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June 2, 2010

Ms. Sarah Qureshi  
Office of General Counsel  
Bureau of Prisons  
320 First Street, N.W.  
Washington, DC 20534

Re: BOP Docket No. 1148-P  
Communications Management Units

Dear Ms. Qureshi:

The Center for Constitutional Rights (CCR) submits these comments in response to the pending Notice of Proposed Rulemaking entitled "Communication Management Units." CCR is a non-profit legal organization dedicated to protecting and advancing the rights enshrined in the United States Constitution and the Universal Declaration of Human Rights.

### INTRODUCTION

CCR has been monitoring policies and conditions at the Communications Management Units (CMUs) since the first unit was opened at FCC Terre Haute in 2006. Over the past several years, we have communicated with a majority of the 60 plus prisoners at both CMUs. In April 2010, one week before publication of the BOP's above-referenced proposed rule, CCR and co-counsel at Weil, Gotshal, & Manges LLP, filed a lawsuit, *Aref v. Holder*, 1:10-cv-00539 (D.D.C.), in the Federal District Court for the District of Columbia on behalf of five current and former CMU prisoners, and two of their spouses. The lawsuit alleges that practices and policies at the CMUs violate procedural and substantive due process, equal protection, the prohibition on cruel and unusual punishment, and the First Amendment.

CCR submits these comments to advise the Bureau of Prisons (BOP) of the discriminatory, arbitrary, and cruel way the CMUs currently function, and to urge the BOP to fundamentally rethink its plan to continue to segregate and isolate certain prisoners without proper procedural protections. CCR also urges the BOP to immediately cease restricting CMU prisoners' ability to meaningfully communicate with

their family and friends without individualized security justifications that are both disclosed and properly reviewed.

Under the new rule proposed by the BOP, arbitrary, discriminatory and retaliatory transfers to the CMU will continue unchecked, without procedural protections or meaningful oversight. The proposed rule will continue to unjustifiably prevent CMU prisoners from maintaining relationships with their families, to the detriment of their mental and emotional health and their prospects for rehabilitation and successful reentry into free society. Their friends and family, including their young children, will continue to suffer and be harmed. Moreover, this cruel treatment will continue to serve no legitimate security need.

## I. PRISONERS DESIGNATED TO THE CMU

The five incarcerated plaintiffs in *Aref v. Holder* are representative of the dozens of men who have been sent to the CMUs over the last three years. They fall into three broad categories: 1) Muslim men of Middle Eastern descent who were designated to the CMU shortly after sentencing; 2) Muslim men who are African American and were designated to the CMU from other BOP facilities; and 3) men who have been convicted of politically-motivated offenses and have spoken out about social justice issues while incarcerated at other BOP facilities. Not one of these individuals has received any meaningful explanation of why they have been designated to the CMU, nor have they been told if and how they can earn their way out. And yet, no *Aref* plaintiff has an even moderately significant disciplinary history; indeed, not one of them has a single communications-related infraction in the past decade. These facts lead to the inescapable conclusion that they were designated to the CMUs based on discriminatory and retaliatory criteria, rather than real evidence or necessity. In the following paragraphs, we describe the *Aref* plaintiffs to provide a fuller sense of who has been designated to the CMUs.

**Yassin Aref** is a 39-year-old refugee and published author from Iraqi Kurdistan who fled Saddam Hussein's regime in 1999. Aref moved to Albany, New York and served as an Imam of the Masjid-As-Salam Mosque. Following a controversial and well-publicized sting operation, Mr. Aref was convicted of money laundering, material support for terrorism, conspiracy, and making a false statement to the FBI. Although Mr. Aref is classified by the BOP as a low security inmate and has never received a disciplinary infraction, he was transferred to the Terre Haute CMU shortly after his conviction in May 2007. After 22 months at the Terre Haute CMU, Mr. Aref was transferred to the Marion CMU. He is married and has four children between the ages of four and 14.

