

# RETROACTIVE DIPLOMATIC IMMUNITY

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## ABSTRACT

*When German tennis star Boris Becker attempted to become a diplomat of the Central African Republic in 2018 to avoid bankruptcy proceedings in the United Kingdom, much of the world ridiculed his efforts. But his actions begged a genuine question: Can an individual become a diplomat so that his or her past actions are immunized from prosecution or suit, even after the actions have occurred or court proceedings have been instituted? In the United States, the answer appears to be yes. On at least two occasions, federal courts have allowed such retroactive applications of diplomatic immunity in cases involving allegations ranging from false imprisonment to mistreatment of domestic workers. Presumably under the political question doctrine, these courts reasoned that they must defer to the executive branch on issues of foreign affairs and on State Department certifications of diplomatic immunity, in particular. These courts did not review the factual contexts of the cases, which would have illuminated that the individuals in question were not actually diplomats, would be unlikely to ever act as diplomats, and seemingly had obtained diplomatic status solely for the purpose of evading suit or prosecution.*

*This Note argues that the purposes of diplomatic immunity, analogies to other forms of immunity like presidential immunity, and the potential for unfettered abuse all cut against the retroactive application of diplomatic immunity. Courts need not dismiss cases as nonjusticiable under the political question doctrine solely because a case involves a question of diplomatic status. Rather, courts should narrowly tailor the judicially developed political question doctrine when legitimate issues as to the factual and legal validity of a defendant's diplomatic position arise.*

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## INTRODUCTION

In the United States, foreign diplomats enjoy full immunity from both civil and criminal liability, meaning they cannot be arrested or detained, their real and personal property cannot be searched, and they are not subject to the jurisdiction of domestic courts.<sup>1</sup> In light of this immunity, one might think that diplomats exploit their positions and threaten the safety of American citizens. Indeed, complaints of diplomats taking advantage of their status permeate the media.<sup>2</sup> But such abuse is not particularly widespread, and diplomats rarely commit violent crimes.<sup>3</sup> Regardless of whether criticism of diplomatic immunity is generally valid, there is an even more brazen potential for abuse that must be addressed. The current U.S. legal regime permits a seldom-discussed retroactive application of diplomatic immunity, meaning that an individual can commit a crime, obtain diplomatic status, and then have that immunity “shield” the individual from liability for those wrongful actions taken before the individual obtained such status.<sup>4</sup>

Consider the following troubling hypothetical application of retroactive diplomatic immunity: Monsieur Rich is a wealthy foreign national living in the United States. Monsieur Rich launders money, which is a federal crime under the Money Laundering Control Act of 1986.<sup>5</sup> After Monsieur Rich finds out that he is being investigated for money laundering, he proceeds to call his old buddy Madame Shady, who works at the foreign ministry in a country that ranks highly on the list of most corrupt countries in the world. Monsieur Rich explains the situation to Madame Shady and asks if there are any diplomatic openings available to him. Madame Shady replies: “Of course, we always need attachés.” Madame Shady proceeds to communicate Monsieur Rich’s new diplomatic status to the U.S. State Department, which in turn certifies Monsieur Rich’s status. When the U.S. Department of Justice indicts Monsieur Rich for money laundering, Monsieur Rich moves to dismiss on the ground that he is immune from prosecution. Because courts

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1. See *infra* Part I.B (providing an overview of diplomatic privileges and immunities).

2. See *infra* note 70 (discussing newsworthy cases).

3. See *infra* Part I.C (noting that abuse of immunity is usually confined to traffic violations).

4. See *infra* Part II (explaining the legality of retroactive diplomatic immunity). Although the concept of retroactive diplomatic immunity has seldom been discussed in legal scholarship, it has been mentioned in the mainstream press. See Alison Frankel, *Retroactive Immunity for the Consul?*, CHI. TRIB. (Dec. 19, 2013), <https://www.chicagotribune.com/news/ct-xpm-2013-12-19-sns-rt-us-column-frankel-20131218-story.html> [<https://perma.cc/HRR4-75S8>] (“It’s a rare but not unprecedented State Department device to grant foreign officials full immunity for their actions even if they weren’t entitled to such broad protection when they committed the supposed misconduct.”).

5. Money Laundering Control Act of 1986, 18 U.S.C. § 1956 (2018).

generally defer to the State Department on the issue of an individual's diplomatic status,<sup>6</sup> Monsieur Rich gets off scot-free.

Although this hypothetical may appear farfetched, it is actually on the tamer side of the few documented cases. Federal courts have twice approached the issue of retroactive diplomatic immunity in cases that involved allegations of false imprisonment, visa fraud, and mistreatment of domestic workers.<sup>7</sup> In both cases, the federal courts declined to question the State Department's certification of diplomatic status, despite the fact that the individuals were not diplomats at the time of their alleged wrongdoing or even, in one case, when the suit commenced.<sup>8</sup>

The problem with nondiplomats<sup>9</sup> abusing diplomatic immunity is not constrained to evading serious crimes committed in the United States. Unlike actual diplomats, nondiplomats seemingly would not have a foreign government to answer to. Although foreign diplomats are not subject to U.S. jurisdiction, they typically remain subject to the jurisdiction of their sending state.<sup>10</sup> But for wealthy and connected nondiplomats, diplomatic immunity may be seen as a means of escaping prosecution or suit in any jurisdiction, presumably without the fear of facing repercussions in the very sending state that corruptly provided their status in the first place.<sup>11</sup> It is unlikely that a foreign government willing to issue an individual a diplomatic position after violating U.S. law would then prosecute that individual for the same wrongdoing. And because federal courts have long refused to review certifications of an individual's diplomatic status under the political question doctrine, once such a status is obtained, these nondiplomats may abuse it without any sending state's bona fide supervision, meaning that any wrongdoing may go undetected. This not only goes against the very purpose of diplomatic immunity,<sup>12</sup> but also is unique in the sense that no other form of immunity, including presidential immunity, may be granted

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6. See *infra* Part II.B.

7. See generally *Abdulaziz v. Metro. Dade Cty.*, 741 F.2d 1328 (11th Cir. 1984); *United States v. Khobragade*, 15 F. Supp. 3d 383 (S.D.N.Y. 2014). These cases are discussed further *infra* Part II.B.

8. *Id.*

9. For the purpose of this Note, "nondiplomats" are defined as individuals who seek diplomatic status after committing a wrongdoing, for the purpose of evading suit or prosecution, and without actually performing or intending to perform any diplomatic functions.

10. See *infra* note 68 and accompanying text.

11. See *infra* Part II.C (discussing a high-profile example). It should be noted that, likely because of the surreptitious nature of retroactive diplomatic immunity, public examples are sparse. But this does not necessarily indicate the actual number of cases. The fact that retroactive diplomatic immunity is so rarely discussed—especially in legal scholarship, where no author has deeply examined the subject—necessitates this Note.

12. See *infra* Part II.A.

retroactively.<sup>13</sup> Federal courts therefore should not allow retroactive diplomatic immunity to persist solely in the name of deference to the executive branch under the political question doctrine.

This Note proceeds in three parts. Part I details the history and development of modern U.S. diplomatic immunity, from its early origins to the codification of the Vienna Convention on Diplomatic Relations in 1961 and the current doctrine. It explains the privileges and immunities accorded to foreign diplomats in the United States, the process of obtaining diplomatic immunity, and the limits on immunity that were developed to curb abuse. Part II argues that the purpose of the Vienna Convention on Diplomatic Relations, analogies to other forms of immunity, and the potential for abuse cut against the concept of retroactive diplomatic immunity. However, because courts have repeatedly refused to review State Department certifications of immunity under the auspices of the political question doctrine, retroactive diplomatic immunity lives on. Part III considers several possible solutions to this problem, concluding that the judiciary should narrowly construe the political question doctrine when an individual's diplomatic status is a genuine issue of fact and law.

#### I. THE HISTORY AND DEVELOPMENT OF U.S. DIPLOMATIC IMMUNITY

For centuries, diplomatic privileges and immunities persisted solely under customary international law.<sup>14</sup> It was not until 1961, with the Vienna Convention on Diplomatic Relations, that the first comprehensive treaty on diplomatic law came into being.<sup>15</sup> Part I traces the history leading up to the Vienna Convention, its international ratification, and its eventual codification in the United States. It explains the scope of privileges and immunities accorded to diplomats under the Vienna Convention, along with the principal rationales behind these immunities. It then discusses how individuals obtain diplomatic immunity and the extent to which laws have been enacted to curb its potential for abuse.

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13. See *infra* Part II.D (explaining that presidential immunity, qualified immunity, and defense witness immunity may not be applied retroactively).

14. Customary international law is one of two principal forms of public international law. CURTIS A. BRADLEY & JACK L. GOLDSMITH, *FOREIGN RELATIONS LAW* xxv (6th ed. 2017). Unlike a written treaty, customary international law arises from the “general practices and beliefs of nations,” meaning that it does not exist unless “nations have consistently followed a particular practice out of a sense of legal obligation.” *Id.* For an overview of how customary international law works in federal courts, see generally Ryan M. Scoville, *Finding Customary International Law*, 101 IOWA L. REV. 1893 (2016).

15. See *infra* notes 41–45 and accompanying text (discussing the Vienna Convention).

### A. Background

Diplomatic immunity has existed in some form or another stretching back to antiquity.<sup>16</sup> During the Roman Empire, for example, “a messenger from a foreign territory was generally allowed to complete his mission without the fear of interference.”<sup>17</sup> And long before diplomatic law was ever codified, countries observed the personal inviolability of diplomats.<sup>18</sup> The establishment and expansion of permanent embassies further solidified the existence of diplomatic immunity,<sup>19</sup> which at the time persisted primarily under customary international practice.<sup>20</sup>

Various theories have been proposed to justify the existence of diplomatic immunities and privileges, but three have drawn the most widespread acceptance: the theories of personal representation, extraterritoriality, and functional necessity.<sup>21</sup> The theory of personal representation finds its greatest support in ancient history and relays the concept that “the diplomatic agent is the personification of his ruler or of a sovereign state whose independence must be respected.”<sup>22</sup> The foreign envoy was seen as “sacrosanct,”<sup>23</sup> holding a character of religious importance, much like the royal prince.<sup>24</sup> But the theory of personal representation has

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16. J. CRAIG BARKER, *THE ABUSE OF DIPLOMATIC PRIVILEGES AND IMMUNITIES: A NECESSARY EVIL?* 14 (1996) (“The roots of diplomatic law lie buried in ancient history . . .”).

17. *Id.* at 33.

18. *See id.* at 32, 71 (“[T]he inviolability of the person of the diplomatic agent was probably the first principle of diplomatic law and remains the most fundamental today.”). As early as 700 B.C., Roman ambassadors were said to have been accorded personal inviolability. MONTELL OGDON, *JURIDICAL BASES OF DIPLOMATIC IMMUNITY: A STUDY IN THE ORIGIN, GROWTH AND PURPOSE OF THE LAW* 16–17 (1936).

19. *See* BARKER, *supra* note 16, at 34–35 (“It was not until the establishment of permanent diplomatic relations . . . that the need for comprehensive enumeration of diplomatic privileges and immunities arose.”); EILEEN DENZA, *DIPLOMATIC LAW: COMMENTARY ON THE VIENNA CONVENTION ON DIPLOMATIC RELATIONS* 7 (4th ed. 2016) (noting that states did not typically need to establish diplomatic relations until the creation of permanent missions).

20. U.S. DEP’T OF STATE, *DIPLOMATIC AND CONSULAR IMMUNITY: GUIDANCE FOR LAW ENFORCEMENT AND JUDICIAL AUTHORITIES* 1 (1998) [hereinafter *DIPLOMATIC IMMUNITY GUIDANCE*].

21. *See* CLIFTON E. WILSON, *DIPLOMATIC PRIVILEGES AND IMMUNITIES* 1 (1967) (noting that scholars have “consistently turned to one of [these] three traditional theories”). Some scholars use the terms “extraterritoriality” and “exterritoriality” interchangeably. *See Extraterritoriality*, *ENCYCLOPEDIA BRITANNICA*, <https://www.britannica.com/topic/extraterritoriality> [<https://perma.cc/8SKH-M9XH>] (noting the two words as synonyms).

22. WILSON, *supra* note 21, at 1.

23. DENZA, *supra* note 19, at 213.

24. *See* OGDON, *supra* note 18, at 8 (“[A]mbassadors were sacred and inviolable . . . because they represented a foreign prince.”). Some argue that this “cloak of religious sanctity” was likely just a means of “guarantee[ing] against harm being done to persons who were regarded as fulfilling an essential role in society.” BARKER, *supra* note 16, at 34.

lost much of its luster following the American and French Revolutions, with the fall of divine monarchies and the rise of modern democracies.<sup>25</sup> The theory also draws criticism for its failure to address why diplomats should be accorded immunities for their unofficial acts, wherein they are not generally thought of as representing the sovereign.<sup>26</sup>

Under the theory of extraterritoriality, foreign diplomats are considered mere passersby unencumbered by local laws.<sup>27</sup> The diplomatic property is thought of as belonging to the foreign jurisdiction rather than to the local jurisdiction.<sup>28</sup> This legal fiction follows the idea “that the ambassador must be treated as if he still is living in the territory of the sending state”<sup>29</sup> and is therefore not subject to the jurisdiction of the receiving state.

