IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Yassin Muhiddin AREF, et al.,	)	
Plaintiffs,	)	Case No. 1:10-cv-00539-BJR
-v-	)	
	)	**Oral Argument Requested**
Eric HOLDER, et al.,	)	
Defendants.	)	

MEMORANDUM OF LAW IN SUPPORT OF
PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

PRELIMINARY STATEMENT

The term Kafkaesque is undoubtedly overdeployed. But the experiences of Yassin Aref, Kifah Jayyousi, Daniel McGowan, and Avon Twitty at the Bureau of Prisons' Communication Management Units (CMUs) are nonetheless fitting of the term. As their moniker euphemistically suggests, CMUs are unusually restrictive units, where select prisoners are barred for *years* at a time from all but the most constrained communication with the outside world, without the opportunity to understand or rebut the rationale for their placement.

Plaintiffs[1] were told the ostensible reason for their CMU designation in a single terse paragraph upon arrival at the unit; discovery has revealed those reasons to be incomplete, inaccurate, and sometimes even false. They were told they could appeal their placement through the Administrative Remedy Program. But upon doing so, each received only repetition of the same inaccurate paragraph. They were told they could earn their way out of the CMU by completing 18 months with clear conduct. But upon meeting that goal, their requests for transfer out of the CMU were repeatedly denied without explanation. Plaintiffs' prolonged stay in the CMU is particularly mysterious given that they are low- or medium-security prisoners with no significant disciplinary history, and *no* disciplinary history related to communication.

Plaintiffs' experiences are not aberrations. As a matter of policy and practice, all CMU prisoners are forbidden from even momentarily hugging their family, or holding hands with their children. Although these restrictions exact a substantial human toll, the BOP has consistently

[1] Aref and Jayyousi remain plaintiffs in the case. Though they have been transferred out of the CMU, they remain in BOP custody and could be redesignated to the CMU at any time. Mem. Op., Dkt. #37, at 11-13. McGowan and Twitty have been released from BOP custody, and thus are no longer plaintiffs, but their experiences corroborate the pattern of procedural deprivations Plaintiffs seek to prove. Former Plaintiff Royal Jones has also been released from BOP custody and dismissed from the case and is no longer represented by undersigned counsel.

employed vague, arbitrary and inconsistent procedures in making non-transparent decisions to subject hundreds of prisoners to this unusually punitive regime.

This perverse combination – of atypically restrictive confinement alongside consistently defective procedures – renders the current regime at the CMUs unconstitutional. The Due Process clause recognizes that prisoners maintain a liberty interest in avoiding treatment that exacts an atypical and significant hardship. Here, the undisputed evidence demonstrates that CMU prisoners endure harsh confinement for dramatically longer than similarly-situated prisoners, establishing a protected liberty interest as a matter of law. As a result, the due process clause guarantees CMU prisoners the essential features of fair process: meaningful notice of the reasons for CMU designation, consistent and comprehensible designation standards, a meaningful opportunity to contest CMU placement, and meaningful periodic review.

In assuring these protections, each of which has been denied here, the Constitution affirms the human dignity of those society incarcerates while imposing on the government the duty to administer its awesome powers of punishment and confinement with fairness and transparency. These demands "signify about all there is of the principle that ours is a government of laws, not of men, and that we submit ourselves to rulers only if under rules." *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 646 (1952) (Jackson, J., concurring). Plaintiffs are entitled to judgment as a matter of law.[2]

STATEMENT OF FACTS

The facts underpinning the due process claim in this case are complex and voluminous. Plaintiffs respectfully refer the Court to Plaintiffs' Rule 56.1 Statement of Undisputed Facts for a

[2] Jayyousi also has a live claim for retaliation related to his long retention in the CMU based on First Amendment protected speech and advocacy. *See* First Am. Compl. ¶¶ 233-36, 238-39, Second Cause of Action, Dkt. #88.1; Memo. Op., Dkt. #115. Plaintiffs are not moving for summary judgment on this claim, because material facts relevant to it are under dispute.

full recitation of those facts. As set forth more fully therein, the undisputed facts compel the following findings: (1) the CMUs were designed to isolate certain prisoners from the rest of the prison population, and impose upon them harsh communications restrictions, including a total ban on contact visits; (2) the duration of CMU designation significantly outlasts that of administrative segregation, a pattern that is true for Plaintiffs and, as the unrebutted statistical evidence demonstrates, for *all* CMU prisoners; (3) comparing the experience of CMU prisoners to that of prisoners in administrative segregation establishes that the CMUs impose an atypical and significant hardship; (4) Plaintiffs and other CMU prisoners are designated to the CMU without notice of the *actual* reasons for their CMU placement; (5) they receive no hearing before or after CMU placement, and the Administrative Remedy program to which they are directed to "appeal" their CMU placement cannot and does not result in substantive reevaluation of their CMU designation; (6) purported reviews of CMU designation are arbitrary, unclear, and too infrequent; and (7) current procedures fail to adequately guard against erroneous deprivations of liberty and thus violate Plaintiffs' right to procedural due process. In the remainder of this Statement of Facts, Plaintiffs will highlight pertinent background to aid the Court's understanding of their due process claim. The factual detail specific to the CMU's systemic procedural failings at every level of process are addressed in the body of the brief.

A. The CMUs on the Spectrum of BOP Facilities.

There is a spectrum of settings in which the BOP houses prisoners, ranging from general population to the Administrative Maximum Facility ("ADX"). The CMUs fall on the harsher end of this spectrum. Prisoners in normal general population units live together, work and program together, and are typically allowed 300 minutes of social telephone calls per month; social contact visitation is limited only by visiting hours and visiting room space – for up to 49 hours

per month. SUF 2-5.[3] Because normal general population units impose no unusual restrictions, prisoners may be transferred from one to another at the BOP's discretion, and without notice or a hearing. *See Meachum v. Fano*, 427 U.S. 215 (1976). Prisoners in general population units may be subject to restricted conditions in administrative segregation, a non-punitive administrative status that temporarily removes a prisoner from general population for a variety of reasons – for example, while his security classification is pending, or when he is in holdover status while being transferred from one prison to another. SUF 40. But, as explained in detail below, spells in administrative segregation are typically short. SUF 52, 53, 82.

On the other end of the spectrum is ADX, a "supermax" facility where prisoners are largely confined to their cells. SUF 6. ADX prisoners receive five non-contact visits per month, each of which may last seven hours. SUF 7. ADX functions as a "step-down program," allowing prisoners increasing access to social telephone calls over time. SUF 8, 9. Designation to ADX involves pre-transfer notice, a hearing at which the prisoner can present documentary evidence and witnesses, a written recommendation detailing the evidence considered and reasons for transfer, and the right to appeal to the Office of General Counsel (OGC). SUF 10.

The BOP also operates Special Management Units (SMUs), designed to house prisoners with a serious gang or disciplinary history. SUF 11. SMUs are more restrictive than general population, SUF 12, but are also a step-down program, with the expectation that prisoners will be released after 18 to 24 months and will earn increasing privileges (including more social telephone calls and visitation) over time. SUF 13. Designation to a SMU involves procedures similar to ADX, including pre-hearing notice, a hearing, a written report detailing the evidence used to support designation, post-hearing notice, and appeal to OGC. SUF 14.

[3] Citations to paragraphs of Plaintiffs' Statement of Undisputed Facts are abbreviated here as "SUF __."

Like ADX and SMUs, the CMUs are specialized units for which BOP prisoners are individually selected. Although the BOP refers publicly to the CMUs as "self-contained general population" units, SUF 37, internal BOP documents reveal that it categorizes CMUs (as well as ADX and SMUs) as distinct from general population.[4] The CMUs were designed to house prisoners who "require increased monitoring of communications with persons in the community to ensure the safe, secure and orderly running of Bureau facilities, and to protect the public." SUF 15. Prisoners at the CMUs are strictly segregated from the rest of the prisoner population, living, programming, and working separately from all other prisoners. SUF 16. There is no limitation on the duration of a prisoner's placement in a CMU. SUF 17.

In other prison settings, BOP policy encourages prisoners to use social telephone calls, visits, and letters to stay in touch with family and other loved ones due to the critical role such communication plays in a prisoner's personal development and successful reentry back into society. SUF 19. In stark contrast, the CMUs impose unusual measures to restrict and monitor a prisoner's communications with the outside world. All CMU phone calls and visits are live-monitored. SUF 22, 25. All social visitation is strictly non-contact – meaning that inmates and their visitors, including their children, meet in partitioned rooms, speak over a telephone, and are forbidden from hugging, kissing, or even shaking hands. SUF 20. Visits must occur in English, unless previously scheduled for, and conducted through, simultaneous translation. SUF 21. Until January 3, 2010, CMU prisoners received only four hours of social visits per month and could only schedule these visits on weekdays. SUF 23. In January 2010, the BOP voluntarily increased

[4] The minutes of a 2008 Executive Staff Meeting indicates that "[r]estrictive conditions of confinement programs currently in use by this agency include the Communications Management Unit (CMU), Special Management Unit (SMU) and Administrative Maximum (ADX)." SUF 38. *See also* SUF 39 (referring to "inmates confined in all forms of housing restricted from the general population, i.e., ADX, CMU, SMU").

CMU visitation to eight hours per month,[5] in two four-hour blocks, excluding Saturdays. SUF 24. But a pending Proposed Rule,[6] which will be applied at the CMUs once formally adopted, allows the BOP to restrict CMU visitation to as little as one hour per month. SUF 29-31.

