waiver be express when immunity of the diplomat is waived by the sending state, the court considering the issue should require such proof.[49]

Neither the Vienna Convention nor the Act provide procedures by which such a waiver is to be obtained or proffered.[50] It seems sensible

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46. As is suggested *supra*, it is possible that it will not be apparent from the filings that the subject actually possesses the prerequisite status for immunity to attach. In that case the proceedings would continue in normal fashion until immunity was raised as a defense either by the subject or by State Department suggestion on behalf of the subject. *Supra* notes 23-27 and accompanying text.

47. 22 U.S.C. § 254d (1982) requires that "[a]ny action or proceeding brought against an individual who is entitled to immunity with respect to such action or proceeding . . . shall be dismissed."

48. *See* Hellenic Lines v. Moore, 345 F.2d 978, 980 n.3 (D.C.Cir. 1965).

49. It is unclear that such proof would always be required. Since immunity must be claimed in order to be given effect, it is possible that one so entitled may submit to jurisdiction with the knowledge of the sending state without the issue ever arising. This, however, raises a separate problem.

Article 29 of the Vienna Convention requires that "[T]he person of a diplomatic agent shall be inviolable. He shall not be liable to any form of arrest or detention. The receiving State shall treat him with due respect and shall take all appropriate steps to prevent any attack on his person, freedom or dignity." It could be said that such attacks are an element of the trial process inherent in the concept of cross-examination, and essential to due process. Upon such a premise, it would be recommended that once a witness or party is identified as one entitled to immunity, the court should require an express waiver.

Another situation would arise if the State Department insisted on its authority to determine status and waiver. This could be accomplished by State's withholding proof of express waiver from the court while making a suggestion pursuant to 22 U.S.C. § 254d that any entitlement to immunity in the particular case had been expressly waived.

50. The matter is discussed briefly by Judge Washington in his concurring opinion in *Hellenic Lines*:

> I would agree that the proper course of a complaining party seeking to serve process upon an accredited ambassador is to request the State Department to ascertain under accepted diplomatic practice whether diplomatic immunity[] will be

that if it is in the local party's possession, then its sole function is as a key to litigation. Therefore, the logical forum for its submission is the court in which the action is pending.

Another alternative would be for the waiver to be maintained at the Department of State subsequent to its grant, perhaps for national security reasons. This would not present problems if the State Department acknowledged the waiver, unless a court *sua sponte* requested proof pursuant to the express waiver provision. The most unlikely problem would arise if the State Department concealed the existence of a waiver for its own political purposes.[51]

For the purpose of this examination it is sufficient to point out that a court has statutory authority to allow an action to proceed if it is presented with an express waiver. The proceedings upon express waiver would not constitute a judicial interference with the executive's Constitutional power to receive ambassadors because it is a mere acknowledgement of the sending state's willingness to participate in the action. The Constitution does not mandate either foreign state accession to executive receipt or foreign state behavior in accordance with executive receipt.

IV. Determination of Waiver

According to the Vienna Convention, waiver of diplomatic immunity must be express.[52] The district court found no express waiver in this case.[53] The document supporting the waiver could have at best served as a basis for a finding of an implied waiver of sovereign immunity.[54] The possibility of an implied waiver was justifiably not explored, and the court made no mention of the forum-selection clause or Cana-

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waived and service will be accepted in a particular case. I would also hold that the complaining party's proper course, if the answer is affirmative, is to request that the State Department make the diplomat's answer available to the court, and if the answer is negative[,] the complainant should ordinarily discontinue its suit.

345 F.2d at 983. While this case dealt generally with sovereign immunity from suit, the issue at bar was whether the diplomatic immunity of the ambassador would preclude service of process on him as agent for the party sending state. The ambassador was not personally joined as a party. *Id.* at 980.

In response to State Department inquiries, the embassy acknowledged an unwillingness to accept service of process. *Id.* at 982.

51. This is unlikely for several reasons, including the Department of State's power to deny requests for waivers and the foreign state's opportunity to provide a duplicate.

52. The Vienna Convention, *supra* note 17, Article 32 (text *supra* note 19).

53. Memorandum and Order at 5, *Deaver* (Crim. No. 87-0096).

54. Talking Points, *supra* note 6.

dian participation in the investigation.[55]

A. *Express Waiver of Diplomatic Immunity*

The Talking Points did not expressly waive either diplomatic or sovereign immunity. It is possible, however, to interpret the language of the document as an implied waiver of sovereign immunity.

