

## FREQUENTLY ASKED QUESTIONS

### **Questions About Foreign Nationals**

Q: Who is a "foreign national"?

For the purposes of consular notification, a "foreign national" is any person who is not a U.S. citizen.

Q. Is a foreign national the same as an 'alien'?

A. Yes. The terms "foreign national" and "alien" are used interchangeably.

Q. Is a person with a U.S. "green card" considered a foreign national?

A. Yes. Lawful permanent resident aliens, who have a resident alien registration card (INS Form I-551), commonly known as a "green card," retain their foreign nationality and must be considered "foreign nationals" for the purposes of consular notification.

Q. Do I have to ask everyone I arrest or detain whether he or she is a foreign national?

A. No, although some law enforcement entities do routinely ask persons taken into detention whether they are U.S. Citizens. If a detainee claims to be a U.S. citizen in response to such a question, you generally can rely on that assertion and assume that consular notification requirements are not relevant. If you have reason to question whether the person you are arresting or detaining is a U.S. citizen, however, you should inquire further about nationality so as to determine whether any consular notification obligations apply.

Q. Short of asking all detainees about their nationality, how might I know that someone is a foreign national?

A. A foreign national may present a foreign passport or an alien registration document as identification. If they present a document that indicates birth outside the United States, or claim to have been born outside the United States, they may be a foreign national. (Most, but not all, persons born in the United States are U.S. citizens; most, but not all, persons born outside the United States are not.) Unfamiliarity with English may also indicate foreign nationality. Such indicators could be a basis for asking the person whether he/she is a foreign national.

Q. What about undocumented and "illegal" aliens?

A. All foreign nationals are entitled to consular notification and access, regardless of their visa or immigration status in the United States. Thus "illegal" aliens have the same rights to consular assistance as do "legal" aliens. There is no reason, for purposes of consular notification, to inquire into a person's legal status in the United States.

Q. What about dual nationals?

A. A person who is a national/citizen of two or more countries other than the United States should be treated in accordance with the rules applicable to each of those countries.

A person who is a citizen of the United States and another country may be treated exclusively as a U.S. citizen when in the United States. In other words, consular notification is not required if the detainee is a U.S. citizen. This is true even if the detainee's other country of citizenship is a mandatory notification country.

### **Questions About Who Is Responsible for Consular Notification**

Q. Who is actually responsible for notification?

A. The responsibility for consular notification, whether in the case of an arrest and detention, a death, or the appointment of a guardian for a foreign national, lies with what are generally called "competent authorities." This term is understood to mean those officials, whether federal, state, or local, who are responsible for legal action affecting the foreign national and who are competent, within their legal authorities, to give the notification required. This interpretation makes sense as a practical matter: compliance with the notification requirements works best when it is assumed by those government officials closest to the foreign national's situation and with direct responsibility for it.

Q. Who is responsible for notification of arrests and detentions?

The law enforcement officers who actually make the arrest or who assume responsibility for the alien's detention ordinarily should make the notification.

Q. What is the responsibility of judicial officials and prosecutors for notification of arrests and detentions?

A. Because they do not hold foreign nationals in custody, judicial officials and prosecutors are not responsible for notification. The Department of State nevertheless encourages judicial officials who preside over arraignments or other initial appearances of aliens in court to inquire at that time whether the alien has been provided with consular notification as required by the VCCR and/or any bilateral agreement providing for mandatory notification. The Department also encourages prosecutors to make similar inquiries. Inquiries such as these will help promote compliance with the consular notification procedures and facilitate the provision of consular assistance by foreign governments to their nationals.

Q. Who is responsible for notification of deaths and of sea and air wrecks?

A. Notification should be made by the appropriate state or local authority, be it a coroner or a probate court official. In cases of serious injury, wrecks, accidents, or major disasters (such as an airline crash), the competent authority may vary, but government officials responsible for such situations should ensure that notification is given when required.

Q. Who is responsible for notification of appointments of guardians?

A. Notification should be made by probate court officials or by representatives of the state or local equivalent of an attorney general, or by any other appropriate official involved in the guardianship process.

Q. Why are state and local government officials expected to provide such notification?

A. State and local governments must comply with the consular notification and access obligations because these obligations are embodied in treaties that are the law of the land under the Supremacy Clause of the United States Constitution. The federal government, however, would be responsible for a dispute with a foreign government concerning obligations under the relevant treaties.