Telephone restrictions are similarly harsh. Until January 10, 2010, CMU prisoners were allowed a single 15-minute social telephone call per week. SUF 27. Each call had to be pre-scheduled for a weekday between 8:30 a.m. and 2:00 p.m. – i.e. during common work and school hours. SUF 27. After voluntary changes by the BOP, CMU prisoners now receive two pre-scheduled 15-minute calls a week. SUF 28. However, the BOP's still-pending Proposed Rule would allow for the restriction of CMU social calls to as little as 15 minutes per month. SUF 31. Like visits, all social calls must occur in English unless they can be live translated. SUF 26. Finally, written correspondence is read by Counter-Terrorism Unit (CTU)[7] officials to determine whether it should be forwarded to the recipient. There is no current limit on correspondence, but the Proposed Rule would authorize limiting it to three double-sided pages per week. SUF 31, 32.

These communications restrictions have harsh consequences. Jayyousi was not able to hug his young daughters for almost *five years*, SUF 33, 64, and his elderly parents did not visit him while he was at the CMU because the prospect of not being able to touch him was too upsetting. SUF 33. McGowan was unable to embrace his wife for four years at the CMU.[8] SUF 34. Aref describes the lack of physical contact with his children for the 47 months that he spent

---

[5] Prisoners at ADX are afforded four times as much social visitation as CMU prisoners. SUF 7, 24.

[6] A Proposed CMU Rule has been pending since June 2010. *See* Mem. Op., Dkt. #37, at 34-35 (dismissing without prejudice Plaintiffs' APA claim). When Plaintiffs moved to amend their Complaint in September 2012, they informed the Court that on August 27, 2012, counsel for Defendants informed them that the rulemaking process is "active" and that the rule will be submitted "in the near term" for review by the Office of Management and Budget. *See* Mem. of Law in Supp. of Mot. to File a First Am. Compl., Dkt. #75-1, at 1 n.1. Based on this representation, Plaintiffs did not seek to renew their APA claim. Twenty months later, the Rule has yet to be finalized.

[7] The CTU was opened just before the first CMU, and has primary responsibility for monitoring and analyzing terrorist prisoners within the BOP. SUF 86.

[8] When McGowan visited with his wife in general population at FCI Sandstone, he was able to "hug and kiss [her] when she got there and when she left . . . and have my arm around her and talk to her and eat with her and play games and have meaningful conversation without a piece of glass between us and without a phone." SUF 34.

at the CMUs as a "kind of torture." SUF 35. During visits, his children wanted to hug him but could not, and struggled with one another to take turns speaking to him over a telephone in the partitioned room. SUF 35. Aref worried so much about the effect the visiting conditions would have on his children that he reconsidered whether they should visit him at all. SUF 35. Other prisoners also experienced non-contact visits as deeply upsetting and disruptive to their relationships with their families.[9] SUF 36.

B. CMU Designation Procedures.

The BOP opened the first CMU before establishing a process for designating prisoners. SUF 94. The process they eventually developed has changed several times, is subject to change at the Regional Director's whim, and will likely change again if the BOP's Proposed CMU Rule is ever finalized. SUF 95. To this day, the BOP has never set forth the requirements for CMU notice and designation in any policy document. SUF 85, 88, 96. As a result, the different offices involved in designation operate without information about how the entire process works, and some BOP staff responsible for day-to-day management of the CMU lack an understanding of how or why prisoners are there. SUF 116, 117, 148, 337.

In its current iteration, CMU designation begins with referral of a prisoner to the CTU for consideration; referrals can come from "just about any source." SUF 98. The CTU is than responsible for creating a supporting "designation packet" and drafting a referral memo which summarizes the information that supports designation and recommends for or against CMU placement.[10] SUF 99. Next, the CTU forwards the packet to the Office of General Counsel

[9] Aref testified about the experience of a fellow CMU prisoner after a non-contact visit with his children: "There is a guy just had a visit, he is coming back to the cell, crying, crying, crying. I said what's wrong, what's wrong. He said his son I think he told me, he's three years, he says every five minute he knock the door, 'police, police, that is my daddy. Let me go there. Let me go there.' And he keeps crying. And he spend all the day, make everybody cry. So it was not really visit." SUF 36.

[10] Like the rest of the designation process, the BOP has never put into writing the required contents of the "designation packet." However, it is the CTU's practice to include a CTU referral memo, the prisoner's Presentence

("OGC") for a review of legal sufficiency. SUF 104. The designation packet is then sent to the Correctional Programs Division and North Central Regional Director. SUF 105, 106. The Regional Director routes the designation packet through several administrators in his office, who each opine on whether they concur with CMU placement; the Regional Director then makes his final decision. SUF 107, 110.

C. Criteria for CMU Designation.

The BOP opened the CMUs without establishing written criteria for CMU designation. SUF 84-86. The first policy document describing any CMU criteria, issued more than a year after the first unit was opened, SUF 88, 89, indicates only that the CMU was established to house "inmates who, due to their current offense of conviction, offense conduct, or other verified information, require enhanced monitoring of all communications with people in the community." SUF 90. The CTU eventually developed internal, unwritten criteria for CMU placement, but those constantly changed to capture, post hoc, the type of prisoners who ended up being sent to the CMU rather than vice versa, making them irrelevant as a rational guide to decision-making. SUF 121, 126, 127. Thus, when Plaintiffs (and many other prisoners) were initially designated to the CMU, they could not compare the reasons for their placement against any criteria.

In 2009, the BOP finally documented five formal CMU criteria in an official policy document about reviews of CMU prisoners for *continued* CMU designation. SUF 124. But to this day there is no BOP policy document *about CMU designation* (as opposed to CMU review)

Investigation Report (PSR), the Judgment and Conviction, the Statement of Reasons (if available), along with a draft Notice to Inmate of Transfer to a CMU and any other relevant information regarding the prisoner's communications, including CTU intelligence reports, institution investigations, and discipline reports. SUF 100. Anything summarized in the referral memo is supposed to be included in the designation packet, unless it is law enforcement sensitive or classified. SUF 101. However, sometimes information relied upon by the CTU and summarized in the referral memo is excluded. SUF 102, 225, 226, 235. At other times, the CTU relies on unproven information, like an indictment or a Department of Justice press release about an indictment. SUF 103.

which sets forth the criteria BOP staff are supposed to use to determine the appropriateness of initial CMU placement, SUF 125, or how such criteria should be applied. SUF 131.

Unsurprisingly, in the absence of a single clear policy statement, BOP staff members continue to disagree about the criteria that make a prisoner eligible for the CMU. According to the BOP, the official CMU designation criteria are the same as the review criteria set forth in the 2009 review memo (discussed further in Section II(B)(2)(c)(ii), below), and are as follows:

> (a) the inmate's current offense(s) of conviction, or offense conduct, included association, communication, or involvement, related to international or domestic terrorism;
> (b) The inmate's current offense(s) of conviction, offense conduct, or activity while incarcerated, indicates a propensity to encourage, coordinate, facilitate, or otherwise act in furtherance of, illegal activity through communications with persons in the community;
> (c) The inmate has attempted, or indicates a propensity, to contact victims of the inmate's current offense(s) of conviction;
> (d) The inmate committed prohibited activity related to misuse/abuse of approved communication methods while incarcerated; or
> (e) 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 unmonitored communication with persons in the community.

SUF 124, 126. However, some North Central Regional Office (NCRO) staff involved in the designation process, including the Regional Director, have relied on a *different* set of CMU criteria. SUF 133-1135. Other NCRO staff involved in the process did not receive or use any written criteria at all.[11] SUF 140. According to the BOP, these alternative "criteria" used by the NCRO are not criteria at all, and do not reflect BOP policy. SUF 137. In his deposition, a senior

[11] One NCRO staff-member tasked with making recommendations to the Regional Director described the CMU criteria as far as she understood it as "very vague," and "never really established formally" or "set." The only guidance she received was just to look for prisoners who "needed their communication with the outside world limited." SUF 141. She believes that "significant leadership abilities, high education and technical background and blatant disregard for government" are all characteristics that could potentially make a prisoner appropriate for CMU designation. SUF 142. She also believes that being a prolific writer, and communicating with others in the white separatist movement makes a prisoner appropriate for CMU designation, regardless of whether the writing and communication is about criminal activities. SUF 143. Another NCRO staff-member tasked with making recommendations to the Regional Director hypothesized that an inmate writing a letter stating that Jihad is a good idea has "links" to terrorism warranting CMU designation. SUF 136. She also opined that if an individual expresses support for Jihad during a telephone call, that means he is associated with a terrorist organization. SUF 244.

CTU staff member criticized these purported "criteria" as too vague and general to be used in the designation process. SUF 138, 139.

Even when BOP staff members utilize the correct CMU criteria, the process is still fraught with ambiguity. Not all prisoners who fit the criteria are recommended or approved for CMU placement. SUF 132. For example, as of March 12, 2012 there were 354 BOP prisoners with terrorism-related convictions or offense conduct, and 3,997 BOP prisoners had more than one sustained disciplinary report involving the misuse or abuse of approved communication methods. SUF 130. But only 178 prisoners have ended up in a CMU. SUF 272. BOP staffmembers receive no written guidance to assist them in deciding whether or not to recommend and/or approve for CMU placement prisoners who meet one or more of the CMU criteria. SUF 129, 131, 132, 252, 253, 254. Moreover, the criteria are routinely interpreted in countertextual ways. For example, the BOP interprets criteria (a) – "the *inmate's current offense(s) of conviction, or offense conduct*, included association, communication, or involvement, related to international or domestic terrorism" – to allow for CMU designation of individuals whose *incarceration conduct,* rather than offense conduct, involves some association, communication, or involvement related to international and domestic terrorism. SUF 128.