1. *No Express Waiver*

While no cases construing express waivers under the Vienna Convention have been found, it can be supposed that Article 32 contemplates a clear statement including the words: "waive diplomatic immunity." These words are not included in the Talking Points received by the State Department from the Government of Canada.[56] Article 32 provides in paragraph 1 that immunity may be waived by the sending state.[57] Besides the preclusion from invoking immunity from jurisdiction with respect to counterclaims enunciated in paragraph 3 of that article, and the implied waiver inherent in the institution of proceedings, this is the only method by which a diplomat's immunity can be waived.[58] Since the document under consideration is from the Government of Canada, this first provision is met.

The Government of Canada stated that it was "prepared to request the cooperation" of Ambassador Gotlieb in the investigation being conducted by the Independent Counsel.[59] While this is not a clear statement of waiver, it is a practical waiver in that it seeks to allow specifically that from which Gotlieb is immune.[60]

The court made much of the circumstances of the cooperation, characterizing it as "voluntary, unsigned, unsworn summary answers to the queries posed, through a diplomatic, not a judicial, medium."[61] Despite this characterization, Ambassador Gotlieb did give evidence as a witness in connection with a statement by his sending state that it was requesting this cooperation. There can be no question that diplomatic

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55. This is understandable because of the clear requirement that waivers be express and the fact that neither the forum-selection clause nor the Canadians' participation was brought to the fore as grounds in filings accompanying the motion for subpoena or the motion to quash.

56. Talking Points, *supra* note 6.

57. Vienna Convention, *Supra* note 19.

58. *But see*, *infra* notes 86-87 and accompanying text regarding implied waiver for national security or safety of ambassador.

59. Talking Points, *Supra* note 6.

60. Vienna Convention, *Supra* note 18.

61. Memorandum and Order at 6, *Deaver* (Crim. No. 87-0096).

immunity from any obligation to respond to the queries posed was waived.

The issue, however, is how far this waiver extends. Since it is expressly directed at cooperation with the investigation, even if it were a clear statement of waiver, it does not encompass participation as a trial witness.[62] The Talking Points clearly contemplate a personal appearance by the Ambassador and reject that possibility.[63] So if the extension of cooperation is put to a strict test, it fails as an express waiver. If it is construed more loosely, it fails for not contemplating participation

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62. The Independent Counsel suggested that diplomatic immunity be treated like "any other legally-sanctioned witness protection, and that once it is waived, it is waived for all purposes in the relevant proceeding . . . ." Memorandum of Points and Authorities In Support of Motion for an Order to Show Cause at 3, annexed to Motion For Order Directing the Issuance and Service of a Trial Subpoena on Allan Gotlieb, *Deaver* (Crim. No. 87-0096). There is an obvious logic to this position in that the trial would be based on information developed during the investigation. However, the requirement that a waiver be express serves two purposes. First, as a reflection of intent to relinquish the privilege; and second, as a description of the extent to which the privilege is foregone.

This second purpose must inhere in the requirement in order to prevent the waiver's application to matters utterly collateral to those contemplated by the waiving party. The fact that the trial is not collateral to the investigation merely refocuses the issue on the clear statement of the waiver. Independent Counsel wanted cooperation in the investigation and the trial if one were to follow. The Government of Canada allowed cooperation specifically in the investigation.

It is true that once attorney-client privilege and the Fifth Amendment privilege against self-incrimination are waived in a proceeding they are waived for all purposes in that proceeding. However, the waiver must be an informed one. If a witness were to attempt to impose a limit with a statement that he was waiving the privilege in order to answer one question only, a court would be bound to inform him that the waiver could not be accepted in that form.

Similarly, the Canadians' waiver, if it is an express one, could not be accepted as an informed waiver for all purposes when it speaks to a clear limitation to the investigation.

63. The Talking Points state in part:

> The Government [of Canada] will cooperate in the investigation being conducted by the Independent Counsel, as appropriate in the light of relevant principles of international law and the practice of states. In keeping with such principles and practice, and with the need to maintain the independent conduct of Canada's foreign relations, the longstanding policy of successive Canadian governments has been to decline requests for Canadian officials to testify before foreign tribunals. Where exceptions have been permitted in the national interest, the Government has generally required that such testimony be voluntary, that it not be given under oath, that it take the form of a written statement, and, finally, that it not be related to the conduct of inter-governmental affairs, or to Canadian Government policy or the policy-making process.

