

MEMORANDUM OF LAW

DATE: November 7, 1986

TO: Sgt. W. H. Campbell, SDPD-CIU
FROM: City Attorney
SUBJECT: Policy/Law Concerning Consular Officers
QUESTIONS PRESENTED

You have asked me to prepare a memorandum as to the rights and/or privileges afforded consular officers. You asked four questions:

1. What State or Federal laws are applicable to Consular Officers?
2. What privileges should we grant these individuals when they are in violation of parking and traffic laws, etc.?
3. Should the Police Department have a written policy or a Department Instruction that explains the laws and rights and how we would like those contacts handled?
4. Any other legal concerns you envision.

I will address your questions in the following format:

- I. Definition and context.
- II. History and purposes of "Diplomatic Immunity."
- III. Privileges and immunities accorded to consular officials.
- IV. Application to traffic violations and parking tickets.
- V. Recommendations.

I. Definition & context

A consul is an officer commissioned by a government to represent it in a foreign country for the purpose of promoting and protecting its commercial interests. Although classed with ministers and ambassadors in the enumeration of parties whose cases are subject to the original jurisdiction of the Supreme Court (U.S. Const. art. 3, section 2), consuls are not diplomatic officers. Unlike diplomatic officers, consular authority does not extend beyond commercial matters. International law regards consular officials as mercantile agents of the government appointing them. *Hamilton v. Erie R. Co.*, 219 N.Y. 343, 114 N.E. 399 (1916), appeal dismissed, 248 U.S. 369, 63 L.Ed. 307, 39 S.Ct. 95 (1919).

Consul officers are either full-time career consular officers or part-time honorary consul officers. Career consuls are salaried public officials, not employed in private business of any kind. They take and pass special examinations in order to be

appointed. Honorary consuls are part-time consular officers normally appointed in ports and cities in which representation is thought important but which cannot support a full-time consular officer. Honorary consuls need not undergo special examination to achieve the post. L. Lee, *Consular Law and Practice*, 1961.

The United States, under the Vienna Convention on Consular Relations, April 24, 1963, articles 58(2) 43, 21 U.S.T. 77, 103, T.I.A.S. No. 6820, provides honorary consuls consular immunity which is less but similar to that of full time consular officers. However, it has been held that honorary consuls are to be given the same "quantum protection" given to career consuls under international law. *United States v. Marcano-Garcia*, 622 F.2d 12 (1st Cir. 1980). Therefore, generally the same rights and privileges are to be accorded honorary consuls as those of career consuls.

II. History and purpose of "Diplomatic Immunity."

Diplomatic immunity may be broadly defined as "the freedom from local jurisdiction accorded under international law by the receiving states to (foreign diplomats and to) the families and servants of such officers." Library of Congress, *History of the Concept of Diplomatic Immunity* (1979), reprinted in Senate Commission on Foreign Relations, 96th Cong. 1st Sess., Report on Leg. Hx. of The Diplomatic Relations Act 12 (Comm. Print 1979).

In 1790, Congress granted by statute complete immunity from prosecution to all diplomatic personnel and their families. Act

of April 30, 1790 Chapter 9, sections 25-27, 1 Stat. 112, as amended by 22 U.S.C. 254 (1976) (repealed 1978). From the moment of its recognition, diplomatic immunity has been noted to be a convenient vehicle for abuse. Diplomats who enjoy such privileges become members of an "overly protected class." Anderson and Whitley, *The Diplomatic Immunity Charade*, Washington Post, November 14, 1975, Sec. c, at 18, col. 1.

In 1961, after years of individual effort at reform, the Vienna Convention on Diplomatic Relations created the authoritative statement of diplomatic privileges and immunities, codifying customary international law of diplomatic relations, resolving inconsistencies in practice relating to scope of immunities and to whom they apply and narrowing that scope and application. Kerley, *Some Aspects of the Vienna Conference of Diplomatic Immunity*, 56 Am. J. of Int'l L., 88 (1962).

By December 31, 1977, 127 states or countries had ratified the Vienna Convention. The Vienna Convention became operative in the United States on December 13, 1972. 23 Cong. Rec. 773 (1965). The provisions of the Vienna Convention apply to all diplomats/consuls under section 3(b) of The Diplomatic Relations

Act, whether or not the particular nation has ratified the Convention.

