

Community and Faith-Based Organizations

BOP Docket No. 1148-P
RIN 1120-AB48

75 Fed. Reg. 17324-17329 (Apr. 6, 2010)

“Communication Management Units”

Comments of:

American-Arab Anti-Discrimination Committee (ADC)

Arab American Institute (AAI)

Asian Law Caucus

Council on American-Islamic Relations (CAIR)

Desis Rising Up and Moving (DRUM)

South Asian Americans Leading Together (SAALT)

Muslim Advocates

Muslim American Society (MAS)

Muslim Bar Association of New York

Muslim Legal Fund of America

Muslim Public Affairs Council (MPAC)

Open Society Institute (OSI)

Sikh Coalition

Introduction

On April 6, 2010, the Bureau of Prisons proposed new regulations allowing for the designation of certain inmates to Communications Management Units (CMUs) in which contact with the outside world is severely restricted and in which general conditions of confinement may be limited.¹ Under the regulation's vague standards, an individual may be sent to a CMU "if evidence exists" that the inmate's conviction or offense conduct included "association, communication, or involvement related to international or domestic terrorism." 28 CFR 540.201(a). An inmate may also be designated to a CMU under other overly broad and vague criteria involving communications-related infractions. 28 CFR 540.201(b-e).

The regulations are unclear as to who retains initial designation authority but note that the Bureau Assistant Director, Correctional Programs Division, has authority to approve CMU designations. 28 CFR 540.202(b). The regulation provides that the designation will be "reviewed regularly" but lacks detail as to the timing and nature of the review process. 28 CFR 540.202(c)(5).

Inmate communications in CMUs may be limited to the following:

- 1) one 3-page letter per calendar week, to and from a single recipient;
- 2) one 15-minute telephone call per month to an immediate family member only; and
- 3) one non-contact, hour long visitation each month limited to immediate family members only. 28 CFR 540.203(a); 28 CFR 540.240(a); 28 CFR 205(a). In spite of these severe restrictions, the Bureau maintains that designation to a CMU is "not punitive." 28 CFR 540.202(c)(3).

In April 2006, the Bureau proposed a regulation entitled "Limited Communication for Terrorist Inmates" that contained communications-related restrictions similar to those in practice at CMUs. However, the Bureau never published a final rule after receiving comments and instead, chose to create CMUs through initially non-public Institution Supplements issued in 2006 and 2008 for the Federal Correctional Institution in Terre Haute and the United States Penitentiary in Marion, respectively.

On April 1, 2010, the Center for Constitutional Rights filed a lawsuit entitled *Aref v. Holder* claiming that the Bureau violated the Administrative Procedures Act by creating two CMUs in secret and without going through proper rulemaking procedures.² The suit also challenges the CMUs on procedural and substantive due process grounds as well as under equal protection and the First Amendment.³

The suit, brought on behalf of several CMU inmates, asserts that not a single plaintiff has been disciplined for a communications-related infraction in the last decade.⁴ The lawsuit alleges that more than two-thirds of CMU inmates are Muslims which over-represents the Bureau's total

¹ 75 Fed. Reg. 17324 (Apr. 6, 2010), BOP Docket No. 1148-P.

² Complaint at 3, *Aref v. Holder* (D.D.C. April 1, 2010) (1:10-cv-00539).

³ *Id.* at 5.

⁴ *Id.* at 3.

Muslim population by over 1000%.⁵ The complaint goes on to state that media scrutiny has resulted in the movement of some non-Muslims – referred to by certain guards as “balancers” -- to the CMUs.⁶ Indeed, two of the lawsuit’s plaintiffs who have been incarcerated in CMUs are Muslims whose underlying convictions bear no relation to acts of terrorism.⁷ Yet, plaintiffs assert that CMUs are known as “terrorist units” and that the stigma of “terrorist” attaches to many of the inmates housed there.⁸

Given these facts, it is clear that the Bureau’s proposed regulations perpetuate post-9/11 targeting of, and discrimination toward Muslims in the name of counterterrorism and national security. The overly broad and vague criteria by which inmates get designated, the lack of process for designation and review, and the high proportion of Muslim inmates in CMUs suggest that individuals are sent to CMUs for illegitimate and discriminatory reasons. CMUs serve to stigmatize Muslim inmates and indeed, further the prejudice felt by the outside Muslim community as a whole. Such profiling that subjects Muslims to specialized and heightened scrutiny without justification alienates the community and may breed mistrust of government.

Finally, the regulations raise serious questions about potential violations of the free exercise clause of the First Amendment. Certain restrictions in place at CMUs inhibit religious practice and the lack of procedural protections for CMU designation may chill religious conduct. For all of these reasons, the proposed regulations should be withdrawn thereby ceasing operation of the CMUs.

