No. 110, Original

In the Supreme Court of the United States

OCTOBER TERM, 1987

IN THE MATTER OF THE REPUBLIC OF SURINAME, EX REL. ETIENNE BOERENVEEN, PETITIONER

ON MOTION FOR LEAVE TO FILE A PETITION FOR A WRIT OF HABEAS CORPUS

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether this Court, pursuant to its original but nonexclusive jurisdiction under 28 U.S.C. 1251(b)(1), should grant leave to file a petition for a writ of habeas corpus contending that the district court erred in denying a claim of diplomatic immunity.

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JURISDICTION

Petitioner invokes this Court's original jurisdiction under 28 U.S.C. 1251(b)(1), on the ground that this is a proceeding involving "a public minister of a foreign state" (Pet. 2-3). We discuss the question of this Court's jurisdiction at pages 5-6, *infra.*

STATEMENT

Petitioner, the Republic of Suriname, requests this Court's leave to file a petition for a writ of habeas corpus on behalf of Etienne Boerenveen, who was convicted on two conspiracy counts involving illegal narcotics trafficking.[1] Petitioner contends that the district court erred in denying Boerenveen's claim of diplomatic immunity.

[1] After a jury trial in the United States District Court for the Southern District of Florida, Boerenveen was convicted of conspiring to travel in interstate or foreign commerce in aid of a racketeering enterprise, in violation of 18 U.S.C. 371 (Count 1), and of conspiring to import and to distribute cocaine, in violation of 21 U.S.C. 963

1. The evidence presented at trial showed that Boerenveen was a 21-year-old Commander of the Army of Suriname and Chairman of the State Fishery Commission. In March 1986, the Government of Suriname asked the local United States Embassy to issue Boerenveen a diplomatic visa for official travel to this country. The Embassy refused to issue the visa because the Surinamese official making the request failed to disclose the purpose or date of Boerenveen's travel. The U.S. Embassy ultimately issued a diplomatic visa (see 22 C.F.R. 41.100) but assigned Boerenveen a "B-2" classification identifying him as a "temporary visitor for pleasure" (22 C.F.R. 41.12). The Surinamese official then requested that Boerenveen be assigned an "A-1" classification, identifying him as a "public minister" (see *ibid.*). The Embassy refused that request, indicating that the United States would not issue a visa of that classification without knowing the purpose of the travel. See U.S. Br. 22-24.

Boerenveen used the "B-2" visa to enter this country on March 21, 1986. Three days later, he was arrested in connection with a scheme to import multi-million dollar quantities of cocaine into this country. See U.S. Br. 3-7, 24. Upon inquiry, the State Department's Associate Chief of Protocol of the United States certified (*id.* at 25-26 (quoting GX 1)):

> A thorough search of the official records of the United States Department of State reveals that Messrs. Etienne Boerenveen [and his two codefendants] are not currently, and have not been in the past, recognized by the Department of State in any capacity which would entitle them to immunity from jurisdic-

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(Count 2). He was sentenced to concurrent prison terms of five years on Count 1 and 12 years on Count 2. The court of appeals affirmed without opinion. No. 86-5964 (11th Cir. Sept. 23, 1987). The relevant facts are taken from the government's brief in the court of appeals.

tion accorded diplomatic or consular personnel under applicable international law.

Thereafter, the Ambassador of Suriname met with officials of the State Department and claimed that Boerenveen was entitled to diplomatic immunity because he had entered the United States on a diplomatic passport for the conduct of official business. U.S. Br. 24-25. The State Department transmitted a diplomatic note unequivocally rejecting the claim of diplomatic immunity (*id.* at 25 (quoting GX 2)):

> Based upon a careful review of the representations of the Government of Suriname and the supporting documentation provided by Ambassador Halfhide, the Department has concluded that Mr. Boerenveen is not entitled, as a matter of international law, to immunity from the criminal jurisdiction of the United States. While certain courtesies may be extended to individuals traveling on diplomatic passports, such passports do not confer immunities under international law. Unless the concerned states have otherwise agreed, an individual is entitled to diplomatic privileges and immunities only as a consequence of his status as a diplomatic agent assigned to the diplomatic mission of the sending state to assume diplomatic responsibilities in the receiving State on a regular basis, or, having been assigned to assume such responsibilities in one country, is passing through another country either directly enroute to or returning from that assignment. Mr. Boerenveen does not fall into either category. Nor is there a treaty or other international agreement between Suriname and the United States providing diplomatic privileges and immunities for government officials temporarily in the other's territory to engage in trade between the two states, promote investment, or otherwise conduct official business.

