

**Questions for the Record Submitted to
Under Secretary Patrick F. Kennedy by
Senator Patrick Leahy (#1-4)
Senate Committee on the Judiciary
July 27, 2011**

Question 1:

It has been asserted that there is no evidence that the United States' failure to comply with its treaty obligations under the Vienna Convention on Consular Relations has or will cause other countries to deny consular access to Americans arrested overseas, and as a result there is no need for legislation such as the Consular Notification Compliance Act of 2011. Is that assessment accurate?

Answer:

There is an urgent and compelling need for this legislation. Congress's failure to act will put U.S. citizens abroad at greater risk of being detained in a foreign legal system without the benefit of critical services that U.S. consular officers routinely provide. U.S. citizens arrested in a foreign country are likely unfamiliar with the legal system, may not understand the language, and often have no ability to contact the outside world other than through a U.S. consular officer. The safety net of consular access is critical to protect them from possible mistreatment and an unfair foreign legal process. U.S. consular officers routinely provide services including prison visits to meet with the person; communicating with the person by phone or in writing; assisting them in finding legal representation; monitoring the progress of judicial proceedings; speaking with

prison authorities about the conditions of confinement; securing food, medicine, religious items, reading material, and other necessities; and transmitting correspondence to and from the person's family. The lack of such services can significantly and adversely impact how our citizens are treated while in the custody of the foreign government, as well as the quality of the legal process they receive.

It is difficult to overstate the importance of consular access to our own citizens. To take one example, U.S. journalist Euna Lee recently published an op-ed in the Washington Post recounting her ordeal in 2009 as a prisoner in North Korea. She said her "biggest fear was nobody knowing where I was or what had happened to me," which was why it was so significant when the Swedish ambassador, who represented U.S. interests, was able to meet briefly with her in her second week of imprisonment.

The international system of consular notification and protection established by the Vienna Convention on Consular Relations ("Vienna Convention") and similar provisions in bilateral agreements creates a network of reciprocal obligations to ensure protection of citizens in the custody of a foreign government. To be effective, this safety net of protection depends on mutual compliance by the United States and our other treaty partners. When the United States fails to comply with these obligations, our own citizens abroad are placed at risk. As Judge Butzner aptly stated:

United States citizens are scattered about the world—as missionaries, Peace Corps volunteers, doctors, teachers and students, as travelers for business and for pleasure. Their freedom and safety are seriously endangered if state officials fail to honor the Vienna Convention and other nations follow their example.

Breard v. Pruett, 134 F.3d 615, 622 (4th Cir. 1998) (Butzner, J., concurring).

The potential harm to U.S. citizens is very significant. U.S. citizens travel internationally in greater numbers than those of most other countries (making an estimated 60 million trips by air last year), so we have the most to lose if the system of consular notification and access falters. Indeed, with respect to just Mexico alone, more U.S. citizens travel to Mexico than to any other country – U.S. citizens made over 68 million entries into the United States from Mexico in FY 2010.

As a result of repeated and high profile incidents over more than a decade in which foreign nationals detained in the United States have not received timely consular notification and assistance – including foreign nationals who were ultimately convicted on capital charges and executed – this safety net has been severely tested.

The harm caused by the United States' continued failure to comply with its consular notification and access treaty obligations can take many forms. Other countries are unlikely to state expressly that they will violate their obligations as a result of, or in retaliation for, our non-compliance. But where one country,

especially as influential a country as the United States, is seen to take a cavalier approach toward its obligations, other countries, or their officials, can readily be expected to take a more cavalier approach to theirs, particularly when U.S. citizens are involved.

For example, in pressing for access to a detained U.S. national, or for reform of a foreign government's consular notification and access practices in general, U.S. consular officials frequently point to the United States' own protocols and practices as examples of best practices to be followed. The persuasiveness of these efforts is directly undermined by perceptions that the United States itself does not comply.