The regulations perpetuate post-9/11 hostility toward Muslims by unfairly targeting and discriminating against Muslim inmates

Following 9/11, Muslims and those perceived to be Muslim including Arabs, South Asians, and Sikhs have faced increased animus from the public at large. A nationwide poll conducted in September 2009 found that “[n]early six-in-ten adults (58%) say that Muslims are subject to a lot of discrimination, far more than say the same about Jews, evangelical Christians, atheists or Mormons.”⁹ John Brennan, Deputy National Security Adviser for Homeland Security and Counterterrorism, reflected in a speech in February 2010 that Muslims have been targeted by “inexcusable ignorance and prejudice here in the United States, Europe, and elsewhere” and that there has been a rise in “scapegoating and fearmongering.”¹⁰ He recognized that some in the public have a “distorted” view of Islam because many people only hear about the religion in the context of terrorism.¹¹

Sentiment against Muslims and those perceived to be Muslim has at times, led to physical acts of violence. As a result, the Civil Rights Division of the U.S. Department of Justice established an

⁵ *Id.* at 3-4.

⁶ *Id.* at 30.

⁷ *Id.* at 6-8.

⁸ *Id.* at 21.

⁹ The Pew Forum, *Muslims Widely Seen as Facing Discrimination at* <http://pewforum.org/Muslim/Muslims-Widely-Seen-As-Facing-Discrimination.aspx> (September 9, 2009).

¹⁰ John Brennan Speaks on National Security at NYU at <http://www.whitehouse.gov/photos-and-video/video/john-brennan-speaks-national-security-nyu> (February 13, 2010).

¹¹ *Id.*

Initiative to Combat Post 9/11 Backlash that has investigated “over 800 incidents since 9/11 involving violence, threats, vandalism and arson against Arab-Americans, Muslims, Sikhs, South-Asian Americans and other individuals perceived to be of Middle Eastern origin.”¹²

Top U.S. government officials recognize that many federal policies have fueled anti-Muslim sentiment. In his speech, John Brennan also said, “in spirit of candor, we must also acknowledge that over the years, the actions of our own government have at times perpetuated [ignorance, prejudice, and discrimination toward Muslims]” and went on to cite specific examples of such government actions including “violations of the Patriot Act, surveillance that has been excessive, policies perceived as profiling, [and] over inclusive no-fly lists.”¹³ Indeed, a number of other government policies reflect this underlying prejudice by subjecting Muslims to specialized and unwarranted scrutiny. The Bureau’s current administration of CMUs is one such policy.

At the same time that government officials recognize the existence of anti-Muslim prejudice and the policies that in part sustain it, they also seek to combat it. During President Obama’s historic June 2009 speech in Cairo, he said, “I consider it part of my responsibility as President of the United States to fight against negative stereotypes of Islam wherever they appear.”¹⁴ John Brennan said that combating stereotypes against Muslims is a “matter of national security.”¹⁵ That recognition clearly demonstrates why the Bureau should change course with respect to CMUs by withdrawing the proposed regulations that allow for the targeting of Muslim inmates.

As written, the regulations provide very little information as to the type or quantity of evidence that would result in a CMU designation. They similarly fail to explain why current Bureau regulations that allow for the monitoring of inmate communications including 28 CFR 540.12, 28 CFR 540.14, 28 CFR 540.100 *et seq.*, and 28 CFR 540.40 *et seq.* are insufficient. In practice, that such a high proportion of the CMU population is Muslim, that some of the Muslim CMU prisoners do not have underlying terrorism convictions, and that some of the CMU population has no communications-related disciplinary history strongly suggests that CMUs are impermissibly used to target Muslim prisoners. Additionally, the unclear timing and nature of the review process and lack of procedural protections afforded to CMU designees further counsels against adoption of these regulations. Lastly, the stigma of “terrorist units” that attaches to CMUs mimics the pervasive and widely recognized stigma faced by Muslims and those perceived to be Muslim in the larger community. Such prejudice should be terminated, not perpetuated, in keeping with directives from the very highest levels of government. For all of these reasons, the regulations establishing CMUs should be withdrawn.

The regulations raise serious concerns under the First Amendment and the Religious Freedom Restoration Act

As a legal matter, the proposed regulations establishing CMUs raise serious First Amendment concerns. In relevant part, the First Amendment reads “Congress shall make no law respecting

¹² Enforcement and Outreach Following the September 11 Terrorist Attacks at <http://www.justice.gov/crt/legalinfo/discrimupdate.php> (last modified February 2, 2010).

¹³ See *supra* note 10.

¹⁴ Remarks by the President on a New Beginning at <http://www.whitehouse.gov/the-press-office/remarks-president-cairo-university-6-04-09> (June 4, 2009).

