Brigham Young University Education and Law Journal

Volume 2003 | Number 2 Article 12

Fall 3-2-2003

What Foreign Students Fear: Homeland Security Measures and Closed Deportation Hearings

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WHAT FOREIGN STUDENTS FEAR: HOMELAND SECURITY MEASURES AND CLOSED DEPORTATION HEARINGS

Many changes in the national agenda after September 11, 2001, have addressed concerns over the abuse of student visas and the enforcement of immigration laws. The ability to track foreign students and take timely action against those who violate the terms of their authorized stay has become a top priority for Congress and the current Bush Administration. Newly introduced regulations have placed added burdens on educational institutions that sponsor foreign students and exchange visitors.

Perfect compliance with these regulations has never been more critical as the enforcing agencies have implemented more restrictive policies. While the Student Exchange Visitor Information System (SEVIS)[1] implementation has remained the major focus of school administrators and others responsible for international students, related issues such as "special registration" and closed "special interest" deportation hearings have a discouraging impact on foreign students. To the extent school administrators advise foreign students on immigration matters, they should be fully aware of the penalties for falling out of status and the increasing likelihood of closed deportation hearings for certain students.

This paper introduces recent changes in enforcing student visas that are beyond the limited scope of SEVIS implementation. Specifically, the circuit split over the constitutionality of closed "special interest" deportation hearings is reviewed to find justification for government discretion and to remind school administrators and

1. Student and Exchange Visitor Information System (SEVIS) was implemented January 1, 2003 with a mandatory compliance date of January 30, 2003. *Retention and Reporting of Information for F, J, and M Nonimmigrants; Student and Exchange Visitor Information System (SEVIS)*, 67 Fed. Reg. 76256-01 (Dec. 11, 2002). A comprehensive guide on how to use SEVIS for educational institutions is available from the Bureau of Citizenship and Immigration Services (BCIS) at <http://www.immigration.gov/graphics/lawsregs/Schoolu3.pdf>.

international students of the broad discretionary power held by the administrative agencies responsible for enforcement.

I. HOMELAND SECURITY AND FOREIGN STUDENTS

A. Post-September 11th Measures

While acknowledging the great benefits our nation enjoys by welcoming international students into our schools, Congress and the Executive branch have found the connection between terrorist attacks and student visas to be more than a mere coincidence. Soon after the 1993 World Trade Center bombing and CIA headquarters shooting, the FBI identified "those who enter on student visas and do not abide by their terms" as one potential source of terrorists.[2] Although only one September 11th hijacker entered on a student visa, two others were granted a change of status after they had entered the United States as visitors, allowing them to attend flight school in Florida.[3] Among the early responses to the September 11th attacks, the President issued a directive that "[t]he Government shall implement measures to end the abuse of student visas and prohibit certain international students from receiving education and training in sensitive areas," and mandated an accelerated implementation of SEVIS.[4]

Provisions of the USA PATRIOT Act of 2001 establish undisputed Congressional intent that implementation of integrated tracking systems for ports of entry and a foreign student visa monitoring system be expedited and expanded.[5] In the area of foreign student monitoring, the Act requires "full implementation and expansion of . . . the program established by . . . the Illegal Immigration Reform and Immigrant

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2. Memo. from Louis J. Freeh, Dir., FBI, to Jamie S. Gorelick, Dep. Atty. Gen., Dept. of J., (Sep. 26, 1994) (discussed in 71 No. 48 Interpreter Releases 1682, 1683 (Dec. 19, 1994) and 74 No. 10 Interpreter Releases 453, 454 (Mar. 17, 1997)).

3. 78 No. 43 Interpreter Releases 1710, 1711 (Nov. 5, 2001); 79 No. 16 Interpreter Releases 549 (Apr. 15, 2002).

4. George W. Bush, *Homeland Security Presidential Directive 2: Combating Terrorism through Immigration Policies* (White House Oct. 30, 2001) (available at 2001 WL 1329414).

5. Pub. L. No. 107-56, §§ 414, 416, 115 Stat. 272, 353-355 (2001) (amending 8 U.S.C. §§ 1365a, 1372 (1994)). For more discussion on the USA PATRIOT Act *see* John W. Whitehead & Steven H. Aden, *Forfeiting "Enduring Freedom" for "Homeland Security": A Constitutional Analysis of the USA Patriot Act and the Justice Department's Anti-Terrorism Initiatives*, 51 Am. U. L. Rev. 1081 (2002).

Responsibility Act [IIRIRA],"[6] adding "information on the date of entry and port of entry" to the items collected under IIRIRA, including "other approved educational institutions" in the system with an implementation deadline of January 1, 2003.[7] Furthermore, any alien supporting terrorist organizations through statements of support, fund contributions, or even association is subject to deportation.[8] And, "any remote link to a terrorist organization serves as reasonable grounds for probable cause to justify detention."[9]

As the 2001-2002 academic year came to a close, Congress passed the Enhanced Border Security and Visa Entry Reform Act of 2002.[10] In addition to the provisions related to the implementation of SEVIS, this act calls for an "interoperable law enforcement and intelligence electronic data system" (referred to as the Chimera System) to be made available to consular officers who issue visas as well as Federal officers responsible for enforcement, intelligence or adjudications related to aliens.[11] Foreign students applying for student visas would be screened more closely based on both data systems. SEVIS would also track the students at various checkpoints in the entrance and enrollment processes.[12]

The Homeland Security Act of 2002 also provides evidence of the national security threat posed by foreign students. The responsibility to collect information under SEVIS is transferred to the Assistant Secretary of the Bureau of Border Security, with instructions to "use such information to carry out the

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6. Pub. L. No. 107-56, §416(a), 115 Stat. 272, 353-355 (2001); *see also Illegal Immigration and Reform and Immigrant Responsibility Act of 1996*, 8 U.S.C. § 1372 (Supp. 1999) (*hereinafter* IIRIRA).

