

Truro Police Department

ARREST OF FOREIGN NATIONALS

Policy Number: OPS 6.01A
REFERENCE:

Effective Date: September 18, 2006
Revised Date: November 16, 2007

Accreditation Standards:

Mass. Gen. Law: Chap. 40, 8G, Chap. 41, 98A & 99, Chap. 274, Sec. 1, Chap. 276, Sec. 10A - 10D, Chap. 276, Sec. 23 & 23A & 28

Other:

POLICY:

I. Historical Background:

On December 24, 1969 the United States became a party to an International Treaty known as the Vienna Convention on Consular Relations (VCCR) which was first formed in Vienna on April 24, 1963. Pursuant to Article VI, clause 2 of the United States Constitution, a Treaty of which the US is a signatory has the status of law ("all treaties made . . . shall be the supreme law of the land"). It is binding on federal, state, and local government officials to the extent that they pertain to matters within such officials' competence.

Because of its comprehensive nature and near universal applicability, the VCCR now establishes the baseline for most obligations with respect to the treatment of foreign nationals in the United States and for treatment of U.S. citizens abroad for foreign governments.

Therefore, the procedures outlined in this policy, which are in conformity with the VCCR, focus primarily on providing consular notification and access with respect to foreign nationals arrested or detained in the United States, so that their governments can assist them. The obligations of consular notification and access apply to United States citizens in foreign countries just as they apply to foreign nationals in the United States. When U.S. citizens are arrested or detained abroad, the United States Department of State seeks to ensure that they are treated in a manner consistent with these instructions, and that U.S. consular officers can similarly assist them. It is therefore particularly important that federal, state, and local government officials in the United States comply with these obligations with respect to foreign nationals here.

II. Policy Statement:

It shall be the policy of the Truro Police Department, that whenever a foreign national, as defined herein, is arrested or detained, they must be advised of the right to have their consular officials notified. See **Consular Notification Form**. In some cases, the nearest consular officials must be notified of the arrest or detention of a foreign national, regardless of the national's wishes [See

Section VI. below]. Once notified, Consular officials are entitled to access to their nationals in detention, and are entitled to provide consular assistance.

III. Definitions:

- Consular officer: A consular officer or consul as sometimes referred to, is a citizen of a foreign country employed by a foreign government and authorized to provide assistance on behalf of that government to that government's citizens in a foreign country. Consular officers are generally assigned to the consular section of a foreign government's embassy in Washington, DC, or to consular offices maintained by the foreign government in locations in the United States outside of Washington, DC.
- Detentions: 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. *(Added November 16, 2007)*

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. *(Added November 16, 2007)*

- Foreign National or ALIEN: For the purposes of consular notification, a "foreign national" is any person who is not a U.S. citizen. The terms "foreign national" and "alien" are used interchangeably.
 - Note: 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" resident aliens. There is no reason, for purposes of consular notification, to inquire into a person's legal status in the United States.

IV. Arrests and Detentions of Foreign Nationals:

Whenever a foreign national is arrested or detained in the United States, there are legal requirements to ensure that the foreign national's government can offer him/her appropriate consular assistance.

- **ALL:** In all cases, the foreign national must be told of the right of consular notification and access.
- **OPTION:** In most cases, the foreign national then has the Option to decide whether to have consular representatives notified of the arrest or detention.
- **MANDATORY:** In other cases, however, the foreign national's consular officials must be notified of an arrest and/or detention regardless of the foreign national's wishes.

Whenever a foreign national is taken into custody, the detaining official should determine whether consular notification is at the option of the foreign national or whether it is mandatory.

A list of all embassies and consulates in the United States, with their telephone and facsimile numbers, shall be maintained in the booking area in a clearly marked binder titled Consular Notification to facilitate the provision of notification by detaining officers to consular officials when required.

V. Notification at the Foreign National's Option:

In ALL cases, the foreign national must be told of the right of consular notification and access. The foreign national then has the option to decide whether he/she wants consular representatives notified of the arrest or detention, unless the foreign national is from a "Mandatory Notification" Country. The mandatory notification countries located in the Booking Room and linked to this policy to facilitate this purpose.

If the detained foreign national is a national of a country not on the mandatory notification list, the requirement is that the foreign national shall be informed without delay of the option to have his/her government's consular representatives notified of the detention. If the detainee requests notification, a responsible detaining official must ensure that notification is given to the nearest consulate or embassy of the detainee's country without delay. For the Officer's convenience, a Consular Notification Fax Cover Sheet is located in the booking area. The Consular Notification Fax Cover Sheet shall be used to satisfy this notification requirement. Please take the time to fill out the appropriate information on this fax cover sheet. In addition please fill out the Consular Notification Form and attach to the original report.

VI. Mandatory Notification:

In some cases, "mandatory notification" must be made to the nearest consulate or embassy "without delay," regardless of whether the foreign national requests such notification.

Foreign nationals subject to mandatory notification requirements should otherwise be treated like foreign nationals not subject to the mandatory notification requirement. Thus, for example, the foreign national should be informed that notification has been made and advised that he/she may also specifically request consular assistance from his or her consular officials.