¹⁵ See *supra* note 10.

an establishment of religion, or prohibiting the free exercise thereof.”¹⁶ The free exercise clause applies beyond Congress to the federal government as a whole.¹⁷

In 1993, Congress passed the Religious Freedom Restoration Act (RFRA) with the explicit finding that “laws ‘neutral’ toward religion may burden religious exercise as surely as laws intended to interfere with religious exercise.” 42 U.S.C. § 2000bb(a)(2). RFRA was passed to set the standard for free exercise challenges and its legislative history makes clear that prisoner claims are covered by the statute.¹⁸

In relevant part, RFRA says:

(a) Government shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability, except as provided in subsection (b).

(b) Government may substantially burden a person's exercise of religion only if it demonstrates that application of the burden to the person --

(1) is in furtherance of a compelling governmental interest; and

(2) is the least restrictive means of furthering that compelling governmental interest.

42 U.S.C. §2000bb-1.

Given the composition of CMUs, the proposed regulations as applied raise serious First Amendment and RFRA concerns. Although the regulations are neutral on their face, they can in practice substantially burden religious practice. A lawsuit brought by the American Civil Liberties Union claims that the CMU at Terre Haute violates RFRA by only allowing for one hour of congregative prayer a week even though prisoners may engage in a number of other congregative activities.¹⁹ The suit maintains that prisoners engage in a variety of group activities including recreation, watching television, playing cards, or conversing and that although the a multi-purpose room is generally vacant and is the room used for congregative Friday prayer, the Warden has prohibited use of the room for group prayer during all other times.²⁰ The suit seeks an injunction allowing Muslim prisoners within the CMU to engage in group prayer for the five daily prayers.²¹

The opaque nature of the designation process and its limited review raises further concerns. Inmates may hesitate to practice their religion for fear of being sent to a CMU. Although the Bureau maintains that CMUs are not “punitive,” their highly restrictive nature makes clear why inmates would want to avoid CMU designation. Without an explanation of why current authority to regulate inmate communication is insufficient, the Bureau fails to demonstrate that there is a compelling interest in sending Muslim prisoners to CMUs and that such action is the least restrictive means of fulfilling such an interest. Because the operation of CMUs raises

¹⁶ U.S. Const. amend. I.

¹⁷ See *Shrum v. City of Coweta*, 449 F.3d 1132, 1140 (10th Cir. 2006) (“The First Amendment applies to exercises of executive authority no less than it does to the passage of legislation.”).

¹⁸ *Henderson v. Kennedy*, 253 F.3d 12, 15 (D.C. Cir. 2001); *Bryant v. Gomez*, 46 F.3d 948, 949 n.1 (9th Cir. 1994).

¹⁹ Complaint at 1, *Arnaout v. Warden* (S.D. Ind. Terre Haute Division June 16, 2009)(2:09-CV-215).

²⁰ *Id.* at 3-4.

²¹ *Id.* at 5.

serious First Amendment concerns, the proposed regulations are ill-conceived and should be withdrawn.

Conclusion

CMUs are known to primarily house Muslim inmates. The proposed regulations offer vague evidentiary standards and criteria by which individuals get designated to CMUs. Furthermore, inmates are offered few procedural protections to challenge their designations or to have periodic reviews of their status. Such a system perpetuates anti-Muslim sentiment that has been growing since the events of September 11, 2001. Officials at the highest level of government have recognized the existence of pervasive anti-Muslim animus and its partial foundation in U.S. government policies. They have also pledged to work against it and for that reason CMUs and their targeting of Muslim inmates should not continue. In addition, operation of CMUs raises serious First Amendment questions by potentially burdening the free exercise of religion to an impermissible degree. For all of these reasons, the proposed regulations establishing and describing CMUs should be withdrawn and the CMUs should cease to operate.

Dear Federal Bureau of Prisons,

The Long Island Progressive Coalition is a community based organization dedicated to promoting sustainable development, revitalizing local communities, enhancing human dignity, creating effective democracy, and achieving economic, racial and social justice.

We are writing to express our concerns over the establishment of, and conditions at, the Communications Management Units (CMUs) that are being run by the Bureau of Prisons (BOP) in Terre Haute, Indiana and Marion, Illinois.

As an organization we strive to bring about transparency within the government and, while we appreciate this opportunity to comment, it would have been ideal to have a public comment period before the actual establishment of the CMUs.

The CMUs have been confining a vast majority of Muslims, while taking in the occasional political prisoner on charges related to environmental issues. Our organizational Bill of Rights acknowledges respect for individual differences and supports an environment that is not toxic to people or animals. There is no need to separate prisoners based on their alleged convictions.