The theory of functional necessity—likely the strongest of the three—stands for the proposition that diplomats must be free to move safely between jurisdictions and be immune from local jurisdictions so as to conduct diplomacy effectively and facilitate international discourse.<sup>30</sup> Without the ability to travel freely and independently, a diplomat would not be able to perform his or her duties properly.<sup>31</sup> Diplomacy would be unworkable if diplomats were unable to communicate with their sending country securely or if receiving states were able to “open diplomatic bags and read their contents, listen to their telephone calls, hack into diplomats’ e-mails,” and so forth.<sup>32</sup> Judge Richard J. Cardamone of the U.S. Court of Appeals for the Second Circuit aptly summarized the safety diplomatic immunity provides to American diplomats abroad under the current framework:

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25. See WILSON, *supra* note 21, at 4 (“The concept [of personal representation] was somewhat more difficult to accept, even theoretically, after sovereign authority was transferred to the people, especially in presidential systems where rule-making is shared by the executive, legislative, and judicial branches.”). François Laurent, an early nineteenth-century critic of diplomatic immunity found this basis to represent “the fetishism of royalty and the arrogance of the prince” and the “voice of a time past.” LINDA S. FREY & MARSHA L. FREY, *THE HISTORY OF DIPLOMATIC IMMUNITY* 339 (1999) (quotations and citations omitted).

26. See WILSON, *supra* note 21, at 4 (“Since the theory of personal representation fails to extend a foundation for immunity to private acts, it must be rejected . . .”).

27. See *id.* at 5 (describing two ways in which the theory explains diplomatic immunity).

28. *Id.*

29. *Id.* at 6–7.

30. *Id.* at 17; see also Veronica L. Maginnis, Note, *Limiting Diplomatic Immunity: Lessons Learned from the 1946 Convention on the Privileges and Immunities of the United Nations*, 28 *BROOK. J. INT’L L.* 989, 995 (2005) (describing functional necessity as “the most accepted theory for the justification of diplomatic immunity”).

31. See BARKER, *supra* note 16, at 224 (“It would seem that the requirement that the individual diplomat is left free to perform his functions independently and efficiently has always been part of the justification behind the granting of diplomatic privileges and immunities.”).

32. Brian Barder, *A Former Diplomat’s Reflections on the Vienna Convention*, in *DIPLOMATIC LAW IN A NEW MILLENNIUM* 16 (Paul Behrens ed., 2017).

The risk in creating an exception to mission inviolability in this country is of course that American missions abroad would be exposed to incursions that are legal under a foreign state's law. Foreign law might be vastly different from our own, and might provide few, if any, substantive or procedural protections for American diplomatic personnel . . . . Recent history is unfortunately replete with examples demonstrating how fragile is the security for American diplomats and personnel in foreign countries; their safety is a matter of real and continuing concern.<sup>33</sup>

Supporters of the functional-necessity theory find it especially relevant in times of war, when “[i]n the midst of hostilities it is necessary to send ambassadors to make overtures of peace or to propose measures tending to moderate the horrors of war.”<sup>34</sup> Critics argue that this theory is anachronistic in a world with modern technology that enables governments to conduct foreign diplomacy from just about anywhere, enabling wholesale avoidance of hostilities.<sup>35</sup>

Despite the long tradition of diplomatic immunity under customary international law, it was not until the early eighteenth century that the British Parliament formally acknowledged it by making the arrest of foreign diplomats unlawful.<sup>36</sup> The U.S. Congress passed a similar law in 1790, providing for absolute criminal and civil immunity for foreign diplomats, their family members and servants, and diplomatic-mission staff.<sup>37</sup> The 1790 Act made it a crime for an American to arrest or even attempt to sue any foreign diplomat or “foreign national[] connected in any capacity with a diplomatic mission located in the United States.”<sup>38</sup> That legal landscape lasted for almost two centuries but drew significant criticism for its lack of

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33. 767 Third Ave. Assocs. v. Permanent Mission of the Republic of Zaire to the U.N., 988 F.2d 295, 300–01 (2d Cir. 1993). Altering the immunities granted to foreign diplomats in the United States would likely threaten the safety of U.S. diplomats working abroad because countries largely rely on reciprocal grants of diplomatic immunity. See Bradley Larschan, *The Abisinito Affair: A Restrictive Theory of Diplomatic Immunity?*, 26 COLUM. J. TRANSNAT'L L. 283, 286 (1988) (“Obviously, host States count on reciprocal immunity for their diplomats abroad.”).

34. OGDON, *supra* note 18, at 10; see also GRANT V. MCCLANAHAN, *DIPLOMATIC IMMUNITY: PRINCIPLES, PRACTICES, PROBLEMS* 184 (1989) (“Immunity has enabled diplomats to work abroad with the peace of mind required for success in performing difficult tasks in a sometimes hostile environment.”).

35. See, e.g., William G. Morris, Note, *Constitutional Solutions to the Problem of Diplomatic Crime and Immunity*, 36 HOFSTRA L. REV. 601, 635 (2007) (“Given increased technological innovations, the ability of leaders to interact has grown enormously and has decreased the necessity of posting diplomats abroad.”).

36. See *DIPLOMATIC IMMUNITY GUIDANCE*, *supra* note 20, at 2 (“In 1708 the British Parliament formally recognized diplomatic immunity and banned the arrest of foreign envoys.”).

37. *Id.*

38. R. Scott Garley, Note, *Compensation for “Victims” of Diplomatic Immunity in the United States: A Claims Fund Proposal*, 4 FORDHAM INT'L L.J. 135, 139 (1980).

safeguards and capacity for abuse.<sup>39</sup> Starting in the twentieth century, the international community began pushing for a more restrictive form of diplomatic immunity that would protect the *functions* of a diplomat but not the diplomat in his or her individual capacity,<sup>40</sup> leading to the Vienna Convention on Diplomatic Relations in 1961.

A general formulation of diplomatic law, the Vienna Convention on Diplomatic Relations “was largely a reaction to the unlimited immunity historically granted to diplomats” under customary international law.<sup>41</sup> On April 18, 1961, thirty-four nations signed onto the Vienna Convention,<sup>42</sup> laying out what would later become the framework for diplomatic privileges and immunities in almost every country.<sup>43</sup> No prior attempt at universalizing diplomatic relations had come close to the widespread adoption of the Vienna Convention.<sup>44</sup>

Although the United States signed the Vienna Convention in 1961, it did not come into force in the United States until December 13, 1972.<sup>45</sup> Furthermore, Congress did not codify the Vienna Convention by passing the Diplomatic Relations Act of 1978 for another six years.<sup>46</sup> In addition to codifying the Vienna Convention, the Diplomatic Relations Act repealed the 1790 Act, required diplomats to carry liability insurance, and created a substantive right of action for injured parties to file suit directly against the

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39. *See id.* at 139–40 (explaining that many nations found *absolute* diplomatic immunity overly broad because it effectively stripped citizens of any legal remedy for harms caused by diplomats and others).

40. *Id.* at 141.

41. Mitchell S. Ross, *Rethinking Diplomatic Immunity: A Review of Remedial Approaches To Address the Abuses of Diplomatic Privileges and Immunities*, 4 AM. U. INT’L L. REV. 173, 180 (1989).

42. Vienna Convention on Diplomatic Relations, Apr. 18, 1961, 23 U.S.T. 3227, 500 U.N.T.S. 95 [hereinafter Vienna Convention on Diplomatic Relations]; *see Privileges and Immunities, Diplomatic and Consular Relations, Etc.*, U.N. TREATY COLLECTION [hereinafter U.N. TREATY COLLECTION], [https://treaties.un.org/pages/viewdetails.aspx?src=treaty&mtdsg\\_no=iii-3&chapter=3&lang=en](https://treaties.un.org/pages/viewdetails.aspx?src=treaty&mtdsg_no=iii-3&chapter=3&lang=en) [<https://perma.cc/A37E-N79K>] (listing parties to the Vienna Convention).

43. *See* U.N. TREATY COLLECTION, *supra* note 42 (noting 192 parties to the Convention).

44. *See* DENZA, *supra* note 19, at 2–3 (“None of the earlier attempts at multilateral codification—the Vienna Regulation of 1815[,] . . . the Resolutions adopted by the Institute of International Law in 1895 and 1929, the Harvard Draft Convention on Diplomatic Privileges and Immunities of 1932—had covered the field so thoroughly.”).

45. S. COMM. ON FOREIGN RELATIONS, 96TH CONG., LEGISLATIVE HISTORY OF THE DIPLOMATIC RELATIONS ACT iii (Comm. Print 1979) [hereinafter LEGISLATIVE HISTORY OF THE DIPLOMATIC RELATIONS ACT].

46. *Id.* For purposes of this Note, the controlling law on diplomatic immunity in the United States will be referred to as the Vienna Convention rather than the Diplomatic Relations Act, as the Diplomatic Relations Act simply states that persons entitled to diplomatic immunity in the United States “enjoy the privileges and immunities specified in the Vienna Convention.” 22 U.S.C. § 254(b) (2018).

insurer when the foreign diplomat enjoys civil immunity.<sup>47</sup> These additions addressed what Congress viewed as the principal abuse of diplomatic immunity: diplomats' lack of accountability for traffic-accident injuries.<sup>48</sup>

*B. Privileges and Immunities Accorded to Foreign Diplomats in the United States*

Under the Vienna Convention, unlike the 1790 Act, not *every* foreign national connected to a diplomatic mission is entitled to complete immunity. The Vienna Convention delineates three categories of foreign nationals: diplomatic agents, administrative and technical staff, and service staff.<sup>49</sup> Diplomatic agents and their family members are entitled to “the highest degree of privileges and immunities,”<sup>50</sup> including personal inviolability, immunity from criminal jurisdiction, immunity from civil jurisdiction, and immunity from being compelled to testify in court.<sup>51</sup> Administrative and technical staff of diplomatic missions and their family members are entitled to immunities and privileges identical to those of diplomatic agents in all respects except for civil immunity.<sup>52</sup> Administrative and technical staff enjoy functional immunity from civil suits, meaning that only acts connected with official mission duties are immune from liability.<sup>53</sup> Service-staff members possess official-acts immunity, but carry no personal inviolability, inviolability of property, or immunity from being compelled to testify in court.<sup>54</sup> Unlike diplomatic agents and administrative and technical staff, the family members of service staff maintain absolutely no privileges or immunities.<sup>55</sup>

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47. LEGISLATIVE HISTORY OF THE DIPLOMATIC RELATIONS ACT, *supra* note 45, at 31.

48. *See, e.g., id.* at 29 (noting that “[p]erhaps the most dramatic of . . . incidents” the Diplomatic Relations Act was meant to address “have involved automobile accidents in which American citizens not at fault have suffered enormous damage and injury but have been unable to collect any compensation” (statement of Sen. Paul Sarbanes)).

49. DIPLOMATIC IMMUNITY GUIDANCE, *supra* note 20, at 4–5.

50. *Id.* Diplomatic immunity extends only to certain family members, including the diplomat’s spouse. *Privileges and Immunities*, U.S. DEP’T STATE, <https://www.state.gov/ofm/accreditation/privilegesandimmunities/index.htm> [<https://perma.cc/H2MF-YH7J>]. Diplomatic immunity also extends to the diplomat’s unmarried children who are under the age of twenty-one, under the age of twenty-three and attending a college or university full time, or who have physical or mental disabilities. *Id.*

51. *Diplomatic and Consular Immunity*, U.S. DIPLOMACY, <http://www.usdiplomacy.org/diplomacytoday/law/immunity.php> [<https://perma.cc/VW6L-8ZLK>].

52. DIPLOMATIC IMMUNITY GUIDANCE, *supra* note 20, at 5.

53. *Id.* at 5. Because the family members of administrative and technical staff have no official mission duties, they are not entitled to any immunity from civil suit. *Id.*

54. *Id.*

55. *Id.*

Personal inviolability is the “cornerstone” of diplomatic law.<sup>56</sup> Under this privilege, diplomats may not be arrested, detained, or handcuffed.<sup>57</sup> Diplomats similarly may not be compulsorily searched by law enforcement officers.<sup>58</sup> Neither the real nor personal property of the diplomatic mission may be searched or seized.<sup>59</sup> Relatedly, foreign diplomats are also immune from both civil and criminal jurisdiction in the United States, meaning that any action brought against such an individual must be dismissed.<sup>60</sup> Although the Vienna Convention lays out no particular procedure for raising the defense of diplomatic immunity in civil cases,<sup>61</sup> courts have in practice granted a defendant diplomat’s motion to dismiss when supported with a State Department certification attesting to the diplomat’s status.<sup>62</sup> But the majority of cases involving individuals entitled to diplomatic immunity never see the courtroom, as many potential plaintiffs abandon suit once they learn of the diplomat’s immunity.<sup>63</sup> However, in cases where diplomats initiate suit, they waive their civil immunity in regard to any resulting counterclaims.<sup>64</sup>

Immunity from criminal jurisdiction enjoins the prosecution of diplomats for any crime, however serious the offense may be.<sup>65</sup> This immunity largely works in tandem with the inviolability of a diplomat’s person and property. Inviolability makes it especially challenging for authorities not only to prove criminal misconduct, but also to detect it at the outset.<sup>66</sup> On the rare occasions officials do institute criminal actions against diplomats, as with civil actions, courts dismiss the indictment.<sup>67</sup> That said,

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56. BARKER, *supra* note 16, at 71.