These vague criteria have allowed for a disturbing overrepresentation of Muslims in the CMU. 101 of 178 total CMU designations have been of Muslim prisoners. SUF 272. Compared to a Muslim population within the BOP of approximately 6%, SUF 274, this marks a *vast* overrepresentation which cannot be explained away by virtue of the CMU's focus on terrorism. Of the first 55 prisoners designated to the CMU, 45 were sent there because of their connection to terrorism, but the other ten were designated due to involvement in prohibited activities related to communication; of that ten, eight self-reported as Muslim. SUF 273. While this Court has

already ruled that this overrepresentation does not state an equal protection claim, it does suggest that the BOP has disproportionately focused on Muslims when making CMU selections and underscores the arbitrariness that results from unbounded discretion.

ARGUMENT

I. SUMMARY JUDGMENT STANDARD

Rule 56(a) of the Federal Rules of Civil Procedure provides that summary judgment shall be granted where the moving party "shows that there is no genuine dispute as to any material fact and that the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). The moving party has the initial burden of showing that the requisites of Rule 56(c) are met. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). Once a moving party meets its Rule 56(c) burden, the non-movant "may not rely merely on allegations or denials in its own pleading," Rule 56(e), but must "set forth specific facts showing that there is a genuine issue for trial." *Anderson v. Liberty Lobby*, 477 U.S. 242, 256 (1986); *Williams v. Callaghan*, 938 F. Supp. 46, 49 (D.D.C. 1996).

II. THERE IS NO GENUINE ISSUE OF FACT REGARDING PLAINTIFFS' CLAIM THAT THEY WERE DESIGNATED TO, AND RETAINED AT, THE CMUs WITHOUT DUE PROCESS.

A procedural due process claim in the prison context involves a two-step analysis. First, a court must inquire whether the prisoner's confinement in a restrictive prison setting implicates a liberty interest protected by the Due Process Clause. *See Sandin v. Conner*, 515 U.S. 472, 484 (1995). If such an interest exists, the court must then consider what process is due to a prisoner who is transferred to such a setting, and whether such process has already been afforded. *See Wilkinson v. Austin*, 545 U.S. 209 (2005).

Here, the undisputed evidence establishes that the CMU's prolonged imposition of restrictive conditions creates a liberty interest in avoiding CMU designation. *See* Section A,

infra. Furthermore, an examination of the designation and review practices at the CMUs demonstrates that the BOP has systematically failed to implement even the most minimal procedural protections to guard against erroneous CMU placement. *See* Section B, *infra*. As such, the undisputed facts establish that Plaintiffs have been deprived of due process, and that elementary procedural protections must be implemented at the CMUs. *Id*.; *see also* Section B(3).

A. Transfer to a CMU Implicates a Liberty Interest.

The Due Process Clause protects a prisoner's liberty interest in avoiding a restraint that "imposes atypical and significant hardship on the inmate in relation to the ordinary incidents of prison life." *Sandin,* 515 U.S. at 484. The "ordinary incidents of prison life" mean "the most restrictive conditions that prison officials, exercising their administrative authority to ensure institutional safety and good order, routinely impose on inmates serving similar sentences." *Hatch v. District of Columbia*, 184 F.3d 846, 847 (1999). Specifically, in *Hatch*, the D.C. Circuit identified the "comparative baseline for determining whether [a prisoner's] segregation was an atypical and significant hardship" as "the usual conditions of administrative segregation" at the prison at which the prisoner is housed. *Hatch*, 184 F.3d at 847. The baseline *can* also include "*more* restrictive conditions at other prisons *if it is likely both* that inmates serving sentences similar to appellants' will actually be transferred to such prisons *and* that once transferred they will actually face such conditions." *Id*. (emphases added). The duration of time spent in restrictive conditions is a pivotal aspect of this comparison. *Id.* at 856; *Sandin*, 515 U.S. at 486.

Thus, the first step under *Hatch* is to analyze whether the challenged restrictions are atypical and significant compared to the baseline of administrative segregation at the same facility. As a second step, a defendant *may* direct the court's attention to more restrictive conditions at other facilities, if the plaintiff is likely to actually be subjected to such restrictions.

1. The CMU is "Atypical and Significant" When Compared to Administrative Segregation at FCI Terre Haute and USP Marion.

Under *Hatch*, this Court must compare the CMUs to administrative segregation at FCI Terre Haute and USP Marion, where the CMUs are located. *Hatch*, 184 F.3d at 847, SUF 1. The undisputed facts establish that, while communications restrictions in both the CMUs and administrative segregation are strict, and living conditions in administrative segregation are harsh, the duration of CMU confinement *substantially* exceeds that of administrative segregation. In administrative segregation, the average prisoner may be forced to forgo his usual allotment of 300 telephone minutes for a week or two; he may endure one non-contact visit. As explained below, by contrast, CMU prisoners typically endure those onerous restrictions for years. The vastness of the durational discrepancy establishes that, by comparison, CMU confinement "work[s] a major disruption in [a prisoner's] environment," *Sandin*, 515 U.S. at 486, and thus implicates a liberty interest. *See Hatch*, 184 F.3d at 856.

As set forth in the Statement of Facts, CMU prisoners are segregated from the rest of the prison, have all communications monitored, receive only two 15-minute calls per week and only two four-hour visits per month, are allowed no physical contact during visits, and are subject to the possible imposition of even harsher conditions. SUF 20-22, 24-26, 28-32. Prisoners in administrative segregation at FCI Terre Haute and USP Marion generally receive one 15-minute phone call per month, but prison officials have discretion to provide more upon request. SUF 40. Until March 1, 2013, prisoners in administrative segregation at FCI Terre Haute were routinely allotted seven contact visits per month, and there was no set limit on the duration of those visits provided they occured within the same visiting hours provided to general population prisoners. SUF 42. Since March 1, 2013, these visits are now non-contact and appear to be more limited in

frequency and duration.[12] SUF 42. Meanwhile, prisoners in administrative segregation at USP Marion receive a minimum of four hours of non-contact social visitation per month. SUF 45. BOP policy allows for discretion to increase the number, duration, and nature of the social visits that prisoners in administrative segregation receive. SUF 46. Unlike CMU prisoners, prisoners in administrative segregation are in lockdown for 23 hours a day. SUF 47.

A superficial comparison of the restrictions at the two settings suggests that some aspects of CMU confinement are harsher than administrative segregation, and vice versa. However, under *Sandin*, "[w]hen we compare [the plaintiffs'] confinement to administrative segregation, we must … look not only to the nature of the deprivation … but also to its length." *Hatch*, 184 F.3d at 856*; Sandin*, 515 U.S. at 486. Placement in a CMU imposes a dramatically more significant disruption to a prisoner's environment than does placement in administrative segregation, because CMU placement lasts up to 55 times as long.

Professor Andrew Beveridge, Plaintiffs' statistical expert, calculated the median duration of both CMU confinement and confinement in administrative segregation at FCI Terre Haute and USP Marion during the period of February 1, 2012 to August 2, 2013. SUF 48-53. The difference is stark. Low and medium security prisoners[13] spent a median time of 66.78 weeks in the CMU during that 78 week period.[14] SUF 48. The median time spent in administrative segregation at FCI Terre Haute and USP Marion during the same 78-week period, by contrast, was only 1.07 weeks and 3.59 weeks respectively.[15] SUF 52, 53.

---

[12] The memorandum announcing the change in policy does not specify the duration or frequency of these visits. SUF 43. Frank Lara, an administrator for the Correctional Services branch for the BOP's Central Office, testified that, as of March 1, 2013, these prisoners receive two two-hour visits per month. SUF 44.

[13] Plaintiffs were all low or medium security prisoners while at the CMUs. SUF 73, 74, 75.

[14] There was little difference between the experience of prisoners at the Terre Haute and Marion CMUs. At Terre Haute, the median stay during this time period was 59.57 weeks; at Marion in was 61.43 weeks. SUF 49, 50.

[15] Indeed, these medians reflect the *aggregate* time that FCI Terre Haute and USP Marion prisoners spent in administrative segregation during the 18-month period, rather than each individual spell in isolation. SUF 52, 53. In

Thus, under *Hatch*, a one to three week stay in restrictive conditions is the baseline to which a CMU prisoner's experience must be compared. Common sense dictates that over a year spent in restrictive conditions at the CMU is atypical and significant compared to a week in administrative segregation. Moreover, the *actual* duration of CMU confinement is generally much longer than 66.78 weeks. Between January 1, 2007 and June 30, 2011 (a period of 234 weeks instead of 78), low and medium security prisoners spent a median of 138.71 weeks in a CMU. SUF 58-60. Indeed, the total duration of CMU confinement is likely even higher than this, because some prisoners arrived there before the reporting period start date, or were transferred out after the reporting period stop date. SUF 57.[16]

This pattern of extremely long spells at the CMUs is borne out by Plaintiffs' individual experiences and other undisputed facts. Jayyousi spent more than 58 months (or 232 weeks) at a CMU, SUF 64, while Aref spent 47 months (or 188 weeks) at the CMUs, SUF 65. McGowan spent 22 months (or 98 weeks) at the Marion CMU and 21 months (or 84 weeks) at the Terre Haute CMU, SUF 66, and Avon Twitty spent more than 39 months (or 156 weeks) at a CMU, SUF 67. Meanwhile, 95 prisoners have spent more than 18 months (or 72 weeks) at the CMUs without any disciplinary infractions, SUF 68, and 25 prisoners have spent more than 36 months (or 144 weeks) at the CMUs despite a lack of disciplinary infractions, SUF 69.

