CHAPTER 4 – PATROL OPERATIONS

Arrest or Detention of Foreign Nationals

422.1 PURPOSE AND SCOPE [1.1.4]

Article 36 of the Vienna Convention on Consular Relations sets forth certain rights of foreign nationals from member countries when arrested, detained, or imprisoned by law enforcement officials in this Country. This Policy provides direction to officers when considering a physical arrest or detention of a foreign national. A copy of the Consular Notification and Access Manual published by the U.S. State Department is also available on the U.S. Department of State website.

All Foreign Service Personnel shall be treated with respect and courtesy, regardless of the level of established immunity. As noted herein, the United States is a party to several bilateral agreements that obligate local law enforcement agencies to notify the consulate upon the person’s detention, regardless of whether the detained person requests that his/her consulate be notified. The list of specific countries that the United States is obligated to notify is listed on the U.S. Department of State website.

422.1.1 DEFINITIONS

Foreign National – Anyone who is not a citizen of the United States (U.S.). A person with dual-citizenship (for example, U.S. and foreign) is not a foreign national.

Immunity – Refers to various protections and privileges extended to the employees of foreign governments who are present in the U.S. as official representatives of their home governments. These privileges are embodied in international law and are intended to ensure the efficient and effective performance of their official “missions” (i.e., embassies, consulates, etc.) in foreign countries. Proper respect for the immunity to which an individual is entitled is necessary to ensure that U.S. diplomatic relations are not jeopardized and to maintain reciprocal treatment of U.S. personnel abroad. Although immunity may preclude U.S. courts from exercising jurisdiction, it is not intended to excuse unlawful activity. It is the policy of the U.S. Department of State’s Office of Foreign Missions (OFM) that illegal acts by Foreign Service Personnel should always be pursued through proper channels. Additionally, the host country’s right to protect its citizens supersedes immunity privileges. Peace officers may intervene to the extent necessary to prevent the endangerment of public safety or the commission of a serious crime, regardless of immunity claims.
422.2 ARREST OR DETENTION OF FOREIGN NATIONALS [74.3.1]

Officers should take appropriate enforcement action for all violations observed, regardless of claims of diplomatic or consular immunity received from violators. A person shall not, however, be subjected to in-custody arrest when diplomatic or consular immunity is claimed by the individual or suspected by the officer, and the officer has verified or reasonably suspects that the claim of immunity is valid.

422.3 LEVELS OF IMMUNITY

The specific degree of immunity afforded to Foreign Service Personnel within the U.S. is directly related to their function and position in this country.

422.3.1 DIPLOMATIC AGENTS

Diplomatic agents (e.g., ambassadors and United Nations representatives) are afforded the highest levels of immunity. They are exempt from arrest or detention and are immune from all criminal (and most civil) prosecution by the host state. The family members of diplomatic agents enjoy these same immunities. Currently there are no diplomatic agents permanently assigned to California, but they do occasionally visit the State.

422.3.2 CONSULAR OFFICERS

Consular officers are the ranking members of consular posts who perform various formal functions on behalf of their own governments. Typical titles include consul general, consul, and vice consul. These officials are immune from arrest or detention, except pursuant to a felony warrant. They are only immune from criminal and civil prosecution arising from official acts. Official acts of immunity must be raised as an affirmative defense in the court jurisdiction, and its validity is determined by the court. Under this defense, the prohibited act itself must have been performed as an official function. It is not sufficient that the consular agent was on-duty or in an official capacity at the time of the violation. The family members of consular officers generally enjoy no immunity, however. Any family member who enjoys a higher level of immunity is issued an identification card by Department of State (DOS) enumerating any privileges or immunities on the back of the card. Examples are consular officers and family members from Russia or China.

There are approximately 600 consular officers in California, with most located in Los Angeles, San Francisco, and San Diego.

