



LEGAL BULLETIN #2001-08 OFFICE OF LEGAL AFFAIRS

VIENNA CONVENTION



Legal Flag: The Vienna Convention is a multi-national treaty that provides for notification of the appropriate consulate upon the arrest or qualifying detention of a foreign national.

This LEGAL BULLETIN discusses the Vienna Convention and its applicability to Department operations.

OVERVIEW

The Vienna Convention is a multi-national treaty entered into by the United States that establishes minimum standards with respect to the treatment of foreign nationals. In particular, the treaty requires a law enforcement agency, upon arrest or qualifying detention, of any foreign national, to advise that person of the right to have his or her consulate promptly notified. Consulate officials must then be granted reasonable access to their citizens so that assistance may be provided. The Department is required by law to comply with the notification provisions of the treaty.

Who is a foreign national?

A foreign national is any person who is not a U.S. citizen. This includes permanent resident aliens, illegal aliens and undocumented aliens.

Citizenship may initially be determined by asking the person where he or she was born (information required to complete an arrest report). A person born within the U.S. may generally be considered a U.S. citizen. A person born outside the U.S. *may* be a foreign

national, possible indicators include possession of a foreign passport or alien registration documentation, or an unfamiliarity with the English language. Such indicators constitute a basis for asking the person whether he or she is a foreign national, and, if so, their country of citizenship.

When must a foreign national be advised of his or her rights under the treaty?

Under the treaty, a foreign national's rights are triggered upon arrest. These rights may also attach during a detention. The determinant of whether a detention triggers a person's rights under the treaty is the length of the detention. Generally, the longer the detention, the more likely a person's treaty rights shall attach, particularly if the detention lasts for a number of hours or overnight. Conversely, momentary detentions, arising from, for example, routine traffic stops, do not trigger the rights afforded under the treaty.

What rights are afforded a foreign national under the Vienna Convention?

Upon arrest or qualifying detention, a law enforcement officer must inform the foreign national of the right to have his or her consulate notified of the arrest or detention. If the person desires, a notification will be made to the

appropriate consulate, indicating the circumstances of the arrest or detention. Several countries of citizenship require mandatory notification of consulate officials regardless of the person's wishes.

The following countries require mandatory notification: Antigua and Barbuda, Armenia, Azerbaijan, Bahamas, Barbados, Belarus, Belize, Brunei, Bulgaria, China, Costa Rica, Cyprus, Czech Republic, Dominica, Fiji, Gambia, Georgia, Ghana, Grenada, Guyana, Hong Kong, Hungary, Jamaica, Kazakhstan, Kiribati, Kuwait, Kyrgyzstan, Malaysia, Malta, Mauritius, Moldova, Mongolia, Nigeria, Philippines, Poland, Romania, Russia, Saint Kitts and Nevis, Saint Lucia, Saint Vincent and the Grenadines, Seychelles, Sierra Leone, Singapore, Slovakia, Tajikistan, Tanzania, Tonga, Trinidad and Tobago, Turkmenistan, Tuvalu, Ukraine, United Kingdom (including Anguilla, British Virgin Islands, Bermuda, Montserrat, the Turks and Caicos Islands), U.S.S.R. (passports issued by the U.S.S.R. may still be in existence), Uzbekistan, Zambia, Zimbabwe.

What procedures should Department members follow in processing a foreign national?

Once a person under arrest or qualifying detention is determined to be a foreign national the Department member who initially learns of the person's foreign citizenship status has responsibility for immediately notifying the watch commander. The watch commander then has the responsibility for making the appropriate notifications.

What response can be expected of consulate officials ?

Upon receipt of the notification, consulate officials may provide a range of assistance to their national, which may include arranging legal representation and facilitating

communication with family members. However, consulate officials not licensed as attorneys within the U.S. may not act as legal counsel for the national.

To provide assistance, consulate officials must be allowed reasonable access to the person arrested or detained. However, consulate officials must comply with any security and safety procedures applicable to any visitor.

What consequences may result from a violation of the Treaty's provisions?

A failure to inform a foreign national of the rights afforded him or her under the Vienna Convention, or a failure to make the appropriate consular notifications may result in a range of consequences, including U.S. State Department intervention. In an increasing number of instances, foreign nationals have sought judicial review of their convictions, petitioning for new trials, re-sentencing, and executive clemency. A recent decision concluded that a foreign national, deprived of his rights under the treaty, could bring a civil action against both the individual officer and the corresponding municipality. *See Standt v. City Of New York*, 153 F.Supp.2d 417 (S.D.N.Y. 2001).

SUMMARY

A foreign national who has been arrested or detained by a Department member shall be made aware of the right to have his or her corresponding consulate notified of the arrest or detention. If the person desires, notification will be made in a timely manner. Certain countries of origin, listed above, will trigger a mandatory obligation to notify consulate officials regardless of the persons wishes. Once notified, consulate officials must be allowed reasonable access to their national so that appropriate assistance may be provided.

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