The brevity of a spell in administrative segregation mitigates its harshness. *See Sandin*, 515 U.S. at 486 ("the State's action in placing [the prisoner in disciplinary segregation] for 30 days did not work a major disruption in his environment"). But the longer a restraint lasts, the

---

other words, these figures may exaggerate the experience of administrative segregation because a prisoner may have had several spells in administrative segregation over the 18 month period that lasted for as little as a day.

[16] Nonetheless, Professor Beveridge relied on the February 1, 2012 through August 2, 2013 data for purposes of his expert report because Defendants were unable to produce data about prisoners in administrative segregation for the earlier, longer reporting period. SUF 60. Because *Hatch* calls for a comparison of, *inter alia*, the duration of CMU confinement to the duration of administrative segregation, *Hatch*, 184 F.3d at 856, Professor Beveridge compared the same reporting periods to provide a meaningful comparison of the relative, rather than actual, amount of time a prisoner spends in the CMU versus administrative segregation. SUF 62.

more likely it implicates a liberty interest.[17] *Hatch*, 184 F.3d at 856; *cf. Wilkerson v. Stadler*, 639 F. Supp. 2d. 654, 684 (M.D. La. 2007) (the "emphasis on duration in all these [prison] cases is in direct response to the acknowledged severity of the deprivation …. With each passing day its effects are exponentially increased, just as surely as a single drop of water repeated endlessly will eventually bore through the hardest of stones"). Indeed, in one of the few decisions applying the *Hatch* analysis, the D.C. District Court addressed whether ten months in administrative segregation might implicate a liberty interest. *See Brown v. District of Columbia*, 66 F. Supp. 2d 41, 46 (D.D.C 1999). The court held that, standing alone, the conditions the plaintiff faced in administrative segregation "cannot be found to impose an 'atypical and significant hardship,' for the simple reason that his confinement was not only comparable to but was in fact administrative segregation." *Id*. But, the court held, *ten months* of such segregation might implicate a liberty interest. *Id*. The court thus requested the development of a factual record about the typical duration of administrative segregation.[18] Here, Plaintiffs have supplied a detailed evidentiary record on the duration of administrative segregation and CMU confinement, and that record clearly establishes that the CMU significantly outlasts administrative segregation.

While unpleasant, brief stays in administrative segregation do not fundamentally alter a prisoner's environment. *Years* of CMU confinement, without a single opportunity to hug one's spouse or cradle one's child, do. This drastic durational difference establishes CMU confinement as "atypical and significant" as a matter of law. *Hatch*, 184 F.3d at 856.

---

[17] Following *Sandin*'s framework, every single circuit has recognized the critical importance of the duration of a restraint to post-*Sandin* due process analysis. *See*, *e.g.*, *Harden-Bey v. Rutter*, 524 F.3d 789, 795 (6th Cir. 2008); *Hernandez v. Velasquez*, 522 F.3d 556, 563 (5th Cir. 2008); *Jordan v. Fed. Bureau of Prisons*, 191 Fed. Appx. 639, 650 (10th Cir. 2006); *Skinner v. Cunningham*, 430 F.3d 483, 487 (1st Cir. 2005); *Lekas v. Briley*, 405 F.3d 602, 612 (7th Cir. 2005); *Magluta v. Samples*, 375 F.3d 1269, 1282 (11th Cir. 2004); *Portley-El v. Brill*, 288 F.3d 1063, 1066 (8th Cir. 2002); *Griffin v. Vaughn*, 112 F.3d 703, 708 (3d. Cir. 1997); *Beverati v. Smith*, 120 F.3d 500, 504 (4th Cir. 1997); *Brooks v. DiFasi*, 112 F.3d 46, 48 (2d. Cir. 1997); *Keenan v. Hall*, 83 F.3d 1083, 1089 (9th Cir. 1996).

[18] The court noted that the record provided "insufficient evidence to allow the Court to reach a reasoned and informed conclusion on this issue." The issue appears to have never been resolved.

2. The CMUs Also Impose Atypical and Significant Restrictions Compared to Administrative Segregation at Other Prisons.

Administrative segregation is not the only baseline the Court can consider under *Hatch.* *Hatch* also allows for a comparison to "*more* restrictive conditions [than the CMUs] at other prisons *if it is likely both* that inmates serving sentences similar to appellants' will actually be transferred to such prisons *and* that once transferred *they will actually face such conditions*." *Hatch*, 184 F.3d at 847 (emphasis added). In response to Plaintiffs' discovery requests regarding units that fit this description, and presumably in light of the fact that Plaintiffs are all low and medium security prisoners, SUF 73-75, Defendants have produced data about administrative segregation at all low and medium security BOP prisons nationwide, SUF 77, 78. Thus it is possible that Defendants will argue that all those 95 settings are relevant to the proper baseline under *Hatch*. It is unclear as a matter of law whether this Court should in fact consider those other settings.[19] But this question need not be resolved by this case, because even if considered, the exact same pattern emerges: CMU confinement also *vastly* outlasts confinement in administrative segregation at all low and medium facilities.

Mirroring his analysis of administrative segregation spells at FCI Terre Haute and USP Marion, Professor Beveridge calculated the median aggregate time a low or medium security prisoner spent in administrative segregation between February 1, 2012 and August 2, 2013 at these 95 facilities. That median aggregate time is 3.42 weeks. SUF 82. During the same period, the median time spent in a CMU was 66.78 weeks. SUF 48. Thus, low and medium security

[19] Such comparison may be improper under *Hatch* because it is unclear that conditions in administrative segregation at these prisons are in fact more restrictive than the CMUs. Of the 95 low and medium security facilities about which Defendants produced data, more than half (54 facilities, or 57% of them) allow contact visits to prisoners in administrative segregation – a significantly less restrictive condition than at the CMUs. SUF 80. Eight of them allow prisoners in administrative segregation a full 300 minutes of phone calls per month – again, a far less restrictive condition than that imposed at the CMUs. SUF 81. Given the fact that communication restrictions are not universally harsher at these administrative segregation units than at the CMUs, it is unclear whether they should be considered as part of Hatch's "comparative baseline." *Hatch*, 185 F.3d at 847.

prisoners spend about 19.5 times as long in a CMU as they do in administrative segregation at the other 95 BOP facilities.[20] SUF 83.

The results of Professor Beveridge's comparison of the relative duration of CMU confinement and confinement in administrative segregation can be summarized as follows:

	Administrative Segregation at USP Marion	**Marion CMU**	**Administrative Segregation at FCI Terre Haute**	**Terre Haute CMU**	**Administrative Segregation at all Medium and Low Security Prisons**	**Marion and Terre Haute CMUs combined**
Median Duration (weeks)	3.59	61.43	1.07	59.57	3.42	66.78

SUF 48-50, 52, 53, 82. The stark difference between the experience of prisoners at the CMUs and in administrative segregation at low- and medium-security facilities across the country establishes a liberty interest in avoiding CMU confinement. *Sandin*, 515 U.S. at 484; *Hatch*, 184 F.3d at 856. Exposure to restrictions at the CMUs simply lasts *much* longer and, because of this, is much harsher than what a prisoner typically experiences in administrative segregation. *Hatch* compels a common-sense conclusion: it is much worse to be strictly restricted from access to the outside world for years at a time than to experience the admittedly harsh conditions in administrative segregation for a matter of days.

B. The Undisputed Facts Show that CMU Procedures Fail to Provide Plaintiffs and other CMU Prisoners with the Process they Are Due.

After concluding that Plaintiffs have a liberty interest in avoiding CMU designation, the Court must next consider what process is due. *Wilkinson*, 545 U.S. at 209 (holding Ohio prisoners have a liberty interest in avoiding placement in that State's highest security prison, but that the State's procedures satisfied due process). This requires the Court to balance:

[20] Professor Beveridge testified that, having run a number of analyses with the BOP's data, the analysis he generated demonstrating that CMU confinement vastly outlasts confinement in a comparable facility is "robust" – in other words, they "are reliable and it won't make too much difference what method … or measurement that you use to look at the differences. The differences are going to be there because, frankly, the differences … are very, very large and you don't generally see differences this large in social science analysis." SUF 63.

> First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

Id. at 224-25 (*citing Matthews v. Eldrige,* 424 U.S. 319, 335 (1976)).