422.3.3 HONORARY CONSULS

Honorary consuls are part-time employees of the country they represent and are either permanent residents of the U.S. or U.S. nationals (unlike career consular officers, who are foreign nationals on temporary assignment to the U.S.). Honorary consuls may be arrested and detained but limited immunity for official acts may be available as a subsequent defense. Family members have no immunity. There are less than 100 honorary consuls in California.
422.4 IDENTIFICATION

All diplomatic and consular personnel who are entitled to immunity are registered with the Department of State and are issued distinctive identification cards by the Department of State Protocol Office. These cards are the best means of identifying Foreign Service Personnel. They include a photograph, identifying information, and on the reverse side, a brief description of the bearer's immunity status. Unfortunately, these identification cards are not always promptly issued by the Department of State. In addition to the Department of State identification card, Foreign Service Personnel should also have a driver's license issued by the Department of State Diplomatic Motor Vehicle Office (DMVO), which in most circumstances replaces the operator's license issued by the State. Additionally, they may have California credentials issued by the California Governor's Office of Emergency Services (Cal OES).

422.4.1 VEHICLE REGISTRATION

Vehicles that are owned by foreign missions or Foreign Service Personnel and their dependents are registered with the Department of State OFM and display distinctive red, white, and blue license plates. Vehicles assigned to diplomatic or consular officers will generally have license plates labeled with the words "diplomat" or "consul." Vehicles owned by honorary consuls are not issued OFM license plates but may have California license plates with an "honorary consul" label. Driver's identity or immunity status should not be presumed from the type of license plates displayed on the vehicle. The status of an OFM license plate should be run via the National Law Enforcement Telecommunications System (NLETS), designating "US" as the state, if the officer has reason to question the legitimate possession of the license plate.

422.5 ENFORCEMENT PROCEDURES

The following procedures provide a guideline for handling enforcement of foreign nationals. Department personnel shall notify the Watch Commander as soon as practicable upon making enforcement related contacts involving a foreign national with immunity. The Watch Commander shall notify the Patrol Division Commander of the contact as a Priority 1 or 2 level in the Telephone Notification Matrix depending upon the circumstances of the contact. The circumstances will be documented on the Watch Commander's Log.

422.5.1 CITABLE OFFENSES [61.1.3(d)]

A citation shall be issued at the scene for all violations warranting such action, regardless of the violator's immunity status. The issuance of a citation is not considered an arrest or detention under current Department of State guidelines. Whenever the equivalent of a notice to appear is issued to an immunity claimant, the following additional procedures shall be followed by the issuing officer:

Identification documents are to be requested of the claimant.

The title and country represented by the claimant are to be recorded on the back of the officer's copy of the Notice to Appear for later reference. Do not include on the face of the Notice to Appear.
The claimant shall be requested to sign the Notice to Appear. If the claimant refuses, the identity and immunity status of the individual shall be conclusively established. The word "Refused" shall be entered in the signature box, and the violator shall be released.

Verified diplomatic agents and consular officers, including staff and family members from countries with which the U.S. has special agreements, are not required to sign the Notice to Appear.

Verified consular staff members, excluding those from countries with which the U.S. has special agreements, are generally obligated to sign the Notice to Appear, but a signature shall not be required if their immunity status is uncertain.

All other claimants are subject to the provisions of Vehicle Code §40302(b) and policy and procedures outlined in this chapter.

The violator shall be provided with the appropriate copy of the Notice to Appear.

422.5.2 IN-CUSTODY ARRESTS [1.2.5; 74.3.1]

Diplomatic agents and consular officers are immune from arrest or detention (unless they have no identification and the detention is to verify their diplomatic status). Proper identification of immunity claimants is imperative in potential in-custody situations. Claimants who are not entitled to immunity shall be placed in custody in accordance with the provisions outlined in §422.7.

A subject who is placed under arrest and claims diplomatic or consular immunity shall not be physically restrained before verification of the claim (unless restraint is necessary for the protection of the officer or others).

A supervisor shall be promptly notified and should respond to the scene when possible. Field verification of the claimant’s identity is to be attempted as follows:

Identification cards issued by the Department of State Protocol Office are the only valid evidence of diplomatic or consular immunity. The following types of identification cards are issued: Diplomatic (blue bordered), Consular (red bordered), and Official (green bordered). The Department of State identification cards are 3-3/4 inch by 1-1/2 inch and contain a photograph of the bearer.