57. See DIPLOMATIC IMMUNITY GUIDANCE, *supra* note 20, at 4 (explaining that diplomatic agents may not be handcuffed “except in extraordinary circumstances”).

58. DENZA, *supra* note 19, at 222.

59. See DIPLOMATIC IMMUNITY GUIDANCE, *supra* note 20, at 4 (stating that diplomatic agents “enjoy complete personal inviolability, which means that . . . neither their property (including vehicles) nor residences may be entered or searched”).

60. *E.g.*, Sabbithi v. Saleh, 605 F. Supp. 2d 122, 126 (D.D.C. 2009).

61. DENZA, *supra* note 19, at 255.

62. See, *e.g.*, Carrera v. Carrera, 174 F.2d 496, 496–97 (D.C. Cir. 1949) (granting the defendant’s motion to dismiss after the State Department recognized defendant as an employee of the Czechoslovakian Embassy); Fun v. Pulgar, 993 F. Supp. 2d 470, 473–74 (D.N.J. 2014) (dismissing the plaintiff’s suit following State Department certification of defendant’s position as Counselor to the Permanent Mission of Peru to the United Nations).

63. DENZA, *supra* note 19, at 255.

64. DIPLOMATIC IMMUNITY GUIDANCE, *supra* note 20, at 4–5.

65. *Id.* at 4.

66. MCCLANAHAN, *supra* note 34, at 128.

67. See, *e.g.*, United States v. Khobragade, 15 F. Supp. 3d 383, 388 (S.D.N.Y. 2014) (dismissing an indictment alleging, *inter alia*, visa fraud); see also Martina E. Vandenberg & Sarah Bessell, *Diplomatic*

the opportunity to prosecute the alleged crime is not wholly lost, as criminal immunity in the receiving state does not impede the possibility of prosecution by the sending state.<sup>68</sup> However, such prosecution is unlikely.<sup>69</sup>

### C. *Limiting Abuses of Diplomatic Immunity*

Much of the concern about diplomatic immunity stems from its presumed susceptibility to abuse. News headlines detailing diplomats getting away with major crimes have likely factored significantly into this opposition.<sup>70</sup> Despite the extensive media coverage of the few egregious cases, such cases are not especially common,<sup>71</sup> and diplomats rarely commit violent crimes.<sup>72</sup> Recently, abuses have been restricted mostly to minor infractions, such as parking offenses.<sup>73</sup> One reason for this may be that the

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*Immunity and the Abuse of Domestic Workers: Criminal and Civil Remedies in the United States*, 26 DUKE J. COMP. & INT'L L. 595, 598 (2016) (noting the rarity of criminal prosecution of diplomats in the arena of domestic abuse, for example). On occasion, the government has also dropped charges against diplomats of its own volition. See Richard Gonzales, *Feds Drop Prosecution of 7 Turkish Bodyguards Involved in Assault of Protesters*, NPR (Mar. 22, 2018, 6:51 PM), <https://www.npr.org/sections/thetwo-way/2018/03/22/596227771/feds-drop-prosecution-of-7-turkish-bodyguards-involved-in-d-c-brawl> [<https://perma.cc/HW7X-AAQ8>] (dropping charges against Turkish President Recep Tayyip Erdogan's bodyguards for an assault allegedly committed against American protesters).

68. Ross, *supra* note 41, at 190.

69. See Steven Erlanger, *Officials Defend Concept of Diplomatic Immunity*, N.Y. TIMES (Jan. 7, 1997), <https://www.nytimes.com/1997/01/07/nyregion/officials-defend-concept-of-diplomatic-immunity.html> [<https://perma.cc/7NLC-RGYD>] (“Almost invariably, . . . diplomats . . . [involved in criminal] cases are called home by their governments, or expelled by the host government, and do not face criminal charges.”) *But see* MCCLANAHAN, *supra* note 34, at 136 (“[T]he diplomat’s knowledge of possible prosecution by his own government can be an effective deterrent.”).

70. See BARKER, *supra* note 16, at 6–10 (describing the Da Silveira and Abisinito affairs as catalysts for attempted reforms to diplomatic immunity).

71. See Erlanger, *supra* note 69 (“Serious cases themselves involving diplomats are relatively rare, State Department officials said, with about 10 to 15 cases a year that are nearly all questions of shoplifting or drunken driving, and usually involve the dependents of diplomats.”); see also LEGISLATIVE HISTORY OF THE DIPLOMATIC RELATIONS ACT, *supra* note 45, at 31 (“Most of the diplomats who are our friends and neighbors are scrupulous in avoiding abuse of this [diplomatic] privilege, but sadly a minority is not.” (statement of Sen. Charles Mathias)).

72. See David Osborne, *Can a Diplomat Get Away with Murder?*, INDEPENDENT (Jan. 10, 1997, 1:02 AM), <https://www.independent.co.uk/news/world/can-a-diplomat-get-away-with-murder-1282444.html> [<https://perma.cc/WHY4-YEB8>] (calculating that in 1995, out of the eighteen thousand individuals entitled to diplomatic immunity, “less than one tenth of one per cent were involved in serious crime”). As a comparison, in 1995, the United States had a total violent-crime rate almost seven times higher than that of diplomats alone. See *Crime in the United States*, FBI: UCR, <https://ucr.fbi.gov/crime-in-the-u.s/2014/crime-in-the-u.s.-2014/tables/table-1> [<https://perma.cc/BGW8-YWYT>] (showing a general population violent-crime rate of approximately 0.68 percent).

73. See Elizabeth Bumiller, *Diplomats Make No Apologies for Immunity*, N.Y. TIMES (Apr. 13, 1997), <https://www.nytimes.com/1997/04/13/nyregion/diplomats-make-no-apologies-for-immunity.html> [<https://perma.cc/W9XG-VB5M>] (discussing the problem of diplomatic parking violations). Examples of diplomatic parking offenses include “blocking fire hydrants” and leaving

Vienna Convention—supplemented by state practice—implemented two limiting mechanisms to curb abuse, namely waiver of diplomatic immunity and designation of a diplomat as *persona non grata*.

When the federal government wishes to prosecute a foreign diplomat but cannot due to the diplomat's immunity, the prosecution can request that the foreign government waive the diplomat's immunity.<sup>74</sup> The U.S. State Department's official position is that it will request a waiver whenever "the prosecutor advises that he or she would prosecute but for immunity."<sup>75</sup> The practice of waiver derives from one of the primary ambitions of the Vienna Convention: protecting diplomacy and the diplomat's functions, rather than the diplomat as an individual.<sup>76</sup> The United States has had mixed results in securing waivers.<sup>77</sup> Elements factoring into these variable outcomes include the state of relations with the sending country,<sup>78</sup> the severity of the alleged crime,<sup>79</sup> the amount of evidence supporting the allegation,<sup>80</sup> and the potential public outcry in the sending state were a waiver to be granted.<sup>81</sup>

Likely the most famous case of waiver involved Georgian diplomat Gueorgui Makharadze, who struck and killed an American teenager while driving under the influence in Washington, D.C.<sup>82</sup> Anger over the sixteen-year-old's death spread through Capitol Hill, and New Hampshire Senator Judd Gregg called upon President Bill Clinton to suspend the \$30 million in

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millions of dollars' worth of parking tickets unpaid. Ray Sanchez, *Diplomats Owe \$17 Mln in New York Parking Fines*, REUTERS (Sept. 24, 2011, 5:16 PM), <https://www.reuters.com/article/uk-un-fines-newyork/diplomats-owe-17-mln-in-new-york-parking-fines-idUSLNE78N00D20110924> [<https://perma.cc/F283-L3XQ>].

74. Vienna Convention on Diplomatic Relations, *supra* note 42, art. 32.

75. DIPLOMATIC IMMUNITY GUIDANCE, *supra* note 20, at 14.

76. *See supra* note 40 and accompanying text.

77. *See Erlanger, supra* note 69 (noting that waiver is granted about half the time).

78. *See infra* notes 82–87 and accompanying text (demonstrating the importance of diplomatic relations in granting a waiver).

79. *See infra* notes 82–87 and accompanying text (granting waiver following a teenage girl's death in a drunk driving accident when the driver was driving seventy-four miles per hour in a twenty-five-mile-per-hour zone).

80. *See* DIPLOMATIC IMMUNITY GUIDANCE, *supra* note 20, at 14 (stating the State Department's ability to get a waiver depends "to a large degree on the strength (and documentation) of the case at issue").

81. *See* Ellen Barry & Benjamin Weiser, *As Indian Diplomat Exits After Arrest, a Culture Clash Lingers*, N.Y. TIMES (Jan. 10, 2014), <https://www.nytimes.com/2014/01/11/world/asia/indian-diplomat-flies-home-after-indictment-in-us.html> [<https://perma.cc/A6LN-J5L6>] (explaining the tension arising from the arrest of an Indian foreign official and India's refusal to grant a waiver).

82. Charlie Savage, *Pakistan Case Tests Laws on Diplomatic Immunity*, N.Y. TIMES (Feb. 22, 2011), <https://www.nytimes.com/2011/02/23/world/asia/23immunity.html> [<https://perma.cc/MPQ3-YCBW>]; Osborne, *supra* note 72.

aid sent to Georgia annually.<sup>83</sup> Although there was little doubt that the State Department would formally request a waiver, most did not expect the Georgian government to comply.<sup>84</sup> But Georgia *did* waive Makharadze's immunity, and he was then prosecuted and pled guilty to involuntary manslaughter.<sup>85</sup> In making this decision, Georgian President Eduard Shevardnadze noted that he considered the "seriousness" of the accident, Makharadze's "obvious" guilt, and a wish not to obstruct U.S. efforts to prosecute Makharadze.<sup>86</sup> The Georgian government also emphasized its interest in maintaining friendly relations with the United States.<sup>87</sup>

When a sending state denies a request for waiver of diplomatic immunity, the United States may designate a diplomat *persona non grata*,<sup>88</sup> meaning that the individual is "unacceptable" or unwelcome in the receiving state.<sup>89</sup> Following a *persona non grata* designation, the diplomat is expelled from the receiving state.<sup>90</sup> This does not permit the diplomat's prosecution—as he or she does not lose diplomatic status—just their ability to remain in the receiving state.<sup>91</sup> The Vienna Convention requires no formal procedure or evidence to support such a determination, leaving this measure entirely up to the discretion of the U.S. State Department.<sup>92</sup> In practice, the United States has seldom utilized this tool, seemingly due to its potential adverse effects on diplomatic relations.<sup>93</sup>

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83. Osborne, *supra* note 72.

84. *Id.*

85. Savage, *supra* note 82.

86. Michael Janofsky, *Georgian Diplomat Pleads Guilty in Death of Teen-Age Girl*, N.Y. TIMES (Oct. 9, 1997), <https://www.nytimes.com/1997/10/09/us/georgian-diplomat-pleads-guilty-in-death-of-teen-age-girl.html> [<https://perma.cc/32LB-TM4X>].

87. See Steven Lee Myers, *Georgia Prepared To Waive Immunity of a Top Diplomat*, N.Y. TIMES (Jan. 11, 1997), <https://www.nytimes.com/1997/01/11/us/georgia-prepared-to-waive-immunity-of-a-top-diplomat.html> [<https://perma.cc/4BG5-9MDL>] ("Georgia has acceded to the deep concerns of the United States . . . and therefore is prepared to waive immunity in this case in the interest of U.S.-Georgian relations . . . ." (statement of the Georgian Embassy to the United States)).

88. Vienna Convention on Diplomatic Relations, *supra* note 42, art. 9.

89. DENZA, *supra* note 19, at 49.

90. Ross, *supra* note 41, at 188.

91. Presidential Power To Expel Diplomatic Personnel from the United States, 4A Op. O.L.C. 207, 207 (1980) [hereinafter Presidential Power To Expel Diplomatic Personnel].

92. See Vienna Convention on Diplomatic Relations, *supra* note 42, art. 9(1) (explaining that the host state may designate a diplomat *persona non grata* "at any time and without having to explain its decision").

