PART I

Leveling the Playing Field

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Consular Access as an Antidote

Foreigners arrested in the United States on a criminal charge are entitled to the same rights as a citizen. They are presumed innocent. Before being interrogated while in custody, they must be given the same warnings as a citizen. Anyone arrested in the United States, foreigner or not, must immediately make a number of critical decisions. One is whether to try to contact a lawyer, and if so, which one. Another is whether to answer questions. Police are likely to press for answers. A police officer may suggest that answering fully may lead to release, or to charges less serious than they might otherwise be. It may not be readily apparent to the suspect what charge might potentially be made in court. A statement may show innocence on one possible charge but guilt on another. A statement intended to show innocence may contain information that incriminates.

If the suspect is a foreigner, the challenges in making these decisions are multiplied. Foreigners are less likely to understand the situation sufficiently to make decisions in their best interest. A foreigner may be in an uncertain immigration status, and thus may approach the police encounter less with regard to avoiding a criminal conviction than with regard to a fear of deportation.

In detention, foreigners may find themselves dealing with police officials whose brand of English is distant from what they may have learned. Being less familiar with the local culture, even a foreigner who understands a police officer's words may not grasp cues in the officer's questions that would help in deciding how to respond.

Foreigners are less likely to understand their right not to answer an officer's questions. The officer will explain that there is no obligation to speak but then may immediately pose questions. Officers may use deception in interrogation, for example, saying that a co-suspect has identified them as the responsible party. Foreigners are more readily taken in by deceptions of this sort. A foreigner from a country with a less than professional police force may fear physical reprisal for not answering questions.

Foreigners who try to convince police of their innocence may have greater difficulty succeeding. Police may be less likely to believe a foreigner, not necessarily out of overt bias, but simply because it is easier to believe a story told by a person with a background similar to one's own. In some cultures, particularly in Africa, it is considered impolite, even impudent, when addressing a person in authority to look them directly in the eye. Children are taught from an early age to avert their eyes. A police officer in the United States may take this behavior as a sign of deception.

If the person is suspected of killing a family member or a close friend and denies guilt, a police officer may try to assess whether the person is grief-stricken. In some cultures, stoicism is expected even in the face of the death of a loved one. Emotion is not to be shown to a stranger. A police officer may read such a reaction as a sign of guilt.

Once a foreigner appears before a judge, gaining release before trial may be more difficult. Judges typically look to a suspect's ties to the local community, on the theory that one with family, friendship, or business connections is less likely to flee. Foreigners may lack those ties. Suspects who are not released pending trial generally have less chance of success at trial in a criminal case.

If a case does proceed to a trial, foreigners may experience the same difficulty they do with a police officer in getting a story believed. Making decisions about trial strategy is more difficult if one does not understand the local culture. Foreigners may not understand what kinds of arguments will appeal to judges or jurors.

For anyone on trial on a criminal charge, family members can be a critical source of aid. Foreigners are less likely to have this support. In capital cases the disadvantage of a foreigner can be especially great. In the penalty phase of capital proceedings, the accused is given great latitude in presenting mitigating evidence to avoid being executed. Hospital records, for example, may contain information about childhood head injuries. For a foreigner, such records may be available only in the home country.

CONSULS AS A CORRECTIVE

A rough, albeit uneven, antidote for the difficulties foreigners face is provided by consuls. As world commerce grew in the eighteenth and nineteenth centuries, governments began to send representatives abroad to assist their nationals. A terminology developed. A state that sent a representative as a consul was called a "sending state." The state to which the consul was dispatched was called a "receiving state." One function of a consul was to aid nationals under arrest, to advise them, and to ensure they were being treated humanely. To ensure that consuls might carry out these functions effectively, consuls were accorded certain privileges, as well as certain immunities from the operation of local law.[1] Documentary files of consuls could not be inspected or seized by local authorities. Consuls could not be forced to tell what they learned from one of their nationals.

Consular assistance may compensate in some measure for a foreigner's disadvantage in facing a criminal charge. A consul will typically know which aspects of local justice foreigners find confusing. Consuls maintain contact with the local bar to recommend attorneys with particular subject specialties, or attorneys who know the sending state language, or attorneys who may have represented their nationals in the past. Consuls can work with a defense lawyer as a case develops. They may be able to arrange for interpreters. Consuls can be especially helpful in capital cases. Consuls may be able to locate documentary information in the home country that can be used as mitigating evidence.

