UNIVERSITY OF DENVER
Sturm College of Law
Clinical Programs

June 7, 2010

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

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

Dear Ms. Qureshi:

The Civil Rights Clinic ("CRC") at the University of Denver Sturm College of Law, on behalf of its clients Omar Rezaq, Mohammed Saleh, El-Sayyid Nosair, and Ibrahim Elgabrowny, comments on the Bureau of Prisons' ("Bureau" or "BOP") proposal to amend 28 C.F.R. Part 540 – "Contact with Persons in the Community" to add "Subpart J – Communication Management Housing Units." BOP Docket No. 1148-P, 75 Fed. Reg. 17324 (Apr. 6, 2010).

Mr. Rezaq, Mr. Saleh, Mr. Nosair and Mr. Elgabrowny are all Muslim men of Middle Eastern descent. Three of them (Mr. Rezaq, Mr. Saleh and Mr. Nosair) are currently held in solitary confinement in the USP - Florence Administrative Maximum prison (ADX), the Bureau's only "supermax" facility. After being held in isolation in the ADX for seven years and successfully completing the ADX "Step-Down Program," Mr. Elgabrowny recently was transferred to a Communication Management Unit (CMU) last year, with no notice or opportunity to be heard. Given that our other three clients share similar religious and ethnic backgrounds and crimes of conviction, the CRC fears that the same fate awaits them, if and when the Bureau decides they no longer require supermax confinement.[1]

I. THE CMUs ARE UNNECESSARY BECAUSE THE BUREAU ALREADY MONITORS AND RESTRICTS PRISONERS' COMMUNICATIONS VIA EXISTING LAW.

As a threshold matter, the CRC asserts that CMUs are unnecessary because existing law permits the Bureau to monitor and restrict prisoners' communications when

[1] Indeed, the Notice of Proposed Rulemaking mentions Mr. Nosair and Mr. Elgabrowny by name (75 Fed. Reg. at 17326), as did a prior proposed regulation entitled "Limited Communication for Terrorist Inmates" that the Bureau submitted for notice and comment in 2006 but never finalized. *See* Limited Communication, 71 Fed. Reg. 16520. This leads to the almost inescapable conclusion that as early as 2006, the Bureau had already predetermined that if Mr. Nosair and Mr. Elgabrowny were ever to be released from the ADX, they would be sent to a CMU.

the Government deems it necessary to do so. In its Notice, the Bureau itself points to four regulations that give the BOP considerable authority to limit prisoner communications: (1) 28 C.F.R. § 540.12 (authorizing wardens to establish and exercise controls to protect individuals, security, discipline and good order of the institution); (2) 28 C.F.R. § 540.14(a) (requiring that institution staff shall open and inspect all incoming general correspondence); (3) 28 C.F.R. § 540.100 (authorizing limitations on inmates' phone privileges consistent with ensuring security or good order of institution or protection of the public and authorizing wardens to establish procedures that enable monitoring of telephone conversations); and (4) 28 C.F.R. § 540.40 (authorizing wardens to limit inmate visiting when necessary to ensure security and good order of the institution). In addition to these (and other) BOP regulations, federal criminal law provides that "upon motion by the Director of the Bureau of Prisons or a United States attorney," the court may issue an order prohibiting the prisoner from associating or communicating with a specified person, other than his attorney, "upon a showing of probable cause to believe that association or communication with such person is for the purpose of enabling the defendant to control, manage, direct, finance, or otherwise participate in an illegal enterprise." 18 U.S.C. § 3582(d).

Given the extensive measures already available to and used by the Bureau to monitor and restrict prisoners' communications, the creation of the CMUs is unnecessary. Additionally, as described below, the conditions of confinement in the CMUs go further than required to achieve the Bureau's stated goals, and in so doing, inflict consequential constitutional harms. The CRC therefore urges the Bureau to dismantle the CMUs and to rely instead on existing law that provides the Bureau with more narrowly tailored means to achieve its stated goals, without the extraordinary attendant harms that the CMUs impose.

II. AS SET FORTH IN THE PROPOSED REGULATIONS, MANY OF THE CONDITIONS OF CONFINEMENT IN THE CMUs VIOLATE THE CONSTITUTION.