1. Plaintiffs' Interest in Avoiding CMU Placement

The first *Mathews* factor, the private interest at stake, is to be evaluated "within the context of the prison system and its attendant curtailment of liberties." *Id*. at 225. Because prisoners have their liberty curtailed by definition, "the procedural protections to which they are entitled are more limited than in cases where the right at stake is the right to be free from confinement at all." *Id*. First, the BOP acknowledges the critical role that social visitation and telephone calls play in allowing a prisoner to maintain family and community ties, and their concomitant benefits to a prisoner's morale, personal development, and prospects upon reentry into society. SUF 19. CMU designation directly interferes with these interests by restricting access to visits and calls, and imposing a categorical ban on physical contact with loved ones. SUF 20, 23, 24, 27, 28, 31. As described above, those restrictions have profoundly interfered with Plaintiffs' ability to maintain their relationships with their family members. SUF 33-36, 64-66; *see also Overton v. Bazzetta*, 539 U.S. 126, 131-32 (2003) (recognition that a person's right to family association survives incarceration); *Searcy v. United States*, 668 F. Supp. 2d 113, 122 (D.D.C. 2009) (recognizing "the First Amendment right to communicate with family and friends"). Second, given the stigma associated with the label "terrorism," Plaintiffs have an interest in avoiding designation to a unit that the Attorney General has described as designed for prisoners with a "nexus to international terrorism." SUF 18; *Tabbaa v. Chertoff*, 509 F.3d 89, 98 (2d Cir. 2007). Indeed, Plaintiffs' status as former CMU prisoners appears to continue to affect

them even after their release from a CMU. SUF 504-508. Thus, Plaintiffs' interest in avoiding CMU designation "is not 'minimal.'" *See* Mem. Op., Dkt. #37, at 26.

2. The Risk of Erroneous Placement Under Current Procedures.

The second *Matthews* factor addresses "the risk of an erroneous placement under the procedures in place." *Wilkinson*, 545 U.S. at 224-25. Since the CMUs opened in 2006, designation and review of CMU prisoners have been marred by systemic failures at every level, leading to an unconscionably high risk of erroneous placements. First, the one-page "Notice of Transfer" the BOP provides CMU prisoners after designation fails to reveal the reason(s) the prisoner was actually approved for the CMU, rendering the prisoners hopeless to challenge reasons for placement. Second, the BOP offers no hearing before or after CMU placement; instead CMU prisoners are left to challenge their designation through the Administrative Remedy process. Yet the Administrative Remedy process is futile: it offers no prospect of relief as it does not allow for substantive reevaluation of CMU placement. Third, for the first three years of the CMU's existence, the BOP had *no* process to review CMU prisoners for potential transfer out of the CMU; when the BOP finally put a summary process into place, it proved arbitrary and insufficient. The CMU process, in short, is a sham, producing a significant risk of erroneous placement and continued confinement in the CMU.

a. Notice

Notice of the factual basis for segregation, along with a "fair opportunity" for rebuttal, is "among the most important procedural mechanisms for purposes of avoiding erroneous deprivations." *Id.* at 226; *see also Brown v. Plaut*, 131 F.3d 163, 171 (D.C. Cir. 1997) (the notice required prior to placement in administrative segregation is "not elaborate" but "must be strictly complied with"). Notice must apprise a prisoner of the *actual* reason for a decision. *Brown v.*

D.C., 66 F. Supp. 2d 41 (D.D.C. 1999). "Obviously, the Due Process Clause requires not simply that the prisoner have an opportunity to address the decisionmaker, but that he have an opportunity to address the basis on which the decisionmaker reasonably expects to make its determination." *Id.* Notice must also be "sufficiently specific … to inform the inmate of what he is accused of doing so that he can prepare a defense to those charges and not be made to explain away vague charges." *Taylor v. Rodriguez*, 238 F.3d 188, 192-93 (2d Cir. 2001) (internal citation and punctuation omitted), *Bills v. Henderson*, 631 F.2d 1287, 1295 (6th Cir. 1980) (same). This requires disclosure of "specific facts." *Sira v. Morton*, 380 F.3d 57, 72 (2d Cir. 2004).

The purported notice provided to CMU prisoners makes a mockery of these requirements. A prisoner is given a one-page "Notice to Inmate of Transfer to [a CMU]," shortly *after* his arrival at a CMU. SUF 144. Each notice includes general information about the CMU along with several prisoner-specific sentences purporting to notify the prisoner of the reason for their placement on the unit. *Id.* But those notices completely fail to provide the information necessary to challenge CMU designation, and thus create a significant risk of erroneous CMU placement for at least three significant reasons.

First, and most fundamentally, the Notice does not actually reflect the reason(s) the prisoner was in fact *approved* for CMU designation. SUF 147. The inmate-specific portion of the Notice of Transfer is drafted by the CTU, the BOP office responsible for making an initial recommendation regarding CMU designation. SUF 97, 99, 101, 145. However, the North Central Regional Director, not the CTU, makes the ultimate decision for or against CMU designation, and his reasons for CMU designation may or may not mirror the reasons for the CTU's recommendation. SUF 110. The Regional Director can make his decision based on information that does not appear in the designation packet, or based only on some of the information that

appears therein. SUF 106, 111, 112. The Regional Director does not draft, edit, or finalize the Notice, so it does not reflect *his* reasons for approving CMU designation. SUF 146. Indeed, because there is no requirement that the Regional Director document his reasons for approving CMU placement, and he generally does not, there is no way to tell, beyond the Regional Director's powers of recall, why an individual was actually approved for CMU designation. SUF 113-115, 180, 227, 236, 239, 245, 250, 257, 261, 266, 270. Without being told the bases for the Regional Director's decision, no prisoner can hope to rebut them.

Second, to the extent that the Notice might have some value as a statement of the *CTU's* reasons for *recommending* CMU placement to the actual decisionmaker, the Notice does not even accurately reflect those reasons. This is because the CTU does not have a policy or practice of including all of the reasons for their CMU recommendation on the Notice. SUF 145. Leslie Smith, Chief of the CTU, sometimes omits one of the CTU's reasons for its recommendation. *Id.* When asked why, he responded that there is not enough space on the form. *Id.*

Some examples illustrate this fundamental failure to provide CMU prisoners with propoer notice. Aref received a Notice of Transfer stating that his CMU designation was based on his convictions and offense conduct; incredibly, the Notice omitted the second major reason for the CTU's recommendation – his alleged links to several terrorists and terrorist organizations, which Aref's counsel only discovered in the course of this civil rights litigation. SUF 167, 171, 172. Information about these alleged links came from Aref's Presentence Report, which itself indicated that the information was disputed and was never introduced at trial. SUF 168.[21] Nevertheless, the Regional Director relied on this contested information in approving Aref for CMU designation; without notice, Aref was hopeless to challenge it. SUF 171, 172, 175.

[21] While the CTU claims that it is their practice to disclose in their referral memo when information is disputed, no such disclosure appears in Aref's CTU referral memo. SUF 169, 170.

McGowan's Notice of Transfer also describes his convictions and offense conduct as bases for his CMU designation. SUF 195. The Notice does not disclose the CTU's reliance on McGowan's communications about environmental issues while at FCI Sandstone (his prison prior to the CMU) to justify his CMU placement. SUF 186, 188, 192, 193. McGowan was never disciplined for these communications or informed (prior to this lawsuit) that his communication was relevant to his CMU designation. SUF 190, 191. Indeed, McGowan's last program review[22] at Sandstone was completely positive, describing McGowan's progress in prison with no mention of any communications issues. SUF 186. Because McGowan was unaware that his communications were relevant to his CMU designation, he was hopeless to challenge their use.

Relevant information regarding the CTU's reasons for recommending CMU placement was similarly excluded from the Notices provided to many other CMU prisoners. SUF 232-234, 237, 238, 240-242, 246-249, 251, 255, 256, 258-260, 262-265, 267-269, 271. Troublingly, the excluded information was frequently related to the prisoner's religious or political views – suggesting that CMU designation is often based on unreported, subjective ideological criteria. SUF 234, 240, 242, 244, 246, 263, 265, 267, 269, 271.

The third elementary defect of CMU notices is that even those incomplete reasons that *are* listed are frequently too vague to provide a prisoner with adequate information to challenge them. For example, Twitty's Notice simply indicates that he was designated to the CMU because of "involvement in recruitment and radicalization efforts of other inmate through extremist, violence oriented indoctrination methods to intimidate or coerce others." SUF 214. Other CMU prisoners received equally obtuse notices. SUF 228, 246. Twitty tried to find out who he was accused of recruiting, when, where, and toward what end, so that he could concretely refute these

[22] A BOP prisoner is assigned a unit team, which consists of a Unit Manager, Case Manager, and Correctional Counselor. That team conducts a prisoner's semi-annual program review, where progress in recommended programs is reviewed, and new programs recommended based upon skills gained during incarceration. SUF 289, 290.

allegations rather than punch at shadows; no information was forthcoming. SUF 216-218. He therefore was left unable to challenge his CMU designation. Indeed, one former CMU warden, when shown one of these vague "recruitment and radicalization" notices, insisted that the notice was not meant to explain to the prisoner why he was transferred to the CMU, though the form itself indicates otherwise. SUF 228, 229.