7. Pub. L. No. 107-56, §416(a), 115 Stat. 272, 354-355 (2001).

8. *Id.* at § 411, 115 Stat. at 346-47. The Terrorist Exclusion List (TEL) identifies terrorist organizations and is available from the Department of State at <http://www.state.gov/s/ct/rls/fs/2002/15222pf.htm>. Foreign students associated in any way with these organizations are subject to exclusion and deportation.

9. Whitney D. Frazier, Student Author, *The Constitutionality of Detainment in the Wake of September 11th*, Ky. L.J. 1089, 1114 (2002).

10. Pub. L. No. 107-173, 116 Stat. 543 (May 14, 2002).

11. *Id.* at §§ 501, 202.

12. *Id.* at § 501. SEVIS requires user input of the following actions: 1) issuance of an electronic I-20 to signify acceptance to an approved educational institution, 2) issuance of a student visa, 3) admission to the U.S. as a foreign student and notification to the sponsoring educational institution of such entrance, 4) the registration and enrollment of the student within 30 days of such enrollment, and 5) "any other relevant act" such as changing schools or terminating studies.

enforcement functions of the Bureau."[13] With separate bureaus for adjudications and enforcement, placing SEVIS in the enforcement bureau will likely lead to stricter application of student visa regulations. "As current events have shown with the July 4 Los Angeles Airport shooter . . . and other recent alien criminals . . . an unencumbered immigration enforcement unit is long overdue."[14] It has also been argued that by moving the adjudication function of INS into the new department, the Homeland Security Act "by implication treats all immigrants [as] terrorists."[15]

B. Special Registration

One specific measure which has a potential impact on many foreign students is the new registration program for nonimmigrant aliens from certain specified countries. The implementation of this program has generated much confusion. For instance, several consulates issued letters indicating that all foreign students should report to their nearest INS office in compliance with the new special registration procedures.[16] Subsequent notices from INS attempted to clarify the program and have identified exactly who is subject to the registration requirements.[17]

Students already in the United States who meet the following criteria had until December 16, 2002 to appear before INS and provide certain information under oath: (1) "males, born on or before November 15, 1986;" (2) nationals or citizens of Iran, Iraq, Libya, Sudan or Syria who entered the United States prior to September 11, 2002 (for those entering after September 10, 2002, individual notices were given by the inspecting officer); and (3) "will remain in the United States at

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13. *Homeland Security Act of 2002*, H.R. 5710, 107th Cong. §442(a)(4) (2002).

14. 148 Cong. Rec. H8702 (daily ed. Nov. 13, 2002) (statement of Rep. Sensenbrenner).

15. *Id.* at H8708 (statement of Rep. Conyers). Additional criticism of the Homeland Security Act points out that centralization under one department does not necessarily lead to increased effectiveness and communication. "We must not delude ourselves into believing that rearranging deck chairs will protect our ship of state." *Id.* at H8709 (statement of Rep. Hoyer).

16. Press Release, *Special Registration Procedures: Foreign Student Advisory* (INS Oct. 9, 2002) (available at <http://www.immigration.gov/graphics/shared/lawenfor/specialreg/studadv.htm >).

17. *Registration of Certain Nonimmigrant Aliens from Designated Countries*, 67 Fed. Reg. 67766 (Nov. 6, 2002).

least until December 16, 2002."[18] Those exempted from the registration requirement are aliens with current A or G visa status, lawful permanent residents, and asylees or potential asylees with applications pending before November 6, 2002.[19]

> Those claiming dual citizenship which involves one of the identified countries are still subject to the registration requirement. Despite assurances offered by the U.S. ambassador to Canada that those entering with Canadian passports "will not be treated any differently depending on where they were born,"[20] the BCIS continues to hold that "[t]hose who claim citizenship from countries included in the Call-In Groups are required to register even if they are also citizens of another country."[21] As the war against terrorism continues, the Secretary of State will continue to determine that other countries are "state sponsor[s] of international terrorism" and add to the list.[22] In fact, three more groups of countries have been identified since the first notice, bringing the total number of countries whose male nationals must register to twenty-five.[23]

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18. *Id.* Note, however, that the Justice Department has indicated the National Security Entry-Exit Registration System (NSEERS) is not limited to the specifically identified countries. Press Release, Statement of Barbara Comstock, Director of Public Affairs, *Regarding the National Security Entry-Exit Registration System* (Dept. of Justice Nov. 1, 2002) (available at http://www.usdoj.gov/opa/pr/2002/November/02_opa_638.htm) ("Indeed, the U.S. has already registered aliens from more than 100 countries around the world using intelligence-based criteria.").