Our perceived failure to strictly adhere to consular notification and access obligations has been pointedly noted by other countries. One recent case in the Philippines provides a concrete example of how U.S. failure to give domestic legal effect to our treaty obligations – and specifically to the *Avena* judgment – can directly affect our ability to protect our own nationals. The case involved a member of the U.S. armed services, who was arrested and prosecuted in the Philippines on criminal charges, but was held in U.S. custody pursuant to the operative U.S.-Philippine Visiting Forces Agreement (VFA). A lawsuit was filed in the Philippine courts contending that the Philippines should retain custody of the service member and that the VFA was invalid because, under the U.S. Supreme

Court decision in *Medellín v. Texas*, the VFA would not be equally enforceable under U.S. domestic law. After closely scrutinizing U.S. treaty practice in general and the *Medellín* decision in particular, the majority of the Philippine Supreme Court concluded that the VFA should be honored, based in significant part on the fact that the United States had consistently complied with its VFA obligations.

Two dissenting justices disagreed,¹ however, and warned:

It would be naïve and foolish for the Philippines, or for any other State for that matter, to implement as part of its domestic law a treaty that the United States does not recognize as part of its own domestic law. That would only give the United States the “unqualified right” to free itself from liability for any breach of its own obligation under the treaty, despite an adverse ruling from the ICJ.²

In this case, the United States’ perceived record for treaty compliance, compliance with the *Avena* judgment, and respect for treaties under its domestic law, were all starkly relevant to the Philippine court’s willingness to recognize and enforce the Philippines’ reciprocal obligations.

Likewise, the Iranian Foreign Ministry repeatedly justified its refusal to provide more frequent consular visits to the three young U.S. hikers arrested by the Iranians for espionage by accusing the United States of violating the consular

¹ The dissenters explained as follows: “Under *Medellin*, the VFA is indisputably not enforceable as domestic federal law in the United States. On the other hand, ...the VFA constitutes domestic law in the Philippines. This unequal legal status of the VFA violates Section 25, Article XVIII of the Philippine Constitution, which specifically requires that a treaty involving the presence of foreign troops in the Philippines must be equally binding on the Philippines and on the other contracting State.” *Sombilon v. Romulo*, G.R. No. 175888 / G.R. No. 176051 / G.R. No. 176222 (Feb. 11, 2009), Supreme Court of the Philippines (Carpio, J., dissenting), available at http://sc.judiciary.gov.ph/jurisprudence/2009/feb2009/175888_176051_176222_carpio.htm.

² *Id.*

rights of detained Iranian nationals.³ On May 24, 2011, a day after the State Department urged Iran to permit “immediate consular access” to the detainees, Fox News reported that a Foreign Ministry spokesperson “rejected” the request, alleging that “Washington had not granted such treatment to Iranians jailed in the US.” “Many innocent Iranians are being kept under the worst conditions in US jails,” he said. “They have neither consular access nor contact with their families.”⁴

Other countries also have repeatedly reminded the United States that the consular notification system depends on mutual compliance. Nearly 60 parties to the VCCR made legal submissions to the U.S. Supreme Court in the case of *Medellín v. Dretke*, 544 U.S. 660 (2005). The 45 Member States of the Council of Europe joined in an *amicus curiae* brief arguing that under the ICJ judgment, “judicial review of conviction and sentence is required if Article 36 is violated.”⁵ Thirteen Latin American nations submitted an *amicus* brief arguing that the United

³ On January 12, 2010, an Iranian spokesperson announced that the detainees would be tried “soon,” after the head of the National Security Commission linked the cases to alleged U.S. violations of the VCCR. “The United States violated the Vienna Convention and international regulations by arresting Iranian diplomats and keeping them in prison for a long time,” the spokesman said, referring to five Iranians detained by U.S. forces in northern Iraq in 2007. Fars News Agency, *Spokesman: Iran to Try 3 US Nationals Soon*, Jan. 12, 2010, available at <http://english.farsnews.com/newstext.php?nn=8810221286>.

⁴ *Iran Refuses to Improve Access to Jailed US Hikers*, FOX NEWS, May 24, 2011, available at http://www.myfoxtwincities.com/dpps/news/iran-refuses-to-improve-access-to-jailed-us-hikers-dpgonc-20110524-fc_13347514.

⁵ Brief of Amici Curiae the European Union and Members of the International Community in Support of Petitioner, *Medellín v. Dretke*, 544 U.S. 660 (Oct. 20, 2004), available at <http://www.debevoise.com/publications/pdf/dpny-21879793-v1-EU%20Merits%20Brief.PDF>.