93. Ross, *supra* note 41, at 188. *But see* Laurel Wamsley, *U.S. Expels 60 Russian Officials, Closes Consulate in Seattle*, NPR (Mar. 26, 2018, 9:00 AM), <https://www.npr.org/sections/thetwo-way/2018/03/26/596966272/us-expels-dozens-of-russian-diplomats-closes-consulate-in-seattle> [<https://perma.cc/U592-DB7W>] (designating sixty Russian officials *personae non gratae* and closing the Russian consulate in Seattle after the poisoning of a former Russian spy and his daughter in England).

## II. THE LEGALITY OF A RETROACTIVE APPLICATION OF DIPLOMATIC IMMUNITY

This Part argues that the purpose of the Vienna Convention on Diplomatic Relations and its codification in the Diplomatic Relations Act cuts against a retroactive application of diplomatic immunity. Yet, federal courts have repeatedly refused to make factual determinations regarding an individual's diplomatic status, instead choosing to defer to State Department certifications under the political question doctrine. In this way, federal courts have—at least indirectly—allowed the practice of retroactive diplomatic immunity to stand on two occasions. After discussing these two cases, this Part then explains that both retroactive diplomatic immunity and judicial deference under the political question doctrine are ripe for abuse and inconsistent with other forms of immunity present in the U.S. legal system, including presidential immunity, qualified immunity, and defense witness immunity.

### A. *Retroactive Diplomatic Immunity Under the Vienna Convention on Diplomatic Relations*

The Vienna Convention does not address retroactive diplomatic immunity.<sup>94</sup> In debating the Diplomatic Relations Act more than a decade after the United States signed the Vienna Convention, not a single member of Congress appeared to anticipate retroactive diplomatic immunity.<sup>95</sup> Rather, congresspersons were primarily concerned with requiring diplomats to have a certain level of liability insurance to compensate victims of traffic accidents.<sup>96</sup> Members of Congress might have found a retroactive grant of diplomatic immunity to be absurd because such a grant runs squarely afoul of the Vienna Convention's stated objective: "[T]he purpose of [diplomatic] privileges and immunities is not to benefit individuals but to ensure the efficient performance of the *functions* of diplomatic missions as representing

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94. *See generally* Vienna Convention on Diplomatic Relations, *supra* note 42 (lacking any mention of diplomatic immunity). For purposes of this Part, retroactive diplomatic immunity refers to the phenomenon of an individual who is factually not a diplomat obtaining diplomatic status and its attendant privileges and immunities for the purpose of immunizing past wrongful conduct.

95. *See generally* LEGISLATIVE HISTORY OF THE DIPLOMATIC RELATIONS ACT, *supra* note 45 (lacking any mention of a retroactive application of diplomatic immunity).

96. *See, e.g., id.* at 29 ("Perhaps the most dramatic of [diplomatic] incidents have involved automobile accidents in which American citizens not at fault have suffered enormous damage and injury but have been unable to collect any compensation whatever. The whole burden of the accident has fallen on its innocent victim." (statement of Sen. Paul Sarbanes)).

States[.]”<sup>97</sup> A retroactive grant of immunity serves the individual—not diplomatic functions—because the individual was not a diplomat and therefore had no official functions when the alleged wrongful conduct occurred. Granting diplomatic immunity for the purpose of evading a lawsuit or criminal prosecution in no way promotes the Vienna Convention’s other stated purpose of “maintain[ing] . . . international peace and security, and the promotion of friendly relations among nations.”<sup>98</sup>

Retroactive diplomatic immunity is similarly inconsistent with the historic rationales for diplomatic immunity—personal representation, extraterritoriality, and functional necessity.<sup>99</sup> A retroactive grant of diplomatic immunity does not promote the diplomat personifying the power and sanctity of the royal prince because the individual seeking a retroactive application never actually represented the foreign government—or “prince”—in connection with the conduct the individual seeks to immunize.<sup>100</sup> Extraterritoriality, for its part, refers to the legal fiction that the diplomat does not actually reside in the receiving state but rather is a passerby not subject to local law.<sup>101</sup> Although true diplomats may not be subject to the jurisdiction of the United States, they are typically subject to the jurisdiction of their home countries.<sup>102</sup> This would also be the case for a person seeking retroactive diplomatic immunity, but the pragmatic consequences would likely be much different. Because the diplomat would be immune in the United States after committing the conduct in question and—even where the act is a crime in the sending state—would not likely be prosecuted in the same foreign country that just granted the individual a major favor in the form of diplomatic status, such an individual could

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97. Vienna Convention on Diplomatic Relations, *supra* note 42, pmbl. (emphasis omitted) (emphasis added). The legislative history of the Diplomatic Relations Act similarly supports this purpose. See, e.g., LEGISLATIVE HISTORY OF THE DIPLOMATIC RELATIONS ACT, *supra* note 45, at 32 (“I approve of the scope of diplomatic immunity provided by the Vienna Convention and recognize that the purpose of such immunity is not to benefit individuals, but to insure the efficient performance of diplomatic duties.” (statement of Sen. Charles Mathias)).

98. Vienna Convention on Diplomatic Relations, *supra* note 42, pmbl. Arguably, however, retroactive grants of diplomatic immunity may promote international peace by avoiding conflicts over an individual’s diplomatic status.

99. These theories are discussed in depth *supra* Part I.A.

100. See DAVID B. MICHAELS, INTERNATIONAL PRIVILEGES AND IMMUNITIES: A CASE FOR A UNIVERSAL STATUTE 47–48 (1971) (explaining the theory of personal representation).

101. Yu-Long Ling, *A Comparative Study of the Privileges and Immunities of United Nations Member Representatives and Officials with the Traditional Privileges and Immunities of Diplomatic Agents*, 33 WASH. & LEE L. REV. 91, 93–94 (1976) (“Extraterritoriality means that diplomatic envoys must be treated as if they are still living in the territory of the sending state.”).

102. MCCLANAHAN, *supra* note 34, at 136 (“A limitation on diplomatic immunity . . . lies in the lack of immunity of all diplomats from the jurisdiction and laws of their own governments.”).

potentially evade all consequences for his or her wrongdoing. Finally, retroactive diplomatic immunity fails under the theory of functional necessity for the simple reason that the individual seeking immunity could not have been performing functions needing protection when the alleged wrongful conduct occurred, as the individual was not in fact a diplomat performing diplomatic services.<sup>103</sup>

*B. Reviewability of State Department Certificates and the Political Question Doctrine*

Despite the fact that retroactive diplomatic immunity cuts against the very purpose of the Vienna Convention, it may nonetheless prevail in court. This is because, under the political question doctrine, “some issues which prima facie and by usual criteria would seem to be for the courts, will not be decided by them but, extra-ordinarily, [are] left for political decision.”<sup>104</sup> In *Baker v. Carr*,<sup>105</sup> the Supreme Court spelled out six factors courts should consider when determining whether a case is justiciable under the political question doctrine.<sup>106</sup> These include “a textually demonstrable constitutional commitment of the issue to a coordinate political department . . . or a lack of judicially discoverable and manageable standards for resolving [the issue]” and several prudential factors.<sup>107</sup> In recent years, however, the Supreme Court has disregarded the prudential concerns in favor of the first two factors.<sup>108</sup> The political question doctrine arose primarily out of a concern for separation of powers.<sup>109</sup> Yet some critics consider the doctrine an objectionable dereliction of federal courts’ Article III duties.<sup>110</sup>

Invoking the political question doctrine, federal courts have long deferred to the executive branch on questions of foreign relations,<sup>111</sup>

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103. See *supra* notes 30–35 and accompanying text (discussing functional necessity).

104. Louis Henkin, *Is There a “Political Question” Doctrine?*, 85 YALE L.J. 597, 599 (1976).

105. *Baker v. Carr*, 369 U.S. 186 (1962).

106. *Id.* at 217.

107. *Id.* The prudential concerns that favor finding a case nonjusticiable under the political question doctrine include “the impossibility of deciding [the issue] without an initial policy determination of a kind clearly for nonjudicial discretion,” “the impossibility of a court’s undertaking independent resolution without expressing lack of the respect due coordinate branches of government,” “an unusual need for unquestioning adherence to a political decision already made,” and “the potentiality of embarrassment from multifarious pronouncements by various departments on one question.” *Id.*

108. BRADLEY & GOLDSMITH, *supra* note 14, at 66; see also *infra* notes 249–50 and accompanying text (discussing *Zivotofsky ex rel. Zivotofsky v. Clinton* (*Zivotofsky I*), 566 U.S. 189 (2012)).

109. Henkin, *supra* note 104, at 597.

110. See *infra* notes 242–49 and accompanying text (examining criticisms of the political question doctrine).

111. See, e.g., *El-Shifa Pharm. Indus. Co. v. United States*, 607 F.3d 836, 844 (D.C. Cir. 2010) (“[C]ourts cannot reconsider the wisdom of discretionary foreign policy decisions.”); see also Beth

including whether an individual is a diplomat entitled to diplomatic immunity.<sup>112</sup> In fact, courts have held that diplomatic status is established by a mere recognition of such by the State Department and that courts should not assess the facts when such certification exists<sup>113</sup>—even in the presence of potential fraud.<sup>114</sup> Although the vast majority of State Department certifications of diplomatic status are valid,<sup>115</sup> there are a number of reasons why the State Department might—knowingly or otherwise—enable retroactive diplomatic immunity. These may include the State Department’s own genuine error, lack of resources, information asymmetry regarding the individual’s wrongdoing prior to the request for diplomatic status,<sup>116</sup> the State Department’s desire to avoid a foreign-relations debacle over a single individual’s diplomatic status,<sup>117</sup> or corruption.<sup>118</sup>

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Stephens, *The Modern Common Law of Foreign Official Immunity*, 79 *FORDHAM L. REV.* 2669, 2710 (2011) (“In cases touching upon foreign affairs, the courts generally give deference to the views of the Executive Branch . . .”).

112. See, e.g., *In re Baiz*, 135 U.S. 403, 421 (1890) (“[T]he certificate of the Secretary of State . . . is the best evidence to prove the diplomatic character of a person . . .”); *United States v. Lumumba*, 741 F.2d 12, 15 (2d Cir. 1984) (“[R]ecognition by the executive branch—not to be second-guessed by the judiciary—is essential to establishing diplomatic status.”); *Carrera v. Carrera*, 174 F.2d 496, 497 (D.C. Cir. 1949) (“It is enough that an ambassador has requested immunity, that the State Department has recognized that the person for whom it was requested is entitled to it, and that the Department’s recognition has been communicated to the court.”); *De Sousa v. Dep’t of State*, 840 F. Supp. 2d 92, 106 (D.D.C. 2012) (“The plaintiff’s entitlement to immunity, however, is a political question that lies beyond the competence of this Court.”).

113. See *Ali v. Dist. Dir.*, 743 F. App’x 354, 358 (11th Cir. 2018) (“In the United States in particular, a person’s diplomatic status is established when it is recognized by the Department of State.” (quotations and citations omitted)); *Zdravkovich v. Consul Gen. of Yugoslavia*, No. 98-7034, 1998 U.S. App. LEXIS 15466, at \*2 (D.C. Cir. June 23, 1998) (per curiam) (“The courts are *required* to accept the State Department’s determination that a foreign official possesses diplomatic immunity from suit.” (emphasis added)).

114. See *Gonzalez Paredes v. Vila*, 497 F. Supp. 2d 187, 194 (D.D.C. 2007) (rejecting the possibility of fraud as an exception to diplomatic immunity that would allow a court to revoke or question a diplomat’s status).

115. See generally U.S. DEP’T OF STATE: OFF. OF FOREIGN MISSIONS, ACCREDITATION POLICY HANDBOOK (2018) (explaining the State Department’s extensive accreditation process).

116. Cf. Robbie Gramer, Dan De Luce & Colum Lynch, *How the Trump Administration Broke the State Department*, FOREIGN POL’Y (July 31, 2017), <https://foreignpolicy.com/2017/07/31/how-the-trump-administration-broke-the-state-department> [<https://perma.cc/R5QG-FWT9>] (discussing the firing of a number of State Department employees, the “White House . . . slashing [the State Department’s] budget,” and a number of crucial positions left unfilled).

117. See, e.g., Ellen Barry, *India Tires of Diplomatic Rift over Arrest of Devyani Khobragade*, N.Y. TIMES (Dec. 20, 2014), <https://www.nytimes.com/2014/12/21/world/asia/india-tires-of-diplomatic-rift-over-arrest.html> [<https://perma.cc/4D5H-JG6J>] (providing an example where the State Department granted an individual diplomatic status for foreign-policy reasons).