19. *Id.* at 67767. A visas are issued to ambassadors and their dependents and G visas are issued to other representatives of foreign governments and their dependents. 8 U.S.C.A. § 1101 (a)(15)(A)(i), (ii), (G)(i), (ii) (Supp. 1999).

20. DeNeen L. Brown, *U.S. Reacts to Canada's Concern on Border Policy*, Washington Post A29 (Nov. 1, 2002) (quoting Canadian Foreign Affairs Minister Bill Graham).

21. *Special Call-In Registration Procedures for Certain Nonimmigrant Aliens* 3 (INS Nov. 26, 2002) (available at <http://www.immigration.gov/graphics/shared/lawenfor/specialreg/CALL_IN_ALL.pdf>).

22. 8 U.S.C. § 1735 (West 2002).

23. The second notice requires similar registration for males from Afghanistan, Algeria, Bahrain, Eritrea, Lebanon, Morocco, North Korea, Oman, Qatar, Somalia, Tunisia, United Arab Emirates, and Yemen between December 2 and January 10 each year, 67 Fed. Reg. 70526 (Nov. 22, 2002); the third group, adding Pakistan and Saudi Arabia, must register between January 13 and February 21 each year, 67 Fed. Reg. 77642 (Dec. 18, 2002); the fourth group includes Bangladesh, Egypt, Indonesia, Jordan, and Kuwait, 68 Fed. Reg. 2363 (Jan. 16, 2003). An extension period was granted until February 7, 2003 for those who failed to register in the first two groups, 68 Fed. Reg. 2366 (Jan. 16, 2003); March 21, 2003 for call-in group three, 68 Fed. Reg. 8047 (Feb.

Those required to register under these notices will also have to register "within 10 days of each anniversary of the date on which they were registered" at one of the designated INS interviewing offices.[24] Students in some of the groups subject to this registration burden will be required to travel to the interviewing office during the later portion of the fall or winter semester each year. For many, the ten day window provided for in the regulation may be insufficient to avoid conflicts with semester exams and final projects. Because the registration requirement applies for those entering prior to September 11, 2002, it can be assumed that almost all currently enrolled foreign male students from those designated countries will have to add the anxiety of an INS interview to their anxiety over final exams each year.

II. CONSTITUTIONALITY OF CLOSED REMOVAL HEARINGS

Foreign students, especially those from the twenty identified terrorist countries, arguably have reason to fear deportation in a closed administrative hearing. With the threat against national security coming from secretive terrorist groups, the Executive Office of Immigration Review has exercised its prerogative to close certain "special interest" deportation hearings to the public. The criticism voiced against the Homeland Security Act may quite accurately describe the feelings of those students who may face such hearings: "The devil you know may be better than the devil you don't."[25]

Two recent federal courts of appeal decisions have created a circuit split on whether the blanket closure of "special interest" deportation hearings violates any First Amendment right of access for the press to such trials and if such closure is an unconstitutional deprivation of due process for the alien.[26]

19, 2003); and April 25, 2003 for call-in group four, *id.* Apparently, the agencies are having a difficult time keeping up with the increased workload caused by Special Registration.

24. 67 Fed. Reg. at 67767. The annual interview is in addition to the requirement to notify BCIS within 10 days of any change of address, employment or school. Aliens subject to NSEERS submit such changes on a new form AR-11SR, available at <http://www.immigration.gov/graphics/formsfee/forms/files/ar-11sr.pdf>.

25. Christopher Smith, *Demise of INS Leaves Many Leery*, Salt Lake Trib. (Nov. 20, 2002) (available at <http://www.sltrib.com/11202002/nation_w/3593.htm>).

26. *Detroit Free Press v. Ashcroft*, 303 F.3d 681 (6th Cir. 2002); *N. Jersey Media*

This section addresses these two constitutional issues and provides additional motivation for schools to ensure proper compliance with relevant immigration regulations.

The framework within which we view these cases is the war on terrorism, which, having "pervaded the sinews of our national life," has now been "reflected in thousands of ways in legislative and national policy, the habits of daily living, and our collective psyches."[27] Acting in response to security procedures implemented by the Attorney General, Chief Immigration Judge Michael Creppy issued a memorandum to all Immigration Judges and court administrators to provide guidance on how to handle certain cases requiring additional security.[28] Specific instructions from the Office of the Chief Immigration Judge that accompany the identified case specifically require that the "courtroom must be closed for these cases —- no visitors, no family, and no press."[29] Members

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Group, Inc. v. Ashcroft, 308 F.3d 198 (3d Cir. 2002), *rev'd* 205 F. Supp. 2d 288 (D.N.J. 2002), *stay granted*, 122 S.Ct. 2655 (2002) (mem).

27. *N. Jersey Media Group, Inc.*, 308 F.3d at 202.