States must comply fully with the ICJ ruling and “furnish a legal remedy” for the Vienna Convention violation.⁶ Prior to the execution of Humberto Leal García, a number of Latin American countries, Switzerland, and the European Union all sent letters to the Governor of Texas emphasizing the consular violation in that case. These countries all underscored that the Vienna Convention is crucial for the protection of all nationals who travel abroad and that “[e]nforcement of treaty obligations depends on reciprocal compliance by all member states to the Convention.” They noted that “such a breach [as Leal’s execution] would undoubtedly undermine the international rule of law and would potentially impede the ability of consular officials around the world to carry out their duties.”

The United States has also long recognized the essential importance of reciprocity and strict adherence to our own consular obligations. Following the 1998 execution in the State of Virginia of Angel Breard, a Paraguayan national who had not received consular notification, the United States issued an apology to Paraguay, which stressed that the United States would redouble its efforts to ensure domestic compliance. It stated that “We fully appreciate that the United States

⁶ Brief of Foreign Sovereigns as Amici Curiae in Support of Petitioner, *Medellin v. Dretke*, 544 U.S. 660 (Oct. 20, 2004), *available at* http://www.debevoise.com/publications/pdf/Brief%20amicus%20curiae%20of%20Foreign%20Sovereigns%20merits_v1.PDF.

must see to it that foreign nationals in the United States receive the same treatment that we expect for our citizens overseas. We cannot have a double standard.”⁷

It is important to reiterate, however, that the harmful consequences of noncompliance are not limited to consular protection. The United States faces serious adverse foreign policy consequences as a result of our continued failure to address our consular notification and access treaty obligations. Many of our most important allies – including Mexico, the United Kingdom, and Brazil – have repeatedly and forcefully called upon the United States to honor its treaty commitments and have pointedly noted the reciprocal nature of these obligations. Over time, such vociferous objections about U.S. treaty noncompliance impair our ability to advance other critical national interests in bilateral and multilateral relationships.

Mexico, in particular, considers compliance a top priority in our bilateral relationship, and continued noncompliance has become a significant irritant in U.S.-Mexico relations. Our partnership with Mexico in cross-border law enforcement and security cooperation, including the fight against drug trafficking and other organized crime, has reached unprecedented levels in recent years as a result of the \$1.5 billion Merida Initiative, and extraditions with Mexico over the past few years have been at an all-time high. Yet as the Mexican Ambassador

⁷ U.S. Department of State, Office of the Spokesman, *Text of Statement Released in Asuncion, Paraguay*, Nov. 4, 1998, available at <http://secretary.state.gov/www/briefings/statements/1998/ps981104.html>.

wrote to the Secretary of State on June 14, 2011, the execution of Mexican nationals in violation of U.S. consular notification and access treaty obligations has “seriously jeopardized” Mexico’s ability to work collaboratively on several joint ventures, “including extraditions, mutual judicial assistance, and our efforts to strengthen our common border,” and could cause the Mexican Congress to “revise our cooperation” and “re-examine [Mexico’s] commitment to other bilateral programs.”

More generally, it is essential that the international community regard the United States as a nation that respects its treaty obligations. When we fail to do so, we lose credibility with our treaty partners, not just on consular notification and access, but across a broad range of issues, including mutual legal assistance, extraditions, nuclear nonproliferation, protection of U.S. diplomats and other officials overseas, and trade. In its July 2011 Letter to Governor Perry regarding the Leal case, for example, the European Union emphasized that “The EU considers the respect for reciprocal treaty obligations based rights to be of vital importance to all aspects of the transatlantic relationship.” The United States cannot afford to have our partners at the negotiating table question our commitment to the rule of law. For all of these reasons, passage of the Consular Notification and Compliance Act is essential to advance vital U.S. interests and the protection of U.S. nationals abroad.

Question 2:

What impact would this legislation have on U.S. citizens' access to consular services when they are detained overseas? It has been asserted that Americans detained overseas do not rely on notification of their right to request consular access under the Vienna Convention on Consular Relations because they consistently request it of their own accord. Is that accurate?