118. Cf. Devan Cole, *US Government Scores Worst Mark Since 2011 in Global Corruption Survey*, CNN (Jan. 29, 2019, 3:01 PM), <https://www.cnn.com/2019/01/29/politics/us-corruption-rating/index.html> [<https://perma.cc/M6WC-AEFT>] (discussing corruption in the U.S. government); Jay

Although this potential for error exists, federal courts have continued to dismiss cases involving State Department certifications—even where said certifications were both legally and factually dubious.<sup>119</sup> This Section discusses two cases, *Abdulaziz v. Metropolitan Dade County*<sup>120</sup> and *United States v. Khobragade*,<sup>121</sup> in which the Eleventh Circuit and Southern District of New York, respectively, implicitly refused to address whether diplomatic immunity can be sustained when such status has been retroactively afforded by the State Department. These two cases, which are the only federal or state cases involving a retroactive application of diplomatic immunity,<sup>122</sup> demonstrate that despite the absurdity of such an application under the Vienna Convention,<sup>123</sup> lack of judicial review enables this conduct to persist.

1. *Abdulaziz v. Metropolitan Dade County*. In late February 1982, a Florida State Attorney’s office obtained a warrant to search Turki bin Abdulaziz’s home, on the basis that Abdulaziz was holding a woman there “against her will.”<sup>124</sup> The State Attorney’s office obtained the search warrant only after learning from the U.S. State Department that Abdulaziz, a member of the Saudi royal family, did not have diplomatic immunity.<sup>125</sup> When police

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Cost, *The Swamp Isn’t Easy To Drain*, ATLANTIC (July 14, 2018), <https://www.theatlantic.com/ideas/archive/2018/07/the-swamp-isnt-easy-to-drain/565151> [<https://perma.cc/M6WC-AEFT>] (same); Ayesha Rascoe, *Trump Says He’s Concerned About Corruption, but Advocates Say His Record Is Weak*, NPR (Oct. 9, 2019, 5:43 AM), <https://www.npr.org/2019/10/09/768134196/trump-says-hes-concerned-about-corruption-but-advocates-say-his-record-is-weak> [<https://perma.cc/A77R-M9MV>] (same).

119. *See, e.g.*, *Fun v. Pulgar*, 993 F. Supp. 2d 470, 473–74 (D.N.J. 2014) (disregarding the fact that the defendant’s post as a diplomat may have been terminated by the sending state prior to the case at hand).

120. *Abdulaziz v. Metro. Dade Cty.*, 741 F.2d 1328 (11th Cir. 1984).

121. *United States v. Khobragade*, 15 F. Supp. 3d 383 (S.D.N.Y. 2014).

122. These cases were discovered by combing through the results of the following Westlaw search: “adv: “diplomatic immunity”.” There is arguably one other federal case that involves a retroactive application of diplomatic immunity. *See generally* *Republic of Phil. v. Marcos*, 665 F. Supp. 793 (N.D. Cal. 1987). However, this Note does not discuss *Marcos* as it is actually a case of foreign sovereign official immunity, and therefore is not applicable. *See id.* at 795 (involving a subpoena served upon the Filipino Solicitor General regarding a lawsuit filed against the former president of the Philippines). Other grants of retroactive grants of diplomatic immunity may exist, perhaps unknown and unpublished because the plaintiff or government failed to pursue claims in light of the potential defendant’s new diplomatic status.

123. *See supra* Part II.A.

124. *Abdulaziz*, 741 F.2d at 1330.

125. *Id.* Abdulaziz was the brother of King Salman of Saudi Arabia and had last worked in the Saudi Arabian government approximately four years prior to the conduct and case at issue. *See Condolences Pour in from Across World on Death of Prince Turki bin Abdulaziz*, ARAB NEWS (Nov. 14, 2016, 12:00 AM), <http://www.arabnews.com/node/1010556/saudi-arabia> [<https://perma.cc/X2WB-Z5BT>] (noting that Abdulaziz served as Saudi Arabia’s “deputy minister of defense from 1968 to 1978”).

officers showed up at Abdulaziz's home to execute the warrant, they were met with armed guards, and a kerfuffle ensued.<sup>126</sup>

On March 2, 1982, Abdulaziz and his family brought suit against Miami-Dade County and the police officers involved in the search, alleging violations of their Fourth and Fourteenth Amendment rights.<sup>127</sup> The defendant police officers then counterclaimed on March 11, 1982, "alleging injuries from the encounter."<sup>128</sup> However, on April 1, 1982, at the request of the Saudi government and a few weeks after the counterclaim was filed, the State Department *then* certified that Abdulaziz and his family were entitled to diplomatic status.<sup>129</sup> At that point, Abdulaziz moved to dismiss both his complaint and the defendants' counterclaim on grounds of diplomatic immunity from suit.<sup>130</sup> The defendants argued that the counterclaim should not be dismissed, "assert[ing] that the immunity was unsubstantiated [and] . . . waived."<sup>131</sup>

The court held that the State Department's certification of Abdulaziz's diplomatic status, after the alleged wrongdoing occurred and after the trial had already begun, was determinative.<sup>132</sup> It did not matter that the State Department had affirmed Abdulaziz's *lack* of diplomatic status leading up to the attempted search of his home.<sup>133</sup> It did not matter that Abdulaziz had not carried out any diplomatic functions while living in the United States.<sup>134</sup> And it did not matter that, for all intents and purposes, Abdulaziz was not a diplomat.<sup>135</sup>

Rather, the court relied on language from the Senate Report on the Diplomatic Relations Act, which "indictate[d] that § 254d [of the Act] intend[ed] dismissal by a court . . . of any action or proceeding where

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126. *Abdulaziz*, 741 F.2d at 1330. Although the facts are unclear as to what happened at Abdulaziz's home, some have characterized it as a "brawl." See Gregory Jaynes, *Royal Saudi Family in Miami Shows It Has a Gift for Giving*, N.Y. TIMES (May 27, 1982), <https://www.nytimes.com/1982/05/27/us/royal-saudi-family-in-miami-shows-it-has-a-gift-for-giving.html> [<https://perma.cc/AM8H-J4KC>]. One of the police officers claimed he was "kicked and spat upon." *Id.*

127. *Abdulaziz*, 741 F.2d at 1330.

128. *Id.*

129. *Id.*

130. *Id.* Abdulaziz likely moved to dismiss his own complaint as well because, under the Diplomatic Relations Act, filing an initial complaint constitutes waiver of diplomatic immunity in regard to any resulting counterclaims. See *supra* note 64 and accompanying text.

131. *Abdulaziz*, 741 F.2d at 1330.

132. See *id.* at 1332 (regarding Abdulaziz's later grant of immunity as conclusive).

133. See *id.*

134. See *id.*

135. See *id.*

immunity is found to exist.”<sup>136</sup> The court found that the State Department certification was enough to satisfy this “existence” requirement because—presumably under the political question doctrine—“courts have generally accepted as conclusive the views of the State Department as to the fact of diplomatic status.”<sup>137</sup> The court further based its reasoning on the fact that Abdulaziz was eligible for but had not yet “been granted diplomatic status at the time he initiated his . . . suit,”<sup>138</sup> all the while disregarding that, theoretically, thousands of nondiplomats would similarly be eligible.<sup>139</sup>

In its affirmance of the district court’s dismissal of the case, the Eleventh Circuit explained that “once the . . . Department of State has regularly certified a visitor . . . as having diplomatic status, the courts are bound to accept that determination, and that the diplomatic immunity . . . serves as a defense to suits *already commenced*.”<sup>140</sup> And so, despite irregular evidence, the Eleventh Circuit refused to analyze the facts in concluding that Abdulaziz was someone who was “regularly certified” as a diplomat so as to necessitate dismissal.<sup>141</sup>

Following this decision, *Abdulaziz* has been routinely cited for the proposition that courts must accord substantial deference to State Department determinations of diplomatic status.<sup>142</sup> However, no federal or

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136. *Id.* at 1331 (quotations and citation omitted).

137. *Id.* Although the court is relatively conclusory in its opinion and does not expressly state that it is dismissing the case on political question grounds, practically, it is. Courts often view issues relating to foreign affairs as nonjusticiable political questions warranting dismissal. *See* PETER W. LOW, JOHN C. JEFFRIES, JR. & CURTIS A. BRADLEY, *FEDERAL COURTS AND THE LAW OF FEDERAL-STATE RELATIONS* 482 (9th ed. 2018) (“In *Baker v. Carr*, the [Supreme] Court acknowledged that foreign affairs was an area where the political question doctrine might have particular salience.”); *see also* Linda Champlin & Alan Schwarz, *Political Question Doctrine and Allocation of the Foreign Affairs Power*, 13 *HOFSTRA L. REV.* 215, 217 (1985) (noting that although the political question doctrine “has been cut back in other areas, the doctrine is thriving and growing in its application to the foreign relations power.”). Although the outcome of dismissal is the same, over time, courts have differed in how they describe the treatment of cases involving foreign affairs. For example, “[i]n some cases, . . . the courts simply treat[] the government’s decision as an unreviewable fact. In others, as with those that challenge[] the powers of particular branches of government, the courts abstain[] from hearing the case altogether.” Harlan Grant Cohen, *A Politics-Reinforcing Political Question Doctrine*, 49 *ARIZ. ST. L.J.* 1, 11 (2017).

138. *Abdulaziz*, 741 F.2d at 1331.

139. The State Department itself claims—perhaps facetiously—that “everyone” can be a diplomat. *Who Else Can Be a Diplomat? Everyone!*, U.S. DEP’T STATE: DISCOVER DIPLOMACY, <https://diplomacy.state.gov/diplomacy/who-else-can-be-a-diplomat-everyone> [<https://perma.cc/75JY-UCWL>]. The Vienna Convention itself does not specify any absolute requirements for an individual to qualify as a diplomat. *See generally* Vienna Convention on Diplomatic Relations, *supra* note 42 (lacking any mention of education or work-experience requirements, for example).

140. *Abdulaziz*, 741 F.2d at 1329–30 (emphasis added).

141. *Id.*

142. *See, e.g.,* *United States v. Al-Hamdi*, 356 F.3d 564, 571 (4th Cir. 2004) (explaining that the State Department has wide discretion in classifying diplomats).

state court relied on *Abdulaziz* for the proposition that diplomatic immunity may apply retroactively for persons who arguably are not diplomats and were not diplomats at the time of the act in controversy for another thirty years, until the Khobragade scandal.

2. *United States v. Khobragade*. On December 12, 2013, Devyani Khobragade, a deputy consul general at the Indian consulate in New York City, was arrested on charges of “visa fraud and making false statements to the government,”<sup>143</sup> causing a veritable “diplomatic rift” between India and the United States.<sup>144</sup> Immediately following the arrest, Indian news outlets decried Khobragade’s arrest,<sup>145</sup> leading to Indian officials removing the security barriers around the U.S. Embassy in India and revoking certain privileges accorded to U.S. diplomats.<sup>146</sup> The scandal culminated in the resignation of U.S. Ambassador to India Nancy Jo Powell.<sup>147</sup> The Indian media particularly condemned the fact that Khobragade was arrested, handcuffed, strip-searched, and kept in a holding cell before being released on bond,<sup>148</sup> something U.S. officials said was simply standard protocol.<sup>149</sup>

Looking behind the relatively mundane charge of visa fraud, the reality of Khobragade’s offense is far more troubling. The visa in question was obtained for Khobragade’s domestic worker, Sangeeta Richard.<sup>150</sup> Richard immigrated to the United States from India to work as Khobragade’s

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143. *United States v. Khobragade*, 15 F. Supp. 3d 383, 383 (S.D.N.Y. 2014).

144. Ellen Barry, *India Tires of Diplomatic Rift over Arrest of Devyani Khobragade*, N.Y. TIMES (Dec. 20, 2014), <https://www.nytimes.com/2014/12/21/world/asia/india-tires-of-diplomatic-rift-over-arrest.html> [https://perma.cc/ZDA3-ZECL].

145. See, e.g., Namrata Brar, *Devyani Khobragade Case: She Was Strip Searched ‘Like Other Arrestees’ Say US Marshals*, NDTV (Dec. 18, 2013, 7:09 PM), <https://www.ndtv.com/india-news/devyani-khobragade-case-she-was-strip-searched-like-other-arrestees-say-us-marshals-544910> [https://perma.cc/RE66-ZL78] (describing Khobragade’s arrest as inexplicable and humiliating); Arpita De, *Who Is Devyani Khobragade?*, TIMES INDIA (Dec. 20, 2013, 7:09 PM), <https://timesofindia.indiatimes.com/india/Who-is-Devyani-Khobragade/articleshow/27659238.cms> [https://perma.cc/KK5R-FL7R] (characterizing Khobragade’s arrest and its aftermath as “an assault on her person and her reputation”).

146. In the midst of the Khobragade affair, Indian officials revoked the U.S. Embassy’s “food and alcohol import privileges” and the right of American consular employees to be free from arrest for certain offenses. Barry & Weiser, *supra* note 81.

147. See Barry, *supra* note 144 (noting that Ambassador Powell’s resignation “was widely seen here as fallout from the imbroglio”).