28. Memo. from Michael J. Creppy, Chief Immigration Judge, Executive Office of Immigration Review, to All Immigration Judges & Court Administrators, *Cases Requiring Special Procedures* (Sept. 21, 2001) (available in 78 Interpreter Releases 1816, app. 1 (Dec. 3, 2001)). None of the court opinions quote from the Creppy Directive, which sheds light on the context and purpose of the court closures:

> To All Immigration Judges and Court Administrators:
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> As some of you already know, the Attorney General has implemented additional security procedures for certain cases in the Immigration Court. These procedures require us to hold the hearings individually, to close the hearing to the public, and to avoid discussing the case or otherwise disclosing any information about the case to anyone outside the Immigration Court.
> If any of these cases are filed in your court, you will be notified by OCIJ [Office of the Chief Immigration Judge] that special procedures are to be implemented. A more detailed set of instructions will be forwarded at that time to the judge handling the case and the court administrator. If you have questions about the handling of security arrangements for a particular case, you should contact your Assistant Chief Immigration Judge.
>
> Although this is obviously a time of heightened security and concern, I am confident that each of us will remember our obligation to be fair and impartial in our dealings with everyone who comes to our courts. Thank you for your understanding and your cooperation.
>
> Michael J. Creppy
> Chief Immigration Judge

29. *Id.* The instructions require the following procedures: 1) assignment of the

of the press and public in Detroit, and later in New Jersey, sought injunctive relief in federal court to open the deportation hearings.

A. First Amendment Right of Access

The Sixth Circuit sought justification in ruling against closed deportation hearings through characterizing an "extraordinary governmental power," which "neither the Bill of Rights nor the judiciary can second-guess."[30] Finding the government interest in national security to not be sufficiently compelling, the court of appeals affirmed the preliminary injunction issued by the district court regarding the deportation proceedings for a particular alien.[31]

The Third Circuit reviewed a district court decision to issue a nationwide injunction against further closures of deportation hearings under the Creppy Directive.[32] Acknowledging the importance of the First Amendment issue, the court took issue with the Sixth Circuit's rhetoric that "democracies die behind closed doors,"[33] and noted that "our democracy was *created* behind closed doors."[34] Straightforward analysis was preferred over broad claims of unlimited rights. Determining that the *Richmond Newspapers* test was the proper test, the court of appeals reversed the district court's order because it found the Creppy Directive to be constitutional.[35] The court summarized the *Richmond Newspapers* test, after reviewing relevant Supreme Court holdings, to require an analysis of both the history and value of openness:

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cases only to judges with secret clearance; 2) additional courtroom security; 3) hearing separate from other hearings and in a closed courtroom; 4) not releasing the Record of Proceeding to anyone other than the attorney of record and only if the file has no classified information (the Office of the General Counsel may handle FOIA requests from others); 5) not confirming or denying whether the case is on the docket and referring press inquiries to the Public Affairs Office; 6) ensuring the case is coded to prevent information from being accessible over the ANSIR phone system or on the posted court calendars; and 7) instructing all courtroom personnel to not discuss the case with anyone.

30. *Detroit Free Press*, 303 F. 3d at 683.

31. *Id.*

32. *N. Jersey Media Group*, 308 F.3d at 199.

33. *Detroit Free Press*, 303 F.3d at 683.

34. *N. Jersey Media Group*, 308 F.3d at 210 n.6.

35. *Id.* at 202.

> The government may not close government proceedings which historically have been open unless public access contributes nothing of significant value to that process or there is a compelling state interest in closure and a carefully tailored resolution of the conflict between that interest and First Amendment concerns.[36]

1. Does the Richmond Newspapers *test apply to administrative hearings?*

Despite arguments presented by the Government, both circuits held that the *Richmond Newspapers* test should be applied in determining the existence of any First Amendment right of access to deportation hearings. The due process inquiry, though closely related, is a separate analysis and deals mainly with the individual rights of the alien.

The Supreme Court has applied *Richmond Newspapers* only in criminal cases, including prehearings, *voir dire* examinations, and trials.[37] Not once has the Court applied the test to proceedings outside the criminal realm,[38] yet many of the circuits have extended its applicability to civil trials as well.[39] Prior to the two cases at hand, the application of the test to administrative hearings was almost nonexistent.[40]

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36. *Id.* at 208 (quoting *Capital Cities Media, Inc. v. Chester*, 797 F.2d 1164, 1173 (3d Cir. 1986)).

37. *Id.* at 206. *See e.g. Globe Newspaper Co. v. Super. Ct. for Norfolk County*, 457 U.S. 596, 605 (1982); *Press-Enterprise Co. v. Super. Ct. of Cal.*, 464 U.S. 501, 505 (1984) (*Press-Enterprise I*); *Press-Enterprise Co. v. Super. Ct. of Cal.*, 478 U.S. 1, 8 (1986) (*Press-Enterprise II*); *Gentile v. St. Bar of Nev.*, 501 U.S. 1030, 1035 (1991); *Capital Cities Media, Inc. v. Toole*, 463 U.S. 1303, 1306 (1983).

38. *Webster Groves Sch. Dist. v. Pulitzer Pub. Co.*, 898 F.2d 1371, 1377 (8th Cir. 1990) ("The Supreme Court never has found a First Amendment right of access to civil proceedings or to the court file in a civil proceeding.").

39. *See Anderson v. Cryovac, Inc.*, 805 F.2d 1, 10-11 (1st Cir. 1986); *Westmoreland v. Columbia Broadcasting System, Inc.*, 752 F.2d 16, 22-23 (2d Cir. 1984); *Publicker Indus., Inc. v. Cohen*, 733 F.2d 1059, 1067-71 (3d Cir. 1984); *Brown & Williamson Tobacco Corp. v. FTC*, 710 F.2d 1165, 1177-79 (6th Cir. 1983); *Newman v. Graddick*, 696 F.2d 796, 801 (11th Cir. 1983); *In re Reporters Comm. for Freedom of the Press*, 773 F.2d 1325, 1333 (D.C. Cir. 1985).