A receiving state's obligation to allow a consul access to a detainee is based on the nationality of the detainee. Some foreign nationals may have arrived only recently in the receiving state and may know little about it. Others may be long-term residents who are fully acculturated. The law as it developed did not distinguish between them. A thoroughly acculturated long-term resident may have less need of consular assistance but is considered entitled to it nonetheless.

CONSULAR TREATIES

Consular protection for Americans abroad has been a priority for the United States from its earliest days. To provide a firm base for consular work, the United States favored treaties on the subject. In 1788, Thomas Jefferson, as US ambassador in Paris, negotiated a consular treaty with France. The treaty went by the title "Convention Between His Most Christian Majesty and the United States of America, for the Purpose of defining and establishing the Functions and Privileges of their respective Consuls and Vice-Consuls."[2] The United States concluded consular treaties with other European powers, dealing with the establishment of consular posts, the process for accepting persons designated as consuls, and the scope of a consul's privileges and immunities.

Some of the US consular treaties addressed a consul's functions, and in particular the protection of sending state nationals. An 1880 consular convention with Belgium contemplated representations that a consul might make to receiving state officials on behalf of a national. "Consuls-General, Consuls, Vice-Consuls and Consular Agents," the treaty recited,

> shall have the right to address the administrative and judicial authorities, whether in the United States, of the Union, the States or the municipalities, or in Belgium, of the State, the province or the commune, throughout the whole extent of their consular jurisdiction, in order to complain of any infraction of the treaties and conventions between the United States and Belgium, and for the purpose of protecting the rights and interests of their countrymen.

Thus, if a Belgian in the United States were under arrest, a consul of Belgium was granted access to executive branch officials, or to the courts.

This same provision in the consular treaty with Belgium gave consuls a power to go over the head of an official who did not give satisfaction. "If the complaint should not be satisfactorily redressed," it recited, "the consular officers aforesaid, in the absence of a diplomatic agent of their country, may apply directly to the government of the country where they exercise their functions."[3] A few years later, Belgium invoked the treaty against the United States over an incident on board a Belgian merchant ship lying in port in Jersey City, New Jersey. Two Belgian seamen got into a fight on the ship and one stabbed and killed the other. Jersey City police learned of the incident. They boarded the ship, arrested the surviving seaman, and charged murder.

Belgium's consul said that New Jersey had no jurisdiction, since the incident occurred on a Belgian vessel. A provision in the consular convention on ocean-going vessels recited that the sending state consul "shall alone take cognizance of all differences which may arise, either at sea or in port, between the captains, officers, and crews, without exception." And further, "The local authorities shall not interfere, except when the disorder that has arisen is of such a nature as to disturb the tranquility and public order on shore, or in the port."[4]

The Belgian consul filed suit in a US federal court, to free the Belgian seaman. The US Supreme Court, to which the case was appealed, decided against him, saying that an incident as serious as a homicide disturbed tranquility on shore. Though it decided against the consul, the US Supreme Court accepted the consul's authority to approach the courts to carry out consular protection.[5]

CONSULAR PROTECTION IN THE WESTERN HEMISPHERE

The United States was assertive in protecting the rights of US nationals detained abroad. It was a routine duty for US consuls to visit Americans under arrest and to provide assistance.[6] One prominent instance came in 1895 when the US consul-general in Havana complained to the Spanish governor-general that US nationals under arrest were being held for long periods without trial.[7] The governor-general replied that making such a complaint was the province of diplomats but beyond the accepted powers of consular officials. When the US consul-general reported on the dispute to the Department of State, US Secretary of State Richard Olney shot back with a note to Spain's ambassador in Washington to back up the US consul-general. Olney wrote that the United States "has persistently directed earnest efforts toward securing for American citizens so detained the immediate enjoyment of all conventional guarantees with respect to process and punishment." By "conventional" Olney meant rights guaranteed by treaties, which are sometimes called "conventions." Olney explained the importance the United States attached to supporting its nationals abroad. He wrote, "The right of consuls to intervene with the local authority for the protection of their countrymen from unlawful acts violative of treaty or of the elementary principles of justice is so generally admitted as to form an accepted doctrine of international law."[8]