#### Questions About When Consular Notification Should Be Given

Q. What kinds of detentions are covered by this obligation?

A. The VCCR provides for informing the foreign national of the right to consular notification and access if the national is "arrested or committed to prison or to custody pending trial or is detained in any other manner." While there is no explicit exception for short detentions, the Department of State does not consider it necessary to follow consular notification procedures when an alien is detained only momentarily, e.g., during a traffic stop. On the other hand, requiring a foreign national to accompany a law enforcement officer to a place of detention may trigger the consular notification requirements, particularly if the detention lasts for a number of hours or overnight.

The longer a detention continues, the more likely it is that a reasonable person would conclude that the Article 36 obligation is triggered.

Q. Do we have to inform and notify even when the detention is only while a traffic citation is written, or for a similar brief time?

A. No. The VCCR on its face requires informing a foreign national that a consular official may be notified whenever a foreign national is arrested or detained in any manner, without distinguishing arrests that do not result in a significant detention. The purpose of this requirement, however, is to ensure that a government does not place an alien in a situation in which the alien cannot receive assistance from his/her own government. When an alien is cited and immediately released, this consideration is not relevant because the alien is free to contact consular officials independently. The Department of State therefore does not consider brief routine detentions, such as for traffic violations or accident investigations, to be the type of situation contemplated by the VCCR.

Q. If we have a foreign national detained in a hospital, do we have to provide consular notification?

A. Yes, if the foreign national is detained pursuant to governmental authority (law enforcement, judicial, or administrative) and is not free to leave. He/she must be treated like a foreign national in detention, and appropriate notification must be provided.

Q. Are aliens in immigration detention covered by the consular notification requirement?

A. Yes, as a general matter. Consular notification is provided for in the Immigration and Naturalization Service's regulations (8 C.F.R. 236.1(e)). The Department of State does not, however, ordinarily consider aliens who are found inadmissible at a port of entry and required to remain there until they can depart to be detained within the meaning of the VCCR. Immigration officials may permit such aliens access to consular officials as a matter of discretion, however--e.g., in situations where the detention becomes prolonged because onward transportation is significantly delayed.

Q. Do I have to give a foreign national consular notification even if I give the Miranda warning?

A. Yes. Consular notification should not be confused with the Miranda warning, which is given regardless of nationality to protect the individual's constitutional rights against self-incrimination and to the assistance of legal counsel. Consular notification is provided by going through the procedures described in this booklet. The consular notification procedures are a mechanism to ensure that a foreign government can provide consular assistance to its nationals who are detained. Once the foreign government's consular offices are aware of the detention it is not necessary, for the mere sake of formality, to follow consular notification procedures. If the foreign government officials involved are not consular officials, however (e.g., if they are law enforcement officials), then consular notification procedures should still be followed.

Q. If we failed to provide consular notification and the alien has already been released from detention, should we still go through the process of notification?

A. If the alien is still involved in proceedings related to the reasons for which he/she was originally detained, the Department of State would recommend that he/she be advised of the possibility of consular assistance even if no longer detained, because consular assistance could still be useful. If proceedings against the alien have ended, so that consular assistance is unlikely to have any continuing relevance, the Department does not consider that it is necessary to provide notification.

Q: What is the remedy if we failed to give consular notification?

A. If the foreign national is still in detention, you should provide notification as soon as you become aware that it was not provided. This will ensure that the foreign government is given the opportunity to provide consular assistance for the remaining period of detention.

If the Department of State receives a complaint that consular notification was not provided, it will take appropriate action. For example, the Department may request the relevant facts from the detaining federal, state, or local authority; discuss the matter with the foreign government involved; apologize on behalf of the Government of the United States to the concerned foreign government for a failure to provide consular notification; intervene to ensure that consular access is permitted; or seek to work with the involved federal, state, or local detaining officials to improve future compliance.

Some aliens are attempting to obtain judicial remedies (such as new trials or sentencing hearings) for failures to give notification. Others have sought executive clemency. For further information on these developments, consult with the appropriate federal or state authorities, or call the Department of State.

## Questions About Consular Access and Assistance

Q. What can we expect a consular officer to do once notified?

A. A consular officer may do a variety of things to assist a foreign national. The consular officer may speak with the detained foreign national over the phone and/or arrange one or more consular visits to meet with the detainee about his/her situation and needs. A consular officer may assist in arranging legal representation, monitor the progress of the case, and seek to ensure that the foreign national receives a fair trial (e.g., by working with the detainee's lawyer, communicating with prosecutors, or observing the trial). The consular officer may speak with prison authorities about the detainee's conditions of confinement, and may bring the detainee reading material, food, medicine, or other necessities, if permitted by prison regulations. A consular officer frequently will be in touch with the detainee's family, particularly if they are in the country of origin, to advise them of the detainee's situation, morale, and other relevant information.