40. The closest a court has come to applying the *Richmond Newspapers* test to federal administrative hearings was *Society of Professional Journalists v. Secretary of Labor*, 832 F.2d 1180, 1185 (10th Cir. 1987), where the court distinguished *Richmond Newspapers* on ripeness grounds, hinting that if the case were ripe they would have applied the test to Department of Labor administrative hearings. The Sixth Circuit has applied it to university disciplinary board proceedings, *United States v. Miami University*, 294 F.3d 797, 824 (6th Cir. 2002), and a civil action against the FTC, *Brown & Williamson Tobacco Corporation v. Federal Trade Commission*, 710 F.2d 1165, 1181

The textual argument for limiting a public access right to Article III trials and not to Executive or Legislative proceedings was struck down by the Third Circuit.[41] While "the Sixth Amendment expressly incorporates the common law tradition of public trials" under Article III, there is no such explicit incorporating provision for Article I and Article II proceedings.[42] The court had earlier held that public access to political branches was to be regulated through the democratic process and not the courts.[43] However, the *North Jersey Media Group* court found that the Sixth Amendment is not "crucial to the right of access."[44] Even though the court found no First Amendment right of access in its prior cases, it concluded so "only after applying the *Richmond Newspapers* test."[45]

A similar argument had been made in *Detroit Free Press* and was denied. The Government argued that *Richmond Newspapers* is limited to judicial proceedings, and that *Houchins* is the proper standard for administrative proceedings.[46] *Houchins* provided a deferential standard, but was limited by the issue before the Court, whether news media had rights "over and above that of other persons" in investigating within a county jail.[47] The court also found that all of the precedent relied on by the Government "purported rights of access to, or disclosure of, government-held *investigatory* information and *not* access to information relating to a governmental *adjudication* process, which is at issue here."[48]

(6th Cir. 1983), the only other examples the Sixth Circuit was able to draw upon were a municipal planning meeting, *Whiteland Woods, L.P. v. West Whiteland*, 193 F.3d 177, 181 (3d Cir. 1999), and the Agriculture Department's voters list, *Cal-Almond, Incorporated v. United States Department of Agriculture*, 960 F.2d 105, 109 (9th Cir. 1992).

41. *N. Jersey Media Group*, 308 F.3d at 207.

42. *Id.*

43. *Capital Cities Media, Inc. v. Chester*, 797 F.2d at 1168.

44. *N. Jersey Media Group*, 308 F.3d at 208 ("indeed, this passage merely states that the Framers assumed a common and established practice").

45. *Id.*

46. *Detroit Free Press*, 303 F.3d at 694-695.

47. *Houchins*, 438 U.S. at 3. The Sixth Circuit also pointed out that *Houchins* was a plurality opinion and was decided two years before *Richmond Newspapers*, which has been adopted by the Court as the appropriate test. *Detroit Free Press*, 303 F.3d at 694.

48. *Detroit Free Press*, 303 F.3d at 699.

Should the question be presented to the Supreme Court on whether the *Richmond Newspapers* test applies to administrative quasi-judicial proceedings, such as the deportation hearings at issue here, it is difficult to predict the outcome. It is quite likely that the Court will take the opportunity to discuss the applicability of the test to civil trials as well. A recognition that the test applies to administrative proceedings is an acceptance of the premise that there is at least some limited right of access to these proceedings, the extent of which is dependent on the outcome of the test. Because the test provides an analytical framework useful in balancing the relevant issues, the Court will probably hold that the test does apply and move on to the experience prong and the balancing within the logic prong.

2. Experience Prong

The experience prong, as formalized by the Supreme Court, states: "First, because a 'tradition of accessibility implies the favorable judgment of experience,' we have considered whether the place and process have historically been open to the press and general public. . . ."[49] Considering sensitive administrative proceedings as a group, the *North Jersey Media Group* court found ample evidence "of mandatorily or presumptively closed administrative proceedings."[50] The newspaper plaintiffs attempted to avoid the issue by narrowing the inquiry under this prong to deportation proceedings in particular.

A comparison of the two circuit cases shows that whether deportation hearings have a sufficient history of openness hinges on which party bears the burden of proof. The Third Circuit found that "*Richmond Newspapers*, in asking whether 'the place and process have historically been open,' seems to place the burden of proof on the party claiming openness."[51] The Sixth Circuit never addressed the burden of proof issue and instead relied on the finding that Congress has never

49. *Press-Enterprise II*, 478 U.S. at 8 (internal citations omitted).

50. *N. Jersey Media Group*, 308 F.3d at 210. Examples of these proceedings include Social Security disability hearings, 20 C.F.R. § 404.944, administrative disbarment hearings for the Office of Comptroller of Currency, 12 C.F.R. § 19.199, and the Federal Reserve Board of Governors, 12 C.F.R. § 263.97, and other closures at the discretion of the administrator.