Notices that fail to provide CMU prisoners with the actual decisionmaker's reason for designation, omit major reasons for placement, or recite only vague assertions without supporting factual detail, undermine the very purpose of notice, deprive CMU prisoners of a "fair opportunity" to rebut CMU placement, and thus fail to safeguard against erroneous deprivations of liberty. *See Wilkinson*, 545 U.S. at 226, *Brown*, 66 F. Supp. 2d at 45, *Taylor*, 238 F.3d at 193, *Bills*, 631 F.2d at 1295; *see also Gray Panthers v. Schweiker*, 652 F.2d 146, 167 (D.C. Cir. 1980) (notice inadequate in benefits context because "the reasons for claims denials … were so unclear that it [was] virtually impossible for the average beneficiary to present a well-reasoned argument"); *Ass'n of Cmty. Orgs. For Reform Now v. FEMA*, 463 F. Supp. 2d 26, 34-35 (D.D.C. 2006) (finding FEMA notices to be "unnecessarily vague").

b. Hearing

Along with proper notice, a prisoner facing transfer to a unit that works an atypical and significant hardship must receive at least some "opportunity to present his views to the prison official charged with deciding whether to transfer him." *Brown*, 131 F.3d at 170 (citation omitted). Indeed, given the nature of the deprivation involved here, Plaintiffs maintain that *more* than an informal hearing is required. *See id.* at n.8; *see also* Section B(3), *infra*. But even if an informal hearing is all that is necessary, it must be held "at a meaningful time and in a meaningful manner." *Taylor*, 238 F.3d at 193 (*quoting Matthews*, 424 U.S. at 333).

The CMUs fail this standard. To begin, CMU prisoners do not receive any hearing or other opportunity for meaningful input before CMU designation. SUF 118, 119. Instead, *after* designation to a CMU, prisoners are informed that they may appeal their transfer through the BOP's Administrative Remedy program. SUF 120, 149. This opportunity is an empty one. As Plaintiffs' and other CMU prisoners' experiences demonstrate, use of the Administrative Remedy program cannot, and does not, result in substantive reevaluation of a prisoner's CMU designation. As a result, *not a single CMU prisoner has ever been released from the CMU through the Administrative Remedy program.* SUF 152.

The BOPs Administrative Remedy program allows a prisoner to seek formal review of an issue relating to any aspect of his BOP confinement. SUF 150, 151. As structured, it cannot provide meaningful relief to CMU prisoners. Prisoners submit a short description of their grievance to their unit team and receive a response; if they are unsatisfied with the response, they may appeal to the Warden, then to the Regional Director, and finally to BOP General Counsel. *Id.* Since the Regional Director, rather than the unit team or the Warden, has decision-making authority over CMU designation, SUF 110, the first two levels of Administrative Remedy review cannot even theoretically result in release from the CMU.[23] And while the North Central Regional Office (NCRO) could theoretically respond to an Administrative Remedy appealing CMU transfer by substantively reconsidering the basis for CMU designation, the office responds to such requests solely by *reviewing* but not *reconsidering* the reasons for the prisoners' designation, and *reminding* the prisoner of those reasons. SUF 153.[24] Finally, given the Regional

[23] The first CMU Warden, Brian Jett, was responsible for responding to many of these Administrative Remedies, but received neither training specific to the CMUs nor any materials or policies about the CMU. SUF 87.

[24] The NCRO's lack of substantive evaluation is further evidenced by their failure to fill out a "CMU review form" in response to Administrative Remedy requests. The NCRO uses these forms, which include a short summary of the CTU designation memo and supporting packet, with spaces for various NCRO staff members to share their recommendation with the Regional Director, *every time* a prisoner is considered for redesignation to or from a CMU. SUF 109, 154, 155

Director's final decisionmaking authority, all the General Counsel could ever do to "grant" an appeal would be to make a non-binding recommendation that the Regional Director reverse his earlier decision. SUF 157. As such, the program is not structured to allow a prisoner to be heard at a meaningful time and in a meaningful manner. *See*, *e.g.*, *Sattar v. Gonzales*, No. 07 C 02698, 2008 U.S. Dist. LEXIS 112428 at *13 (D. Colo., Nov. 3, 2008) ("the Court does not agree that the administrative remedy program is 'all that is required' to satisfy procedural due process …. '[T]he fundamental requirement of due process is the opportunity to be heard at a meaningful time and in a meaningful manner'").

In practice, unsurprisingly, appeal of CMU designation through the Administrative Remedy process is also completely meaningless. For example, McGowan's Notice of Transfer indicated that his offense conduct included "destruction of an energy facility," and "teaching others to commit arson." SUF 195. McGowan used the Administrative Remedy program to appeal his CMU designation on the basis that each of these factual assertions, among others, is demonstrably false. SUF 205, 206. McGowan's Presentence Investigation Report (PSR) establishes that McGowan was a participant in two arsons: one at Superior Lumber Company and one at Jefferson Poplar Farm. SUF 196. There is no indication and the PSR does not suggest that McGowan destroyed (or had anything to do with) an energy facility. SUF 197. And while the PSR indicates that McGowan attended meetings meant to train arsonists, it does not indicate that he was a trainer at such meetings (rather than a trainee). SUF 198. The evidence suggests that this erroneous information came from a different prisoner's Notice.[25]

[25] McGowan's PSR indicates that one of McGowan's co-defendants trained others to commit arson, *and* received an aggravating role adjustment for his leadership role in the conspiracy (which McGowan did not). SUF 199, 200. Indeed, the CTU drafted that individual's Notice of Transfer prior to McGowan's, and used it as a template for McGowan's. SUF 201, 202. This may explain the source of the erroneous information.

When confronted with McGowan's Administrative Remedy, the BOP falsely insisted that the factual information in McGowan's notice of transfer came from his PSR, ignoring the PSR's glaring silence with respect to the specific facts identified above. SUF 206, 207. Yet tellingly, the BOP's 30(b)(6) witness testified, after review of McGowan's ill-fated attempt to address the factual inaccuracies in his Notice of Transfer through the Administrative Remedy program, that the process *worked* because McGowan "had the opportunity to file all the way up." SUF 208.

Aref's Notice, meanwhile, indicates that he was designated to the CMU because his offense conduct included "significant communication, association, and assistance to Jaish-e-Mohammed [JeM]," a foreign terrorist organization. SUF 164. However, Aref's PSR, upon which the CTU relied to draft the Notice of Transfer, shows that Aref's conviction resulted from a sting operation: he never initiated nor had any actual contact with anyone from JeM, but rather with an undercover informant working with the FBI who contacted him, and *pretended* to be a member of JeM. SUF 160-162. Aref tried to appeal his CMU designation by bringing to the BOP's attention this mischaracterization. SUF 173. But at each level of Administrative Review, the BOP failed to address or respond to Aref's claim that the information in his Notice of Transfer was factually inaccurate. SUF 169. Instead the appeal was summarily denied. *Id.*[26]

Jayyousi had a similar experience. His Notice of Transfer indicates that his offense conduct involved use of "religious training to recruit other individuals in furtherance of criminal acts in the country … and included significant communication, association and assistance to al-Qaida." SUF 181, 182. Jayyousi appealed his designation through the Administrative Remedy

[26] In remarkable doublespeak, the BOP continues to defend its mischaracterization of Aref's offense conduct. According to former Regional Director Nalley, Aref's "significant communication" with JeM was "key" in his decision to approve Aref's designation to the CMU. SUF 163. Nalley explained that Aref thought he was "dealing with a terrorist. If he thinks and believes it then his is dealing with a terrorist." SUF 165. Similarly, in response to Plaintiffs' requests that Defendants admit that Aref's offense conduct did not include communication, association or assistance to JeM, or any member of JeM, Defendants "interpreted" "JeM or any member of JeM" to "include individuals purporting to be assisting the organization" and denied the request. SUF 166.

program, arguing that neither his conviction nor offense conduct included religious recruitment or assistance to al-Qaida. SUF 183. Again, the BOP failed to respond to these factual questions, and merely parroted the purported reasons for his designation. SUF 184.

Twitty's experience also demonstrates the meaninglessness of the Administrative Remedy Program. As explained in Section B(2)(a) above, Twitty's Notice of Transfer indicates that he was designated to the CMU due to "involvement in recruitment and radicalization efforts." SUF 214. Twitty used the Administrative Remedy program to ask who he was accused of recruiting, for what, and what evidence was being relied upon. SUF 216. In response he was instructed to file a Freedom of Information Act request. SUF 217.[27] He did so, and received a one page "Request for Transfer" form from USP Hazelton, indicating that Twitty had "average rapport" with staff and inmates and parroting that Twitty "is considered a management problem due to his recruitment and radicalization of other inmates." SUF 218. The form also indicated that Twitty was being sent to the CMU pursuant to a "close supervision" transfer. SUF 219.

However, this information directly contradicted Twitty's last program review at USP Hazelton, conducted little more than a month earlier, during which Twitty's unit team indicated that he had good work ratings, good rapport with staff and inmates, had clear conduct since 2005, and "was not a management problem." SUF 213. Moreover, a "close supervision" transfer is disciplinary in nature, and must be based on a documented act of misconduct. SUF 220. Twitty was not charged with any misconduct prior to CMU designation. SUF 221. Though it does not appear that Twitty meets any of the BOP's criteria for CMU designation, he had no access to those criteria and therefore could not use them as a basis to argue that he did not belong in the CMU; nor could BOP staff reviewing his designation evaluate such a claim. SUF 88, 212.

[27] McGowan was similarly advised to file a FOIA request when he tried to use the Administrative Remedy to ask where the erroneous factual information in his Notice of Transfer came from. SUF 209. He did so, and received nothing of substance in response. SUF 210, 211.

