Susan was excited about her plans to visit her friend Isabel in Costa Rica. Isabel had been a high school exchange student five years earlier and had lived with Susan’s family. Susan’s college graduation gift from her parents was a trip to visit Isabel. Susan picked up her rental car at the airport when she landed in San Jose, Costa Rica’s capital, and settled in for the two-hour drive to Isabel’s hometown. Along the road, something went very wrong. A pedestrian came out of nowhere — Susan did not see him until she had hit him. Panicstricken, she stopped the car. After a short time, help arrived — as did the police, who took Susan to a local police station. Susan was terrified: Her rudimentary Spanish was of no help to her, Isabel’s family did not have a telephone, and she had no idea what to do. The police officer was trying to say something to her, ask her something: Did she want the U.S. consulate to know she had been detained? Yes!

Luckily, the U.S. consulate was notified of Susan’s arrest, and a consular officer was able to visit and help her contact her parents and hire a lawyer. Without the consular officer’s help, Susan would have felt completely lost. Her rights — and those of anyone arrested in a foreign country — to consular notification and access are codified in the Vienna Convention on Consular Relations (VCCR). VCCR, and some bilateral treaties to which the United States is party, gives detained or arrested foreign nationals (anyone who is not a citizen, including foreign visitors, legal permanent aliens and illegal aliens) the right to have their consulate notified of their detention or arrest. These treaties also give consular officers the right to have access to their citizens in these situations.
This article focuses on the notification and access rights inherent in these treaties, explains why they are important, and describes how correctional officers can easily comply with the obligations created by these rights.

THE BASICS

Foreigners in any country are likely to be less aware of the laws and legal system than that country’s citizens. They also are more likely to be cut off from the support of friends and family than a native. For this reason, when a foreigner is arrested for any reason, it is important that consular officers be able to offer assistance and guide the detainee through the legal system. This right was codified in VCCR in Articles 36 and 37. More than 165 countries have agreed to abide by the terms of VCCR. The United States has been a party to VCCR since 1969.

VCCR Article 36 states that arresting authorities must inform foreign detainees that they have the right to have their respective consulate notified of their detention. It also affords consular officers the right to have access to detainees. Therefore, when a foreign national is arrested or detained, authorities must ask if the detainee would like his or her consulate notified. If the detainee answers yes, authorities must make that notification. After that, if the consulate wishes to have access to the detainee — via personal visit, telephone or letter — the detaining authorities must provide that access.

VCCR Article 37 provides that appropriate authorities must notify the consulate when a foreign national dies. While it may be rare that a foreign national dies while in the custody of a correctional facility in the United States, such deaths occur periodically and it is important that correctional authorities are aware of their responsibilities under VCCR.

CONSULAR OFFICERS

Consular officers (consuls) are commissioned to perform certain duties on behalf of their governments. They either are members of a country’s foreign service or are local residents (known in the United States as “honorary consuls”) appointed by the foreign government to perform consular duties. Their responsibilities include developing economic, commercial, scientific and cultural relations between the countries they represent and the areas in which they serve, and safeguarding interests of their governments and their citizens traveling or residing in their consular districts. Consuls provide a wide variety of assistance to their nationals, which may include performing notarial functions, issuing passports and assuring that the interests of their nationals are defended in court. Of concern here is that consuls help their nationals who get into trouble — such as death, disappearance, injury or illness, destitution, falling victim to crime, involvement in legal disputes and other difficulties — including arrested or detained nationals. Consuls may visit a detained national, check on his or her welfare, notify relatives, and arrange for financial or legal assistance, among other things.

THE TREATIES

VCCR establishes basic customary international law obligations on a variety of topics, including notification and access rights of consuls when a national of their particular country is detained or arrested. It does not specify a particular process but instead, provides general guidelines. For example, it states that authorities shall inform a detained foreign national “without delay” of his or her rights to have the national’s consulate notified.