Talking Points, *supra* note 6, at 1.

by the Ambassador as a trial witness. In either case the theory of the Talking Points as an express waiver was correctly decided.

2. *Implied Waiver of Sovereign Immunity*

Sovereign immunity may be waived either expressly or by implication.[64] The allowance for a finding of an implied waiver sheds new light on the Talking Points. The communication states that "[t]he Government [of Canada] will cooperate in the investigation being conducted by the Independent Counsel,"[65] and that "Canada is pleased to accede to the request . . . for cooperation in obtaining information from sources within Canada . . . ."[66] If Canada had invoked its sovereign immunity, the cooperation described could not have been compelled; therefore, these statements reflect an intent to relinquish its right to ignore the proceedings.[67]

While this could fairly be deemed an implied waiver of sovereign immunity, it still must be analyzed as to its extent. Because of the repeated reference to the investigation, and no fair implication of an intent to participate beyond that phase, this waiver seems to suffer the same defect found in the search for waiver of diplomatic immunity.[68] However, in the earlier discussion, the extent of application was restricted by the requirement that the waiver be express.

The focus shifts in implied waiver to the proceedings for which waiver is sought. In this case, the trial and the surrounding circumstances should be analyzed.[69] Since the trial is the logical result of an investigation, consent to participate in one or the other can justifiably be implied to cover both.[70]

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64. 28 U.S.C. § 1605 (1982), states that:

(a) A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case-

(1) in which the foreign state has waived its immunity either explicitly or by implication, notwithstanding any withdrawal of the waiver which the foreign state may purport to effect except in accordance with the terms of the waiver.

See also RESTATEMENT OF THE LAW, FOREIGN RELATIONS OF THE UNITED STATES (REVISED) §456(1)(a) (Tentative Draft No. 2 March 27, 1981) [hereinafter Restatement].

65. Talking Points, *supra* note 6, at 1.

66. *Id.* at 2.

67. *See*, Memorandum and Order at 6, *Deaver* (Crim. No. 87-0096).

68. *See supra* notes 62-63 and accompanying text.

69. *See* National City Bank v. Republic of China, 348 U.S. 356 (1955); *The Schooner Exchange*, 11 U.S. (7 Cranch) at 143.

70. In *National City Bank* the Republic of China sued an American bank to recover certain funds deposited. The District Court dismissed the bank's counterclaim on

In a separate, related analysis it can be said that once immunity was waived by the Government of Canada, the waiver could not be withdrawn.[71] This presents two questions for this case. First, whether the investigation and the trial can be considered as one proceeding. Second, whether participation in the proceedings was to such an extent that immunity could no longer be claimed.

As to the first question, it could be argued that since the indictment and trial grow out of the investigation, they are essentially one continuous process. The Canadians did not appear before the Grand Jury;[72] they only responded to written questions with unsworn, written answers.[73] Since the indictment should be based upon information presented to the Grand Jury, it can be assumed that the indictment of Mr. Deaver was based, at least in part, on these written answers. While it could be a question of fact to be determined in the discretion of the trial court, a claim that the participant state did not anticipate that the investigation would lead to a trial, should be subject to a rebuttable presumption against the participant. The investigation is, after all, pursuant to allegations of criminal activity.[74]

As to the second question, the Second Circuit has held that participation in litigation by a foreign state without an affirmative assertion of immunity constitutes an implied waiver.[75] It is also within the discretion of the trial court to determine that the conduct of the participant is of such a character as to qualify as a waiver that cannot be withdrawn.[76] Following the preceding analysis, participation in a criminal investigation by providing information that is sought in support of an indictment, without asserting immunity before the indictment issues, could be found to be evidence of a waiver that cannot be withdrawn.

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grounds of sovereign immunity in this pre-FSIA case. The Supreme Court held that although China was entitled to immunity from suit, the filing of their claim served as an implied waiver to suit on a counterclaim not even arising out of the same transactions or occurrences. *Id.* at 364-65. This holding is now reflected in the FSIA at 28 U.S.C. § 1607 (1982).

71. 28 U.S.C. § 1605(a)(1) (1982), text *supra* at note 64.

72. Testimony by four Canadians was sought by the Independent Counsel. Talking Points, *supra* note 6, at 1.

73. *See*, Declaration I, *supra* note 5, at 2-3.