148. Barry & Weiser, *supra* note 81.

149. Gardiner Harris, *Outrage in India, and Retaliation, over a Female Diplomat’s Arrest in New York*, N.Y. TIMES (Dec. 17, 2013), <https://www.nytimes.com/2013/12/18/world/asia/outrage-in-india-over-female-diplomats-arrest-in-new-york.html> [https://perma.cc/H7JR-N8SJ].

150. Barry & Weiser, *supra* note 81.

childcare provider and occasional housekeeper.<sup>151</sup> In obtaining an A-3 visa on Richard's behalf, Khobragade confirmed to the U.S. government that Richard's working conditions would comply with U.S. labor laws, meaning she would pay Richard at least minimum wage and overtime when applicable.<sup>152</sup> But Richard did not receive even the bare minimum. Rather, Richard was often forced to work over one hundred hours per week—with no days off—and at an hourly wage of \$1.42.<sup>153</sup> Contrary to what Khobragade maintained in the visa application, Richard did not receive any holidays, sick days, or vacation days.<sup>154</sup> Khobragade also declined to return Richard's passport to her "despite several requests" to do so.<sup>155</sup> After Khobragade refused to pay Richard \$9.75 per hour—the wage stipulated in the employment contract presented to the U.S. government—or terminate Richard's employment and allow her to return to India as she requested on several occasions, Richard fled.<sup>156</sup>

Richard is not alone in the treatment she endured while working for Khobragade. In fact, the trafficking and abuse of domestic workers by foreign officials has become an issue in the United States.<sup>157</sup> In the last decade, domestic workers have filed approximately twenty lawsuits against diplomats and other foreign envoys living in the United States.<sup>158</sup> This number likely does not represent the scope of the problem, as cases often go unreported and "[s]ome workers may only rarely be allowed to leave the home or make contact with outsiders, or may have little knowledge of their rights."<sup>159</sup> Despite the severity of these circumstances, some commentators

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151. Indictment at 3–7, *United States v. Khobragade*, 15 F. Supp. 3d 383 (S.D.N.Y. 2014) (No. 14-Crim-008) [hereinafter *Indictment*].

152. *Id.* at 3–4.

153. *Id.* at 3.

154. *Id.* at 10, 14.

155. *Id.* (alleging that during one conversation, Khobragade told Richard she would only return her passport once her three-year employment elapsed, in violation of U.S. law).

156. *Id.* at 16.

157. See Vandenberg & Bessell, *supra* note 67, at 596–99 (explaining that "many diplomatic trafficking cases are never criminally prosecuted" and that significant improvement is needed in the enforcement of such cases). Research from the Institute for Policy Studies in Washington, D.C. shows that domestic workers employed by foreign officials commonly "have their passports taken away, [are] barred from contacting friends[,] and . . . earn salaries of \$100 to \$400 a month." Somini Sengupta, *An Immigrant's Legal Enterprise; In Suing Employer, Maid Fights Diplomatic Immunity*, N.Y. TIMES (Jan. 12, 2000), <https://www.nytimes.com/2000/01/12/nyregion/immigrant-s-legal-enterprise-suing-employer-maid-fights-diplomatic-immunity.html> [<https://perma.cc/B4KH-85GV>].

158. Benjamin Weiser & Vivian Yee, *Claim Against Indian Diplomat Has Echoes of Previous Cases*, N.Y. TIMES (Jan. 9, 2014), <https://www.nytimes.com/2014/01/10/nyregion/claims-of-diplomats-mistreating-household-staff-are-far-from-the-first.html> [<https://perma.cc/34DU-KNB3>].

159. *Id.*

explain away the mistreatment of domestic workers as merely a difference in culture.<sup>160</sup>

But Richard's case was reported, and the U.S. Attorney's Office for the Southern District of New York filed an indictment against Khobragade on January 9, 2014.<sup>161</sup> Khobragade promptly moved to dismiss the indictment, claiming diplomatic immunity<sup>162</sup> even though she was a consular officer—not a diplomat—when she allegedly violated U.S. law, when she was being investigated, and when she was arrested.<sup>163</sup> Consuls are entitled to significantly lesser protections under the Vienna Convention on Consular Relations, at least partially because “[c]onsular officials are . . . thought of as administrators, rather than diplomats.”<sup>164</sup> The Vienna Convention on Consular Relations immunizes consuls only as to their *official* acts, and, unlike diplomats, they may be arrested and detained under certain circumstances.<sup>165</sup> Also unlike diplomats, the property of consular officers may be searched under the appropriate constitutional restraints, and consular immunity does not extend to a consul's family members.<sup>166</sup> Therefore, when, as a consular officer, Khobragade allegedly committed visa fraud and made false statements to the government, she was not immune from arrest or prosecution for such actions.<sup>167</sup>

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160. See, e.g., Harris, *supra* note 149. Harris argues that “[i]t is not unusual in India for domestic staff to be paid poorly and be required to work more than 60 hours a week,” and “[r]eports of maids being imprisoned or abused by their employers are frequent.” *Id.* On the other hand, “the idea of a middle-class woman being arrested and ordered to disrobe is seen as shocking. Airport security procedures in India provide separate lines for women, and any pat-down searches are performed behind curtains.” *Id.*

161. Indictment, *supra* note 151, at 1.

162. *United States v. Khobragade*, 15 F. Supp. 3d 383, 383 (S.D.N.Y. 2014).

163. See *id.* at 383–84 (“Khobragade . . . served as a consular officer in the United States from October 26, 2012 through January 8, 2014, a position that cloaked her with consular immunity . . .” (footnote omitted)).

164. Savage, *supra* note 82; accord IRVIN STEWART, CONSULAR PRIVILEGES AND IMMUNITIES 9 (1926) (“The consular regulations of many states expressly provide that the consul has no diplomatic character and forbid the invoking of the privileges of diplomatic agents.”). Typical functions of consular personnel include the “issuance of travel documents, attending to the difficulties of their own countrymen who are in the host country, and generally promoting the commerce of the sending country.” DIPLOMATIC IMMUNITY GUIDANCE, *supra* note 20, at 10.

165. See DIPLOMATIC IMMUNITY GUIDANCE, *supra* note 20, at 6–7 (explaining that consuls may be arrested for felonies when the arresting officer has a proper warrant).

166. *Id.* at 7.

167. Under the indictment, the alleged violations of 18 U.S.C. §§ 1001 and 1546 are felonies carrying sentences up to eight and fifteen years in prison, respectively. 18 U.S.C. §§ 1006, 1546 (2018); Indictment, *supra* note 151, at 19–20; Heather Timmons, *Now That Devyani Khobragade Is Leaving the US, Is This the End of US-India Tensions?*, QUARTZ (Jan. 9, 2014), <https://qz.com/165510/will-devyani-khobragades-departure-from-the-us-signal-the-end-of-us-india-tensions> [<https://perma.cc/5EA3-AB7H>].

However, on January 8, 2014, one day before the U.S. government filed its indictment against Khobragade—almost a month after her arrest and at least one year after the alleged wrongdoing began—the Indian government promoted Khobragade to a position that would cloak her with diplomatic status and its corresponding privileges.<sup>168</sup> The next day, Khobragade returned to India, in turn divesting her of the purported diplomatic immunity.<sup>169</sup> The U.S. government argued against Khobragade’s motion to dismiss on the ground that Khobragade was not a diplomat entitled to diplomatic immunity when she was arrested.<sup>170</sup> The government supported this contention with a statement by Stephen Kerr, an Attorney-Adviser at the U.S. State Department’s Office of the Legal Adviser, who asserted that “Khobragade did not enjoy immunity from arrest or detention at the time of her arrest” and “does not presently enjoy immunity from prosecution for the crimes charged in the Indictment.”<sup>171</sup> The court found Kerr’s declaration irrelevant, focusing rather on the fact that all parties, including the State Department, conceded that Khobragade was a diplomat on a single day: January 9, 2014, which also happened to be the day the indictment was filed.<sup>172</sup> The court disregarded Khobragade’s status at the time of her arrest, instead relying on a prior State Department pronouncement that “criminal immunity precludes the exercise of jurisdiction by the courts over an individual whether the incident occurred *prior to* or during the period in which such immunity exists.”<sup>173</sup> The court similarly found the Eleventh Circuit’s decision in *Abdulaziz* to stand for the position that “diplomatic immunity acquired during the pendency of proceedings destroys jurisdiction even if the suit was validly commenced before immunity applied.”<sup>174</sup> The court declined to consider whether Khobragade was in fact a diplomat or whether Khobragade ever acted as a diplomat.<sup>175</sup> The court also did not entertain why the State Department granted Khobragade diplomatic immunity for that single day in January or whether such an action was

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168. *Khobragade*, 15 F. Supp. 3d at 384.

169. *Id.* at 386. When a foreign diplomat exits the United States, his or her diplomatic immunities and privileges customarily cease to exist. DENZA, *supra* note 19, at 354.

170. *Khobragade*, 15 F. Supp. 3d at 387.

171. *Id.*

172. *See id.* at 386–87 (“Even assuming Kerr’s conclusions to be correct, the case must be dismissed based on Khobragade’s conceded immunity on January 9, 2014.”).

173. *Id.* at 387 (quoting DIPLOMATIC IMMUNITY GUIDANCE, *supra* note 20, at 15).

174. *See id.* (explaining *Abdulaziz* provides “that diplomatic immunity serves as a defense to suits already commenced” (quotations omitted)). The court did not find the fact that the *Abdulaziz* case comprehended civil rather than criminal charges to be determinative. *Id.* at 388.

175. *Id.* at 387–88.

lawful.<sup>176</sup> Instead, the court dismissed the indictment, concluding that diplomatic immunity is simply “a jurisdictional bar” warranting “dismiss[al of the] proceedings the moment immunity is acquired.”<sup>177</sup> And so, for a second time, a federal court allowed a retroactive grant of diplomatic immunity in the name of following particular State Department determinations.<sup>178</sup>

### C. Abuse of Retroactive Diplomatic Immunity

The principal problem with a retroactive application of diplomatic immunity is its potential for unfettered abuse. In both *Abdulaziz* and *Khobragade*, individuals were successfully able to garner diplomatic immunity *after* having allegedly committed serious crimes ranging from false imprisonment to mistreatment of domestic workers.<sup>179</sup> The fact that courts have allowed such retroactive grants of diplomatic immunity enables its abuse. Recall the earlier hypothetical involving Monsieur Rich.<sup>180</sup> Simply by virtue of his contact with a corrupt foreign government official, Madame Shady, who was then able to designate him as a foreign attaché, Monsieur Rich was able to immunize his past money laundering. This is all in spite of the fact that Monsieur Rich never acted as a diplomat and likely never would have performed any diplomatic functions.

German tennis star and six-time Grand Slam titleholder, Boris Becker, attempted a similar scheme in 2018.<sup>181</sup> Faced with creditors and bankruptcy in the United Kingdom, Becker pulled a trick right out of Monsieur Rich’s playbook and claimed diplomatic immunity from the English court’s jurisdiction.<sup>182</sup> Becker informed the High Court in London that since the inception of its bankruptcy proceedings, the Central African Republic had appointed Becker to “Attaché to the European Union on sporting, cultural

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176. *See id.* (lacking any explicit discussion to this effect). The State Department’s grant of diplomatic immunity to Khobragade has widely been seen as a move to assuage Indian anger in response to the incident, especially considering the State Department’s request that India waive the immunity and that Khobragade leave the country. *See Barry, supra* note 144 (“In an effort to resolve the dispute, the State Department granted Ms. Khobragade diplomatic immunity and told her to leave the country.”).

177. *Khobragade*, 15 F. Supp. 3d at 388.

178. *See id.* at 385 (summarizing the conception of the political question doctrine shared by other federal courts, providing that “where a person’s diplomatic status is contested, courts generally consider the State Department’s determination to be conclusive”).

179. *See supra* Part II.B (discussing the two cases).

180. *See supra* notes 5–6 and accompanying text.

181. Richard Pérez-Peña, *Boris Becker Is an African Diplomat? His Creditors Are First To Know*, N.Y. TIMES (June 15, 2018), <https://www.nytimes.com/2018/06/15/world/europe/boris-becker-diplomatic-immunity.html> [<https://perma.cc/M88C-QFDB>].

182. *Id.*

and humanitarian affairs,” a position he claimed immunized him from his past debts.<sup>183</sup> In one interview, Becker candidly revealed that his reason for claiming diplomatic status was to evade the bankruptcy proceedings: “I have now asserted diplomatic immunity as I am in fact bound to do, in order to bring this farce to an end, so that I can start to rebuild my life.”<sup>184</sup> The Central African Republic, for its part, is perceived as one of the most corrupt countries in the world.<sup>185</sup> The Central African Republic’s own officials could not even agree on whether Becker was indeed an attaché.<sup>186</sup> But without waiting for a court’s ruling, Becker dropped his claim of diplomatic immunity,<sup>187</sup> perhaps due to the media attention it garnered when Becker may have preferred to go undetected.