Initiate telephone verification with the Department of State. Newly arrived members of diplomatic or consular missions may not yet have official Department of State identity documents. Verify immunity by telephone with the Department of State any time individual claims immunity but cannot present satisfactory identification, the officer has reason to doubt the claim of immunity, or there is a possibility of physical arrest.
Law enforcement personnel should use the following numbers in order of preference:

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<th>Office of Foreign Missions</th>
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<td>San Francisco, CA</td>
<td>Los Angeles, CA</td>
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<tr>
<td>(415) 744-2910, Ext. 22 or 23 (415)</td>
<td>(310) 235-6292, Ext. 121 or 122</td>
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<tr>
<td>744-2913 FAX</td>
<td>(310) 235-6297 FAX</td>
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<td>(0800-1700 PST)</td>
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<td>(202) 895-3521 (Driver License Verification) or (202) 895-3532 (Registration Verification)</td>
<td>(202) 647-7277</td>
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<tr>
<td>(202) 895-3533 FAX</td>
<td>(202) 647-1512</td>
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<tr>
<td>(0815-1700 EST)</td>
<td>(Available 24 hours)</td>
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<td>(202) 647-0122 FAX</td>
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Members of diplomatic or consular missions also may have other forms of identification. These include identification cards issued by California Governor's Office of Emergency Services (Cal OES), local law enforcement agencies, the foreign embassy or consulate; driver's licenses issued by Department of State; and, Department of State license indicia on the vehicle. All these items are only indications that the bearer may have some form of immunity.

Subjects verified through the above procedures as being officials entitled to immunity (diplomatic agent, consular officers, and consular staff and family members from countries with which the U.S. has special agreements) should not be arrested. The procedures below shall be followed instead. These procedures should also be used in the event immunity cannot be verified but another form of identification indicates that immunity is probable.

If the release of the violator will not create an additional hazard, adequate information to properly identify the violator shall be obtained then the official shall be released. A supervisor's approval for the release shall be obtained whenever possible. The necessary release documents and/or a Certificate of Release form should only be issued under the proper conditions.

If the violator appears to have been driving while under the influence, field sobriety tests, including Preliminary Alcohol Screening (PAS) device tests, and chemical tests should be offered and obtained whenever possible. These tests cannot be compelled, however. The subject shall not be permitted to drive. A supervisor's approval for release shall be obtained whenever possible and alternative transportation should be arranged.
All facts of the incident shall be documented in accordance with this policy in a Driving Under the Influence (DUI) Arrest-Investigation Report, Arrest-Investigation Report and/or any other relevant report form. Notwithstanding the field release of the subject, prosecution is still appropriate and should be pursued by the Burbank Police Department. The Department of State will take appropriate sanctions against errant Foreign Service Personnel, even where prosecution is not undertaken by the agency.

422.6 TRAFFIC COLLISIONS

Persons involved in traffic collisions who possess a Department of State OFM Diplomatic Driver License, issued by the DMV, shall have "D" coded in the license "class" box of the Traffic Collision Report. The actual driver's license class (e.g., 1, 2, 3, or A, B, C, M) shall be entered in the miscellaneous box on page two of the traffic report. If subsequent prosecution of the claimant is anticipated, the claimant's title, country, and type of identification presented should be recorded for future reference. Issuance of a citation to, or arrest of, an immunity claimant at the accident scene should be handled in accordance with the procedures specified in §422.5.

422.6.1 VEHICLES

Vehicles owned by subjects with full immunity may not be searched, stored, or impounded without the owner's permission (such permission may be assumed if the vehicle has been stolen). These vehicles may, however, be towed the necessary distance to remove them from obstructing traffic or creating any other hazard.

422.6.2 REPORTS

A photocopy of each traffic collision report involving an identified diplomat and/or immunity claimant shall be forwarded to the Chief of Police within 48 hours whether or not the claim is verified. The words "Immunity Claim" shall be marked on the photocopy, together with a notation of the claimant's title, country, and type of identification presented (if applicable). In addition to the report, a follow-up cover memorandum should be submitted if the violation was flagrant, if the claimant was uncooperative, or if there were any other unusual aspects of the enforcement contact that should be reported to the Department of State for further action. The Watch Commander/Supervisor apprised of the incident shall also send a copy of all documents and reports submitted by the investigating officer along with any supervisor's notes, materials, and/or logs to the Chief of Police within 48 hours of the incident. The Chief of Police will ensure that notification to the Department of State and all necessary follow-up occurs.