74. Ethics in Government Act, 18 U.S.C. § 207 (1982).

75. Canadian Overseas Ores, Ltd. v. Companio De Acero Del Pacifico, 727 F.2d 274, 278 (2d Cir. 1984).

76. *Id.*

3. *Waiver of Sovereign Immunity Waives Diplomatic Immunity*

Diplomatic immunity primarily serves the needs of the foreign sovereign.[77] The Fourth Circuit has described the immunity of the diplomat as a privilege that is "merely incidental to the benefit conferred on the government he represents."[78] This concept is also inherent in the Vienna Convention in the requirement that diplomatic immunity can only be waived by the sending state.[79] Interpreting this provision in *United States v. Arizti*,[80] the district court held that "the immunity is that of [the sending] government and is not personal to [the diplomat]."[81]

It seems to follow from this premise that if the sovereign has waived immunity with respect to certain proceedings, that the diplomat's derivative immunity is consequently waived as well.[82] Applying this rationale to the *Deaver* case, it was within the court's discretion to find that the cooperation by the Government of Canada constituted an implied waiver of sovereign immunity with reference to the investigation. That waiver could not be withdrawn with reference to the trial, thus Canada waived the derivative diplomatic immunity of Ambassador Gotlieb preventing service of a trial subpoena.[83]

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77. *See The Schooner Exchange*, 11 U.S. (7 Cranch) at 138.

78. United States v. Arlington, 669 F.2d 925, 930 (4th Cir.), *cert. denied*, 459 U.S. 801 (1982). The Court relied on the legislative history of § 254c of the Act, which indicates an intent that the section reflect Article 47 of the Vienna Convention. This article indicates, at least to the Fourth Circuit, that immunity primarily should benefit governments rather than individuals who serve them. *Id.*

The Vienna Convention recognizes that "the purpose of such privileges and immunities is not to benefit individuals but to ensure the efficient performance of the functions of diplomatic missions as representing States." Vienna Convention, *supra* note 17, at the preamble.

79. Vienna Convention, *supra* note 17, art. 32.

80. 229 F.Supp. 53 (S.D.N.Y. 1964).

81. *Id.* at 55.

82. The opposite situation is suggested by the circumstances of *Hellenic Lines*, *supra* note 48, but the question was not reached. If the named party foreign state had waived the ambassador's immunity from service of process, as Judge Washington suggested in his concurring opinion in *Hellenic Lines*, the court still would have been faced with the issue of the party's potential claim of sovereign immunity from suit. Relying on the Second Circuit's reasoning in *Arlington*, *supra* note 78, it seems doubtful that acceptance of process without filing a responsive pleading would qualify as waiver.

83. This raises the inherent issue of an ambassador's competence as a witness. In Diehl v. United States, 265 F.2d 344 (D.C. Cir. 1959), the issue was decided in favor of competency of the diplomat. The Court held that possible perjury by the diplomat does not render his testimony inadmissible the on grounds that any perjury prosecution would be futile due to immunity. The Court reasoned that the sending state could

B. *Implied Waivers of Diplomatic Immunity*

Notwithstanding the Vienna Convention mandate that waiver of diplomatic immunity must always be express, there are several circumstances that result in what can only be classified as implied waivers. One is inherent in the provisions of the Vienna Convention, and others grow out of necessity.

The Vienna Convention provides that immunity cannot be invoked with respect to counterclaims when a diplomat avails himself of a court's jurisdiction for suit.[84] The diplomat's voluntary initiation of the action serves as a waiver by implication with reference to any directly related claims that may be brought by the party opponents.[85]

Under the rubric of necessity, two circumstances have been raised in which implied waivers may be found. The Restatement suggests that temporary arrest or detention may be required for the diplomat's safety or that of others.[86] It has also been suggested that waiver can be implied when the diplomatic agent's activities threaten the national security of the receiving state.[87]

The preamble to the Vienna Convention gives the basis for extending immunity to the diplomat as "ensur[ing] the efficient performance of the functions of diplomatic missions . . . ."[88] This functional necessity theory seems to extend immunity to a field of activities that is limited by an impact *vel non* on diplomatic functions. This limit is not reflected by a provision that extends immunity to all situations until the sending state expressly waives it.[89]

A proper inquiry under the functional necessity theory would be whether Ambassador Gotlieb's participation as a trial witness would interfere with his diplomatic functions. Article 3 of the Vienna Convention describes these functions as representing the sending state, protect-

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waive the diplomat's immunity for purposes of any perjury prosecution. The Court did not speculate as to the practical potential of such a result.