Like Mr. Aref, **Kifah Jayyousi** is a Muslim man convicted of a crime related to terrorism. He is a 48-year-old American citizen of Jordanian descent from Detroit, Michigan, a veteran of the US Navy, and a former university professor. Despite the fact that his alleged criminal conduct was restricted to financial contributions to charities, and his sentencing judge found that he ceased involvement in any criminal conspiracy in 1998, Mr. Jayyousi was convicted of conspiracy to murder, kidnap and maim in a foreign

country and conspiracy to provide material support to terrorism in August 2007, and sentenced to 12 years and eight months imprisonment. Like Mr. Aref, Mr. Jayyousi has been classified by the BOP as a low security prisoner and has no communications-related disciplinary infractions. He was, however, transferred to the CMU at Terre Haute in June 2008. He is married, and has five children; the youngest is twelve. Mr. Jayyousi's wife, Hedaya, is also a plaintiff in the case.

While Mr. Jayyousi and Mr. Aref's convictions include allegations of material support, many prisoners in the CMU were convicted of crimes that bear no connection to terrorism. Most of them, too, are Muslim. **Avon Twitty**, for example, is a 55-year-old African American man from Washington, DC. In 1984, Mr. Twitty was sentenced to 20 years to life imprisonment on one count of murder while armed and three to ten years imprisonment for one count of carrying a pistol without a license. Despite the fact that Mr. Twitty has received no communications-related disciplinary infractions – and received only very minor disciplinary infractions overall – during his time in prison, he was transferred to the Terre Haute CMU in 2007. Mr. Twitty has been given no meaningful information about why he was designated to the CMU. After over 25 years in prison, Mr. Twitty will be released to a halfway house this August. He will re-enter free society without any release preparation, as the CMU offers none.

Former CMU prisoner **Royal Jones** has also never been given an explanation as to why he was designated to the CMU. Mr. Jones is a 42-year-old man from San Francisco, and he too is a practicing Muslim. In July 2006, Mr. Jones pleaded guilty to soliciting a crime of violence (bank robbery) and a probation violation relating to an earlier gun charge, and was sentenced to 94 months in prison. Despite the fact that Mr. Jones received no major disciplinary infractions, and absolutely no communications-related disciplinary infractions, he was transferred to the CMU at USP Marion in June 2008. Mr. Jones filed a *pro se* federal lawsuit about conditions in the CMU and was promised by CMU staff that he would be transferred if he withdrew it. Several months later, after withdrawing the lawsuit, Mr. Jones became the first prisoner ever granted a non-disciplinary transfer from the CMU. He was not given any official explanation for the transfer, but told he would be transferred back to the CMU if he again engaged in the activities that led to his designation. He has, however, never been told what those activities are.

Mr. Jones' designation to the CMU seems based on his litigation and advocacy. **Daniel McGowan**, another CMU prisoner and *Aref* plaintiff, was likewise designated based on speech and protected political beliefs. Mr. McGowan is a 36-year-old man from Queens, New York. In 2007, Mr. McGowan was sentenced to 7 years imprisonment for conspiracy and arson. Although he was a model inmate at the low security prison to which he was initially designated, and never received a disciplinary infraction, he was transferred to the Marion CMU in August 2008. Mr. McGowan's imprisonment resulted from his activities when associated with the Earth Liberation Front (ELF). Although he broke off ties with ELF long ago, he has continued to speak out about social justice issues and the rights of political prisoners and to communicate with law abiding activists

involved in these movements. Mr. McGowan's wife, Jenny Synan, is also a plaintiff in the case.

The five incarcerated plaintiffs in *Aref v. Holder* are representative of the CMU population overall. Most CMU prisoners are Muslim, and those who are not hold politically unpopular views. Many of them are classified as low security prisoners, and have received little or no discipline for prison rule violations. They are all being held under unnecessarily and disproportionately restrictive conditions of confinement. Now, the BOP seeks the authority to not only continue but actually *increase* these restrictions.

