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Implications of the Vienna Convention on Consular Relations upon the Regulation of Consular Identification Cards

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Summary

Recent controversy regarding the use of consular identification cards (IDs) by aliens within the United States, in particular Mexico's *matricula consular*, has led to calls for legislation to regulate the issuance of the cards by foreign missions or their acceptance by U.S. government and private entities. This report identifies possible implications that U.S. regulation or monitoring of the issuance of these cards by foreign missions might have upon U.S. obligations under the Vienna Convention on Consular Relations (VCCR), which protects foreign missions in the exercise of their legitimate consular functions and codifies customary international law with respect to the inviolability of consular premises and documents. The REAL ID Act (P.L. 109-13, Division B) prohibits states, when issuing drivers' licenses or state ID cards, from accepting for purposes of personal identification foreign documents other than valid passports, if such drivers' licenses or ID cards are to be accepted for federal purposes. Other recent legislative proposals aimed at restricting the acceptance (but not the issuance) of consular IDs include H.R. 688, the SAFER Act, introduced by Representative J. Gresham Barrett on February 9, 2005; H.R. 815, the Financial Customer Identification Verification Improvement Act, introduced by Representative Scott Garrett on February 15, 2005; and H.R. 925, the Identification Integrity Act of 2005, introduced by Representative Elton Gallegly on February 17, 2005.

Foreign consulates have historically issued consular identification cards to their nationals residing within the United States. In recent years, efforts by Mexico and other countries to persuade U.S. entities to accept the cards for identification purposes have generated some controversy.¹ Some charge that only illegal aliens have any need for these documents, and that they are easily procured for fraudulent purposes. They object

¹ See CRS Report RL32094, *Consular Identification Cards: Domestic and Foreign Policy Implications, the Mexican Case, and Related Legislation*.

that U.S. law enforcement agencies have no way of confirming the identification of the holders, and advocate prohibiting U.S. banks and other entities from providing services to persons whose only proof of identification is a consular ID.² Others disagree that the cards are less secure than typical forms of identification, and urge government and private entities to accept the cards. They argue that cards enhance security by providing a means of identifying illegal immigrants and discouraging crimes against them.³

Measures seeking to regulate the activities of foreign missions, such as the issuance of consular IDs, may implicate U.S. obligations under the Vienna Convention on Consular Relations (VCCR),⁴ which provides certain privileges and immunities to foreign consular missions. This report provides a background and summary of the provisions of the VCCR relevant to the issuance of consular IDs by foreign missions. The report briefly analyzes possible conflicts between the obligations of the United States under the VCCR and some of the potential means of addressing the security issues associated with the *matricula consular* and similar IDs.

The Vienna Convention on Consular Relations

The institution of consuls began centuries ago as a product of international commerce. In modern times, States (countries) establish consulates in major foreign cities to represent their interests to the local authorities in certain matters, including issues concerning trade and navigation, and to perform services for nationals of the sending State. The VCCR was completed in 1963 as a multilateral treaty to codify consular practices that developed through customary international law and numerous bilateral treaties. Most States, including the United States and Mexico,⁵ have ratified the VCCR, and the United States has “relied increasingly on it as the principal basis for the conduct of [its] consular activities.”⁶

The VCCR enumerates basic legal rights and duties of signatory States including, *inter alia*, (1) the establishment and conduct of consular relations, by mutual consent, and (2) the privileges and immunities of consular officers and offices from the laws of the “receiving State” (the country where the foreign consular office has been established). If the receiving State fails to honor the privileges and immunities afforded to the “sending State” (the State that has established a consular office in the receiving State) under the VCCR, the sending State is permitted to reciprocate this treatment against the foreign

² See Hearing on the Federal Government’s Response to Consular Identification Cards Before the House Subcomm. on Immigration, Border Security, and Claims, 108th Cong. 44-45 (Jun. 26, 2003) [hereinafter *Hearings*] (statement of Craig Nelson, Director, Friends of Immigration Enforcement).

³ See *id.* at 163-64 (statement of the Mexican American Legal Defense and Education Fund).

⁴ Vienna Convention on Consular Relations, Apr. 24, 1963, 21 U.S.T. 77 [hereinafter VCCR].