In 1978, to remedy the conflict between the still operative and liberal statute of 1790 and the more restrictive Vienna Convention rules, Congress passed the Diplomatic Relations Act of 1978, 22 U.S.C.A. Sec. 254 a-e (West Supp. 1985). See also 28 U.S.C.A. Secs. 1351, 1364 (West Supp. 1985). The Diplomatic Relations Act repealed the old statute and adopted portions of the Vienna Convention. The Act also reduced the number of diplomatic personnel entitled to full diplomatic immunity and allowed personal recourse by United States citizens against diplomatic tortfeasors. See generally The Diplomatic Relations Act, 11 Cal. West Int'l L.J. 354 (1981). See also related topic, Foreign Sovereign Immunities Act of 1976, 28 U.S.C.A. Sec. 1605 (1976). After adoption, the Act became the sole U.S. law on diplomatic privileges and immunities.

Although the act rectified many problems, it did not completely eliminate the misuse of diplomatic privileges and immunities in the United States. See The Diplomatic Relations Act, *supra*. In 1982, the United States Congress adopted the Foreign Missions Act of 1982, 22 U.S.C. Secs. 254 e, 4301-4313 (1984). "The purpose of (the Act) was to address the serious and growing imbalance between the treatment accorded in many countries to official missions of the United States and that made

available to foreign government missions in the United States." S. Rep. No. 329, 97th Cong., 2nd Sess., reprinted in 1982 U.S. Code Cong. and Admin. News 714. The bill authorized assistance to federal, state and municipal governments with regard to ascertaining and according benefits, privileges and immunities to foreign missions. (Current phone number: 1-(202) 647-3416; or call (202) 647-6575 Public Inquiries Office.) The passage of The Foreign Missions Act and the creation of the Office of Foreign Missions, with the mandate to equalize the imbalance in rights, privileges, and immunities accorded diplomats, has provoked controversy and fostered uncertainty as to U.S. diplomatic policy. See generally Enforcing Reciprocity in U.S. Diplomatic Policies: The Foreign Missions Act of 1982, 17 N.Y.U.J. of Int'l Law and Poli. 817, (Sum. 1985). Also noted in personal communication with Dennis Smith, Office of Chief of Protocol, State of California, (916) 427-4235.

While the U.S. statutory law is foundational, the specific immunities and privileges applicable to a particular diplomat or consular officer may be created by treaty, informal agreement or as a result of reciprocity. For instance, under the Vienna Convention, consuls in general are entitled to immunity from

jurisdiction only when carrying out consular functions. Under the terms of Article XIII of the 1972 United States-Poland Consular Convention and Article 16 of the United States-Bulgaria Consular Convention of 1974, complete immunity is accorded to all Polish and Bulgarian Consulars and their family members and partial immunity to consular employees with regard to civil matters. *Cocron v. Cocron*, 375 N.Y.S. 2d 797, 84 Misc.2d 335 (1975).

The rationale or purpose for the doctrine of diplomatic immunity is the perception that, without such privileges and immunities, every sovereign would be hazarding his own dignity in sending a public minister abroad. A sovereign committing the interests of his nation with a foreign power to the care of a minister cannot intend to subject him in any degree to that power. *The Schooner Exchange v. M'Faddon*, 7 Cranch (U.S.) 116, 3 L.Ed. 287 (1812).

Diplomats operate under the fiction of extraterritoriality whereby a minister, though actually in a foreign country, theoretically remains within the territory of his own sovereign. He remains subject to the laws of his own country which govern his personal status and rights of property. See 4 Am.Jur.2d *Ambassadors and Consuls*, section 4, at 90 (1949). Consuls, not being ministerial representatives but rather commercial representatives, are thereby not due full diplomatic immunity but

a more limited immunity. A consul is subject to the laws of the receiving country except when acting within the scope of consular duties.

Consuls, under the Vienna Convention as well as the Diplomatic Relations Act of 1978, are provided the following immunity:

1. Consular officers and consular employees shall not be amenable to the jurisdiction of the judicial or administrative authorities of the receiving State in respect of acts performed in the exercise of consular functions.
2. The provisions of paragraph 1 of this Article shall not, however, apply in respect of a civil action either:
 - (a) arising out of a contract concluded by a consular officer or a consular employee in which he did not contract expressly or implicitly as an agent of the sending State; or
 - (b) by a third party for damage

arising from an accident in the receiving State caused by vehicle, vessel or aircraft.

21 U.S.T. at 105.

The Havana Convention on Consular Agents of 1928 states the following rule:

Article 16. -- Consuls are not subject to local jurisdiction for acts done in their official character and within the scope of their authority.

There is no agreement on what constitutes "official function." But it would seem that, in general, it devolves upon the receiving state to determine whether an act is "official" or "unofficial."