Answer:

Passage of this legislation would affirm the U.S. government's commitment to vigorous compliance with our consular notification and access obligations, and thus improve reciprocal protections for U.S. citizens overseas. As a practical matter, it would clarify the steps that federal, state, and local authorities already must take under the Vienna Convention on Consular Relations ("Vienna Convention") and comparable bilateral agreements, thereby directly improving U.S. compliance.⁸ We think that this, in turn, will encourage foreign authorities to intensify their own efforts to comply with these obligations. It will also strengthen the U.S. government's position when we are demanding access to U.S. citizens in particular cases and when we are trying to persuade foreign governments, as we regularly do, to improve their treatment of U.S. citizens and their processes for

⁸ As explained in more detail in response to Question 3, domestic officials at the federal, state, and local level are obligated under Article 36 of the Vienna Convention to follow three simple rules with respect to any national of another Vienna Convention party who is arrested or detained in their jurisdiction: authorities must *ask* the individual without delay if he or she wants to have the consulate notified; *notify* the consulate without delay if so; and allow the consulate *access* to the individual if the consulate requests it.

ensuring that law enforcement officials at all levels and in all jurisdictions are providing consular notification and access to detained foreign nationals.

U.S. citizens live and travel abroad extensively and their welfare is of one of the highest priorities of the Department of State. Approximately 6.5 million U.S. citizens live abroad, and 103 million hold passports, taking 60 million trips abroad last year. In 2010 alone, Department of State employees conducted more than 9,500 prison visits, and assisted more than 3,500 U.S. citizens who were arrested abroad. Thousands of U.S. citizens benefit from these services annually. In the past five years, we have provided consular services to arrested U.S. citizens from each of the 50 states, the District of Columbia, and the other U.S. territories. U.S. citizens who reside in the states represented by Members of the Judiciary Committee have benefited specifically from consular assistance.

We strongly believe that most U.S. citizens need to be explicitly informed that they can seek the assistance of their consulate if they are detained abroad. There is no evidence to suggest that they will voluntarily request access to their consulate of their own initiative in the absence of such notification. However, even if they did, this fact would not alter the vital importance of the Vienna Convention consular notification and access regime to ensuring that U.S. nationals are protected when they are detained abroad, and that the U.S. government is aware of their custody and able to offer assistance. More importantly, leaving it up

to the detained national or a family member to call the U.S. consulate is not sufficient to discharge the treaty obligation. The Vienna Convention requires that the host government authorities themselves notify the consulate as a central part of its protective regime, and the United States routinely demands that foreign governments honor this core commitment. Many U.S. citizens who travel overseas are not aware that they are entitled to have their consulate notified if they are arrested or detained by foreign authorities. These include all types of U.S. travelers, although certain types of travelers have less awareness of their rights than others, such as minors, younger students, U.S. citizens traveling overseas for the first time, and individuals who are mentally unstable or who may be incapacitated by alcohol or drugs. In all such cases, we must and do rely every day on foreign governments to comply with their obligation under Article 36 of the Vienna Convention to provide this information to our nationals. Even when our nationals themselves request access to U.S. officials, the foreign government may not acquiesce based solely on the request. Some travelers are easily intimidated in a detention setting, in the custody of foreign law enforcement officials, and either are silenced by fear or force, or do not know how to assert their rights effectively. In most countries, foreign authorities do regularly inform U.S. citizens that they may request to meet with U.S. consular officials, and U.S. citizens usually request that their consulate be notified when informed of this option.

With the proliferation of channels for instant communication, more detained U.S. citizens are now able to notify their families, or our consular officials, directly of their situation. However, these communication options often are not available – particularly in situations where detained U.S. citizens may be most vulnerable and at risk – and the cell phones and computers that make such communication possible are often confiscated by the detaining authorities or otherwise not available in detention. And again, the fact that a detained U.S. citizen may be able to contact family or U.S. consular officials independently does not relieve foreign authorities of their obligation to inform him or her of the option to have consular officials notified and their obligation to notify U.S. consular officials if the person so requests. We regularly inform foreign law enforcement, for example, that simply giving the U.S. citizen detainee access to a telephone, and leaving it up to him or her to call the consulate, is not sufficient to discharge the treaty obligation; instead, the authorities must themselves notify the consulate.

Once notified (whether by foreign authorities, the detained U.S. citizen, or other parties), we rely on foreign authorities' ongoing cooperation to obtain access—often repeated access—to the detained citizen, and to provide other forms of assistance.