⁵ The United States and Mexico also retain a bilateral treaty on consular relations that largely overlaps with provisions of the VCCR. Convention between the United States of America and Mexico Respecting Consular Officers, Mar. 26, 1943, 57 Stat. 800.

⁶ United States Department of State, Bureau of Consular Affairs, Consular Notification and Access, Part 5: Legal Material, *available at* [http://travel.state.gov/law/consular/consular_744.html].

consulates that the receiving State has established in the sending State.⁷ There is also recourse if the sending State acts in disregard of its obligations under the VCCR. Consular officials who conduct activity outside the scope of legitimate consular functions are not immune to judicial or administrative process with respect to such activity.⁸ The receiving State may also demand that the sending State recall any consular official whose conduct it finds objectionable, even if such conduct is related to a legitimate consular function, or request it to take other remedial action.⁹ States Parties may also have recourse to the International Court of Justice (ICJ) to resolve any disputes.¹⁰

Issuance of Consular Identification Cards as a Consular Function. The VCCR does not directly privilege the issuance of consular IDs. However, Article 5 of the

⁷ VCCR art. 72(2). According to the State Department, the U.S. “itself issues documents other than a passport for U.S. citizens abroad and at times occasionally issues similar identity cards or travel documents...” See *Hearings, supra* note 2 (statement of Roberta S. Jacobson, Acting Deputy Assistant Secretary of State for the Bureau of Western Hemisphere Affairs). It is unclear how reciprocity would operate where the receiving State’s foreign missions do not perform the consular function abroad that it seeks to restrict at home. If reciprocity is limited to actions affecting the same consular function, the United States would be subject to retaliation only in States where U.S. missions issue consular IDs to U.S. nationals. However, it may be that an aggrieved State could restrict some other consular function to a proportionate degree. For example, in the event that the Secretary of State suspended the issuance of visas to nationals of a sending State as a penalty for its issuance of consular IDs to persons who have not been legally admitted into the United States, that State could reciprocate by suspending visas to U.S. nationals.

⁸ VCCR art. 43(1). Consular officers are immune from judicial or administrative procedure with respect to any activity they carry out as part of their official consular duties, but not for private conduct. A consular official may be immune from suit for conduct that violates a law, as long as the act qualifies as a discretionary consular function. See *Risk v. Halvorsen*, 936 F.2d 393 (9th Cir. 1991) (Norwegian consular official was immune from lawsuit for provision of travel documents and other assistance to a national and her children, despite a court order prohibiting the woman from removing the children from the jurisdiction of the court).

⁹ See VCCR art. 23 (upon notification that a consular officer has been declared *persona non grata* by the receiving State, the sending State shall recall the person concerned or terminate his or her functions); *id.* art. 25 (receiving State may refuse to issue or withdraw *exequatur* — a certificate of authorization — with regard to members of a foreign consular post).

¹⁰ The United States is a party to the Optional Protocol Concerning the Compulsory Settlement of Disputes, whose parties agree to accept the jurisdiction of the ICJ to resolve disputes arising between States with respect to the VCCR. The United States brought such a case against Iran during the Hostage Crisis. See *United States Diplomatic and Consular Staff in Tehran*, (United States of America v. Iran), ICJ Judgment, May 24, 1980. The United States has defended against complaints with regard to VCCR art. 36, which states that aliens arrested or detained in the receiving State shall be notified of their right to communicate with the appropriate consulate. See, e.g., *Avena and Other Mexican Nationals* (Mexico v. United States of America), ICJ Judgment (Mar. 31, 2004); *Case Concerning the VCCR (Breard)* (Para. v. United States), ICJ (Apr. 9, 1998). In the *Avena* case, the ICJ instructed the United States to review and reconsider the convictions and sentences of foreign nationals denied requisite consular information owed under VCCR art. 36, and held that U.S. state or federal procedural default rules should not prevent relief from Article 36 violations. For additional background, see CRS Report RL32390, *Vienna Convention on Consular Relations: Overview of U.S. Implementation and International Court of Justice (ICJ) Interpretation of Consular Notification Requirements*.