The United States also is party to bilateral consular treaties with nearly six dozen countries. These treaties often contain more specific provisions about consular notification. For example, several treaties state that the foreign arrestee’s consulate must be notified of his or her arrest within 72 hours, in which case the arrestee has no choice and there is a specific time limit.

BASIC RULE VERSUS “MANDATORY” RULE

The basic rule is noted in VCCR: Ask all foreign detainees if they want their consulate notified of their detention, document the decision and act on it. This applies to all foreign nationals, whether they are in the United States legally or not, including legal permanent residents (green card holders) who are not yet U.S. citizens.

Mandatory notification is a provision of some of the bilateral treaties. For citizens of those countries with which the United States has mandatory notification agreements, the consulate must be notified without delay, regardless of the detainee’s wishes. Because these obligations are not uniformly administered throughout the United States — due, unfortunately, to some law enforcement agencies’ unfamiliarity with them — there is the possibility that when foreign nationals are placed in U.S. jails or prisons, they have not been advised of this right. In this case, inform them of their right and if they want their consulate notified, ensure that it is done. Do likewise if they come from a mandatory notification country and it is determined that notification has not been provided. In these instances, late notification is better than no notification.

Why does this seem so complicated? Couldn’t it be simplified by just notifying the consulate in all cases? Due to privacy concerns, the answer is no. VCCR provides the option of having consuls notified because some foreign nationals will not want their arrest or detention disclosed. They may be seeking asylum and their privacy wishes should be respected, unless there is a mandatory notification requirement. If the detainee is an asylum-seeker from a mandatory notification country, notification still must be given, however, the fact that the detainee has applied
for asylum should not be revealed to the consulate.

**How to Provide Notification**

In order to meet the notification obligations imposed by those rights, corrections officials first must look for indicators that the detainee may be a foreign national, e.g., a foreign passport or an alien registration card, a non-U.S. birthplace, unfamiliarity with English, etc. Once it has been determined that the detainee is not a U.S. citizen, ask if he or she would like his or her consulate notified of the arrest. The U.S. Department of State provides a suggested statement on notification country (the list of which is in the Consular Notification and Access booklet), inform him or her that his or her consulate will be notified and then do so as soon as possible.

**Consular Access**

What happens next is up to the consulate. VCCR Article 36 and the bilateral treaties provide consuls with the right to have access to their nationals. They may visit, call or write. Whether they choose to do so depends on the traditions and resources of the country, and the location of the nearest consulate. Each country has discretion in deciding what level of consular services it actually will provide.

Consuls are entitled to visit and communicate with their detained nationals. This is true even if the foreign national has not requested a visit. (A consular officer may wish to confirm that the detainee does not want consular assistance by speaking to him or her; once the detainee has confirmed that he or she does not want consular assistance, detaining authorities are not required to provide further access — unless the detainee later changes his or her mind, which sometimes happens.) Consuls are expected, however, to follow the regulations of the correctional facility regarding facility security, and the time, place and manner of their visits. The U.S. Department of State urges correctional authorities to grant consuls 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 consuls have to travel long distances to visit their nationals.

Although consuls have certain privileges and immunities, they must comply with applicable prison security rules. Consuls may be subject to search prior to visiting an inmate, but because they are entitled to be treated with respect, searches of consular officers should not be unnecessarily intrusive.

Once cleared through security, consuls are entitled to meet privately with their nationals. VCCR does not explicitly state that visits may be private, but some of the bilateral agreements contain such requirements. The Department of State believes that consuls should normally be allowed to converse in private. This does not mean, however, that the conversation cannot be monitored for security reasons. If a consul insists upon a private meeting but the detained national objects to meeting privately, guidance should be sought from the Department of State.