51. *N. Jersey Media Group*, 308 F.3d at 212 n. 11.

mandated closure of deportation hearings.[52] The circuits split on whether this exclusion of specific guidance on deportation hearings by Congress indicates a presumption of openness or merely leaves the decision to the discretion of the agency.[53]

3. Logic Prong

Although closely tied to the experience prong and its inquiry into the history of openness, the logic prong is a separate balance of the positive and negative impacts that openness would have on the proceeding. The outcome of this balancing determines whether the court reviews the government action with deference or applies strict scrutiny.

a. Positive Justification

Courts have identified at least six values that are served by holding open criminal trials.[54] A review of each of these in the deportation context shows that positive justifications do exist for keeping such administrative proceedings open. The first is "promotion of informed discussion of governmental affairs by providing the public with more complete understanding of the judicial system."[55] This value is at the core of First Amendment speech protections, pointing out that the freedom to engage in political speech may be hampered and skewed if the truth is not known regarding deportation and the actions the government is taking. Proponents of this value argue that free speech alone is sufficient justification for openness.

The second value is "promotion of the public perception of fairness which can be achieved only by permitting full public view of the proceedings."[56] If deportation hearings had been left open, there may have still remained a few critics to cry out on behalf of victims of perceived due process violations. Answers to such allegations would have been readily available to the public through the press, and false rumors dispelled. But once the proceedings are closed, the inherent inquisitive nature of the press serves as a driving force for greater inquiry into what is now the unknown. For the press, the only

52. *Detroit Free Press*, 303 F.3d at 701.

53. *Id.* at 702; *N. Jersey Media Group*, 308 F.3d at 212.

54. *U. S. v. Simone*, 14 F.3d 833, 839 (3d Cir. 1994).

55. *Id.*

56. *Id.*

satisfactory answer would be access to the secrets being discussed behind closed doors. It is somewhat ironic that public perception of deportation hearings prior to the reactionary period beginning with September 11, 2001 was almost nonexistent, and that the fervor we see today is only because the press can no longer attend.

Third, openness "provid[es] a significant community therapeutic value as an outlet for community concern, hostility and emotion."[57] Vigilantism is minimized by providing access to the court for those who press for justice against a criminal, especially in cases where the crime has been made public and the community as a whole feels threatened or injured.[58] It may be argued that in the deportation setting, there are those who wish to witness the enforcement of immigration laws against those who violate them, but it is highly speculative that the community as a whole would have a sense of hostility or strong emotion against someone who overstayed their status.

Fourth, openness "serv[es] as a check on corrupt practices by exposing the judicial process to public scrutiny."[59] This argument also goes directly to the issue of whether any due process violations are occurring at the hearing and is closely related to the fifth value: "enhancement of performance of all involved."[60] Government officials tend to make more cautious decisions when the threat of critical headlines loom over their heads, but we generally hold judges to a higher standard in hopes that their decisions will be based on justice rather than public opinion.[61] It is also difficult to determine how the presence of press representatives would allow "mistakes to be cured at once."[62] Are we to allow the press to make objections and otherwise participate in the proceeding?

And sixth, "discouragement of perjury" is facilitated by an open court.[63] Press coverage of testimony undoubtedly serves

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57. *Id.*

58. *N. Jersey Media Group*, 308 F.3d at 205.

59. *Simone*, 14 F.3d at 839.

60. *Id.*

61. The *Detroit Free Press* court partly relied on a Tenth Circuit opinion that had been vacated as moot, which had argued that "[t]he natural tendency of government officials is to hold their meetings in secret. They can thereby avoid criticism and proceed informally and less carefully." 303 F.3d at 704. *Society of Prof. Journalists*, 616 F.Supp. 569, 576 (D. Utah 1985), *vacated as moot*, 832 F.2d 1180 (10th Cir. 1987).

62. *Detroit Free Press*, 303 F.3d at 704.

63. *Simone*, 14 F.3d at 839.

as a check against perjury when otherwise unknown witnesses are made aware of the trial and the statements made therein and come forward with their testimony. The added value of having the press make such reports is in addition to the value of careful and complete investigation by the government. Aliens placed in deportation hearings are often desperate enough to say anything to convince the judge that they should be granted relief.

These six justifications are equally persuasive when the alien is a student. International students generally spend all of their time within the confines of the university, with limited interaction with the outside world. Their own voice thus limited, international students in deportation hearings where the press and public are not admitted are without an advocate outside the courtroom. The sponsoring educational institution, the student's only hope, must balance its interest in helping this one student against the threat of losing certification to sponsor all other foreign students should it become involved in the proceeding.

b. Negative Results—Government Interests

On the other side of this inquiry is the government's substantial interest in national security. Affidavits filed by the Chief of Terrorism and Violent Crimes Section of the Criminal Division within the Justice Department and by the Counterterrorism Chief of the Federal Bureau of Investigations identified the specific harms that would come from opening the hearings to the public and press.[64] Between these two statements there are at least eight potential dangers that opening special interest deportation hearings would create.

(1) Intimidation or harm—disclosure of the identity of the detainees would "lead to public identification of individuals associated with them," allowing terrorist organizations to intimidate or harm them.[65] (2) Eliminating information sources—if the terrorist organizations know their member is detained, they will no longer make contact with them, "thereby eliminating valuable sources of information for the Government and impairing its ability to infiltrate terrorist

64. *Detroit Free Press v. Ashcroft*, 195 F. Supp. 2d 937, 946-47 (E.D. Mich. 2002); *N. Jersey Media Group*, 308 F.3d at 218.