Convention lists among legitimate consular functions (1) issuing passports and travel documents to nationals of the sending State, and visas or appropriate documents to persons wishing to travel to the sending State, (2) protecting in the receiving State the interests of the sending State within the limits permitted by international law, and (3) helping and assisting nationals of the sending State.¹¹ While the VCCR explicitly provides that certain other consular functions may be limited by the laws and regulations of the receiving State, it does not provide for any limitation on these key functions.¹²

Although a consular ID is not a passport, some States may recognize it as a “travel document” that makes it easier for nationals to travel back to the sending State. For example, the Mexican Consulate for Houston, Texas includes on its web page a message from the Mexican Ministry of Foreign Affairs stating, “If you are a Mexican Citizen and wishes (*sic*) to travel to Mexico, a Mexican Passport is not necessary, you may apply for a Consular ID (Matricula).”¹³ Additionally, it may be argued that consular IDs serve a legitimate consular function of the sending State in assisting its nationals. The Mexican Consulate, for example, argues that the matricula consular will enable Mexican nationals to obtain banking accounts in the U.S., so as to provide “a more secure way to handle...money and facilitate its transfer to Mexico.”¹⁴ Consular IDs may also assist the sending State’s foreign consulate in identifying, monitoring, and coming to the aid of its nationals within the receiving State.¹⁵ Accordingly, States might object that U.S. efforts to regulate the issuance of consular IDs interfere with legitimate consular functions, and may view such regulations as infringing on their sovereignty.

On the other hand, the VCCR obligates consular officers “not to interfere in the internal affairs of [the receiving] State,”¹⁶ and requires that consular premises “not be

¹¹ VCCR art. 5 (a) & (d-e).

¹² *See, e.g., id. art. 5(h)* (a foreign mission’s ability to safeguard the interests of minors and other persons lacking full capacity is limited by the laws and regulations of the receiving State); art. 5(i) (a mission’s right to represent or arrange representation for nationals before tribunals of the receiving State is “subject to the practices and procedures” of the receiving State and in accordance with its domestic laws and regulations).

¹³ Mexican Consulate for Houston, Texas, *Consular ID Card (Matricula)*, available at [<http://www.sre.gob.mx/houston/MatriculaEng.htm>] (last visited Jan. 26, 2005) [hereinafter Mexican Consulate for Houston]. Under U.S. immigration law, many Canadians and Mexicans are permitted to enter the United States without passports, using instead, for example, U.S.-issued border-crossing cards. *See* 2 C. GORDON *ET AL.*, IMMIGRATION LAW & PROCEDURE § 12.04[4] (2002).

¹⁴ *See* Mexican Consulate for Houston, *supra* note 13.

¹⁵ When a foreign national is arrested in the receiving State, it is obligated to notify the national’s foreign consulate upon the national’s request. VCCR art. 36. According to the U.S. Department of State, “because a foreign consular identification card is a means to identify an individual as a foreign national, a bearer’s possession of this card can alert responsible law enforcement authorities to the need to provide consular notification.” *See Hearings, supra* note 2, at 114 (statement of Roberta Jacobson)

¹⁶ VCCR art. 55(1).

used in any manner incompatible with the exercise of consular functions.”¹⁷ It may be argued that the issuance of consular IDs to persons residing in the United States, knowing they may be used in part for purposes other than consular notification and provision of consular benefits, potentially impacts the receiving State beyond the scope of customary consular functions, constituting an internal interference. Opponents of consular IDs argue that providing assistance in a manner known to facilitate the stay of unlawful aliens is not a consular function intended to be protected by the VCCR. However, the VCCR does not distinguish among foreign nationals based on their immigration status, and does not impose on consulates a duty to take action to prevent or report their nationals’ entering or remaining in the receiving State unlawfully.