The services a consul may provide include assisting in arranging legal representation, monitoring the progress of the case and seeking 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 consul may speak with jail 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. Consuls frequently will be in contact with detainees’ families, particularly if they are in the country of origin, to advise them of detainees’ situations, morale and other relevant information.
Consuls 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 detainees and their legal counsel in preparation of the detainees’ defense. The usual process should be used to arrange for a lawyer for detainees. While consuls are permitted to assist in arranging counsel, they may or may not actually choose to take such action.

Ultimately, these are mutual obligations. In general, a consul should be permitted the same access that you would want an American consul to have in a similar situation in a foreign country.

WHY CORRECTIONS OFFICIALS SHOULD CARE

There are legal, policy and pragmatic reasons why corrections officials should care about affording these rights to foreign detainees and consuls. First, the Supremacy Clause in article VI of the U.S. Constitution states that “all Treaties ... shall be the supreme Law of the Land.” Therefore, these notification and access obligations are part of both U.S. and international law.

The United States chose to undertake these obligations in part due to the principle of reciprocity. As a philosophical matter, reciprocity seems a sound operating principle to most of us: “Do unto others as you would have done unto you.” But reciprocity is a key practical consideration as well. It is important that the hundreds of American citizens who find themselves detained or arrested abroad each year, such as Susan, have the protection and assistance of U.S. consuls. Fulfillment of our obligations under international law is the best guarantee that other governments will do the same.

Reciprocity also is important from a diplomatic perspective. The Department of State monitors American citizen arrests abroad; if it finds that it has not been properly notified, the department protests to the foreign government. It is difficult to demand action on such protests if the department is not complying with this requirement itself.

Finally, there are several fundamental reasons corrections officials should care about including these issues in their procedures. First and foremost, investigation and litigation tie up scarce resources. If the Department of State receives a complaint from a consulate, it must contact the detaining officials to investigate whether the detainee was informed of his or her right to notify his or her consulate and what follow-up was provided. Further, litigation results are unpredictable. Courts still are deciding how to address these cases, and there is a risk of having a conviction overturned or of evidence being suppressed.

A court in New York recently held that someone who does not receive consular notification may file for monetary damages under civil rights statutes (“deprived of rights under color of law”). Providing notification will avoid giving grounds for challenging the prosecution due to a lack of notification.

Ultimately, the last reason corrections officials should care about notification is that the consul can help them. Consuls know the language and the culture, can contact relatives and, in general, can be a useful resource.

NOTIFICATION IS AN OBLIGATION

VCCR gives detained foreigners almost anywhere in the world the right to have their consulates notified of their detention. Advising detainees of this right is an obligation, as is acting on their decision. For the countries with bilateral treaties, mandatory consular notification is an obligation. Thereafter, providing consular access to detainees is an obligation as well.

There are many reasons that providing notification and access are important, and there are many ways in which consuls can help detaining officials. But again, the most important reason to abide by these obligations is reciprocity. The Department of State must ensure that U.S. consuls always can come to the aid of Americans in distress — those who find themselves in the wrong place at the wrong time and desperately need their consuls’ help.

CONCLUSION

The American consul in Costa Rica helped Susan contact her parents and Isabel’s family, and continued to relay messages during the course of Susan’s confinement. The consul helped Susan obtain an English-speaking attorney, who arranged for her bail and defended her in court. The consul also disclosed funds forwarded by Susan’s family through the Department of State to pay for her defense and to meet her needs while awaiting trial. Throughout the entire ordeal, the consul provided Susan and her family with information and reassurance. The consul did not get Susan released — it would not be appropriate for a consul to intervene in a case in that way — but he helped make her ordeal more bearable for herself and her family.

FIND OUT MORE

The U.S. Department of State has a Consular Notification and Access outreach program for federal, state and local officials throughout the United States. Booklets, pocket cards and training videos are available to all corrections officials free of charge. To receive them, fax requests to the Bureau of Consular Affairs at (202) 736-7559. The booklet, along with an e-mail link, also can be found on the consular notification Web site: travel.state.gov/consul_notify.html. For training information, please call the Bureau of Consular Affairs at (202) 647-4415.

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