2. Shortly after his indictment, Boerenveen moved to dismiss the conspiracy charges on the ground that he is entitled to diplomatic immunity under the Vienna Convention on Diplomatic Relations and Optional Protocol on Disputes, Apr. 18, 1961, art. 31, 23 U.S.T. 3227, T.I.A.S. No. 7502 (Vienna Convention). The district court denied the motion to dismiss (Pet. App. 30-37). First, the court affirmed the previous finding of a magistrate that Boerenveen "was not a part of a mission performing mission functions under the terms of the Vienna Convention" (*id.* at 34). The court explained (*id.* at 34-35) that Boerenveen's "appointment to a mission and request for diplomatic status was neither properly notified to nor recognized by the United States." Second, the court observed (*id.* at 35-36) that, absent exceptional circumstances, it was bound to accept the determination of the State Department that Boerenveen was not entitled to diplomatic immunity. Finally, the court concluded (*id.* at 36-37) that, even if it was not bound by the State Department's determination, there had been no abuse of discretion by the State Department warranting judicial intervention.

Boerenveen was later convicted on the conspiracy charges. He renewed his claim of diplomatic immunity in the court of appeals. That court affirmed his conviction without opinion.

ARGUMENT

This Court should deny petitioner's motion for leave to file a petition for a writ of habeas corpus. This case does not warrant the exercise of this Court's original jurisdiction because there are other more appropriate forums available for deciding claims of diplomatic immunity. Moreover, that claim, which has already been rejected by

two lower courts, is without merit and would not qualify for this Court's consideration.

1. This Court repeatedly has observed that its original jurisdiction (28 U.S.C. 1251) should be exercised sparingly.[2] The court generally declines jurisdiction if another forum is available "where there is jurisdiction over the named parties, where the issues tendered may be litigated, and where appropriate relief may be had." *Illinois* v. *City of Milwaukee,* 406 U.S. 91, 93 (1972); see *id.* at 98, 108.[3] These principles apply with especial force when, as here, the Court's original jurisdiction is nonexclusive (28 U.S.C. 1251(b)).

Petitioner asks this Court to exercise its nonexclusive original jurisdiction over proceedings involving "ambassadors, other public ministers, consuls, or vice consuls of foreign states" (28 U.S.C. 1251(b)(1)) to determine a claim of diplomatic immunity. But such claims, which arise with some frequency and which depend on the State Department's determination of the alien's status, are particularly unsuitable for treatment as original actions. A

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[2] See, *e.g., Arizona* v. *New Mexico,* 425 U.S. 794, 796 (1976); *United States* v. *Nevada,* 412 U.S. 534, 538 (1973); *Illinois* v. *City of Milwaukee,* 406 U.S. 91, 93 (1972); *Ohio* v. *Wyandotte Chemicals Corp.,* 401 U.S. 493, 497-499 (1971); *Utah* v. *United States,* 394 U.S. 89, 95 (1969); *Massachusetts* v. *Missouri,* 308 U.S. 1, 18-20 (1939). "What gives rise to the necessity for recognizing such discretion is preeminently the diminished societal concern in our function as a court of original jurisdiction and the enhanced importance of our role as the final federal appellate court." *Ohio* v. *Wyandotte Chemicals Corp.,* 401 U.S. at 499. See also *Arizona* v. *New Mexico,* 425 U.S. at 797-798; *Washington* v. *General Motors Corp.,* 406 U.S. 109, 113 (1972); *Illinois* v. *City of Milwaukee,* 406 U.S. at 93-94.