The isolation and secrecy imposed by the CMU is of the utmost concern to us. This runs counter to our principles of enhancing human dignity and creating effective democracy in our quest for racial and social justice.

We hope that the BOP will take the above concerns into account in the decision whether to adopt this proposed rule. We thank you for your consideration of our above stated concerns.

Sincerely,

Lisa Tyson
Director
Long Island Progressive Coalition



May 12, 2010

Rules Unit, Office of General Counsel
Bureau of Prisons (BOP)
320 First Street, NW
Washington, DC 20534

**Re: BOP Docket #1148-P
Communication Management Units**

To Whom It May Concern:

I am writing to express my concern over the establishment of, and conditions at, the Communications Management Units (CMUs) that are being run by the BOP in Terre Haute, Indiana and Marion, Illinois. I have read the proposed rule that was published in the Federal Register on April 6, 2010, and I am troubled not only by the conditions and policies proposed in that rule, but also by existing practices at the CMUs. The CMUs are needlessly destructive to families, have been used to disproportionately confine Muslim and political prisoners, and violate basic constitutional protections. I urge the BOP to abandon this proposed rule.

I would like to highlight the following issue(s) at the CMU that are of particular concern to me.

Lack of due process at the CMU: *None of the CMU prisoners have been told in any meaningful way why they were designated to the CMU, or what evidence was used to make that decision. They have received no hearing to challenge their CMU designation. Likewise, there is no meaningful review process to earn their way out of the CMU. This lack of transparency deprives prisoners of their due process rights.*

Overrepresentation of Muslim and political prisoners at the CMU: *Because there is no oversight procedure of who gets sent to the CMU and why, there has been an unchecked pattern of Muslim prisoners and politically active prisoners being sent to the CMU. Somewhere between 65 and 72% of prisoners at the CMU are Muslim. Others are, and have been, politically active individuals, such as environmental activists, or individuals who have advocated for themselves while in prison. In the absence of specific allegations of wrongdoing, their designation to the CMU is both discriminatory and retaliatory.*

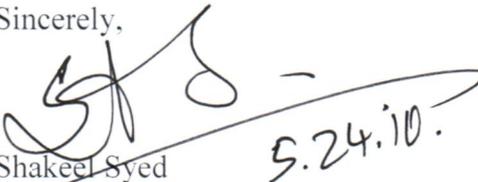
Destructive effect of the CMU on families: *The meager number of phone calls and visits that CMU prisoners receive, and the blanket ban on physical contact with loved ones –*

including children – during visits tears families apart and inflicts pointless suffering of the prisoners and their families alike.

Conditions at the CMU amount to cruel and unusual punishment: *The isolation experienced by CMU prisoners, and the ways in which they are prevented from maintaining their family ties, is cruel and serves no legitimate purpose.*

I hope that the BOP will take the above concerns into account as it decides whether to adopt this proposed rule. I thank you for your consideration of my above stated concerns.

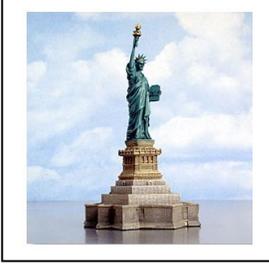
Sincerely,



Shakeel Syed
Executive Director

5.24.10.

cc: Center for Constitutional Rights



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May 18, 2010

To whom it may concern:

We are writing in response to the requests for public comments about the Communication Management Units (CMU):

First, most of the people in the CMUs are Muslims who have not committed any crime. Rather, they have been preemptively prosecuted because the government thinks they might do something in the future. Imprisoning people for something they may do in the future is illegal, and obviously results in many innocent people being incarcerated.

For example, after the conviction of Yassin Aref, the government prosecutors made the following statement at a press conference:

*“Did he [Aref] actually himself engage in terrorist acts? Well we didn’t have the evidence of that, but he had the ideology...Our investigation was concerned with what he was going to do here and in order to **preempt** any, anything else, we decided to take the steps that we did take...”*

Second, any contact with the outside world is extremely limited (four hours per month of visitation and one 15-minute phone call a week). Most (if not all) of the prisoners have families, and many of them have young children. Because the CMU’s are located in the middle of the country, it can be very difficult for the families to stay in touch with the inmates. Families who are able to visit do so through a Plexiglas window and via a telephone. Thus, assignment to a CMR becomes an extreme hardship for both the family and the inmate. In addition, visits from friends are actively discouraged.

The government knows full well that these people are not terrorists, and thus, it seems that the purpose of the CMUs is to convince the American public that the government is successful at capturing real terrorists.

It is shameful to be treating a religious minority, or anyone else in this illegal and discriminatory manner that is clearly contrary to the Bill of Rights.

Respectfully,
Melva Underbakke, Ph.D.