Examples of U.S. citizens who have benefitted from U.S. consular services abound. Some examples were provided in my testimony before the Committee.

But securing consistent notification and access remains challenging around the world. The examples set forth in Tab 1 are additional examples of U.S. citizens who have been detained abroad and were in need of consular assistance. These examples demonstrate how vital the consular notice and access system continues to be for our ability to protect our citizens abroad, regardless of how the Embassy may first learn of the detention. They also demonstrate how critical it is for United States officials to be able to claim, on a daily basis, that proper notification and access would be afforded to that nation's citizens in the United States, and why an impeccable U.S. record of compliance is essential.

Question 3:

What obligations regarding consular notification currently apply to the states and why?

Answer:

The Vienna Convention on Consular Relations (“Vienna Convention”) is a multilateral international treaty to which the United States has been a party since 1969. President Kennedy signed the treaty in 1963, and in 1969 President Nixon transmitted the Vienna Convention to the Senate for advice and consent under Article II, Section 2 of the Constitution, which the Senate unanimously provided by a vote of 81 to 0. The United States is also party to over 50 bilateral consular conventions containing similar provisions on consular notification and access. The United States became a party to each of these conventions by ratifying them upon the Senate’s advice and consent. All of these conventions have been the law of the land, binding on U.S. federal, state, and local authorities, since their ratification.

Domestic officials at the federal, state, and local level are obligated under Article 36 of the Vienna Convention⁹ to follow three simple rules with respect to

⁹ Article 36 of the VCCR provides as follows:

1. With a view to facilitating the exercise of consular functions relating to nationals of the sending State:
 - (a) consular officers shall be free to communicate with nationals of the sending State and to have access to them. Nationals of the sending State shall have the same freedom with respect to communication with and access to consular officers of the sending State;

any national of another Vienna Convention party who is arrested or detained in their jurisdiction: authorities must *ask* the individual without delay if he or she wants to have the consulate notified; *notify* the consulate without delay if so; and allow the consulate *access* to the individual if the consulate so requests. “Asking” an individual means that if authorities ascertain that the detained individual is a foreign national, they must tell the individual that he or she may have the consulate notified of the detention. This may be accomplished by asking the individual if he or she is a foreign national, or by informing all individuals taken into custody that if they are a foreign national, they may have their consulate notified. “Without delay” means that the authorities should inform the individual promptly. This means that there should be no deliberate delay, and notification must occur as soon

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- (b) if he so requests, the competent authorities of the receiving State shall, without delay, inform the consular post of the sending State if, within its consular district, a national of that State is arrested or committed to prison or to custody pending trial or is detained in any other manner. Any communication addressed to the consular post by the person arrested, in prison, custody or detention shall be forwarded by the said authorities without delay. The said authorities shall inform the person concerned without delay of his rights under this subparagraph;
 - (c) consular officers shall have the right to visit a national of the sending State who is in prison, custody or detention, to converse and correspond with him and to arrange for his legal representation. They shall also have the right to visit any national of the sending State who is in prison, custody or detention in their district in pursuance of a judgment. Nevertheless, consular officers shall refrain from taking action on behalf of a national who is in prison, custody or detention if he expressly opposes such action.
2. The rights referred to in paragraph 1 of this article shall be exercised in conformity with the laws and regulations of the receiving State, subject to the proviso, however, that the said laws and regulations must enable full effect to be given to the purposes for which the rights accorded under this article are intended.

as reasonably possible under the circumstances. In criminal proceedings, this ordinarily means that the person should be informed about the option to seek consular assistance at booking, when identity and foreign nationality can be confirmed in a safe and orderly way. Notification of the consulate “without delay,” in turn, means as soon as possible but generally no later than 72 hours after arrest.¹⁰

For nationals of countries that are parties to relevant bilateral conventions, the rules may differ slightly. Most commonly, bilateral conventions, including those with China, Russia, and the United Kingdom, require state authorities to notify the consulate of an arrest or detention, whether or not the individual requests it. The specific requirements of these “mandatory notification” conventions and other information are provided in the Department of State’s Consular Notification and Access Manual, available at www.travel.state.gov/consularnotification.