422.7 FOREIGN NATIONALS WHO DO NOT CLAIM IMMUNITY

This subsection applies to foreign nationals who do not claim diplomatic or consular immunity. Officers shall only arrest foreign nationals under the following circumstances:

(a) There is a valid warrant issued for the person's arrest.

(b) There is probable cause to believe that the foreign national has violated a Federal or State law or a local ordinance.
International treaty obligations provide for notification of foreign governments when foreign nationals are arrested or otherwise detained in the U.S. Whenever an officer arrests and incarcerates a foreign national, or detains a foreign national for investigation for over two hours, the officer shall promptly advise the individual that he/she is entitled to have his/her government notified of the arrest or detention (Penal Code §834c). If the individual wants his/her government notified, the officer shall begin the notification process.

Officers shall not arrest foreign nationals solely for alleged undocumented entry into the U.S. Federal courts have consistently held that undocumented presence is not a crime but a Federal civil violation enforceable only by Federal officers. Therefore, officers shall not stop or detain persons solely for determining immigration status.

In light of the recent positions taken both by the Federal Court of Appeals (Miranda-Olivares v. Clackamas County) and the California Attorney General, ICE immigration detainers are considered mere requests. As such, this Department is under no obligation to enforce them. Officers and supervisors shall not detain any person pursuant to an immigration detainer ("Ice Hold") unless the person is in custody or being detained under another authority or a court order. Immigration detainer detentions may be considered a violation of the Fourth Amendment. Any questions about the appropriateness of an immigration detainer detention shall be resolved by a supervisor or higher authority.

422.7.1 ARREST PROCEDURE [1.2.5]

Whenever an officer physically arrests or detains an individual for criminal investigation and the officer reasonably believes the person to be a foreign national, the officer shall inquire to determine the person's citizenship.

This procedure applies to detentions of more than two hours. An inquiry is not required if the individual is detained less than two hours for criminal investigation.

If the individual indicates that he/she is other than a U.S. citizen, the officer shall immediately advise the Watch Commander.

422.7.2 WATCH COMMANDER'S RESPONSIBILITY

The Watch Commander shall advise the individual that he/she has a right to have the nearest appropriate embassy or consulate notified of the arrest/detention (Vienna Convention on Consular Relations, Art. 36, (1969)).

If the individual requests such notification, the Watch Commander shall, as soon as practicable, notify the appropriate embassy/consulate and provide the following information:

(a) Country of citizenship
(b) Full name of the individual, including paternal and maternal surname
(c) Date of birth or age
(d) Current residence
(e) Date, time, and location of arrest
(f) Location of incarceration/detention
(g) 24-hour telephone number of the place of detention (if different from the Department making the notification)

If the individual claims citizenship of one of the countries for which notification of the consulate/embassy is mandatory, the Watch Commander shall make the notification without delay, regardless of whether the individual desires that the embassy/consulate be notified. This procedure is critical because of treaty obligations with the particular countries. The list of countries and jurisdictions that require notification can be found on the U.S. Department of State website.

The Watch Commander must document all notifications on the Watch Commander's Daily Log (see the Watch Commanders Policy).

422.7.3 DOCUMENTATION AND RECORDKEEPING

Consular notifications should be made by fax if possible, using the appropriate form, or by telephone. The notification must be documented in the incident report with a copy of the fax confirmation attached.

If the notification must be made by telephone, note the name and location of the consulate notified, the name of the person accepting the notification, and the date and time of notification. When possible, the call should be made from a recorded line.

For foreign nationals from "upon request" countries, the foreign national should be advised that he or she may have the consulate notified. The national's response and the date and time of the offer should be documented on the Statement to Detained Foreign Nationals Form.

For foreign nationals from mandatory notification countries, make a notation that you informed the national that you notified the consulate.

422.8 DEATH OR SERIOUS INJURY OF A FOREIGN NATIONAL

In addition to the above procedures, when a foreign national dies or is seriously injured, notify the nearest consulate of his/her country as soon as reasonably possible.