Should the Bureau decide to maintain the CMUs, however, the CRC supports the Bureau's efforts to establish clear regulations that will govern these highly restrictive units. As other commenters have noted (and some litigants have asserted), in creating and operating the two existing CMUs at Terre Haute and Marion via Institution Supplements, the Bureau arguably has created substantive rules that required notice-and-comment rulemaking of the kind it has now put forth via these proposed rules. The CRC believes that by submitting the proposed CMU regulations for comment, the Bureau has the potential to better safeguard the constitutional rights of both prisoners and the free persons who communicate with them, without unduly infringing upon the legitimate penological interests of the Bureau. As currently drafted, however, the proposed regulations suffer serious constitutional infirmities. In availing itself of the administrative process, we urge the Bureau to address these issues.

As set forth in the proposed regulations, the conditions of confinement in the CMUs are extremely restrictive. The Bureau describes CMUs as "general population

housing unit[s] where inmates will ordinarily reside, eat and participate in educational, recreation, religious, visiting, unit management and work programming within the confines of the CMU." *See* proposed 28 C.F.R. § 540.200(b). However, both the proposed regulations and the current operation of the CMUs make plain that that these units are not "general population" units in any regularly-understood meaning of that term.

While the Notice states that the proposed regulation "will not extinguish the monitored communication" of CMU prisoners, a review of the regulation itself makes plain that the restrictions it authorizes come very close to doing just that. CMU prisoners are limited to one six-page letter per week to a single recipient, one call per month that can be limited to three minutes in duration, and a single non-contact visit per month that can be limited to one hour. *See* proposed 28 C.F.R. §§ 540.203 – 540.205. CMU prisoners may communicate only with immediate family members, and if there is no translator available, the Bureau requires them to speak only in English during visits and phone calls. During visits, CMU inmates may not touch, hug, kiss, shake hands, or have any physical contact whatsoever with their children, wives, siblings or parents.

A. First Amendment Issues

As currently drafted, the communication restrictions placed on CMU inmates impermissibly infringe on the First Amendment rights of both CMU inmates and those who wish to communicate with them. Although it is a generally accepted principle that the rights of prisoners are inherently more limited than free persons, constitutional protection does not stop at the prison gate. *Wilkinson v. Austin*, 545 U.S. 209, 225 (2005). Even when a regulation restricting speech is rationally related to a legitimate penological interest, the Supreme Court has required consideration of alternative means for exercising First Amendment rights, and whether there are alternatives to the regulation that can accommodate the rights without undermining the penological interests. *See Turner v. Safley*, 482 U.S. 78, 89-91 (1987).[2]

Communication with family. The CMU regulations impose extreme restrictions on inmates' communications with their family members. Family association is a long recognized fundamental right. See *M.L.B. v. S.L.J.*, 519 U.S. 102, 116 (1996); *Moore v. City of East Cleveland,* 431 U.S. 494, 499 (1977); *Meyer v. Neb.*, 262 U.S. 390 (1923). Prisoner-family association is inherently limited by incarceration, yet its recognition and preservation is of particular concern as it can often be the primary source of strength and rehabilitation for many prisoners facing lengthy periods of incarceration.[3]

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[2] Restrictions on *outgoing*, non-legal mail are governed by *Procunier v. Martinez*, which requires the Bureau to demonstrate that the restriction must further an important governmental objective and the restriction must be no greater than necessary to achieve that objective. 416 U.S. 396, 413-14 (1974). As existing BOP's regulations provide obvious examples of less restrictive means to achieve the Bureau's objective, the proposed regulation regarding written correspondence violates the *Martinez* standard. *See* proposed 28 C.F.R. § 540.203.

[3] Indeed, in its other regulations, the Bureau itself "encourages visiting by family, friends and community groups to maintain the morale of the inmate and to develop closer relationships between the inmate and family members of others in the community." 28 C.F.R. § 540.40.

The proposed CMU regulations further limit already restricted communications to prisoners with only particular classifications of family members, having a disparately negative impact on unmarried prisoners, those with no children, or those whose age or circumstance means that they have no surviving parents. Moreover, many prisoners rely on contact and support from extended family members, particularly Muslim inmates of Middle Eastern descent, for whom the concept of nuclear family is much more extensive than in the United States, yet most of these family members are categorically excluded from talking with or visiting CMU prisoners. In order for relatives of prisoners housed in CMUs to avail themselves of their right to speak with their relatives, and for the prisoners in turn to receive the salubrious effect of such communication, the proposed regulations should be amended to allow for increased family communication.