[3] See also *South Carolina* v. *Regan,* 465 U.S. 367, 400-401 (1984) (O'Connor, J., concurring in the judgment) ("An original party establishes that a case is 'appropriate' for obligatory jurisdiction by demonstrating, through 'clear and convincing evidence,' that it has suffered an injury of 'serious magnitude' and that it otherwise will be without an alternative forum." (citations omitted)).

claim of diplomatic immunity can generally be presented to the judicial forum where the legal action is pending; that forum (as in this case) will usually be fully capable of resolving the issue.[4] Indeed, Boerenveen has already presented his claim to the lower courts here. He first raised his claim in the district court where the criminal charges were pending. That court provided a detailed explanation why Boerenveen did not qualify for immunity (Pet. App. 30-37). Boerenveen then raised his claim in the court of appeals that reviewed his conviction (see Defendant's Br. 27-40). That court affirmed the district court's decision. Petitioner does not contend that these courts denied Boerenveen the opportunity to present his diplomatic immunity claim. Moreover, Boerenveen may now seek review of the court of appeal's judgment by way of a petition for a writ of certiorari. Thus, there is no warrant whatsoever for this Court to begin the process anew by granting petitioner's motion for leave to file an original action.

2. We further submit that this Court should deny petitioner leave to file a petition for a writ of habeas corpus because Boerenveen's claim of diplomatic immunity is without merit and therefore not of sufficient "seriousness and dignity" to warrant this Court's consideration. *Illinois* v. *City of Milwaukee,* 406 U.S. at 93. The court of appeals and the district court correctly concluded, in accordance with the State Department's determination and well-established principles of United States foreign relations law, that Boerenveen is not entitled to diplomatic immunity.

We note at the outset that the Executive Branch's determination of an alien's diplomatic status is a political question. This determination goes to the heart of the President's constitutionally prescribed power to conduct foreign affairs and to his exclusive authority "to receive Ambassadors and other public Ministers." U.S. Const.

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[4] Congress has specifically provided for the dismissal of actions against persons entitled to diplomatic immunity. See 22 U.S.C. 254d.

Art. II, § 3. Thus, "the courts have generally accepted as conclusive the views of the State Department as to the fact of diplomatic status." *Abdulaziz* v. *Metropolitan Dade County,* 741 F.2d 1328, 1331 (11th Cir. 1984). See, *e.g., In re Biaz,* 135 U.S. 403, 431-432 (1890); *Carrera* v. *Carrera,* 174 F.2d 496, 497 (D.C. Cir. 1949); *United States* v. *Fitzpatrick,* 214 F. Supp. 425, 433 (S.D.N.Y. 1963); *United States* v. *Coplon,* 88 F. Supp. 915, 920-921 (S.D.N.Y. 1950). Here, the State Department expressly certified that Boerenveen is not recognized "in any capacity which would entitle [him] to immunity from jurisdiction accorded diplomatic or consular personnel under applicable international law" (GX 1). The State Department's determination accordingly resolves the matter. See Restatement (Revised) of the Foreign Relations Law of the United States § 461, reporters' note 1 (Tent. Draft No. 4, 1983) [hereinafter Restatement (Revised)]; Restatement (Second) of the Foreign Relations Law of the United States § 73, comment i (1965) [hereinafter Restatement].

The State Department applied familiar principles of United States foreign relations law in determining that Boerenveen was not entitled to diplomatic immunity. The United States adheres to the principles set forth in the Vienna Convention to determine such claims. See 22 U.S.C. (& Supp. III) 254a-254d. See also Restatement (Revised) Tit. B (introductory note). Under the Vienna Convention, an accredited diplomatic agent is immune from the criminal jurisdiction of the state to which he is accredited. See art. 31, 23 U.S.T. 3240. Here, the Government of Suriname never sought to accredit Boerenveen as a head or member of a mission. See arts. 4, 7, 9, 10, 23 U.S.T. 3232, 3233, 3234. Thus, the Government of Suriname failed to take even this first step towards assigning to Boerenveen the status of a diplomatic agent. Moreover, even if that Government had sought to accredit Boerenveen as a diplomatic agent, the United States would

be free, under the Vienna Convention, to reject his accreditation (by declaring him *persona non grata*) at any time and without stating a reason for doing so. See art. 9, 23 U.S.T. 3233-3234. Boerenveen accordingly is not entitled to diplomatic immunity. See Restatement (Revised) § 461 (reporters' note 1). See, *e.g., Vulcan Iron Works* v. *Polish American Machinery,* 479 F. Supp. 1060 (S.D.N.Y. 1979).[5]