## **II. THE PROPOSED RULE ALLOWS THE BOP TO CONTINUE ARBITRARY, DISCRIMINATORY, AND RETALIATORY DESIGNATIONS TO THE CMU.**

As set out in the BOP's proposed rule, criteria for designation to the CMU is incredibly broad (*see* proposed 28 C.F.R. § 540.201 (a)-(e)). Tens of thousands of federal prisoners are presumably eligible for transfer to the CMU based on prison infractions involving communications or association with terrorist organizations. In 2006, for example, BOP categorized 19,720 inmates within the federal system as "high-risk" based on gang, international or domestic terrorist association (*see* U.S. Dep't of Justice, Off. of the Inspector Gen., THE FEDERAL BUREAU OF PRISONS' MONITORING OF MAIL FOR HIGH-RISK INMATES (Sept. 2006)). In 2009, BOP Director Harley Lappin informed Congress that the BOP has custody of 1,200 international and domestic terrorists. And over 1,774 unauthorized cell phones were confiscated from federal prison camps and secure prisons in 2008 alone.

But the proposed rule goes even further than these broad categories. Under § 540.201 (e), a prisoner can be designated to the CMU without any proven or alleged connection to terrorism, or any prison rule violation, if "there is *any* other evidence of a *potential* threat to the safe, secure, and orderly operation of prison facilities, or protection of the public, as a result of the inmate's communication with persons in the community" (emphasis supplied). As the threat need only be "potential," this provision apparently knows no bounds. The strikingly broad mandate that the BOP seeks in terms of its ability to designate prisoners to the CMU is cause for deep concern, particularly given the lack of process and oversight associated with designation, and the discriminatory and retaliatory ways in which CMU designation has so far been used.

### **A. CMU Designation Is Made Without Disclosure of its Basis or Opportunity for Challenge.**

While tens of thousands of prisoners appear eligible for CMU designation, it is impossible to discern why or how those who have actually been designated to the CMU were selected. This is because, as it currently operates, designation to the CMU neither involves nor requires documentation or a paper trail, and is without a proper review or appeal mechanism. Unlike designation to other restrictive units or prisons within the BOP, there is simply no meaningful disclosure of facts or allegations associated with

CMU assignment. The proposed rule does nothing to improve this situation or introduce any transparency into the CMU designation process.

Instead, the proposed rule sets forth broad designation criteria, and indicates that the Assistant Director of the Correctional Programs Division has the authority to approve designations (*see* proposed 28 § 540.201, 540.202(a) & (b)). However, there is no requirement in the rule that the reason for CMU designation be documented or substantiated. This is a glaring omission. Compare, for example, the BOP's regulation controlling designation to a Control Unit. 28 C.F.R. 541.40 *et seq.* There, the BOP is required to set out written criteria for the referral and selection of a prisoner. BOP regulations require that the Warden submit a recommendation to the relevant regional director, and BOP's implementing program statement requires that recommendation to be in writing, accompanied by corroborating material such as investigative reports, up-to-date mental health information, and a detailed discussion of the relevant background material. The regulation also sets out specific factors the Warden must consider in making his/her recommendation.

Once a Warden recommends a prisoner for Control Unit placement, the prisoner is provided notice of the *specific* acts and evidence that provide the basis for placement, and is invited to be present at a pre-transfer hearing, during which the prisoner may, with the assistance of a staff representative, provide documentary evidence and call witnesses. 28 C.F.R. § 541.43. At the conclusion of the hearing, the hearing administrator must prepare a written decision that summarizes the hearing and all information upon which the decision is based and indicates the reason for the decision, including any specific act and the evidence on which the decision is based. 28 C.F.R. § 541.44. The prisoner is told of the decision, and is entitled to receive the written findings, barring a security need to withhold them.

This referral, documentation, notice and hearing process is important not just to guide a Warden's discretion, but also to provide a fair explanation to the prisoner of why he/she has been designated to a Control Unit, and to give meaning to the several layers of review and appeal set out in the rule. *See* 28 C.F.R. § 541.45 (Executive Panel Review and Appeal). Where deprivations of liberty far beyond the ordinary restrictions associated with incarceration are involved, such process is absolutely critical and indeed required by governing legal standards.