South American countries were active as well to protect their people abroad. In 1911, Bolivia, Colombia, Ecuador, and Peru concluded a treaty on "the functions of the respective consuls," aimed at ensuring that their nationals, if charged with crime, would be treated fairly. The treaty gave consuls a right

> to address the authorities of the district of their residence . . . in regard to all abuses committed by the authorities against individuals of the country whose interests they protect; they may act in such a way that justice may be rendered such individuals without delay and that they may be judged and condemned by the competent tribunals conformably to the laws of the country.[9]

The United States and Mexico dealt with the detention of each other's nationals by setting up a claims process. In 1915, a US national was arrested while on a business trip in Mexico, on suspicion of circulating counterfeit money. He asked to see a US consul but was not allowed contact for several days. This case was taken through the claims process. The claims commission said that a foreigner, like this businessman, should be given an opportunity to contact a consul.[10]

The United States confronted Chile in the 1920s because when US nationals were arrested and charged with crime there, they were denied contact with US consuls during the time the crime was being investigated with a view to prosecution. A number of countries at that time allowed no outside contact for a prisoner until the pretrial investigation was completed. The US Department of State instructed the American ambassador in Santiago to tell the Chilean Government that "American citizens arrested in foreign countries should not be held *incommunicado*, but should be allowed to communicate with diplomatic or consular representatives of this country."[11]

US consuls pressed countries like Switzerland, Germany, and Italy, which were among those that restricted a suspect's contact while the crime was being investigated. In 1922, the Department of State protested to Switzerland. Consuls, the Department said, "should be permitted to interview American prisoners promptly." And when consuls visited, the Department demanded, they "should be permitted to interview American prisoners without restrictions upon the use of the English language and without the conversation being overheard by a Swiss official."[12]

In 1928, the United States joined twelve Latin American states at Havana in concluding a region-wide consular treaty that strengthened the hand of consuls by spelling out their immunities from local law.[13] By this time, consular access was so widely observed for detainees that it was considered mandatory, even if no treaty required it. A 1932 study by Harvard Legal Research concluded that a receiving state was required under what is called the customary law of nations to allow consular visits, even during detention that was otherwise incommunicado under the local law.[14]

US consuls were assertive in complaining when they encountered violations against US nationals in detention. In 1932, the Department of State published an instruction to US consuls to "protect American citizens before the authorities of foreign countries in all cases in which they may be injured or oppressed."[15]

The Department of State grasped the importance of strict implementation of consular access by police in the United States if compliance by other governments was to be expected. In 1934, a Mexican national was arrested in California. The California prosecuting attorney refused to allow a visit by a consul of Mexico. Mexico alerted the Department of State and demanded access. The Department sent an urgent wire to the governor of California, saying,

> Even in the absence of applicable treaty provisions this Government has always insisted that its consuls be permitted to visit American citizens imprisoned throughout the world and it is believed that if [the] attitude [of the] District Attorney is maintained in [the] instant case there will be repercussions in Mexico and perhaps other countries unfavorable to American citizens. It is earnestly requested that you take prompt action looking to [gain] reversal [of the] District Attorney's position.[16]

An Argentinian lawyer who surveyed practice in Latin America in that era found consular access to be generally accepted in the Hemisphere. Consuls, he said, were able to raise complaints to ensure fair treatment. He found consuls attentive to violations of rights. "A consul," he said, "may call the attention of the local authorities to any irregularity or abuse suffered by his fellow nationals."[17]

LOCAL LAW TO GIVE WAY

When it negotiated with the Soviet government in 1933 to grant it diplomatic recognition, the United States took consular access for detained Americans as a priority issue. President Franklin Roosevelt and Soviet Foreign Affairs Commissar Maxim Litvinov exchanged letters to establish their agreement. In a letter to Roosevelt on March 16, 1933, Litvinov said that the Soviet Union would grant certain rights to Americans on the most favored national principle, meaning that Americans would gain whatever rights the Soviet Union granted to other countries. Litvinov focused in the letter on a 1925 Soviet treaty with Germany that provided for consular visits. Americans would get whatever rights Germans got against the Soviet Union. The Soviet-German treaty required notification to a consul "as soon as possible" of the arrest of a national and recited that requests by a consul to visit would be granted "without delay."[18] Roosevelt replied in a letter of his own the same day, noting the Soviet-German treaty, and saying, "We shall expect that the nearest American diplomatic or consular officer shall be notified immediately of any arrest or detention of an American national, and that he shall promptly be afforded the opportunity to communicate and converse with such national."[19] President Roosevelt thus acknowledged the Soviet commitment. He took the phrase "without delay" to mean "immediately," drawing no objection from Litvinov.