65. *Detroit Free Press*, 195 F. Supp. 2d at 946.

organizations."[66] (3) Compromising the investigation—"Even minor pieces of evidence that might appear innocuous to us" could allow the terrorist organization to piece together the contours of the investigation and "thwart the government's efforts to investigate and prevent future acts of violence."[67] (4) Exposing weaknesses in border security—terrorist organizations could trace patterns of successful and unsuccessful entry if entry information regarding special interest cases were made public.[68] (5) Identifying compromised cells—the terrorist organizations will be able to determine which cells can still be used for future attacks, and, "open hearings would reveal what evidence the government lacks."[69] (6) Accelerating planned attacks—releasing identifying information would serve as an alarm, enabling the terrorist organizations to accelerate the timing of their attack or switch to undiscovered cells.[70] (7) Interference with the proceeding—releasing information to the public would "allow terrorist organizations and others to interfere with the pending proceedings by creating false or misleading evidence," or even by destroying evidence.[71] (8) Privacy interests and stigmatization—the release of detainees' identities in special interest cases would infringe on their right to privacy and they would be forever stigmatized as being connected to the September 11 attacks.[72]

Both the Sixth Circuit Court and the Third Circuit dissent determined that the government's national security interest can be just as fully protected by a more targeted case-by-case determination. The expansiveness of both the First Amendment rights and national security prohibit a broad determination for all cases. "The word "security" is a broad, vague generality whose contours should not be invoked to abrogate the fundamental law embodied in the First Amendment. The guarding of military and diplomatic secrets

66. *Id.*

67. *N. Jersey Media Group*, 308 F.3d at 218.

68. *Id.*

69. *Id.*

70. *Id.*; *Detroit Free Press*, 195 F.Supp.2d at 946.

71. *Detroit Free Press*, 195 F.Supp.2d at 946; *N. Jersey Media Group*, 308 F.3d at 218.

72. *Detroit Free Press*, 195 F.Supp.2d at 946; *N. Jersey Media Group*, 308 F.3d at 218.

at the expense of informed representative government provides no real security for our Republic."[73]

In response, however, the *North Jersey Media Group* court found the argument persuasive that even "the identification of certain cases for closure, and the introduction of evidence to support that closure, could itself expose critical information about which activities and patterns of behavior merit such closure."[74] Administrative Immigration Judges also lack the expertise to make decisions regarding national security, a decision which the Creppy Directive identifies as being made by the Attorney General. Despite the characterization of killing democracy behind closed doors pervading the Sixth Circuit opinion, these are closures in response to specific determinations made by "senior government officials responsible for investigating the events of September 11th and for preventing future attacks," not the haphazard, blanket closures of all deportation hearings.[75]

The logic prong clearly involves balancing the benefits of openness and public scrutiny with the dangers to security and life that such disclosure would threaten. In "a time when our nation is faced with threats of such profound and unknown dimension," openness serves as more of a threat than anything else.[76] The Sixth Circuit failed to balance the dangers against the positive benefits of openness when it applied the *Richmond Newspapers* test; instead, it made a preemptive determination that the First Amendment right of access existed and reviewed the threats with strict scrutiny. Perhaps this hasty conclusion is based on the factual distinction between the two cases since the identity and circumstances of detainment of the alien had been published prior to the determination that this would be a special interest case. Even so, it was reversible error for the court of appeals not to consider the disclosure of threatening information during the trial.

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73. *N.Y. Times v. U.S.*, 403 U.S. 713, 719 (1971) (Black, J., concurring).

74. *N. Jersey Media Group*, 308 F.3d at 219.

75. *Id.*

76. *Id.* at 220.

4. Strict Scrutiny or Deference

The outcome of the *Richmond Newspapers* test determines whether the court will review the government action with strict scrutiny or deference. Under a strict scrutiny analysis, the factors weighed against openness under the logic prong of the *Richmond Newspapers* test would be reviewed again when considering the compelling government interest only if the court had found a First Amendment right of access.[77] Absent a First Amendment right, the courts give great deference to the justifications provided by the government for their actions.

The Sixth Circuit applied strict scrutiny to the closure of special interest deportations and made three separate findings. The first of these was that the government had demonstrated "compelling interests sufficient to justify closure."[78] But the court then found the Creppy Directive to be unconstitutional because it did not require particularized findings and was not narrowly tailored.[79]

The final question comes down to "whether the Creppy Directive's blanket closure rule—which removes the decision from the Immigration Judge on a case-by-case basis—is reasonably necessary for the protection of national security."[80] In making this determination of reasonableness, "heightened deference to the judgments of the political branches with respect to matters of national security" has been the standard set by the Supreme Court when reviewing terrorist issues.[81] Furthermore, the "courts have not demanded that the government's action be the one the court itself deems most appropriate."[82] This deference is limited, though, to areas of specialty for the agency, and constitutional challenges to procedures do not receive such heightened deference.[83]

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77. *Id.* at 217.

78. *Detroit Free Press*, 303 F.3d at 705.

79. *Id.* at 707.

80. *N. Jersey Media Group*, 308 F.3d at 227 (Scirica, J., dissenting).

81. *Zadvydas v. Davis*, 533 U.S. 678, 696 (2001).