By contrast, there is no process to guide the Assistant Director's discretion in making CMU designations, and no requirement that he document or substantiate his decisions in any way. The BOP's proposed rule states that each inmate "will be provided an explanation of the decision in sufficient detail, unless providing specific information would jeopardize the safety, security, or orderly operation of the facility, or protection of the public." (*See* proposed 28 C.F.R. § 540.202 (c)(4)). But in practice, CMU prisoners receive no meaningful explanation of the reason for their designation, and there is no review or appeal process in place. And even if there were a real appeals process, there would be no record to review.

With the final decision for designation in the hands of one lone bureaucrat, who need not consider any specific criteria, nor document his decision or explain the evidence he relied on, it is no wonder that designations to the CMU, thus far, have been arbitrary at best, and rife with discrimination and retaliation at worst.

Mr. Twitty's designation to the CMU is a prime example. As of April 20, 2007, BOP records indicated that Mr. Twitty was doing well. A progress report stated that he received good work performance ratings, had good rapport with staff and inmates, and was not a management problem. He had not received a prison rule violation since 2005; indeed, that 2005 infraction – for failure to stand for count – was his only infraction in his entire time in BOP custody. At the same time, however, Mr. Twitty was involved in an ongoing dispute with BOP staff, as well as active civil litigation, over missing good time credits and program documentation.

Just one month after this positive progress report, and without prior notice, Mr. Twitty was abruptly transferred to the CMU at Terre Haute. The one-page notice of transfer he received shortly thereafter explained the reason for his transfer in two terse sentences:

Your current offense of conviction is Murder While Armed, 22 USC section 2101. Reliable evidence indicates your incarceration conduct has included recruitment and radicalization efforts of other inmates through extremist, violence oriented indoctrination methods to intimidate and coerce others.

When Mr. Twitty attempted to find out what “reliable evidence” existed, and what alleged behavior was objectionable, he was told only that he could file a Freedom of Information Act (FOIA) request. When he challenged his CMU placement through the administrative remedy process, as set out in § 540.202 (c)(6) of the proposed rule, he received only the same vague and unsubstantiated language about alleged recruitment and radicalization. He filed the FOIA request, as instructed, but the few documents released included no information substantiating or explaining his designation.

While Mr. Twitty remains completely unaware of the reason for his designation, he did receive, as a result of his FOIA request, his prior Warden's written request that Mr. Twitty be designated to the CMU. The Warden's request, written one month after Mr. Twitty's positive program review, indicated, without specification, that he was a management problem involved in recruitment and radicalization. It provided no explanation of what occurred within the intervening month to turn Mr. Twitty from a model prisoner to a dangerous radical. It did, however, erroneously state that Mr. Twitty received a disciplinary report for a serious assault at a prior prison. This error, advertent or not, went uncorrected, as BOP rules require no referral packet and allow for no meaningful review of CMU placement. Mr. Twitty remains at the CMU to this day despite repeated attempts to bring this error to the attention of prison staff and continued efforts to uncover any factual predicate to his designation. He has never been told which

criteria for CMU placement he meets, who he attempted to recruit or radicalize, when, or to what ends.

Other prisoners have also been designated to the CMU based on mistaken information. Mr. McGowan, too, was a model prisoner. He served the first year of his sentence at a low security facility and received no rule violations and positive program reviews. He did, however, speak out on social justice issues. Like Mr. Twitty and all other CMU prisoners, he too was never given the chance to discuss or oppose designation to the CMU. Instead, he was transferred to the Marion CMU and, like all other CMU prisoners, *then* received a one-page notice of transfer. Mr. McGowan's notice indicates that his designation was based on, among other things, his being "identified as a member and leader in the Earth Liberation Front (ELF) and Animal Liberation Front (ALF)," and because his offense conduct included teaching others how to commit crimes of arson.