Not every case will be as high profile as Boris Becker’s. Still, the idea that diplomatic status may be so gameable is wholly contrary to the purposes of diplomatic immunity.<sup>188</sup> The fact that diplomatic immunity can be accorded retroactively, once an individual has already committed a wrongful act and has had time to drum up ways to evade prosecution or suit, enables its abuse. Federal courts might do well to take note of this when faced with individuals whose diplomatic status is a genuine question of fact.

#### D. *Retroactive Applications of Other Forms of Immunity*

Diplomatic status is not the only legal mechanism providing immunities for certain allegedly wrongful acts—although it is likely the most expansive. Presidential immunity, qualified immunity, and defense witness immunity all immunize the holder from prosecution or suit. In comparing these three

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183. Ben Emmerson (@BenEmmerson1), TWITTER (June 14, 2018, 11:08 AM), <https://twitter.com/BenEmmerson1/status/1007323893433098241> [<https://perma.cc/6RRF-AK8L>] (statement of Boris Becker’s attorney).

184. Alexander Britton, *Boris Becker Claims Diplomatic Immunity To Avoid Bankruptcy*, INDEPENDENT (June 15, 2018, 1:42 AM), <https://www.independent.co.uk/news/uk/home-news/boris-becker-diplomatic-immunity-bankruptcy-a8399731.html> [<https://perma.cc/F2MK-4XZ7>].

185. *Corruption Perceptions Index 2018*, TRANSPARENCY INT’L, <https://www.transparency.org/cpi2018> [<https://perma.cc/9KMZ-68FX>] (ranking 149 out of 180 for most corrupt, where the 180th country is perceived to be the most corrupt country in the world).

186. See Siobhán O’Grady, *Boris Becker Claims To Be a Central African Diplomat. Officials Say His Passport Is a Fake*, WASH. POST (June 20, 2018), <https://www.washingtonpost.com/news/worldviews/wp/2018/06/20/boris-becker-claims-to-be-a-central-african-diplomat-officials-there-say-his-passport-is-a-fake> [<https://perma.cc/4LLA-5PB3>] (explaining that the Central African Republic’s Ambassador to the European Union confirmed Becker’s diplomatic status while other country officials indicated Becker’s diplomatic passport was fake).

187. *Former Tennis Star Boris Becker Drops Immunity Claim*, AP NEWS (Dec. 3, 2018), <https://apnews.com/ce6c0169a6524be995cef12e659f3273> [<https://perma.cc/564H-NXX7>].

188. See *supra* Part II.A (explaining the policy rationales against such an application of diplomatic immunity).

instruments, none allow for a retroactive grant of immunity in the way that courts have enabled for diplomatic immunity. Indeed, the Supreme Court has previously explicitly denied retroactive application of presidential immunity<sup>189</sup>—a position that would appear much less manipulable than that of diplomats considering that one would have to be elected by millions to attain it.

Historically, courts dismissed any case involving the U.S. president,<sup>190</sup> much like courts now dismiss suits filed against diplomats.<sup>191</sup> The Watergate Scandal changed this. In *United States v. Nixon*,<sup>192</sup> the Supreme Court held that, in some circumstances, the president may be appropriately subjected to judicial processes.<sup>193</sup> Yet, the Supreme Court has held that the president has complete immunity when acting “within the outer perimeter of his [or her] official duties.”<sup>194</sup> Rather than prosecution or suit, the response to serious, official presidential misconduct is impeachment.<sup>195</sup> A primary purpose of presidential immunity revolves around “the idea that the constitutional orientation of a President’s responsibilities requires him [or her] to act, and those actions should be as unencumbered as possible.”<sup>196</sup> Much like diplomatic immunity, the objective of presidential immunity is to allow the president to effectively perform his or her discretionary functions, without needing to repeatedly analyze them for possible liability.<sup>197</sup>

Unlike diplomatic immunity, the Supreme Court has actually heard a case involving the retroactive application of presidential immunity. In *Clinton v. Jones*,<sup>198</sup> the Court held that presidential immunity does not apply retroactively to actions taken before the president took office.<sup>199</sup> In 1994,

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189. See *infra* notes 198–205 and accompanying text.

190. Stephen L. Carter, *The Political Aspects of Judicial Power: Some Notes on the Presidential Immunity Decision*, 131 U. PA. L. REV. 1341, 1342 (1983).

191. See *supra* notes 104–14 and accompanying text.

192. *United States v. Nixon*, 418 U.S. 683 (1974).

193. See *id.* at 697 (finding justiciable a subpoena of President Nixon’s tape recordings).

194. Douglas B. McKechnie, @POTUS: *Rethinking Presidential Immunity in the Time of Twitter*, 72 U. MIAMI L. REV. 1, 4 (2017) (quotations omitted) (quoting *Nixon v. Fitzgerald*, 457 U.S. 731, 756 (1982)).

195. See Joseph Isenbergh, *Impeachment and Presidential Immunity from Judicial Process*, 18 YALE L. & POL’Y REV. 53, 100 (2000) (“Immunity from judicial process does not place the President above the law. The existence and breadth of impeachment . . . assure that the President is not above the law.”). In practice, punishment for presidential misconduct has historically come through unofficial channels, including “failure of reelection, or through trashing of the President’s . . . image.” Carter, *supra* note 190, at 1341.

196. McKechnie, *supra* note 194, at 25.

197. *Id.*

198. *Clinton v. Jones*, 520 U.S. 681 (1997).

199. See *infra* notes 203–05 and accompanying text.

Paula Corbin Jones, a former Arkansas state employee, filed a sexual harassment suit against President Bill Clinton.<sup>200</sup> Although Clinton was president when Jones instituted the lawsuit, the alleged sexual harassment occurred prior to his presidency, when Clinton was Governor of Arkansas.<sup>201</sup> In response to Jones's suit, President Clinton filed a motion to dismiss on presidential-immunity grounds.<sup>202</sup> The Supreme Court affirmed the district court and the Eighth Circuit's denial of the motion to dismiss, explaining that the president is not entitled to immunity for unofficial acts taken before the president took office.<sup>203</sup> The Court then concluded that it would be a matter for Congress to extend presidential immunity to actions taken in an unofficial capacity.<sup>204</sup> And so, despite the broad immunity granted to U.S. presidents,<sup>205</sup> the Supreme Court has declined to authorize retroactive grants of presidential immunity.

Other state and federal government officials are also entitled to limited immunities. Under the doctrine of qualified immunity, state and federal officials are protected from certain civil liabilities when "performing discretionary functions . . . insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known."<sup>206</sup> Like diplomatic immunity, the purpose of qualified immunity is to protect the government official's functions and not the individual in his or her personal capacity.<sup>207</sup> With this purpose in mind, qualified immunity thus shields a government official only as to actions taken under the scope of the individual's employment.<sup>208</sup> Therefore, like with presidential immunity,<sup>209</sup> a retroactive grant of qualified immunity would be unworkable. Actions taken before the individual became a government official are definitionally beyond the scope of employment and could not have been taken while performing official functions. Therefore, such actions could not be immunized.

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200. *Jones*, 520 U.S. at 684–85.

201. *Id.*

202. *Id.* at 686.

203. *See id.* at 691–96, 710 (holding that functional immunity extends only to actions taken under office).

204. *Id.* at 709.

205. *See supra* notes 194–97 and accompanying text.

206. *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982).

207. *Id.* at 807 (“[T]he recognition of a qualified immunity defense . . . reflected an attempt . . . to protect officials who are required to exercise their discretion and the related public interest in encouraging the vigorous exercise of official authority.” (quotations omitted)).

208. *Id.* at 818.

209. *See supra* notes 190–205 and accompanying text (discussing presidential immunity).

Finally, defense witness immunity was established as a response to the Fifth Amendment bar against compelling an individual to provide self-incriminating testimony.<sup>210</sup> Because of the Fifth Amendment's "broad scope," the government saw it as a significant barrier to obtaining evidence.<sup>211</sup> Defense witness immunity is used as a means of overcoming this barrier<sup>212</sup> and is especially useful in prosecutions of organized crime and political corruption.<sup>213</sup> Over time, two forms of defense witness immunity have arisen: transactional immunity and use immunity.<sup>214</sup> Transactional immunity grants defense witnesses absolute immunity from prosecution for any crime—or transaction—brought up in the compelled witness's testimony.<sup>215</sup> This form of defense witness immunity became problematic, as it was so expansive that it was "easily abused."<sup>216</sup> Witnesses could, for example, "skillfully provoke[] a line of inquiry that allowed them to establish a complete record of their crimes and thus secure broad immunity."<sup>217</sup> This led to a shift in the late twentieth century toward use immunity,<sup>218</sup> which immunizes the witness only to the extent that his or her testimony may not be used as evidence to later develop a case against the witness.<sup>219</sup>

What is interesting about defense witness immunity is that from an initial perspective, it may appear as though its whole premise is retroactive in nature—the defense witness was not a witness when the wrongful act in question took place, and yet later receives immunity for that act. However, use immunity is better thought of as immunizing the witness's *testimony*, and not the actions themselves.<sup>220</sup> From that angle, the individual is already a

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210. U.S. CONST. amend. V ("No person . . . shall be compelled in any criminal case to be a witness against himself . . ."); Robin Deborah Mass, Note, *Witness for the Defense: A Right to Immunity*, 34 VAND. L. REV. 1665, 1667–68 (1981).

211. Mass, *supra* note 210, at 1667.

212. *Id.* at 1668.

213. Clifford S. Fishman, *Defense Witness As "Accomplice": Should the Trial Judge Give a "Care and Caution" Instruction?*, 96 J. CRIM. L. & CRIMINOLOGY 1, 2 (2005) (explaining that testimony by an accomplice is useful in the prosecution of organized crime and political corruption).

214. James F. Flanagan, *Compelled Immunity for Defense Witnesses: Hidden Costs and Questions*, 56 NOTRE DAME L. REV. 447, 448–50 (1981) (providing an overview of the transition between transactional and use immunity).

215. Mass, *supra* note 210, at 1669.

216. *See id.* at 1672 (discussing one particular transactional-immunity statute).

217. *Id.*

218. *See* Rita Werner Gordon, *Right to Immunity for Defense Witnesses*, 20 CONN. L. REV. 153, 159 (1987) ("A shift away from transactional immunity occurred in 1970 when Congress passed the Federal Immunity of Witnesses Act.").

219. Mass, *supra* note 210, at 1669.

220. *See* Peter Lushing, *Testimonial Immunity and the Privilege Against Self-Incrimination: A Study in Isomorphism*, 73 J. CRIM. L. & CRIMINOLOGY 1690, 1690–92 (1982) (explaining that to bypass the

witness when the immunity is granted. And even in those rare cases where transactional immunity applies, having it apply to actions before the individual became a witness cannot be untethered from the concept of defense witness immunity—it would theoretically be impossible to designate someone as a *future* witness. To assume otherwise would be contrary to the fundamental nature of transactional immunity. Thus, courts should pause before denying review of retroactive grants of diplomatic immunity under the political question doctrine, as retroactive grants of analogous forms of immunity have either been expressly disapproved of by the Supreme Court or appear irreconcilable with their basic purposes.

### III. THE SOLUTION TO RETROACTIVE DIPLOMATIC IMMUNITY

All three branches of the federal government have the ability to address the problem of retroactive diplomatic immunity. The executive branch could continue its current efforts of limiting abuses of diplomatic immunity generally through State Department designations of diplomats as *personae non gratae* and requests for waiver. Congress could pass a statute requiring sending states to provide a list of all diplomats so as to determine immunities *ex ante* and avoid retroactive applications altogether. But neither of those approaches would prove as effortless or effective as a judicial solution. Because the known retroactive applications of diplomatic immunity have depended on the federal courts' deference to the State Department on matters of foreign affairs, the judiciary could narrowly interpret the political question doctrine in cases involving diplomatic immunity. This would not only provide a means by which judges and juries could make legal and factual determinations as to whether an individual is indeed a diplomat entitled to diplomatic immunity, but also align diplomatic immunity with the retroactive treatment of other forms of immunity.<sup>221</sup>

#### A. *The Executive Solution*

One potential approach to the issue of retroactive diplomatic immunity would be to rely on existing remedies already designed to curb abuse of diplomatic immunity. Existing limits include the executive branch's designation of an individual as *persona non grata* and requesting waiver of an individual's diplomatic immunity.<sup>222</sup> Designating an individual as

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Fifth Amendment right against self-incrimination, only the witness's testimony need be immunized, not the witness in his or her individual capacity).

221. See *supra* Part II.D (discussing the retroactive treatment of presidential immunity, qualified immunity, and defense witness immunity).