Privacy concerns or the possibility that a foreign national may have a legitimate fear of persecution or other mistreatment by his/her government may exist in some mandatory notification cases. The notification requirement should still be honored, but it is possible to take precautions regarding the disclosure of information. For example, it may not be necessary to provide information about why a foreign national is in detention. Moreover, under no circumstances should any information indicating that a foreign national may have applied for asylum in the United States or elsewhere be disclosed to that person's government. The Department of State can provide more specific guidance in particular cases if necessary.

For the Officer's convenience, a Consular Notification Fax Cover Sheet is located in the booking area. The Consular Notification Fax Cover Sheet shall be used to satisfy this notification requirement. Please take the time to fill out the appropriate information on this fax cover sheet. In addition please fill out the Consular Notification Form and attach to the original report.

VII. Recordkeeping:

The Truro Police Department shall maintain written records sufficient to show compliance with the above notification requirements. These records should show all notifications to foreign consular representatives. In addition, in cases in which notification is at the discretion of the detained foreign national, these records should show that the foreign national was informed of the option of consular notification, the date when the foreign national was so informed, and whether or not the foreign national requested that consular officials be notified. If a confirmation of receipt of notification is available (e.g. fax confirmation receipt), it should be saved if possible.

The Department of State from time to time receives inquiries and complaints from foreign governments concerning foreign nationals in detention. The Department in such cases may request information from the relevant law enforcement officials on whether consular notification was in fact given. Concerns about consular notification may also be raised by foreign consular officials directly with the responsible federal, state, and local officials. Good recordkeeping will facilitate responding to these inquiries and to any consular notification issues that may be raised in litigation.

VIII. Consular Access to Detained Foreign Nationals:

Detained foreign nationals are entitled to communicate with their consular officers. Any communication by a foreign national to his/her consular representative must be forwarded by the Officer in Charge, or designee, to the consular post without delay.

Foreign consular officers must be given access to their nationals and permitted to communicate with them. Such officers have the right to visit their nationals, to converse and correspond with them, and to arrange for their legal representation. In addition, consular officers may not act as attorneys for their nationals.

The rights of consular access and communication generally must be exercised subject to local laws and regulations. Department Policy may not, however, be so restrictive as to defeat the purpose of consular access and communication. Such policies "must enable full effect to be given to the purposes" for which the right of consular assistance has been established.

IX. Summary of Process:

4 Steps to Follow When a Foreign National is Arrested or Detained:

(1.) Determine the foreign national's country. In the absence of other information, assume this is the country on whose passport or other travel document the foreign national travels.

(2.) If the foreign national's country is not on the mandatory notification list:

- Offer, without delay, to notify the foreign national's consular officials of the arrest/detention. Please use the following Statement to facilitate this purpose:
 - “As a non-U.S. citizen who is being arrested or detained, you are entitled to have us notify your country's consular representatives here in the United States. A consular official from your country may be able to help you obtain legal counsel, and may contact your family and visit you in detention, among other things. If you want us to notify your country's consular officials, you can request this notification now, or at any time in the future. After your consular officials are notified, they may call or visit you. Do you want us to notify your country's consular officials? “
- If the foreign national asks that consular notification be given, notify the nearest consular officials of the foreign national's country without delay using the Consular Notification Fax Cover Sheet. For phone and fax numbers for foreign embassies see binder kept in the booking area or the linked document to this policy titled Consular Notification.

(3.) If the foreign national's country is on the list of mandatory notification countries:

- Notify that country's nearest consular officials, without delay, of the arrest/detention.
- Tell the foreign national that you are making this notification. Please use the following Statement to facilitate this purpose:

- “Because of your nationality, we are required to notify your country's consular representatives here in the United States that you have been arrested or detained. After your consular officials are notified, they may call or visit you. You are not required to accept their assistance, but they may be able to help you obtain legal counsel and may contact your family and visit you in detention, among other things. We will be notifying your country's consular officials as soon as possible.”
- Notify the nearest consular officials of the foreign national's country without delay using the Consular Notification Fax Cover Sheet. For phone and fax numbers for foreign embassies see the linked document to this policy titled Consular Notification. This document is kept at the Truro Police Department’s booking area.

Note: For TRANSLATIONS of these Statements made to the Foreign Nationals please click on the following link: Consular Notification and Access or check the reference material from the United States Department of State titled Consular Notification and Access (2003) Part Four page 25 maintained in the booking area.

(4.) Keep a written record of the provision of notification and actions taken. Keep a copy of the Fax Notification Receipt as well as the Consular Notification Fax Cover Sheet and make appropriate notations to the narrative of the Arrest / Incident Report of all notifications made and actions taken. All written documentation shall be stored with the appropriate report (Arrest/Incident).