These treaty obligations are directly binding on state and local governments, as well as the federal government, by virtue of the Supremacy Clause, Article VI of the Constitution.¹¹ See *Hauenstein v. Lynham*, 100 U.S. 483, 489 (1879) (By

¹⁰ As noted below, the Federal Rules Committee currently is considering a recommendation from the Department of Justice to amend Rule 5 of the Federal Rules of Criminal Procedure to require that federal courts ensure that consular notification has been provided to foreign national defendants at the time of their first appearance.

¹¹ The Supremacy Clause provides that “This Constitution, and the Laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme Law of the Land; and the judges in every state shall be bound thereby, anything in the constitution or laws of any state to the contrary notwithstanding.” U.S. Const., Art. VI.

virtue of Supremacy Clause, “every treaty made by the authority of the United States shall be superior to the Constitution and laws of any individual State.”); *Kolovrat v. Oregon*, 366 U.S. 187, 190-91 (1961) (provisions in bilateral treaty with Yugoslavia prevailed over inconsistent provisions of Oregon law); *Clark v. Allen*, 331 U.S. 503, 508 (1947) (same for treaty with Germany and California law); *Asakura v. City of Seattle*, 265 U.S. 332, 340-41 (1924) (under the Supremacy Clause, U.S. treaty with Japan was “binding within the state of Washington” and prevailed over a municipal ordinance); *Breard v. Pruett*, 134 F.3d 615, 622 (4th Cir. 1998) (“The Supremacy Clause mandates that rights conferred by a treaty be honored by the states.”).

These obligations are also self-executing, and domestic legislation to implement these treaty obligations is not required. In other words, these consular notification and access obligations are already automatically obligatory on federal, state, and local authorities, and implemented through their existing powers.¹² See, e.g., *Gandara v. Bennett*, 528 F.3d 823, 828 (11th Cir. 2008) (The Vienna Convention “has the force of domestic law without Congress having to implement legislation.”); *Cornejo v. County of San Diego*, 504 F.3d 853, 856 (9th Cir. 2007) (“There is no question that the Vienna Convention is self-executing. As such, it

¹² The Consular Notification Compliance Act is needed, however, because it will give domestic legal effect to the *Avena* judgment and prevent further violations of the Vienna Convention by enshrining existing treaty obligations on consular notification and access in Federal law.

has the force of domestic law without the need for implementing legislation by Congress.”); *Jogi v. Voges*, 480 F.3d 822, 831 (7th Cir. 2007) (“When the United States Senate gave its advice and consent to the ratification of the Vienna Convention in 1969, . . . the Convention became the ‘supreme Law of the Land,’ binding on the states.”); *Breard*, 134 F.3d 615 at 622 (“The provisions of the Vienna Convention have the dignity of an act of Congress and are binding upon the states.”).¹³ Section 3 of the Consular Notification and Compliance Act merely confirms these existing obligations on federal, state, and local governments, and sets forth the simple, practical steps their officials must take to discharge the treaty obligations.

For decades, federal, state, and local governments have applied the Vienna Convention and bilateral conventions directly on the basis of the relevant treaty language and written guidance such as the State Department’s Consular Notification and Access Manual. Many state and local authorities have also issued internal regulations, directives, orders, or similar instructions for their officials. For example, effective January 1, 2000, California adopted legislation setting forth the obligations under state law, Cal. Penal Code § 834c. Texas, Virginia, Indiana,

¹³ It is important to note that the U.S. Supreme Court in *Medellín* did not hold that the consular notification requirements of the Vienna Convention are not binding on the United States or the several states. Instead, it addressed the nature of the International Court of Justice’s judgment in the *Avena* case, holding that the judgment was not, on its own, directly enforceable in state courts even though President Bush had issued an executive memorandum directing state courts to give effect to the judgment. *Medellín v. Texas*, 552 U.S. 491, 522–23, 525–26 (2008).

and Wisconsin have all published manuals setting forth consular notification guidance; and a number of local jurisdictions have issued formal policies and guidance to law enforcement, including Peoria and Chandler, Arizona; Bowling Green, Kentucky; Truro, Massachusetts; Suffolk County, New York; and Chesapeake, Virginia.