Mr. McGowan was never a "leader" of ELF or ALF, and has not been a "member" of either organization for over seven years. Nor did he teach others to commit arson. Within one week of receiving this notice, Mr. McGowan attempted to use the Administrative Remedy process to challenge his transfer to the CMU and alert BOP staff to the inaccurate information in his notice of transfer. Eventually, Mr. McGowan was told that the source of the information was his Pre-Sentence Investigation Report (PSR). However, an inspection of Mr. McGowan's PSR reveals that it includes no statement that he taught others to commit arson. It does, however, include an allegation that several *other* named individuals, but not Mr. McGowan, trained others about arson. Moreover, Mr. McGowan's PSR indicates there is *no* evidence suggesting that he played a leadership role, in contrast to three of his co-conspirators, for whom the prosecution sought role enhancements and/or characterized as leaders. Mr. McGowan's repeated attempts to bring this discrepancy to the attention of the BOP have been fruitless, and he remains in the CMU. He too, has never been told which criteria for CMU placement led to his designation.

As these individual stories exemplify, the lack of transparency in CMU designations allows for abuse and error. Because there is no meaningful disclosure involved in the process, CMU designation can be based on erroneous information or assertions, or done in retaliation for protected advocacy and beliefs. The BOP should not adopt a rule that allows for arbitrary and baseless designations to a unit that so significantly curtails a prisoner's ability to maintain ties with the outside world. This is not only unsound and defenseless policy, but policy that infringes on the constitutional rights of CMU prisoners.

### **B. Once Designated to the CMU, Prisoners Have No Way to Either Challenge Their Designation or Earn Their Way Out.**

Compounding this situation, the BOP's proposed rule does not set out what prisoners may do to earn their way out of the CMU, nor how long designation will last. In March 2010, Mr. Jones became the first CMU prisoner to be released into general population. He was given no explanation as to why he had earned redesignation, but

believes it was based on the BOP following through on its illegal and unethical promise to transfer him if he dropped his *pro se* suit challenging the constitutionality of the unit. Mr. Jones was told that he would be designated back to the CMU if he again engaged in the conduct that landed him there in the first place, but as he has no idea what that conduct was (his notice of transfer contained an identical allegation of “recruitment and radicalization” as Mr. Twitty’s), he does not know how to avoid redesignation.

For many others, it is apparent that CMU designation will last the duration of their sentence. Mr. Jayyousi and Mr. Aref, for example, were designated to the CMU immediately after sentencing, and their notices of transfer refer only to their conviction and offense conduct (some of which was not proven at trial) as explanation for that designation. Offense conduct cannot change. Thus, Mr. Jayyousi has been informed that he will serve his entire sentence, 12 years and 8 months, in the CMU. With one stroke of the pen, a single bureaucrat has made an unreviewable decision that Mr. Jayyousi will not be able to hug his children for over a decade.

Unlike designation to a Control Unit, there is no meaningful process by which ongoing confinement at a CMU is reviewed. For several years, there was not even a pretense of process. In October 2009, an undated, unsigned Notice to Inmates was posted at both the Terre Haute and Marion CMUs, detailing a new process by which the unit team would review inmates for continued CMU placement at program reviews. The Notice indicated that inmates will be provided with 48 hours notice prior to the review, are expected to attend, and could personally raise questions and concerns with the Unit Team regarding their placement in the CMU. The proposed rule apparently refers to this process, indicating that continued designation to the CMU will be “reviewed regularly.” (See proposed 28 C.F.R. § 540.202 (c)(5)).

But this purported review process is illusory. By its own description, the process does not serve as a review of, or opportunity to contest, the original reasons individual inmates were transferred to the CMU; rather, the Notice presumes that CMU designation was initially appropriate, indicating that the Unit Team will consider whether the original reasons for CMU placement *still* exist. Because designation is based on past conduct, such as offense conduct, rather than continuing conduct, nothing can change. Moreover, CMU prisoners have no way to meaningfully contest their ongoing placement in the CMU because the allegations underlying their designation have never been disclosed or reviewed.