The functions of a consul may be grouped under the following headings: (1) promotion of the commercial interests of the State which he represents; (2) supervision of its maritime service; (3) protection of the interests of the citizens of the State which

accredits him; (4) notarial services; and (5) miscellaneous administrative duties, such as the issuance of passports, the granting of visas, the registration of births, etc.

The functions of a consul are listed in Article 5 of the Vienna Convention on Consular Relations as follows:

- (a) protecting in the receiving State the interests of the sending State and of its nationals, both individuals and bodies corporate, within the limits permitted by international law;
- (b) furthering the development of commercial, economic, cultural and scientific relations between the sending State and the receiving State and otherwise promoting friendly relations between them in accordance with the provisions of the Convention;
- (c) ascertaining by all lawful means conditions and developments in the commercial, economic, cultural and scientific life of the receiving State, reporting thereon to the Government of the sending State and giving information to persons interested;
- (d) issuing passports and travel documents to nationals of the sending State, and visas and appropriate documents to persons wishing to travel to the sending State;
- (e) helping and assisting nationals, both individuals and bodies corporate, of the

sending State;

(f) acting as notary and civil registrar and in capacities of a similar kind, and performing certain functions of an administrative nature, provided that there is nothing contrary thereto in the laws and regulations of the receiving State;

(h) safeguarding, within the limits imposed by the laws and regulations of the receiving State, the interests of minors and other persons lacking full capacity who are nationals of the sending State, particularly where any guardianship

or trusteeship is required with respect to such persons;

(i) subject to the practice and procedure obtaining in the receiving State, representing or arranging appropriate representation for nationals of the sending State before the tribunals and other authorities of the receiving State, for the purpose of obtaining, in accordance with the laws and regulations of the receiving State, provisional measures for the preservation of the rights and interests of these nationals, where, because of absence or any other reason, such nationals are unable at the proper time to assume the defense of their rights and interests;

(j) transmitting judicial and extra-judicial documents or executing letters rogatory or commissions to take evidence for the courts of the sending State in accordance with international agreements in force or, in the absence of such international agreements, in any other manner compatible with the laws and regulations of the receiving State;

(k) exercising rights of supervision and inspection provided for in the laws and regulations of the sending State in respect of vessels having the nationality of the sending State, and of aircraft registered in that State, and in respect of their crews;

(l) extending assistance to vessels and aircraft mentioned in sub-paragraph (k) of this Article, and to their crews, taking

statements regarding the voyage of a vessel, examining and stamping the ship's papers, and, without prejudice to the powers of the authorities of the receiving State, conducting investigations into any incidents which occurred during the voyage, and settling disputes of any kind between the master, the officers and the seaman insofar as this may be authorized by the laws and regulations of the sending State;

(m) performing any other functions entrusted to a consular post by the sending State which are not prohibited by the laws and regulations of the receiving State or to which no objection is taken by the receiving State or which are referred to in the international agreements in force between the sending State and the receiving State.

III. Privileges and immunities accorded to consular officials.

The rationale for granting immunity from criminal or civil liability for acts done in pursuit of a consul's official functions is that a consul in discharging his official duty is acting on behalf of his state which cannot be sued in a court of another state without its consent. Where a consul's act is not within his official duty, he is not exempted from local jurisdiction and thereby may be found civilly or criminally liable. Since immunity only attaches to consular personnel when acting officially, family members, absent special treaty or agreement, are not immune but fully subject to the laws and jurisdiction of the U.S. An example of the scope of immunity granted to consular officials is evident in *Commonwealth v. Jerez*, 457 N.E. 2d 1105 (1983). In *Jerez*, the defendant, a consular official, was accorded immunity from jurisdiction after he struck a police officer seeking to detain and question him. The court held the tort occurred within the scope of *Jerez's* employment since it occurred as a "response to the (police officer's) conduct which was presently interfering with the employee's ability to perform his duties successfully." *Id.* at 1108.

Privileges accorded consuls are:

- Consular officers are not subject to arrest or detention pending trial except in the case of a grave crime and pursuant to a judicial determination.
- If it has become necessary to detain a consular officer,

the proceedings against him must be instituted with minimal delay.

- As official agents, consular officers are entitled to the high consideration of all officials, national or local, of the receiving State.

- The receiving State must treat consular officers with due respect and take all appropriate steps to prevent any attack on their person, freedom or dignity.

- Consulars have a right to communicate with and contact nationals of the sending State.

- Consulars are exempt from customs, duties and inspections.