The actual services provided by a consular officer will vary in light of numerous factors, including the foreign country's level of representation in the United States and available resources. For example, some countries have only an Embassy in Washington, D.C., and will rarely be able to visit their nationals imprisoned in locations remote from there. Other countries have consulates located in many major U.S. cities and may regularly perform prison visits throughout the United States. Each country has discretion in deciding what level of consular services it will actually provide.

Q. Can we rely on the consular officer to arrange for legal counsel?

A. No. If the foreign national has a right to counsel and requests that he/she be given a court appointed lawyer, the usual process of arranging counsel should be followed. While a consular officer is permitted to assist in arranging counsel, the consular officer may or may not actually choose to take such action.

Q. Is a consular officer entitled to act as legal counsel for a detained alien?

A. No. Consular officers are not permitted to practice law in the United States. They may, however, participate in litigation as "friends of the court," and they may assist an alien and his/her legal counsel in preparation of the alien's defense.

Q. Do I have to permit a consular officer to have access to a detainee?

A. Yes. Consular officers are entitled to visit and to communicate with their detained nationals. This is true even if the foreign national has not requested a visit. The consular officer must refrain from taking action on behalf of the foreign national if so requested by the national, however.

Q. Are consular officers entitled to visit whenever they want to?

A. No. Law enforcement authorities may make reasonable regulations about the time, place, and manner of consular visits to detained foreign nationals. Those regulations cannot, however, be so restrictive that the purpose of consular assistance is defeated. These matters are addressed in Article 36 of the VCCR. The Department urges law enforcement authorities to grant foreign consular officials liberal access to detained persons, granting the consular officer every courtesy and facility consistent with local laws and regulations. Liberal visiting privileges are particularly important when consular officers have to travel long distances to visit their nationals.

Q. Do consular officers have to comply with prison security regulations?

A. Yes. If the consular officer questions having to follow a particular security rule, the consular officer should be advised to address the question to the Department of State. Such questions may arise occasionally because, while not exempt from security regulations, under rules relating to the privileges and immunities of diplomatic and consular officers, consular officers conducting prison visits are entitled to be treated with respect.

Q. Can a consular officer be subject to search prior to visiting a prisoner?

A. Yes. Even though a consular officer has certain privileges and immunities, the officer must comply with applicable prison security rules. On the other hand, because a consular officer is entitled to be treated with respect, any search of a consular officer should not be unnecessarily intrusive.

Q. Is a consular officer entitled to meet privately with a detained foreign national?

A. Yes, as a general rule. The VCCR entitles consular officers to converse with their nationals. It does not explicitly state that such conversations may be private, but some of the bilateral agreements do contain such explicit requirements. The Department of State believes that consular officers should normally be able to converse in private. This does not mean, however, that the conversation cannot be observed for security reasons.

If a consular officer insists upon a private meeting but the detained national objects to meeting privately, you should seek guidance from the Department of State.

Q. Is there a guiding principle I can follow in providing consular access?

Yes. Remember, always, that these are mutual obligations. In general, you should permit a consular officer the same access to a foreign national that you would want an American consular officer to have to an American citizen in a similar situation in a foreign country.

## Questions About Contacting the Department of State

Q. Do we need to notify the U.S. Department of State when we detain a foreign national?

A. No. Your obligations are to inform the detainee of the right to consular notification, and to make the notification to the detainee's embassy or consulate if the detainee requests or if the detainee is from a "mandatory notification" country. You do not need to inform the State Department about the detention, and in fact we generally prefer that you not do so, since informing the State Department often causes confusion about whether the foreign consulate has been informed properly in a timely manner. On the other hand, it may be appropriate to inform us of unusual cases, provided that this is not done in lieu of making any required

notification to a foreign consulate. Also, if you have questions about the VCCR consular notification obligation or related matters, the Department stands ready to help with information and advice.

Q. How can I get answers to other questions?

A. Additional inquiries may be directed to the Office of the Assistant Legal Adviser for Consular Affairs, LICA, Room 5527A, U.S. Department of State, Washington, D.C. 20520; telephone number 202-647-4415; facsimile number 202-736-7559. Urgent telephone inquiries after regular business hours may be directed to the State Department Operations Center, 202-647