Inviolability of Consular Premises and Documents. The principle of inviolability of consular premises is recognized in many treaties regarding consular relations, although some provide for certain exceptions.¹⁸ Article 31 of the VCCR states that any part of the consular premises which is used exclusively for consular work shall be inviolable to the authorities of the receiving State absent authorization from the sending State’s representatives. Under this provision, U.S. inspectors would not be able to enter consular premises to conduct inspections without the consent of the sending State. The principle of inviolability of consular archives is even more firmly established as part of customary international law.¹⁹ The VCCR codifies this rule at Article 33, which states that all consular archives and documents “shall be inviolable at all times and wherever they may be.” Foreign consuls would appear to be within their rights to refuse access to their premises and archives to allow the inspection and auditing of records related to the issuance of consular IDs. On the other hand, a sending State could choose to enter into an agreement with the United States to make these documents available, or to otherwise satisfy the Secretary of State that the identification cards do not pose a threat to the United States.

Obligation to Honor Consular Identification Cards. While the VCCR may obligate a receiving State to allow foreign consular offices to exercise their legitimate consular functions, the Convention does not place limitations upon a State’s ability to adopt domestic laws limiting the effects that consular functions might have upon the State’s internal affairs. Thus, although the VCCR provides that consular offices are privileged to issue passports and travel documents to nationals intending to travel to other States, there is no concomitant obligation upon other States to allow foreign nationals with these documents to enter their countries, or to live or remain there contrary to law. Accordingly, legislation limiting the acceptance of consular IDs by U.S. entities is less

¹⁷ *Id.* art. 55(2).

¹⁸ *See* B. SEN, A DIPLOMAT’S HANDBOOK OF INTERNATIONAL LAW AND PRACTICE 287 (3d ed. 1988) (noting that some conventions contain exceptions for police to enter the consular premises in an emergency or pursuant to court order).

¹⁹ *See id.* at 288-89 (noting the inviolability of consular archives is one of the few that is universally recognized). “Consular archives” include “all the papers, documents, correspondence, books, films, tapes and registers of the consular post, together with the ciphers and codes, the card-indexes and any article of furniture intended for their protection or safekeeping.” VCCR art. 1(1)(k).

likely to raise concerns regarding the VCCR than legislation limiting foreign consular offices' ability to issue IDs to nationals residing within the United States.²⁰

The VCCR does not prohibit the United States from enacting laws that impose different standards for the domestic acceptance of identification cards issued by different States. Article 72 of the VCCR requires only that States do not discriminate in their treatment of other States in "the application of the provisions of the...Convention." The VCCR would not seem to require the United States to recognize or afford equal benefits to *all* holders of consular IDs, regardless of the State that issued them. The VCCR permits states to grant additional rights to certain countries above and beyond Convention provisions without violating the Convention's non-discrimination requirements.²¹ Thus, legislation restricting the acceptance of certain consular IDs by U.S. entities would likely raise fewer concerns regarding VCCR obligations than legislation directly regulating the issuance of cards by foreign missions. However, States that desire to improve the usefulness of such documents to their nationals may be willing to satisfy U.S. security concerns by mutual arrangement, which would not contravene any provisions of the VCCR.

Recent Legislative Action

A number of legislative proposals have been introduced in the 109th Congress that would restrict the acceptance (but not the issuance) of consular IDs by U.S. institutions. Section 202(3)(B) the REAL ID Act,²² enacted May 11, 2005, prohibits U.S. states, when issuing drivers' licenses or state ID cards, from accepting for purposes of personal identification foreign documents other than valid passports, if such state drivers' licenses or ID cards are to be accepted for federal purposes. Other recent legislative proposals aimed at restricting the acceptance of consular IDs include § 503 of H.R. 688, the SAFER Act, which was introduced by Representative J. Gresham Barrett on February 9, 2005, and generally limits federal acceptance of foreign identification documents for identification purposes; H.R. 815, the Financial Customer Identification Verification Improvement Act, which was introduced by Representative Scott Garrett on February 15, 2005, and prohibits U.S. financial institutions from accepting foreign identification documents other than valid passports for purposes of verifying an applicant's identity; and H.R. 925, the Identification Integrity Act of 2005, which was introduced by Representative Elton Gallegly on February 17, 2005, and generally prohibits federal acceptance of foreign identification documents other than valid passports for *any* official purpose.

²⁰ Though not an issue under the VCCR, a domestic legal concern might arise as to how broadly Congress can regulate the acceptance of consular IDs by state, local, and private entities.

²¹ VCCR art. 72(2)(b).

²² P.L. 109-13, Division B.

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