Contrary to the notice, but consistent with past practice, the Unit Teams at both CMUs have continued to fail to review the propriety of CMU placement at program reviews, and continue to state that the responsibility for decisions about CMU placement occur at the Central rather than facility level. Each of the *Aref* plaintiffs has attended a program review since the Notice was posted. They were not provided with any information at the review regarding which of the stated criteria led to their CMU designation, nor were they provided with factual information underlying the designation. At Mr. Aref’s last review he was explicitly told that he was categorically ineligible for a transfer until he had spent 18 months at the Marion CMU (this despite the fact he had



already spent 22 months at the Terre Haute CMU). After Mr. McGowan's last review, his unit team and Warden recommended, based on his continued good behavior, that he be approved for a transfer from the CMU. That recommendation was overruled at the regional level without explanation.

Not only, then, are prisoners designated to the CMU without transparent process, they are held there indefinitely, without any meaningful way to contest their ongoing confinement, or demonstrate that they should not have been designated, or no longer require CMU placement. Again, the BOP should not adopt a rule that allows for arbitrary or baseless designations to a highly restrictive unit, and denies prisoners any real means of seeking redesignation to general population.

### **III. THE CMUS BURDEN PRISONERS' ABILITY TO MAINTAIN FAMILY RELATIONSHIPS WITHOUT ANY LEGITIMATE SECURITY NEED OR PENOLOGICAL PURPOSE.**

The BOP's proposed rule will, without process or review, subject prisoners to uniquely restrictive conditions of confinement. Under the rule, CMU prisoners could be:

- Limited to one 3-page, double-sided letter per week to one recipient. Prisoners in general population in the BOP, by contrast, have almost unlimited general correspondence. *See* BOP Program Statement 5265.11 - Correspondence. Even prisoners in Control Units are provided correspondence privileges in accordance with the BOP's general correspondence rules. *See* BOP Program Statement 5212.07 - Control Unit Programs.
- Limited to one 15-minute phone call per month, to immediate family only. All other general population prisoners in the federal system get 300 minutes per month to call anyone on a list of 30 approved names.
- Limited to a single one-hour visit per month, with immediate family only. These visits must be non-contact in nature. At almost all federal prisons, prisoners may receive visits on any weekday evening or weekend with anyone on their approved list. There is not a single general population unit in the federal system with a blanket ban on contact visitation.

Prisoners at the CMUs are currently allowed more communication than set out in the proposed rule. Yet even under the current rules, CMU prisoners are unable to maintain essential family ties. Current restrictions are needlessly harming both CMU prisoners and their families; further restrictions would cause irreparable damage.

Mr. Aref, for example, has four young children, ages 4, 10, 12, and 14. He has not seen his children for two years, as they found the experience of non-contact visitation too traumatizing to repeat. Although he regularly writes them letters, this means of communication does not allow him to maintain any meaningful relationship with his 4-year-old, who cannot yet read or write. Under the proposed rule, Mr. Aref could only

write to each of his children once a month, and would be unable to correspond with anyone else. Moreover, the current ban on contact visits means that Mr. Aref will next embrace his 4-year-old daughter when she is 12.

The blanket ban on physical contact during visits is not only unique within the federal prison system, it is uniquely harmful. Psychological research shows a consistent correlation between quantity and quality of touch and relationship integrity.<sup>1</sup> Physical contact is a basic human need essential to one's mental health, and the maintenance of close family relationships, especially those between couples, and parents and children. With respect to young children, it is the *only* means of effective association. Physical contact in the context of prison visitation is of central importance, as non-contact visitation leads to emotional stress and interferes with the positive role visitation can play in maintaining family integrity. Given the comprehensive security measures that are already in place at the CMUs, there is simply no justification for a blanket and indefinite ban on contact visits. It serves only to harm CMU prisoners, their families, and their relationships with the outside world – relationships that will be pivotal in assuring their successful transition back to society upon release.