82. *N. Jersey Media Group*, 308 F.3d at 226 (Scirica, J., dissenting). *See Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 570 n. 5 (1993); *Rostker v. Goldberg*, 453 U.S. 57, 70 (1981).

83. *N. Jersey Media Group*, 308 F.3d at 219 n. 15 ("The issue at stake in the Newspapers' suit is not the Attorney General's power to expel aliens, but rather his power to exclude reporters from those proceedings. This is plainly a constitutional challenge to the means he has chosen to effect a permissible end, and under *Zadvydas*

This leads to the conclusion that determinations by the Attorney General that selected cases identified as "special interest" should be, *inter alia*, closed to the public and the press, and should receive deferential review by the courts as to whether such action is reasonable to protect the compelling state interest. It also follows that determinations of whether such action intrudes upon a First Amendment right is for the courts to decide with strict scrutiny. In other words, it is the conflict itself that is subject to scrutiny, not the reasonableness of the means chosen by the government. The Creppy Directive reasonably protects the national security interests defined by the government, and the question of what level of the agency should make the determination to close proceedings has little or no bearing on the issue of whether closure in general violates any First Amendment right of access.

Since there is no violation of a First Amendment right of access by closing special interest deportation hearings to the public or press, international students are at a distinct disadvantage. Most international students process their visa and renewal applications on their own, with advice and assistance from the sponsoring educational institution's international student services office rather than through a hired attorney. Should one of these international students be placed in deportation proceedings that are closed, the school advisors would be unable to attend the proceedings, just as would the press. Although the alien has a right to retain counsel, there is no obligation to provide him one at the government's expense. The foreign student who has relied exclusively on the international student services office will be hard pressed to retain counsel once his deportation proceedings have been closed.

B. The Rights of the Alien

The rights of the alien detainee are separate and distinct from any speech rights enjoyed by the press. Many critics voice the concern that we are forgetting the mistakes of our past, namely Chinese exclusion and Japanese internment.[84] But,

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we owe no executive deference. We defer only to the executive insofar as it is expert in matters of national security, not constitutional liberties.").

84. For an in-depth analysis of the Chinese Exclusion cases and their impact on immigration jurisprudence, *see* Louis Henkin, *The Constitution and United States Sovereignty: A Century of Chinese Exclusion and Its* Progeny, 100 Harvard L.R. 853

much to the disgruntlement of human rights activists, the Bill of Rights "has never protected non-citizens facing deportation in the same way" it protects citizens.[85] From the Chinese Exclusion Case, we can catch a glimpse at the extent of the Executive's power in the realm of immigration and exclusion: "If the government . . . considers the presence of foreigners of a different race in this country . . . to be dangerous to its peace and security, [this] determination is conclusive upon the judiciary."[86]

The litigious fight for a right of access to deportation hearings for the press has been fought by some because they recognize that this is perhaps the only protection deportees have against government action.[87] And while "non-citizens, even if illegally present in the United States, are 'persons' entitled to the Fifth Amendment right of due process in deportation proceedings,"[88] the extent of process that is *due* an alien is limited.

Other limitations arise when the deportee is a student. While theoretically the foreign student has a right to secure his own counsel just like all other aliens, the funds available to a student are generally quite limited, unlike the business visa holder. Any funds provided to the student by foreign sources would be suspect when the alien is placed in a special interest deportation hearing.

III. CONCLUSION

The threat of the elusive terrorist foe has swept our entire country up in a swell of patriotism that, regrettably, has sometimes gone so far as exclusionary nationalism and discrimination. The Creppy Memo remains in force, keeping special interest deportation hearings closed to the public; and, the list of those subject to special registration requirements continues to grow. The ease with which many entered our country to seek training and education in our schools has been replaced by repeated security checks, enhanced tracking, and special registration procedures. For the many educational

(Feb. 1987).

85. *Detroit Free Press*, 303 F.3d at 683.

86. 130 U.S. 581, 606 (1889).

87. As for the newspaper litigants, the motivation is most likely self-interest.

88. *Detroit Free Press*, 303 F.3d at 688.

institutions that depend on foreign student tuition, budget cuts seem inevitable.

The relationship between administrators and foreign students involves much more than tuition bills, though. The worthwhile desire to assimilate these students into the student body and benefit from their diversified backgrounds also does not represent the fulfillment of the school's responsibilities. Certain administrators at these schools have been somewhat deputized by the Justice Department to ensure these students maintain legal status and are tracked in their educational career and moves. The duties and obligations assumed by these Designated School Officials and Administrative School Officials have now been transferred to the Department of Homeland Security, in essence including these administrators as part of the enforcement bureau of the new department, not the services bureau. As foreign students come to realize the enforcement role that these administrators play in the process, fear and suspicion may rise and the effectiveness of international student services offices will lessen.

With the Justice and Homeland Security administrations moving towards heightened enforcement and increased secrecy, the need for openness and trusting relations between school administrators and foreign students has never been greater. Scare tactics employed by many administrators, by bringing in BCIS personnel to threaten students with deportation should they violate even the most miniscule and inane provision of their student visa, hinder the relationship and trust that should exist between foreign students and international student services administrators. These students are left fearful of both BCIS and the school administration. School administrators should focus more on assisting international students in completing their studies and transitioning into the certified alien labor market than on issuing warnings and other threatening notices.

D. Ray Mantle