Given that no CMU prisoner has ever successfully challenged his CMU designation through the Administrative Remedy Program, SUF 152, it is clear that these experiences are not unique to the current and former plaintiffs in this action. *See* SUF 228, 230, 231. Hearings that do not allow for substantive review of CMU designation nor measure a prisoner's conduct against set criteria, do not adequately "safeguard against the inmate's being mistaken for another or singled out for insufficient reason." *Wilkinson,* 545 U.S. at 226.

c. Periodic Review

Along with notice and an opportunity to be heard, due process requires periodic review of the continued need for segregation. *See Hewitt v. Helms,* 459 U.S. 460, 477 n. 9 (1983), *Brown*, 131 F.3d at 170. There is no settled rule as to how frequently review must occur, but annual review is probably insufficient. *McQueen v. Tabah*, 839 F.2d 1525, 1529 (11th Cir. 1988) (11 months without review stated a due process claim); *Toussaint v. McCarthy*, 801 F.2d 1080, 1101 (9th Cir. 1986) (12 months without review violated due process).

When they do occur, reviews must be meaningful; "to insure that periodic review does not simply become a sham, the content and substance of that review must be scrutinized." *Mims v. Shapp*, 744 F.2d 946, 954 (3d Cir. 1984). If redesignation is denied, the prisoner must be apprised in writing of the reason for continued segregation. *Wilkinson*, 545 U.S. at 225-226. "This requirement guards against arbitrary decisionmaking while also providing the inmate a basis for objection before the next decisionmaker or in a subsequent classification review. The statement also serves as a guide for future behavior." *Id.*; *see also Williams v. Hobbs*, 662 F.3d 994, 1008 (8th Cir. 2011) (review meaningless because of failure to explain with "reasonable specificity" why the prisoner continued to constitute threat to prison security).

CMU reviews do not meet even this minimal standard. As shown below, CMU prisoners were not reviewed for potential transfer out of the unit for the first three years of the CMU's existence. It was only on the eve of this case being filed that any reviews began. And to this day, considerable confusion remains as to how the reviews work, and when they should occur. Finally, though BOP policy requires that prisoners be apprised of the reason(s) for continued CMU placement, in practice this does not occur.

i. Reviews Between 2006 and 2009.

For the first three years the CMUs operated, there was no review process in place to allow for transfer out of the unit. SUF 293-295. Thus, not a single prisoner was transferred from the CMU to a non-CMU general population unit. SUF 278. At the same time, Plaintiffs and other CMU prisoners received erroneous information about when and how they might be considered for transfer out of the CMU. SUF 279-281. McGowan and Jayyousi were informed that their continued CMU placement would be "reviewed" during each program review by their unit team. SUF 280. They and other CMU prisoners were also told they would be considered for transfer out of the CMU after they had achieved 18 months of clear conduct. SUF 281, 283, 300, 303, 426. By contrast, Aref was initially informed that he would remain in the CMU unless and until his criminal convictions were reversed. SUF 279.

During that initial three-year period, the CMU institution supplements, which should set forth facility procedures, stated only that "classification and reviews of … [CMU] inmates will occur according to national policy." SUF 282, 284-286. The referenced policy says nothing specific about the CMUs, but does indicate that BOP prisoners are eligible for a "nearer release" transfer after spending 18 months with clear conduct in a given facility. SUF 287, 288, 291.

In contrast to what prisoners were told and to national BOP policy, 18 months of clear conduct was neither necessary nor sufficient for release from the CMU. SUF 293, 314. Instead, the BOP decided that CMU prisoners should stay in the CMU until there was a determination that their communications no longer required the level of monitoring allowed by the CMU. SUF 294. However, the BOP did not put into place a system to make this determination until D. Scott Dodrill, Assistant Director of Correctional Programs, issued a memo establishing CMU reviews in October 2009. SUF 295, 296. Thus, for the first three years the CMU was open, Plaintiffs and other prisoners received no meaningful periodic review and had no real chance of getting out of the CMU.[28] SUF 343, 344, 346-351, 354-359, 386, 384, 425, 426, 430-436. During that period, several prisoners approaching 18 months of clear conduct at one CMU were abruptly transferred to the other, and informed that they would not be considered for release until they achieved 18 months of clear conduct at their new unit, without credit for the prior period of clear conduct at the other CMU. SUF 65, 350-352, 358, 475, 476, 477.

ii. Reviews Post-Dodrill Memo.

On October 14, 2009, the BOP issued a memo regarding reviews of continued CMU placement. SUF 293-295. The memo was intended to notify BOP staff that CMU prisoners should be reviewed for potential redesignation at every program review, which occur *every six months*. SUF 296, 290.[29] Implementation of that policy has been flawed at every level.

[28] The BOP appears to have misled not just CMU prisoners about this issue, but the Deputy Attorney General as well. In an April 25, 2008 email, Joyce Conley (then Assistant Director of BOP Correctional Programs) informed the Deputy Attorney General that the BOP would "consider redesignating certain terrorist inmates currently at the CMU after 18-months of clear conduct." SUF 299. In reality, such reviews did not occur in 2008, and could not have resulted in release from the CMU. SUF 292, 293, 294, 295.

[29] An earlier version of the Dodrill memo, with substantially the same content, was actually issued by Joyce Conley, Dodrill's predecessor, several months earlier, on July 24, 2009. The memo was sent to the Regional Director, but for some reason the reviews described were not implemented at that time. SUF 298.

First, official CMU policy documents at both USP Marion and FCI Terre Haute misstated the review policy. The 2009 CMU Institution Supplements[30] incorrectly indicated that redesignation reviews would commence with the first unit team meeting *after the prisoner has spent a minimum of 18 months in the unit* with subsequent reviews at six-month intervals, and that inmates were expected to maintain clear conduct and have no sanctioned incident reports for between 18 and 24 months to be recommended for transfer. SUF 300, 303.

Shortly after publication of the Institution Supplements, the CTU notified USP Marion that it was providing erroneous information to CMU prisoners and staff members. SUF 301, 302. However, USP Marion did not issue a new Institution Supplement until August 29, 2011. SUF 302. Similarly, FCI Terre Haute's 2011 and 2012 Institution Supplements continued to include erroneous information, specifically that CMU prisoners would be reviewed "after the Unit Team has had ample time to monitor the inmate's institutional adjustment" and that "[i]nmates are expected to maintain clear conduct and have no sanctioned incident reports for the 12 months period prior to their review, regardless of designation, to be recommended for transfer." SUF 304, 305. But "policy" actually required prisoners to be reviewed at their first program review, and 12 months of clear conduct was not a requirement. *Id.* The incorrect "ample time" statement persists in FCI Terre Haute's current institution supplement. SUF 306.

Given the erroneous information in the CMU policy statements, it is unsurprising that BOP officials involved in the review process did not understand it. According to the BOP, after the Dodrill memo was issued, prisoners were reviewed every six months for potential redesignation out of the CMU (although the Institution Supplements indicate otherwise). SUF 307. However, some BOP employees responsible for the CMU reviews, including Marion and

[30] Institution supplements set forth facility procedures to implement national policy. SUF 282. The Supplements are available to prisoners on the unit, who read them to understand CMU policy. SUF 283.

Terre Haute wardens, understood the Dodrill memo to apply only to program reviews *after* 18 months of clear conduct. SUF 308-310, 312, 306. BOP documentation from this period corroborates this interpretation of the Dodrill memo. SUF 313-315. Thus, while BOP policy required review of CMU prisoners every six months, and these reviews may or may not have taken place, it is undisputed that CMU prisoners received contradictory information about the policy, SUF 283, 300, 303, 304, 305, and BOP employees responsible for overseeing the process did not understand how it was supposed to work. SUF 308-310, 312-315.

Second, even when BOP staff did attempt to follow the Dodrill memo and review CMU prisoners for potential redesignation, the policy set forth in the memo was so unclear as to render the reviews meaningless. Under the Dodrill memo, review of CMU placement commences with the CMU unit team, which is tasked with determining whether continued CMU placement is still necessary by "consider[ing] whether the original reasons for CMU placement still exist" along with "whether the original rationale for CMU placement has been mitigated, whether the inmate no longer presents a risk, and that the inmate does not require the degree of monitoring and controls afforded at a CMU." SUF 316. But because the unit team does not always have complete information about why prisoners are sent to the CMU, it thereby cannot determine whether the original reasons for CMU designation still exist. SUF 322, 323. Moreover, given that CMU designation is frequently based on a prisoner's conviction or offense conduct, or a particular action or series of actions while incarcerated, it is not clear how historical and static reasons for placement could ever be found to no longer exist. SUF 126.

The Dodrill memo also fails to explain *how* a prisoner might "mitigate" the original rationale for CMU placement. SUF 316. There is no timeframe for how long a prisoner must refrain from the type of behavior that led to CMU placement to be appropriate for transfer out of

the CMU, SUF 317, 318, and wardens responsible for overseeing the reviews provided no guidance as to how the reviews should be accomplished. SUF 319-321.

Without guidance, members of the unit team used their own individual discretion in applying the Dodrill memo. Paul Kelly, Marion CMU Unit Manager, testified, for example, that a prisoner could mitigate the reasons for his initial placement by no longer *believing* in the ideology that motivated the activities that led to his CMU placement. SUF 323, 324. Henry Rivas, the Intelligence Research Specialist at the Marion CMU, thought that an individual sent to the CMU for environmental extremism who continued to read extremist environmental publications qualified for continued CMU placement. SUF 325. Whether or not these interpretations, which focus on the thoughts, beliefs, and reading interests of a prisoner, are a legitimate or accurate interpretation of the policy remains a mystery.