At the federal level, providing consular notification is standard operating procedure, and is incorporated into the internal procedural manuals and directives of federal law enforcement agencies. The Department of Justice and the Department of Homeland Security (DHS) have promulgated regulations on the steps their officials must take in order to discharge the obligations. *See* 28 C.F.R. § 50.5; 8 C.F.R. § 236.1. Within these agencies, U.S. Customs and Border Protection (CBP), Immigration and Customs Enforcement (ICE), the Bureau of Alcohol, Tobacco, Firearms, and Explosives, the U.S. Marshals Service, the Drug Enforcement Agency, and the Federal Bureau of Investigation, as well as the U.S. Postal Inspection Service and the Internal Revenue Service Criminal Investigation Division, have all issued standard operating procedures relating to consular notification and access.

For example, guidelines set forth by two components of DHS that frequently detain foreign nationals—CBP and ICE—provide as follows:

- CBP policy requires that foreign nationals (including lawful permanent residents) who are arrested or detained be advised of the right to have their consular officials notified of that fact “without delay,” i.e., as soon as it becomes feasible. Under CBP policy, the notification to consular officials should be made within 24 to 72 hours of the arrest. Also, if the removal of any alien cannot be completed in 24 hours or the alien is turned over to another agency, CBP officers notify the alien of his or her right to communicate by telephone with the consular or diplomatic officers of his or her country of nationality. CBP policy also requires that this notification be annotated on a Form I-213. Additionally, aliens deemed inadmissible who request to communicate with their consular officers or diplomatic officers, regardless of the period of time the alien has been/will be detained at the port of entry, will be allowed access to communicate with these entities under CBP’s policy.
- Aliens in ICE custody are informed of their option to request consular notification as soon as possible after they are taken into custody. If aliens so request, notifications to consulates must occur within 24 to 72 hours of arrest. Typically, aliens who remain in ICE custody receive a copy of the detainee handbook which includes information regarding consular notification and telephone access and signs are posted next to all telephones with instructions for calling consular officials. Consular officials are given reasonably unlimited access to interview their nationals, and detainees and consular officials are regularly allowed to communicate telephonically with minimal restrictions. In some facilities, free and unrestricted access to telephones is provided for this purpose. In all facilities, calls to consular officials are at no cost to the detainee.

Guidance for federal prosecutors is routinely made available to U.S.

Attorneys Offices. Foreign nationals charged with federal crimes eventually may benefit from a proposed amendment to Rule 5 of the Federal Rules of Criminal Procedure that would require federal courts to inform individuals at the time of

their first appearance that if they are foreign nationals, they have the option to meet with a consular official. In addition, the Uniform Law Commission currently is considering whether to form a drafting committee for similar uniform state legislation.

Furthermore, for well over a decade, the Departments of State and Justice have worked closely with federal, state, and local officials to ensure that they are aware of their consular notification and access obligations and properly discharge them. The Department of State has distributed over one million sets of briefing materials on consular notification and regularly conducts training sessions all over the country. The Consular Notification and Access Manual is the centerpiece of these efforts, explaining the very simple and practical steps that should be taken to fulfill the obligations in real-world contexts. Last year, the Department distributed 6,000 manuals to law enforcement officials. The Department also distributes tens of thousands of small pocket cards each year (70,000 last year) and training videos for law enforcement personnel, maintains updated information on consular notification on its website, www.travel.state.gov/consularnotification, and has a Twitter feed, @ConsularNotify, followed by over 1,200 organizations and individuals, where it provides tips on consular notification practice.

Question 4:

Does the Department of Defense support the Consular Notification Compliance Act of 2011? Why is it relevant for members of the U.S. Armed Forces?

Answer:

The Department of Defense supports the Consular Notification Compliance Act of 2011, and intends to send a letter to the Committee directly expressing its views on the relevance of the legislation for members of the Armed Forces.

Attachments:

- Tab 1 – Examples of the importance of consular access to U.S. citizens
- Tab 2 – Letters submitted to the Governor of Texas prior to the execution of Humberto Leal García, by a number of Latin American countries, Switzerland, and the European Union emphasizing the consular violation in that case.
- Tab 3 – June 14, 2011 letter from the Mexican Ambassador to the Secretary of State expressing his concern about the execution of Mexican nationals in violation of U.S. consular notification and access treaty obligations
- Tab 4 – American citizens visited by consular officers while detained abroad, by state of residence or state of birth, 2006-2011