- The receiving State must permit and protect freedom of communication on the part the consular post for all official purposes.

- The receiving State may not open or detain a consular mail bag unless there is serious reason to believe the bag contains something other than correspondence, documents, etc.

- All members of the consular post are due freedom of movement but are subject to laws and regulations regarding prohibited or regulated zones for reasons of national security.

- Consulars enjoy tax exemptions.

- The receiving State must take necessary steps to protect consular premises against intrusion or damage. Generally, consular premises are not to be used as places of asylum unless an individual is in imminent danger of mob violence but only for the period during which active danger continues.

- Consular archives and officers are inviolable from search or seizure.

- Consuls have a right to display their national arms and flag of State.

- Some authorities write that consular officers are not subject to criminal jurisdiction unless the crime is of a serious character. See *Commonwealth v. Jerez*, supra.

IV. Application to traffic violations and parking tickets.

Congress has noted the particular problems associated with traffic violations and parking tickets. See *Leg. History of Diplomatic Relations Act*, S. Rep. No. 958, 95th Cong. 2nd Sess., reprinted in 1978 U.S. Code Cong. and Admin. News 1935. Traffic violations, such as speeding, running stop signs, and not paying parking tickets are the most common areas for abuse of diplomatic

immunity. See *The Diplomatic Relations Act*, supra, at 370. If the ticket or violation occurs while the consul is performing his or her official business, clearly no jurisdiction over the

official is available. The official may be cited, but no further recourse is permitted.

Citing a consular official, while not proscribed, should be done with reasonable regard to balancing the concern for safety against the deference due a consular official under international law. Because unpaid parking tickets and unsafe driving behavior can be a significant safety and financial burden upon a city, Secretary of State George P. Schultz informed the Chiefs of Missions at Washington, by circular dated July 2, 1984, that the State Department would no longer request cancellation of traffic tickets on behalf of diplomatic members as of July 15, 1984. Department of State File No. P 84 0091-0626. Following expressions of concern generated by the above noted circular, Secretary Schultz issued a clarification of the policy, as follows:

The Chiefs of Mission are advised that the Department's discontinuance of its practice of requesting cancellation of traffic citations on behalf of foreign missions does not affect the immunities of members of missions delineated in the Vienna Convention on Diplomatic Relations. Members of diplomatic missions, for example, to whom the provisions of Article 31 of the Vienna Convention apply, (applying only to diplomats, not consular personnel) will not be required to appear in court or otherwise to personally submit themselves to the civil or administrative jurisdiction of local authorities.

The Chiefs of Mission are further advised that the issuance of a traffic citation is not considered a violation of the immunities to which members of missions may be entitled. Such citations give notice that the recipient has disobeyed local traffic laws or regulations, which constitutes a failure to "respect the laws and regulations of the receiving State" as required by Article 41 of the Vienna Convention. The penalty attached to the citation is normally a fine. Payment of the fine is an acknowledgement of the violation of the law and acceptance of the penalty. (This section does apply to consular personnel.)

However, even though a citation may be in order, foreign consuls who violate traffic laws and regulations generally will avoid sanctions because, under the U.S. Constitution and

decisional common law, a foreign consul is subject to prosecution only in cases in which federal courts have jurisdiction for violations of law which occur outside consular business. See L. Lee, *Consular Law and Practice*, at 259. As to this issue, Secretary Schultz stated in his December 17th note: "The Department is aware . . . that such payment is voluntary and cannot be compelled. Furthermore, local jurisdictions may not take further punitive action against diplomatic agents such as the towing of the automobile or arrest of the individual for failure to pay such fines."

Notices of violations which are not paid or otherwise resolved do nonetheless record a failure to obey local law and therefore may be maintained by the jurisdiction concerned and communicated to the Department of State. The Department, through its Office of Foreign Missions, will review the nature and extent of the violations of laws by an individual member of a mission. The Department will then decide whether such violations indicate a flagrant disregard for the laws of the United States and whether the individual shall be permitted to continue to operate an automobile in this country. State Department File No. P 85001-0980.

Since the particular immunities granted to a particular consular official are subject to informal agreements, the Governor's office of Emergency Services should be contacted for information regarding individual consuls.

V. Recommendations

It is recommended that the Police Department formulate a policy regarding the handling of police contacts with consular officers and members of their families and staff. It is further recommended that a Department Instruction be prepared regarding police contacts with consular officers, their families and staffs based upon the information and guidelines set forth herein.

JOHN W. WITT, City Attorney

By

Nina B. Deane

Deputy City Attorney

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