In the ensuing years, however, the Department of State reported obstructions on the Soviet side to compliance with what the United States called "the undertaking of March 16, 1933."[20] Soviet authorities followed the incommunicado procedure

while a crime was being investigated and excluded consuls on that ground.[21] In reply to US protests, the Commissariat for Foreign Affairs sent a formal note to the US Chargé d'Affaires in Moscow. The Commissariat referred to the 1925 Soviet-German treaty and explained that the treaty "could not have in view the granting of an interview to the prejudice of the interests of the investigation. The practice prevailing in the Soviet Union provides for the granting of an interview only upon the termination of such investigation."[22]

In 1938, the United States had occasion to decide what procedure to follow in the reverse situation. The Federal Bureau of Investigation arrested a Soviet employee of the Soviet tourist agency in Los Angeles on suspicion of spying. Consular contact was facilitated as soon as the man was detained. The Department of State informed the American Chargé in Moscow about the arrest, suggesting that he use it as an example of compliance when protesting to Soviet authorities about delay in access to Americans.[23]

After World War II, consular access continued as a bone of contention not only with the Soviet Union but with its east European allies as well. In 1959, an American named Sylvia Neulander was arrested in Bucharest, Romania. Neulander was held for four days and then released without a charge. Romanian officials did not notify a US consul, and Neulander had no contact with US officials before her release. When US officials inquired, Romanian officials said that under Romanian law, a detainee could communicate with other persons only with permission of police. Even though Neulander was held for only four days, the US Legation in Bucharest filed a formal protest, stating that it

> cannot accept the contention that Rumanian legislation bearing on the right of communication of persons, whatever the provisions of that legislation, nullifies in any respect the force of international custom and courtesy according to which foreign representatives are normally notified concerning the arrest of their nationals and are permitted to communicate with them.

The US position was that the international obligation prevailed over local law. The United States also regarded Neulander as possessing a legal right of her own under international law to contact an American consul. "The right of communication of foreign nationals with local representatives of their country," it said in the protest, "is a generally accepted principle of international intercourse."[24]

Espionage charges were often behind the detentions in the Soviet-bloc cases. In 1960, Mark Kaminsky, an American, was arrested in the Soviet Union and charged with collecting restricted information. Kaminsky was held several weeks for questioning. He demanded to contact a consul but was refused.[25] The Department of State was unsure of Kaminsky's whereabouts and made inquiries of the Soviet Foreign Ministry, but to no avail.[26] Kaminsky was put on trial. He was convicted of espionage and sentenced to seven years in prison, but the sentence was immediately commuted and he was released.[27]

In 1961, Marvin Makinen, another American, was arrested in Kiev for photographing a building said to be of military importance. Makinen was charged with espionage. It was alleged that while living as a student in Berlin he was recruited by US intelligence agents to travel to Ukraine for intelligence-gathering.[28] The United States denied that Makinen was spying and protested his arrest. Makinen was held several weeks without allowance for contact with a US consul, leading to a US demand for access. Makinen was then put on trial for espionage and made a statement acknowledging violation of Soviet law. He was convicted and sentenced to eight years in prison. Only then was a US consular officer allowed to meet with Makinen.[29] The United States protested the fact that Makinen was placed in the position of making an incriminating statement at his trial before he had access to a US consul.[30] Makinen's sentence was commuted two years later. He was released in October 1963.[31]

In 1962, authorities in Czechoslovakia arrested an American named Robert Budway, on an allegation of espionage. The US officials demanded access. Czech officials refused, saying that in the absence of a treaty obligation, Czechoslovakia would not allow a consular visit. The United States objected that consular access was required even without a treaty. Budway later claimed he asked several times that US officials be notified, specifically so that he might ascertain "the type of legal counsel which would best help him." Budway said that Czech police told him that they had informed the US Embassy but that it had made no inquiries because it was not interested in helping him.[32]

At the time of these episodes, the United States had no consular treaty with these countries. The positions the United States took were based on its understanding of the customary law on communication between a consul and an arrested national. The United States claimed immediate access and did not regard local laws to provide an excuse.