

of Government.” U.S. Const., Art. IV, § 4. That constitutional provision is not implicated here.

Third, the commenters’ Due Process concerns are unfounded. Under federal law, INS detainees in removal proceedings are entitled to invoke a panoply of applicable administrative and judicial procedures. *See, e.g.*, 8 U.S.C. 1226–31; 8 CFR 240.10. The rule in no way abrogates any of those rights. Moreover, administrative removal proceedings are “intended to provide a streamlined determination of eligibility to remain in this country, nothing more.” *INS v. Lopez-Mendoza*, 468 U.S. 1032, 1039 (1984). Thus, due process requirements in this context are reduced, and hearings need not comply with “the forms of judicial procedure.” *Yamataya v. Fisher*, 189 U.S. 86, 97 (1903); *see also, e.g., United States v. Verdugo-Urquidez*, 494 U.S. 259, 271–273 (1990) (due process “accord[s] differing protection to aliens than to citizens”); *Fiallo v. Bell*, 430 U.S. 787, 792 (1977) (political branches may adopt rules for aliens “‘that would be unacceptable if applied to citizens’” (citation omitted)); *Landon v. Plasencia*, 459 U.S. 21, 34 (1982) (“it must weigh heavily in the [due process] balance that control over matters of immigration is a sovereign prerogative, largely within the control of the executive and the legislature”). The disclosure rule here invades no due process rights.

Fourth, the rule does not infringe upon any public First Amendment rights. Rather, the rule ensures that any disclosure of information pertaining to federal detainees will be governed by the federal Freedom of Information Act (FOIA), 5 U.S.C. 552. The FOIA provides generally for disclosure of records by federal agencies, but contains exceptions that Congress believed crucial to the effective functioning of the national government. *See, e.g.*, 5 U.S.C. 552(b)(1), (7)(A), (C), (E), (F). The rule here ensures that federal interests will be protected by channeling information requests through the FOIA. In addition, the rule guarantees that information regarding federal detainees will be released under a uniform federal scheme rather than the varying laws of fifty states. It is this Act of Congress and this implementing rule that are controlling, not the Constitutional bar to impairment of freedom of speech. “The Constitution itself is neither a Freedom of Information Act nor an Official Secrets Act.” *Houchins v. KQED, Inc.*, 438 U.S. 1, 12 (1978) (quoting Stewart, “Or of the Press,” 26 Hastings L.J. 631, 636 (1975)). By channeling requests for information through the FOIA, which contains a privacy exception, the rule

also protects detainees’ privacy. Just as the government has a substantial interest in protecting legitimate national security, intelligence and law enforcement functions under the FOIA, detainees may have a substantial privacy interest in their names and the personal information connected with their status as detainees. 5 U.S.C. 552(b)(1), (6), (7)(A), (C), (E). For example, individuals who were originally detained because of their possible connection to terrorism, have an overwhelming interest in not being connected with such activity. And particularly with respect to those individuals cooperating with the government’s law enforcement investigations, there are powerful reasons why such persons would wish to conceal their identities and whereabouts. Indeed, other INS regulations expressly shield from disclosure information pertaining to or contained in an asylum application. *See* 8 CFR 208.6(a). Contrary to some of the commenters’ suggestions, the fact that certain detainees may wish to publicly identify themselves, which they are free to do, in no way undermines this assessment.

4. The contention that the rule violates international law is similarly without basis. Federal law explicitly addresses the issue of access to consular officials. The Vienna Convention requires that a detained individual be advised of his or her right to contact his or her country’s consul, and consular notification upon request of the detainee. *See* Vienna Convention on Consular Relations, 21 U.S.T. 77, T.I.A.S. No. 6820, Art. 36(1)(b). However, an alien detainee may not wish to have his nation’s representatives advised of his detention and may wish to apply for refugee status or asylum. Consular notification is mandatory only if the bilateral consular convention specifically requires notifying consular officials of all arrests or detentions. *See* 8 CFR 236.1(e) (listing countries covered by such bilateral conventions).

5. Finally, all of the comments argue that the rule reflects unwarranted public policy choices. The Service disagrees. In this post-September 11, 2001, era of heightened national security concerns, it is necessary that information regarding aliens detained in the United States be released with great care. As explained in connection with promulgation of the interim rule, the inappropriate release of information concerning detained aliens can provide hostile interests with intelligence harmful to the national security and law enforcement interests of the United States. In upholding the regulation, the

Appellate Division of the New Jersey Superior Court expressly accept[ed] the government’s characterization of the interests affected as important, *i.e.*, facilitation of law enforcement operations, the protection of detainees, and promotion of national security.” *ACLU v. County of Hudson*, *supra*, 799 A.2d at 652; *see also id.*, at 649 (“With regard to the government’s national security argument, there can be no question that the government of the United States has a compelling interest in securing the safety of the nation’s citizens against terrorist attack”). The Service continues to believe that the rule is fully warranted and adopts the analysis and legal authority in the supplementary information to the interim rule as support for the adoption of this final rule. 67 FR at 19501–19510.

The commenters’ contention that the rule is impractical has not proven to be true. The FOIA has a long history of success in providing for proper public access to information while also protecting appropriate public safety, national security, and individual privacy interests. The Service is fully capable of carrying out this mandate in the context of federal immigration detainees housed in non-federal facilities, and the commenters have supplied no evidence to the contrary.

Accordingly, the Service is adopting the interim rule as a final rule without amendment.

Regulatory Flexibility Act

The Commissioner of the Immigration and Naturalization Service, in accordance with the Regulatory Flexibility Act (5 U.S.C. 605(b)), has reviewed this regulation and, by approving it, certifies that this rule will not have a significant economic impact on a substantial number of small entities. This rule applies only to release of information about Service detainees being housed or maintained in a state or local government entity or a privately operated detention facility. It does not have any adverse on small entities as that term is defined in 5 U.S.C. 601(6).

Unfunded Mandates Reform Act of 1995

This rule will not result in the expenditure by State, local, and tribal governments, in the aggregate, or by the private sector, of \$100 million or more in any one year, and it will not significantly or uniquely affect small governments. Therefore, no actions were deemed necessary under the provisions of the Unfunded Mandates Reform Act of 1995.