It seems that another issue is raised when the testimony is compelled pursuant to the waiver scenario under consideration here. Does the waiver that permits the diplomat to testify extend to a potential perjury prosecution? The *Diehl* Court would apparently answer this in the negative, as it considered the potential perjury prosecution as a separate proceeding requiring a separate waiver. *See id.* at 345.

84. Vienna Convention, *supra* note 17, art. 32(3) (text *supra* note 19).

85. *Id.*

86. Restatement, *supra* note 64, § 461 comment d.

87. Comment, *Diplomatic Immunity from Criminal Jurisdiction: Essential to Effective International Relations*, 7 LOY. L.A. INT'L & COMP. L.J. 113, 136 (1984).

88. Vienna Convention, *supra* note 17, at the preamble.

89. *See*, Comment, *A New Regime of Diplomatic Immunity: The Diplomatic Relations Act of 1978*, 54 TUL. L. REV. 661, 669-71 (1980).

ing the sending state's interests, negotiating with the receiving state's government, reporting to the sending state conditions and developments in the receiving state, and promoting friendly relations between the two states through developing economic, cultural and scientific relations.[90] Giving testimony as a trial witness could arguably interfere with these functions in two ways.

First, the time consumed by participation both in giving trial testimony and its preparation cannot be used in pursuit of duties responsive to the diplomatic mission.[91] This risk could be minimized, however, with a flexible approach to scheduling.

Second, the act of compelling testimony could interfere with the promotion of friendly relations between the sending and receiving states. On the other hand, the same could be said about the predicate refusal by the sending state to allow the testimony.

While it has been suggested that the functional necessity theory does not support an extension of immunity to any actions against the diplomat that do not affect the mission's function,[92] the cumulative effect of many such actions could interfere with the diplomat's time and the promotion of friendly relations.[93] The provision requiring express waiver in all cases, therefore, is only justified under the functional necessity theory to the extent that it avoids this cumulative effect. The same result could be obtained if the requirement were scaled back commensurate with the approach to sovereign immunity that permits waiver by implication.

The Justice Department raised two policy arguments against a finding of waiver in this case. First, such a finding would serve as a basis for reciprocal treatment against United States diplomats abroad.[94] This only follows from a finding of implied waiver where an express one is required, an act that would seem to indicate a disregard for the Vienna Convention. It does not follow from a finding that no diplomatic immunity attaches to areas where sovereign immunity has been waived, an act that is perfectly in line with the Convention's

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90. Vienna Convention, *supra* note 17, art. 3(1).

91. Interference with the diplomatic function by making demands on the diplomat's time is based on an assailable premise that the time at trial would not have been used for non-diplomatic activities.

92. *E.g.*, Comment, *supra* note 89, at 681-82; Note, *Insuring Against Abuse of Diplomatic Immunity*, 38 STAN. L. REV. 1517, 1521-22 (1986).

93. *See Diplomatic Immunity: Hearings Before the Senate Comm. on the Judiciary*, 95th Cong., 2d Sess. 129 (1978).

94. Statement of Interest of the United States at 12, *Deaver* (Crim. No. 87-0096).

stated purpose.[95]

The Justice Department also suggested that the success of the United States' policy of seeking voluntary cooperation of foreign governments in law enforcement matters would be thwarted if such cooperation were construed as a waiver of immunity.[96] Two weaknesses in this argument are made apparent by the *Deaver* case. First, there is no history that cooperation has ever been litigated as a waiver. Second, the cooperation sought in the *Deaver* case concerned the Canadian Government's intimate involvement in the matters under investigation.

V. CONCLUSION

The District Court correctly assumed jurisdiction to decide the issue of waiver of diplomatic immunity in this case, and the issue itself was correctly decided. However, the issuance of a trial subpoena might have been justified if the court had been asked to consider the possibility of an implied waiver of sovereign immunity both by the language of the "Talking Points" diplomatic note and the actual participation by the Canadian Government in the investigation. Such a finding would not offend the basic purpose underlying the extension of immunity to diplomats.

Richard C. Kay

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95. The Conference that produced the Vienna Convention adopted a resolution that "recommends that the sending state should waive the immunity of members of its diplomatic mission . . . when this can be done without impeding the performance of the functions of the diplomatic mission . . . ." Restatement, *supra* note 64, § 461, Reporters' Note 14.

96. Statement of Interest of the United States at 12, *Deaver* (Crim. No. 87-0096).