Communication with media representatives. Additionally, because the proposed regulations prohibit prisoners from communicating, by telephone or visit, with anyone other than immediate family, this includes a ban on communication with representatives of the media. While the proposed regulations do not prohibit CMU prisoners from writing to representatives of the news media, they are prohibited from doing so via special mail. *See* proposed 28 C.F.R. § 540.203(b)(1). Additionally, because CMU prisoners are limited to one letter per week to a single recipient, writing to a news media representative means having to forego a letter to a spouse, child or other family member. The effect of these restrictions is that the First Amendment rights of non-prisoners—including media representatives and the public at large—to receive the information and ideas attending those communications are also abridged. Moreover, representatives of the press do not receive and are unable to report and publish that information to readers and the public, who in turn remain uninformed about, *inter alia*, the conditions of confinement in the CMUs.[4] This is particularly troubling given the secrecy and lack of

[4] *See Phelps v. Wichita Eagle-Beacon*, 886 F.2d 1262, 1271 (10th Cir. 1989) (the right to publish and to exercise "editorial discretion concerning what to publish" is protected); *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241, 258 (1974) ("The choice of material to go into a newspaper...constitutes the exercise of editorial control and judgment. It has yet to be demonstrated how governmental regulation of this crucial process can be exercised consistent with First Amendment guarantees on a free press..."); *Kingsley Books, Inc. v. Brown*, 354 U.S. 436, 441 (1957) (an essential element of the liberty of free press is freedom from all censorship over what shall be published).

The liberty of free press also affects the rights of non-inmates to receive and read the information published or reported, *see Kleindienst v. Mandel*, 408 U.S. 753, 762-63 (1972) ("Freedom of [speech and press] . . . necessarily protects the right to receive") (quoting *Martin v. City of Struthers*, 319 U.S. 141, 143 (1943)); *Bd. of Educ., Island Trees Union Free Sch. Dist. v. PICO*, 457 U.S. 853, 866-67 (1982); *Am. Commc'ns Ass'n v. Douds*, 339 U.S. 382, 395 (1950) ("[T]he public has a right to every man's views"). First Amendment protection is afforded "to the communication, to its source and to its recipients both." *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council*, 425 U.S. 748, 756 (1976). Censorship of inmate mail has been determined to infringe on the First Amendment rights of non-inmates recipients. *Id.* at 757 (citing *Procunier v. Martinez*, 416 U.S. 396, 408-09 (1984)). These public rights are equally and likewise chilled by the proposed CMU regulations.

information surrounding the creation and operations of the CMUs to date.[5] This limitation is at odds with other Bureau regulations and policy in which the Bureau "recognizes the desirability of establishing a policy that affords the public information about its operations via the news media" and acknowledges that the intent of the rules regarding Contact with News Media is to "insure a better informed public." *See* 28 C.F.R. § 540.60.

Communication with attorneys. The restrictions contained in the proposed regulations also may impermissibly interfere with the attorney-client relationship. As drafted, the proposed regulations allow the Bureau to restrict the frequency and volume of legal mail if the "quantity to be processed becomes unreasonable." *See* proposed 28 C.F.R. § 540.203(c). Additionally, the proposed regulation authorizes prison staff not only to inspect incoming legal mail for contraband, but also to review and assess attorney-client correspondence "to ensure its qualification as privileged communication." Proposed 28 C.F.R. §540.203(b)(2).

Interference with attorney-client consultation or invasion of its confidentiality is a violation of the First Amendment. *See e.g., Poole v. County of Otero*, 271 F.3d 955, 961 (10th Cir. 2001) ("First Amendment rights of association and free speech extend to the right to retain and consult with an attorney"); *see also*, *Denius v. Dunlap*, 209 F.3d 944 (7th Cir. 2000) (because maintenance of confidentiality in attorney-client communications is vital to the ability of an attorney to effectively counsel her client, interference with this confidentiality impedes the client's First Amendment right to obtain legal advice); *Sallier v. Brooks*, 343 F.3d 868, 874 (6th Cir. 2003) ("[W]hen the incoming mail is "legal mail," we have heightened concern with allowing prison officials unfettered discretion to open and read an inmate's mail because a prison's security needs do not automatically trump a prisoner's First Amendment right to receive mail, especially correspondence that impacts upon or has import for the prisoner's legal rights, the attorney-client privilege, or the right of access to the courts."). Because of their effect on the attorney-client relationship, the CRC urges the Bureau to remove these provisions from its proposed regulations.