222. See *supra* Part I.C.

*persona non grata* effectively expels the diplomat from the receiving state,<sup>223</sup> which is especially useful in cases where the diplomat is seen as dangerous as when he or she has committed a violent crime. However, such a designation does not provide a way to prosecute or sue the individual in the receiving state,<sup>224</sup> which may leave the victim without a remedy. Requesting that the sending state waive the individual's immunities can similarly be ineffective because sending nations often refuse to grant them.<sup>225</sup> States may be even less likely to grant waivers where the individual's diplomatic status was accorded for corrupt means.<sup>226</sup> Also, this approach does not necessarily account for situations in which an individual's subversive use of a retroactive application of immunity goes undetected, as it relies entirely on State Department capabilities. In any case, as seen in *Abdulaziz* and *Khobragade*, the State Department cannot always be relied upon to correctly issue diplomatic certifications.<sup>227</sup>

### B. *The Legislative Solution*

A more invasive approach would involve the enforcement of a diplomatic list requiring sending states to, *ex ante*, provide receiving states with a list of *all* their diplomats. Congress could pass a statute wherein individuals not on the diplomatic list would be unable to claim any immunity from civil or criminal prosecution, therefore effectively eradicating any sort of retroactive application. The U.S. State Department's Office of the Chief

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223. Ross, *supra* note 41, at 188; see also Philip Bump, *How To Be Declared 'Persona Non Grata' and Get Yourself Kicked Out of the United States*, WASH. POST (Dec. 29, 2016, 3:51 PM), <https://www.washingtonpost.com/news/the-fix/wp/2016/12/29/how-to-be-declared-a-persona-non-grata-and-get-yourself-kicked-out-of-the-united-states> [https://perma.cc/T3LP-LSLM] (explaining how a designation of *persona non grata* effectively banishes a diplomat from the United States).

224. Presidential Power To Expel Diplomatic Personnel, *supra* note 91, at 207 (omitting the right to sue or prosecute the individual in the included powers).

225. See *supra* notes 77–81 and accompanying text. For a recent example of a foreign relations debacle involving a diplomatic immunity waiver request, see *PM's Plea to US To Rethink Immunity over Harry Dunn Fatal Crash*, BBC (Oct. 7, 2019), <https://www.bbc.com/news/uk-england-northamptonshire-49961679> [https://perma.cc/7YD8-VRNJ] (involving the death of British teenager Harry Dunn following a crash allegedly caused by the wife of an American diplomat).

226. For instance, the Indian government denied a waiver request in the course of the *Khobragade* scandal. DENZA, *supra* note 19, at 352.

227. See *supra* Part II.B (providing an overview of *Abdulaziz* and *Khobragade*).

of Protocol already provides for a version of such a list,<sup>228</sup> although it is neither exhaustive<sup>229</sup> nor legally enforceable.<sup>230</sup>

The problem with requiring an all-encompassing diplomatic list is threefold. First, countries might not want to divulge all of the agents they have working in a foreign country.<sup>231</sup> For instance, in 2011, the United States claimed diplomatic immunity over a covert American agent accused of killing two men in Pakistan.<sup>232</sup> The United States had not declared the agent's status to Pakistan prior to the incident.<sup>233</sup> Classifying the diplomatic list so that it is unavailable to the public, as is the case in the United Kingdom,<sup>234</sup> might assuage some countries, but others might be concerned with anyone at all—especially the receiving state—obtaining such information. Second, a legally determinative diplomatic list would prevent any sort of flexibility in cases where governments made genuine errors in either naming someone a diplomat or refraining from doing so.<sup>235</sup> Third, unless every name on the sending state's list of diplomats is thoroughly vetted, which could prove costly, some individuals may still attempt to become diplomats through corrupt means in anticipation of committing a wrongful act.

### C. *The Judicial Solution*

The solution that best resolves the dilemma of retroactive diplomatic immunity involves courts narrowly construing the political question doctrine in cases of retroactive diplomatic immunity. As it stands, federal courts generally defer to State Department certifications of an individual's diplomatic status, declining to consider whether the individual functions as a diplomat or obtained diplomatic status for the purpose of evading the

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228. U.S. DEP'T OF STATE, DIPLOMATIC LIST (2018), <https://www.state.gov/documents/organization/287365.pdf> [<https://perma.cc/PC42-9GHA>] [hereinafter DIPLOMATIC LIST].

229. *See id.* (listing only certain diplomats and their spouses but not diplomats' dependent children who may also be entitled to diplomatic immunity).

230. *See* MCCLANAHAN, *supra* note 34, at 86 (“[I]n a court of law[, a diplomatic list] may be only prima facie evidence, not decisive, and may require supporting testimony from the foreign ministry.” (emphasis omitted)).

231. *See infra* notes 232–33 and accompanying text (describing a situation where the United States abstained from ex ante providing information on an individual's diplomatic status).

232. Savage, *supra* note 82.

233. *See id.* (noting conflicting statements about the agent's legal status in Pakistan and confusion over whether he was a consular or diplomatic staff member).

234. MCCLANAHAN, *supra* note 34, at 86.

235. Aside from potential constitutional concerns, this is similarly why a statute prohibiting the State Department from certifying an individual's diplomatic status after a civil suit or criminal proceeding has been instituted would be troublesome.

consequences of past misconduct.<sup>236</sup> Where the plaintiff pleads sufficient facts that the defendant was not a diplomat when committing the alleged conduct, or perhaps not even a diplomat when the proceedings began, as in *Abdulaziz*,<sup>237</sup> federal courts should not mechanically grant the defendant's motion to dismiss. This approach would provide at least some means for the court to determine whether the individual became a diplomat for nefarious or fraudulent purposes, while continuing to provide courts with discretion in cases where retroactive diplomatic immunity may be desirable to maintain peaceful foreign relations.<sup>238</sup> Moreover, a narrow reading of the political question doctrine in cases involving retroactive grants of diplomatic immunity would harmonize the law of diplomatic immunity with that of presidential immunity. Because the Supreme Court has clearly held that not even the U.S. president enjoys retroactive immunity,<sup>239</sup> there is no compelling reason for a diplomat to be afforded as much—especially considering that the presidency is an almost unobtainable office, whereas there are theoretically thousands of foreign diplomatic positions available for exploitation in the United States.<sup>240</sup>

Legal scholarship has long criticized the political question doctrine. The main arguments against it include that the doctrine enjoys only an attenuated textual basis in the Constitution,<sup>241</sup> that the executive branch is not always the best situated to make certain decisions,<sup>242</sup> and that it is contrary to one of the “fundamental tenet[s]” of the U.S. government—that “courts have a core

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236. See *supra* Part II.B (examining two cases in which federal courts allowed retroactive grants of diplomatic immunity).

237. See *supra* Part II.B.1 (discussing *Abdulaziz*).

238. See *supra* notes 144–47 and accompanying text (explaining the fallout from the Khobragade scandal).

239. See *supra* notes 198–205 and accompanying text.

240. There are likely over six thousand registered foreign diplomats currently living in the United States. This number was determined by counting all diplomats and their spouses featured in the State Department's Diplomatic List, which was last updated in Fall 2018. DIPLOMATIC LIST, *supra* note 228. This number does not include spouses who are U.S. nationals, nonspouse family members, or individuals entitled to consular immunity. *Id.*

241. See, e.g., Eric A. Posner & Cass R. Sunstein, *Chevronizing Foreign Relations Law*, 116 YALE L.J. 1170, 1202 (2007) (arguing that the textual basis for deference to the executive on foreign relations matters is “rather sparse and ambiguous”).

242. See, e.g., Rachel E. Barkow, *More Supreme Than Court? The Fall of the Political Question Doctrine and the Rise of Judicial Supremacy*, 102 COLUM. L. REV. 237, 240 (2002) (maintaining that the idea “that some constitutional questions ultimately must be decided by the political branches and not through judicial review . . . is beginning to seem antiquated”); William S. Dodge, *International Comity in American Law*, 115 COLUM. L. REV. 2071, 2132 (2015) (“A . . . myth of international comity is the notion that the executive branch enjoys a comparative advantage in making comity determinations.”).

responsibility under the Constitution to resolve disputes.”<sup>243</sup> Indeed, some scholars contend that the political question doctrine directly conflicts with Chief Justice Marshall’s oft-cited axiom from *Marbury v. Madison*<sup>244</sup> that “[i]t is emphatically the province and duty of the judicial department to say what the law is.”<sup>245</sup> And Michael J. Glennon, former Legal Counsel to the Senate Foreign Relations Committee during the enactment of the Diplomatic Relations Act of 1978,<sup>246</sup> argues that the political question doctrine is particularly unfit in the arena of foreign affairs:

The unevenness of congressional oversight, the proclivity of executive foreign affairs agencies for violating the law and the traditional responsibility of the courts as the last guardians of the Constitution—all point to the propriety of an active role for the judiciary in ensuring governmental compliance with the law. Specifically, courts should not decline to resolve foreign affairs disputes between Congress and the President because they present “political questions.”<sup>247</sup>

Glennon explains that without the possibility of judicial review of certain State Department decisions under the political question doctrine, wrongful actions go unchecked,<sup>248</sup> something wholly at odds with the very essence of the separation-of-powers doctrine.

Total abandonment of the political question doctrine is unnecessary for purposes of resolving the issue of retroactive diplomatic immunity. Federal courts need only provide for a narrow reading of a doctrine that has already been limited by the Supreme Court.<sup>249</sup> As recently as 2012, the Supreme

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243. *E.g.*, Michael J. Glennon, *Foreign Affairs and the Political Question Doctrine*, 83 AM. J. INT’L L. 814, 815 (1989).

244. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803).

245. *Id.* at 177; Glennon, *supra* note 243, at 815.

246. *See Michael J. Glennon*, TUFTS: FLETCHER SCH., <https://fletcher.tufts.edu/people/michael-j-glennon> [<https://perma.cc/T7HY-PWLK>] (noting Glennon’s tenure working for the Senate Foreign Relations Committee from 1977 through 1980).

247. Glennon, *supra* note 243, at 814.

248. *Id.*

249. *See Zivotofsky ex rel. Zivotofsky v. Clinton (Zivotofsky I)*, 566 U.S. 189, 194–95, 211–12 (2012) (describing the political question doctrine as narrowly applicable); *see also* Cohen, *supra* note 137, at 4 (explaining the Supreme Court’s narrowing of the political question doctrine in *Zivotofsky I*); Alex Loomis, *Why Are the Lower Courts (Mostly) Ignoring Zivotofsky I’s Political Question Analysis?*, LAWFARE (May 19, 2016, 4:23 PM), <https://www.lawfareblog.com/why-are-lower-courts-mostly-ignoring-zivotofsky-political-question-analysis> [<https://perma.cc/3F7G-ZXC6>] (providing an overview of the Supreme Court’s view of the political question doctrine and subsequent treatment by lower courts). *But see* *Rucho v. Common Cause*, 139 S. Ct. 2484, 2507–08 (2019) (finding a gerrymandering case nonjusticiable under the political question doctrine). Justice Kagan’s dissent in *Rucho* aptly describes the ills that may come when the political question doctrine is wrongly employed: “In the face of grievous harm to democratic governance and flagrant infringements on individuals’ rights . . . the majority declines

Court refined the political question doctrine so that its invocation necessitates either “a textually demonstrable constitutional commitment” to a political branch, or “a lack of judicially . . . manageable standards.”<sup>250</sup> Neither the Constitution nor the text of the Vienna Convention require that courts defer to the State Department on matters of retroactive diplomatic immunity.<sup>251</sup> Furthermore, courts need only use their preexisting fact-finding tools to determine whether individuals should be entitled to diplomatic immunity. District courts could easily follow the Supreme Court’s lead and not leave cases of inherently erroneous diplomatic immunity to the political question doctrine. Returning to Monsieur Rich,<sup>252</sup> this judicial solution would provide an opportunity for a court to determine whether Monsieur Rich factually acted as a diplomat, thus warranting immunity, or whether he obtained a diplomatic position for the purpose of evading criminal prosecution. It might also discourage others like Monsieur Rich from attempting such a scheme in the first place.

#### CONCLUSION

Diplomatic immunity is an important pillar of international law. Its abuse by nondiplomats is an unfortunate and unintended consequence of both the broad language of the Vienna Convention on Diplomatic Relations and federal courts’ deference to the State Department on matters of foreign relations. It remains to be seen whether more cases of retroactive diplomatic immunity will crop up following the successes of the defendants in *Abdulaziz* and *Khobragade*. Where new cases do arise, however, courts should not feel compelled to disregard fraud or malfeasance in the name of promoting the executive branch’s view of diplomacy. Diplomacy concerns the friendly, open relations between states—not sneaky invocations of immunity.

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to provide any remedy.” *Id.* at 2515 (Kagan, J., dissenting). This is not what federal courts were established to do. *See supra* note 245 and accompanying text. Rather, federal courts should be able to resolve issues of individual rights, such as in the mistreatment of Richard in *Khobragade*. *See supra* Part II.B.2 (discussing *Khobragade*).

250. *Zivotofsky I*, 566 U.S. at 195 (quotations and citation omitted).

251. *See generally* U.S. CONST.; Vienna Convention on Diplomatic Relations, *supra* note 42.

252. *See supra* notes 5–6 and accompanying text.