Similarly, under current CMU rules, Mr. Aref gets just two 15 minute calls a week which he uses to speak to his four children for just a few minutes each. Telephone access at its current level makes it largely untenable to maintain meaningful family bonds. But under the new rule, Mr. Aref could only speak to each of his children once every four months. Such limited contact would completely deprive Mr. Aref of playing a meaningful role in his children's lives, and preserving this central relationship.

Mr. Jayyousi has five children, a wife with whom he is very close, and elderly parents. Since he has been imprisoned in the CMU, the lack of contact visits has led one of his sons and his parents to cease all visitation. He currently splits his limited telephone time between all eight of these close family members, and thus has inadequate time to truly maintain contact with anyone. These already damaged family relationships would be completely – and pointlessly – destroyed by the limits the BOP proposes here.

The BOP should not adopt policies regarding telephone use and visitation that needlessly and cruelly harm family integrity. To do so is counterproductive, runs contrary to sound policy favoring the maintenance of community ties, and inflicts unconstitutional harms on CMU prisoners and their families alike.

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<sup>1</sup> See generally, Matthew J. Hertenstein, Julie Verkamp, Alyssa M. Kerestes, Rachel M. Holmes, *The Communicative Functions of Touch in Humans, Nonhuman Primates, and Rats: A Review and Synthesis of the Empirical Research*, 132 GENETIC, SOC. & GEN. PSYCHOL. MONOGRAPHS 34 (2006) (available at [http://www.depauw.edu/learn/lab/publications/documents/touch/2006\\_Touch\\_The%20communicative\\_functions\\_of\\_touch\\_in\\_humans.pdf](http://www.depauw.edu/learn/lab/publications/documents/touch/2006_Touch_The%20communicative_functions_of_touch_in_humans.pdf)); see also, JUDEE K. BURGOON, DAVID B. BULLER, & W. GILL WOODALL, *NONVERBAL COMMUNICATION: THE UNSPOKEN DIALOGUE*, McGraw-Hill (1996) (arguing that people rely more heavily on nonverbal communication, especially in times of stress, because nonverbal communication preceded language in evolution of the species, and thus has phylogenetic primacy).

#### IV. THE PROPOSED RULE CODIFIES A UNIT THAT VIOLATES FUNDAMENTAL CONSTITUTIONAL RIGHTS.

The proposed rule, along with the current CMUs it describes, violate procedural and substantive due process, freedom of speech, association, and religion, equal protection, and the prohibition on cruel and unusual punishment. A brief analysis of some of the operative law follows.

“Prison walls do not form a barrier separating prison inmates from the protections of the Constitution.” *Turner v. Safley*, 482 U.S. 78, 84 (1987). “A prison inmate retains those First Amendment rights that are not inconsistent with his status as a prisoner or with the legitimate penological objectives of the correctional system.” *Pell v. Procunier*, 417 U.S. 817, 822 (1974); *accord Shaw v. Murphy*, 532 U.S. 223, 228 (2001) (“incarceration does not divest prisoners of all constitutional protections”). While First Amendment rights are necessarily abridged by incarceration, they are not extinguished. Thus, the Supreme Court has consistently required prison officials to prove that a regulation which infringes on First Amendment rights has a valid, rational connection to a legitimate governmental interest. *Turner*, 482 U.S. at 89-91.

CMU restrictions are without security or penological justification. First, as there is no process to guide CMU designation, there has been no showing that any individual in the CMU poses a danger to prison security or to the outside world that is any different or greater than that posed by any other convicted prisoner. Many CMU prisoners, including all the *Aref* plaintiffs, received phone calls, contact visits, and mail privileges at prior facilities without incident.

Furthermore, although the stated purpose of the CMUs is to allow for monitoring of communication, such monitoring need not include these harsh and harmful restrictions. It is unclear for example, why CMU prisoners, alone out of all federal prisoners in general population throughout the country, should be denied contact visitation. Contact visits can be monitored and recorded just as easily as non-contact visits by requiring, for example, that the prisoner and his visitor speak audibly, and by placing a tape recorder on the table in front of them. This solution presents minimal cost to the prison, and would substantially alleviate the intense psychological pain and injury prisoners and their family members (who frequently include young children) suffer when being forced to interact with their loved ones through plexiglass, without the chance to embrace, hold hands, or kiss goodbye.