B. Fifth Amendment/Procedural Due Process Concerns

As described above, the CMUs are designed to subject inmates to extreme communications restrictions, and such limitations should be protected from the risk of erroneous deprivation by the inclusion of adequate procedural safeguards. CMU prisoners are permitted significantly less communication than prisoners in general population units in other BOP facilities, even in comparison to those inmates who are held in maximum-security facilities. CMU inmates' written correspondence, telephone communications and visitation opportunities are subject to extraordinary limitations.

[5] As Justice Kennedy observed in his 2003 speech to the American Bar Association, our prisons "are the concern and responsibility of . . . every citizen. This is your justice system; these are your prisons. . . . As a people, we should know what happens after the prisoner is taken away." Anthony M. Kennedy, Assoc. Justice, U.S. Supreme Court, *Speech at the American Bar Association Annual Meeting*, Aug. 9, 2003 (rev'd Aug. 14, 2003).

Additionally, the Bureau's requirement that all CMU prisoners be confined in a segregated unit limits not only their communications, but also other aspects of their daily lives. For example, prisoners in the CMUs are not able to hold UNICOR jobs or work in other areas of the prison where they would have the opportunity to develop employment skills. Many educational programs available to prisoners in the regular general population units are denied to CMU prisoners by virtue of their being isolated in the CMUs.

The Supreme Court has held that, when a liberty interest is threatened by imposing certain conditions, inmates must: 1) receive notice of the factual basis relied upon for their placements; 2) be given an opportunity to object and be heard before the decision is made; 3) be provided a statement of the reasons for the decision; 4) receive an appeal, or multiple levels of review and 5) continue to receive periodic meaningful reviews assessing the on-going basis for the placement. *Wilkinson v. Austin*, 545 U.S. at 226. The Bureau's proposed regulations for the CMUs fail to provide the minimum bedrock procedural safeguards that the Constitution requires.

First, pursuant to proposed regulation 28 C.F.R. § 540.210, the criteria for placement in a CMU are so general as to appear almost wholly devoid of meaning, allowing for the risk that prisoners could be designated to the CMUs for discriminatory or retaliatory reasons. Additionally, given that the proposed regulations allow a prisoner to be transferred to a CMU based solely on his crime of conviction, a prisoner could have served years in less restrictive conditions without receiving a single incident report and without having misused or abused communications, and still be transferred to a CMU merely because of a crime he committed years or even decades prior.[6] *See* proposed 28 C.F.R. § 540.201. Indeed, this is exactly what happened to Ibrahim Elgabrowny, who was transferred to a CMU after years of good conduct and positive institutional adjustment. Pursuant to the Bureau's own policy on custody classification, Mr. Elgabrowny is scored as a "low" security inmate. *See* P.S. 5100.08, *Security Designation and Custody Classification*, (Sept. 12, 2006). The only explanation Mr. Elgabrowny has ever been given regarding the reason for his transfer to the CMU is his crime of conviction. Mr. Elgabrowny's situation illustrates the inherent problems in the lack of specific criteria for designation and reinforces the need for adequate safeguards to protect against erroneous or unnecessary placement.

Additionally, the proposed regulations do not require that prisoners receive prior notice of CMU placement and an opportunity to object and be heard before the decision is made. *See* proposed 28 C.F.R. § 540.202(c). CMU prisoners do not receive notice of their placements until *after* the decision has been made, at which point they have already been transferred from their prior facility. In addition, the only opportunity a prisoner has to object to placement is through the Bureau's administrative remedy program, which fails to provide inmates with a meaningful opportunity to be heard before the decision is

[6] Surprisingly, the Bureau does not even require proof of misconduct, allowing that prisoners can be designated to a CMU if their crime of conviction "*indicates a propensity* to encourage, coordinate, facilitate or otherwise act in furtherance of illegal activity through communication with persons in the community." Proposed 28 C.F.R. § 540.201(b) (emphasis added).

made. *See Sattar v. Gonzales*, No. 07-CV-02698, 2008 WL 5712727, at *4 (D. Colo. Nov. 3, 2008). Also, the proposed designation procedures make clear that the decision to place a prisoner in a CMU is made by the Bureau's Assistant Director of Correctional Programs, who is a senior-level official in the Bureau's Central Office. The suggestion, therefore, that a prisoner has a multi-level review of the CMU designation available to him via the administrative remedy program rings false when two of the three levels of review are conducted by persons in positions subordinate to the original decisionmaker.