- X. Case Law Review:** On June 28, 2006, the U.S. Supreme Court issued a decision in two cases (*Bustillo v. Johnson* and *Sanchez-Llamas v. Oregon*) involving breaches of the Vienna Convention on Consular Relations (VCCR). Both cases involved the failure to inform foreign nationals that they may request consular notification and access upon their arrest or detention. In its decision the Court did not decide whether the VCCR creates individual and judicially enforceable rights with respect to consular notification and access. The Court agreed with the U.S. Government's position that even if the VCCR creates such rights, suppression of evidence is not an appropriate remedy for failure to provide consular notification and access. The Court also agreed that defendants can be barred from raising claims alleging lack of consular notification and access if they did not raise such claims at trial.

The Court also reiterated the importance of the U.S.’s international obligations and stated that its decision in no way disparages the VCCR. The Department of State reminds all federal, state, and local law enforcement and other government officials that all consular notification and access requirements governed by the VCCR and other international agreements continue to remain in effect in the United States. Our respect for international law and our desire to ensure that U.S. consular officers are able to assist our citizens abroad make it a high priority for us to fulfill our international obligations concerning consular notification and access. (*Added November 16, 2007*)

Consular Notification Form

Arrestee / Detainee:

Arrest Number (if applicable)

Date / Time of Notification:

I.) If the foreign national's country is on the list of mandatory notification countries:

Notify that country's nearest consular officials, without delay, of the arrest/detention.

Tell the foreign national that you are making this notification.

Please use the following Statement to facilitate this purpose:

"Because of your nationality, we are required to notify your country's consular representatives here in the United States that you have been arrested or detained. After your consular officials are notified, they may call or visit you. You are not required to accept their assistance, but they may be able to help you obtain legal counsel and may contact your family and visit you in detention, among other things. We will be notifying your country's consular officials as soon as possible."

Notify the nearest consular officials of the foreign national's country without delay using the Consular Notification Fax Cover Sheet. For phone and fax numbers for foreign embassies see the linked document to this document titled Consular Notification.

II.) If the foreign national's country is not on the mandatory notification list:

Offer, without delay, to notify the foreign national's consular officials of the arrest/detention.

Please use the following Statement to facilitate this purpose:

"As a non-U.S. citizen who is being arrested or detained, you are entitled to have us notify your country's consular representatives here in the United States. A consular official from your country may be able to help you obtain legal counsel, and may contact your family and visit you in detention, among other things. If you want us to notify your country's consular officials, you can request this notification now, or at any time in the future. After your consular officials are notified, they may call or visit you. Do you want us to notify your country's consular officials?"

If the foreign national asks that consular notification be given, notify the nearest consular officials of the foreign national's country without delay using the **Consular Notification Fax Cover Sheet**. For phone and fax numbers for foreign embassies see the linked document to this policy titled **Consular Notification**.

_____	_____	_____
Arrestee	Date	Time
_____	_____	_____
Arresting Officer	Date	Time

Mandatory Notification Countries and Jurisdictions

Algeria	Malta
Antigua and Barbuda	Mauritius
Armenia	Moldova
Azerbaijan	Mongolia
Bahamas, The	Nigeria
Barbados	Philippines
Belarus	Poland (non-permanent residents only)
Belize	Romania
Brunei	Russia
Bulgaria	Saint Kitts and Nevis
China ¹	Saint Lucia
Costa Rica	Saint Vincent and the Grenadines
Cyprus	Seychelles
Czech Republic	Sierra Leone
Dominica	Singapore
Fiji	Slovakia
Gambia, The	Tajikistan
Georgia	Tanzania
Ghana	Tonga
Grenada	Trinidad and Tobago
Guyana	Tunisia
Hong Kong ²	Turkmenistan
Hungary	Tuvalu
Jamaica	Ukraine
Kazakhstan	United Kingdom ³
Kiribati	U.S.S.R. ⁴
Kuwait	Uzbekistan
Kyrgyzstan	Zambia
Malaysia	Zimbabwe

¹ Notification is not mandatory in the case of persons who carry "Republic of China" passports issued by Taiwan. Such persons should be informed without delay that the nearest office of the Taipei Economic and Cultural Representative Office ("TECRO"), the unofficial entity representing Taiwan's interests in the United States, can be notified at their request.

² Hong Kong reverted to Chinese sovereignty on July 1, 1997, and is now officially referred to as the Hong Kong Special Administrative Region, or "SAR." Under paragraph 3(f)(2) of the March 25, 1997, U.S.-China Agreement on the Maintenance of the U.S. Consulate General in the Hong Kong Special Administrative Region, U.S. officials are required to notify Chinese officials of the arrest or detention of the bearers of Hong Kong passports in the same manner as is required for bearers of Chinese passports-- *i.e.*, immediately, and in any event within four days of the arrest or detention.

³ United Kingdom includes England, Scotland, Wales, Northern Ireland and Islands and the British dependencies of Anguilla, British Virgin Islands, Bermuda, Montserrat, and the Turks and Caicos Islands. Their residents carry British passports.

⁴ Although the U.S.S.R. no longer exists, some nationals of its successor states may still be traveling on its passports. Mandatory notification should be given to consular officers for all nationals of such states, including those traveling on old U.S.S.R. passports. The successor states are listed separately above.