That such unique restrictions are imposed without procedural protection is equally unconstitutional. Prisoners have a liberty interest in avoiding placement in a prison unit which “imposes atypical and significant hardship on the inmate in relation to the ordinary incidents of prison life.” *Sandin v. Conner*, 515 U.S. 472, 484 (1995). Where a liberty interest exists, it may not be extinguished without sufficient procedural protections.

There are only two CMUs within the entire federal prison system, and they impose upon low and medium security prisoners communication restrictions more

onerous than those in effect at the highest “max” security prison in the federal system – ADX Florence. Thus, designation to the CMU cannot be constitutionally employed without meaningful process, to ensure that designation is appropriate for each individual inmate.

The need for such process is underscored where, as here, the composition of the units strongly suggest religious profiling, religious segregation, and retaliation. Of the first 17 prisoners transferred to the Terre Haute CMU, 15 were Muslim. According to the BOP’s response to a 2009 FOIA request, 26 of 36 prisoners in the Marion CMU were classified by the BOP as Muslim (making the unit 72% Muslim). And while the BOP only reported 14 of 63 prisoners at the Terre Haute CMU as Muslim (or practicing a religion related to Islam), an October 13, 2009 letter from the Associate Director of the DOJ Office of Information Policy, placed the number of Muslim prisoners at Terre Haute at 25. According to *Aref* Plaintiffs and other CMU prisoners’ self-reporting, 24 of 40 prisoners at Terre Haute in November 2009 were Muslim. This constitutes 65% of the CMU population.

These numbers represent a vast overrepresentation of Muslim prisoners at the two CMUs when compared to the overall population of BOP facilities. Of 150,000 prisoners in BOP facilities nationwide in 2004, approximately 9,000 prisoners (or 6% of the total prisoner population) sought Islamic religious services. *See* U.S. Dep’t of Justice, Off. of the Inspector Gen., A REVIEW OF THE FEDERAL BUREAU OF PRISONS’ SELECTION OF MUSLIM RELIGIOUS SERVICE PROVIDERS (2004), at 5. This encompasses prisoners who identify as Sunni and Shiite, or are affiliated with Nation of Islam and the Moorish Science Temple of America.

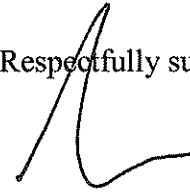
BOP statistics themselves demonstrate that the Marion CMU is 72% Muslim – a 1,200% overrepresentation compared against the national average. And reliable estimates suggest that the CMU at Terre Haute includes an overrepresentation of Muslim prisoners at a rate of over 1,000% of the national average. This discrepancy cannot be explained by any legitimate non-discriminatory reason. No Plaintiff in the *Aref* case has engaged in any behavior while incarcerated to indicate his communication requires monitoring or he otherwise poses a unique threat to prison security. Rather than being based on a legitimate and substantiated security need, their designations – and those of many Muslim prisoners at the CMUs – appear instead to be based on the discriminatory belief that Muslim prisoners are more likely than others to pose a threat to institution security. This violates the clear dictate that prison officials may not discriminate among different religions, and is troubling evidence of the forms of discrimination that can run rife when such designations are made without due process.

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In sum, both current conditions at the CMU, as well as the considerably worse conditions catalogued in the above-referenced proposed rule, are ill-advised, harmful, and unnecessary. Moreover, they violate core constitutional principles and protections. We urge the BOP to abandon these overly harsh and needless regulations.

Thank you for your consideration of these comments. We would welcome the opportunity to speak with you, and we hope you will contact us to arrange a time to discuss these matters further.

Respectfully submitted,

A handwritten signature in black ink, appearing to be 'Alexis Agathocleous', written in a cursive style.

Alexis Agathocleous  
Staff Attorney

A handwritten signature in black ink, appearing to be 'Rachel Meeropol', written in a cursive style.

Rachel Meeropol  
Staff Attorney