Equally troubling is the fact that the proposed CMU regulations fail to sufficiently detail the process and criteria by which inmates may earn their way out of a CMU, thus enabling indeterminate placement. The proposed regulations fail to provide the criteria a prisoner must satisfy in order to be transferred to a less restrictive facility. This omission will perpetuate unconstitutional denials of due process for inmates housed in CMUs.

As currently drafted, neither prisoners nor the public has meaningful notice of CMU operations or criteria for designation to or release from these units. Particularly given that the BOP has identified the purpose of the CMU regulations as "establish[ing] specific parameters for Bureau staff when operating CMUs while putting inmates and the public on notice of CMU operation," we urge the Bureau to further define and delimit its criteria for placement in and transfer out of the CMUs.

III. THE TRANSFER OF PRISONERS FROM THE ADX TO A CMU IS OF PARTICULAR CONCERN.

Finally, we urge that designation to the CMU facility is particularly illogical for inmates who are eligible to transfer out of the Bureau's ADX facility. This concern is grounded in the fact that inmates leaving the ADX will have just completed that facility's Step-Down Program, the primary mechanism for inmates to achieve transfer out of the ADX. The Step-Down Program is designed as a multiple-tiered process that, by the Bureau's description, prepares prisoners for a less restrictive environment. To successfully complete the Step-Down process only to then be placed in a *more* restrictive environment, based solely on their crime of conviction, is both illogical and unfair to prisoners who have proven themselves capable of complying with Bureau rules and regulations. Moreover, these prisoners have ultimately proven themselves to be capable of serving their sentences in true open population settings, as would be available in U.S. penitentiaries.

Conditions of confinement at the ADX are the most restrictive in the Bureau. Prisoners in the "general population" of the ADX have no contact whatsoever with other inmates or visitors and all interactions with staff occur either through a steel door or while shackled and guarded by multiple correctional staff. As part of the restrictive confinement at ADX, inmates also have their phone calls, visits, and mail (other than with attorneys) one hundred percent monitored. If these prisoners violate the restrictions on phone, mail and visiting privileges, they are forced to demonstrate their ability to function in a less secure prison by beginning the Step-Down process over. The ADX's Step-Down Program is at least a three-year process of progression through increasingly

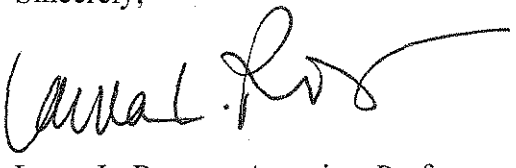
less-restrictive units within the ADX facility. By the time a prisoner achieves transfer out of the ADX through this program, he would have spent the past year, or likely more, in the final phase of Step-Down, a much less restrictive setting akin to the conditions in a true general population penitentiary. During their time in the last phase of the Step-Down Program, ADX inmates do not have page limits on their written correspondence and have 300 minutes of phone privileges per month, which they may use at any time they are out of their cells.

Sending prisoners from the ADX to a CMU puts them through a lengthy and grueling exercise in futility. Successful completion of the Step-Down Program requires consistent and steadfast adherence to institutional rules and behavioral expectations. An inmate's ability to meet these expectations and complete the Step-Down Program should therefore be rewarded by transfer to a facility offering at least the same levels of communication and human interaction as is afforded them in the last phase of the Step-Down Program. As a result, it is illogical to place an inmate directly from the ADX into a CMU without an individualized determination that communications monitoring is necessary due to prior communication-related infractions.

IV. CONCLUSION

Thank you for your consideration of these comments. If the BOP is amenable, we would appreciate the opportunity to further discuss these concerns with Bureau staff.

Sincerely,



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