Petitioner argues that he is entitled to diplomatic immunity because he was issued a "diplomatic" visa (Br. in Support of Pet. 22-26). However, the holder of a diplomatic visa is not necessarily a diplomatic agent, and the State Department's issuance of a diplomatic visa does not, of itself, confer diplomatic immunity.[6] Generally, a

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[5] Petitioner mistakenly contends that Article 14 "defines 'heads of mission' in a broader category than the permanent diplomatic staff attached to the mission" (Br. in Support of Pet. 21). Actually, Article 14 simply *classifies* "heads of mission"—as defined by ~~Section 1~~ Article—into three general categories for purposes of "precedence and etiquette" (23 U.S.T. 3235-3236). These classifications have no bearing on diplomatic immunity. See *id.* at 3236 ("Except as concerns precedence and etiquette, there shall be no differentiation between heads of mission by reason of their class."). Petitioner is also mistaken in contending that Boerenveen is entitled to diplomatic immunity as a "visiting head of state" (Br. in Support of Pet. 22). The Vienna Convention does not apply to visiting heads of state. See S. Exec. Rep. 6, 89th Cong., 1st Sess. 10 (1965); *Vienna Convention on Diplomatic Relations: Hearing on Exec. H, 88th Cong., 1st Sess. Before the Subcomm. of the Senate Comm. on Foreign Relations,* 89th Cong., 1st Sess. 76, 81 (1965); E. Satow, *Satow's Guide to Diplomatic Practice* § 2.1 (5th ed. 1979). The State Department may extend immunity to visiting heads of state, but plainly did not do so in this case.

[6] The State Department's regulations, which enumerate the classes of aliens eligible to receive diplomatic visas (22 C.F.R. 41.102(a)), include many persons who clearly do not qualify as "members of the mission" within the meaning of the Vienna Convention and who are not entitled to diplomatic immunity. See *United States* v. *Coplon,* 88 F. Supp. at 920. For example, under 22 C.F.R. 41.102(a)(7), career

sending state issues to its diplomatic agent a diplomatic passport, and the receiving state gives him a diplomatic visa, but such passports and visas are sometimes issued as a courtesy to other persons, including foreign officials on official business in the United States, and are not sufficient evidence that the holder enjoys diplomatic privileges and immunities in the receiving state. See Restatement (Revised) § 461 reporters' note 1. See also, *e.g., United States* v. *Arizti,* 229 F. Supp. 53 (S.D.N.Y. 1964) (denying immunity to career diplomat who entered the United States on a diplomatic visa).[7]

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consular officers are eligible for diplomatic visas. However, pursuant to the Vienna Convention on Consular Relations and Optional Protocol on Disputes, Apr. 24, 1963, art. 41, 21 U.S.T. 77, T.I.A.S. No. 6820, consular officers do not enjoy absolute diplomatic immunity. They enjoy only limited "consular" functional immunity, and may be prosecuted for crimes not related to their performance of consular functions, such as a felony drug offense. See *United States* v. *Chindawongse,* 771 F.2d 840, 848 (4th Cir. 1985), cert. denied, 474 U.S. 185 (1986).

[7] Petitioner's reliance on *United States* v. *Egorov,* 222 F. Supp. 106 (E.D.N.Y. 1963), is altogether misplaced. There, the court rejected Egorov's claim to diplomatic immunity despite the fact that he carried a diplomatic passport because he had never "been notified to and recognized by the Department of State in any capacity which would entitle him to diplomatic immunity * * *" (*id.* at 108). Likewise here, proper notification was not given to the State Department and the State Department did not recognize Boerenveen as being entitled to diplomatic immunity.

CONCLUSION

The motion for leave to file a petition for a writ of habeas corpus should be denied.

Respectfully submitted.

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