If the unit team does recommend a prisoner for transfer out of the CMU, it is supposed to pass this recommendation on to the Warden for his/her review and recommendation. SUF 326. If the Warden disagrees with the unit team's recommendation s/he ends the review process right there, shortcutting the CTU and Regional Office's review of the prisoner for potential redesignation. SUF 327. *Cf. Wilkinson*, 545 U.S. at 226 (noting with approval the existence of the opposite policy at Ohio's supermax, where only a reviewer's recommendation *against* OSP placement terminates the process, while a recommendation for OSP placement can be overturned by a subsequent reviewer's disapproval).

In short, the Warden has power to stop the review process in its tracks. As a result, Plaintiffs and others were not reviewed for potential redesignation out of the CMU by the CTU (the BOP officials with supposed expertise on the need for CMU placement) or the Regional Director (the actual decision-maker regarding continued CMU placement) for *years* at a time.

SUF 97, 110, 158, 366, 371 (showing that Aref's CMU placement was first reviewed by the CTU and the Region over three years after his CMU designation), 176, 402, 406 (showing that Jayyousi's CMU placement was first reviewed by the CTU and the Region almost three years after his CMU designation), 185, 440, 448 (showing that McGowan's CMU placement was first reviewed by the CTU and the Region over a year and a half after his CMU designation). And under this review structure, a CMU prisoner could theoretically serve his entire sentence at the CMU, without ever being reviewed by the CTU or Region.

Pursuant to the Dodrill memo, if the Warden does concur with the unit team's recommendation for redesignation out of the CMU, she forwards that recommendation to the CTU, which then considers the facility recommendation and makes an independent assessment. SUF 328, 330.[31] The CTU then forwards its recommendation, and the facility's, to the Regional Director for a final decision.[32] SUF 333, 336.

Prisoners who are denied transfer from the CMU are supposed to be notified in writing by the unit team of the reason(s) for continued CMU designation. SUF 338. This is especially important if a prisoner's conduct while at the CMU is the (or a) reason for ongoing retention there. SUF 339. In practice, however, the BOP notifies prisoners of transfer denials by sending a form memo that does not provide *any explanation* of why the prisoner was denied transfer. SUF 340. Without information about why they are being kept in the CMU, the prisoner cannot meaningfully challenge the review outcome, nor can he change his behavior (if relevant) to eventually earn CMU release. *See Williams*, 662 F.3d at 1009 (prisoner was deprived of due

[31] In 2013, the BOP began using a new form to document the review process. SUF 331. The form includes a box for "inmate comments/Statement." SUF 332. The Chief of the CTU testified that he did not read the inmate's comments prior to making his recommendation. *Id.*

[32] At some point in the last several years, the CTU also began routing the recommendations through the administrator at the BOP's Correctional Programs Division prior to sending them to the NCRO, but the Dodrill memo does not describe this step. SUF 334, 335.

process because defendants "failed to apprise [him] of the reasons he continued to pose a threat to the security and good order of the institution.")

The arbitrary, misleading, and ineffective nature of the CMU review policy is illustrated by Plaintiffs' and other prisoners' experiences. Aref, for example, was designed to the Terre Haute CMU in May 2007. SUF 158. Once he achieved 18 months of clear conduct at the Terre Haute CMU, SUF 348-350, his case manager told him he would be recommended for transfer, SUF 351. Unbeknownst to him, however, the BOP was not processing such transfers for CMU prisoners at that point. SUF 292, 294, 295. Instead, Aref was transferred to the Marion CMU, and was told that he needed to achieve *another* 18 months of clear conduct in this new unit, before he would be considered for a transfer out of a CMU. SUF 353, 359.

Aref received program reviews every six months in the CMU, but the BOP's documentation does not show that he was actually reviewed for transfer until September 23, 2010 – over three years after his designation. SUF 343-364. At Aref's September 23, 2010 program review (after 18 further months of clear conduct at Marion, and over three years of clear conduct in a CMU), he was finally recommended for transfer by his unit team and Warden. SUF 364, 365. The CTU disagreed, based on confidential information[33] from the Joint Terrorism Task Force. SUF 367-369. The Regional Director relied on this information to deny Aref's transfer. SUF 371. While there may have been other reasons, he did not document them. SUF 372.[34]

Aref received a short memo stating that his transfer request had been denied, with no explanation of why. SUF 373, 374. He used the Administrative Remedy program to ask why his transfer had been denied despite his three years in a CMU without a single disciplinary offense, and what he needed to do to be approved for a transfer out of the CMU. SUF 376. The BOP

[33] This information was redacted from the documents produced to plaintiffs, and has never been disclosed.

[34] For example, the correctional programs summary of Aref's offense conduct described him as being "in constant contact with terrorist sympathies (sic)," which has no support anywhere in the record. SUF 370.

denied his remedy without answering his questions. SUF 377. At Aref's next program review, his unit team and warden again recommended him for redesignation. SUF 378, 379, 380. This time, the CTU concurred, and the Regional Director approved Aref's transfer without comment. SUF 381, 382, 383. Again, Aref was not told why, and thus has been provided with no guidance about how to avoid future redesignation to the CMU. SUF 384, 385.

Jayyousi's experience in the CMU was equally confounding. He was designated to the Terre Haute CMU in June 2008. SUF 176. He received program reviews every six months, but it does not appear that he was considered for a possible transfer out of the CMU until his December 14, 2009 review, at which point he had achieved 18 months of clear conduct. SUF 386-390. At that time and at his next program review, Jayyousi's unit team recommended against his transfer because of the nature and severity of his offense, the length of his sentence, and his offense conduct; the warden concurred. SUF 390-392, 395, 396. After the second denial, Jayyousi filed an Administrative Remedy noting that he did not understand the transfer review process and asking why he was being kept in the CMU. SUF 397. The BOP declined to respond to these questions, stating that Jayyousi's Administrative Remedy was repetitive of the one he filed after his first transfer request rejection, and would not be considered. SUF 393, 394, 398.

After almost two and a half years with clear conduct in the Terre Haute CMU, Jayyousi was transferred to the Marion CMU without explanation. SUF 399.[35] On February 22, 2011 Jayyousi's new unit team recommended him for transfer out of the CMU based on his clear conduct and good rapport with staff, and Warden Hollingsworth concurred. SUF 401. The CTU, however, recommended against Jayyousi's transfer and included in its supporting memo and packet to the Regional Director a substantial amount of information about a situation in August

[35] The transfer was administrative in nature, and not based on any misbehavior. SUF 400.

of 2008, when Jayyousi led a Jumah prayer while at the Terre Haute CMU. SUF 403. The Regional Director denied Jayyousi's transfer without explanation. SUF 406, 407.

Jayyousi received a short memo informing him that his transfer had been denied without any explanation of why. SUF 408, 409. He was not informed that his three-year-old Jumah sermon played any role in his continued CMU designation. SUF 412. Filing an Administrative Remedy to try to learn the reasons for his denial again bore no fruit. SUF 410, 411. The BOP's failure to identify the relevance of the Jumah prayer is particularly troubling, as Jayyousi was initially brought up on disciplinary charges for leading that prayer, but was ultimately cleared of any wrongdoing through the disciplinary process. SUF 404. Indeed, the BOP expunged the charge from his record. SUF 399.

Shortly thereafter, Warden Hollingsworth was replaced by Warden Roal Warner, and under her leadership, Jayyousi's unit team recommended against his transfer from the CMU at his next three program reviews. SUF 310, 413, 414. Though BOP policy requires the unit team to make an independent recommendation for review by the Warden, Jayyousi's unit team told him that Warden Roal Warner herself decided that he would not be recommended for transfer. SUF 326, 329, 415. BOP documentation of those decisions state only that the reasons for Jayyousi's original placement continued to exist. SUF 416.

Finally, on March 28, 2013, Jayyousi's unit team recommended him for transfer based on his four and a half years of clear conduct in the CMU, and a new Warden and the CTU concurred. SUF 418-420. The Regional Director approved Jayyousi's transfer without explanation, and Jayyousi was transferred to a non-CMU general population unit at USP Marion in May of 2013. SUF 421-423. Jayyousi was never told what he done to finally "mitigate" the original reasons for his CMU designation, almost five years later. SUF 424.

McGowan's experience also illuminates the inadequate nature of the CMU review process. Just as McGowan was never informed that his prison communications about environmental issues were partially responsible for his CMU designation, SUF 186, 188, he was also never told that continuing those communications would result in his continued CMU designation. SUF 427, 428, 452. At McGowan's first three program reviews at Marion he was told that he would have to achieve 18 months of clear conduct prior to being considered for a transfer from the CMU. SUF 425-427, 429, 430, 432, 433, 435, 436. When McGowan approached 18 months with clear conduct, his unit team recommended him for a transfer, and his warden concurred. SUF 437-439. The CTU, however, recommended against McGowan's transfer because of his communications while incarcerated. SUF 440, 441. Specifically, the CTU noted that McGowan "continues to correspond with numerous associates of [radical environmental and anarchist groups] …. Through his communications, McGowan continues to provide guidance, leadership, and direction for activities, publications and movement practices in order to further the goals of radical environmental groups." SUF 442.[36] The Regional Director rejected McGowan's transfer without explanation,[37] and, in violation of BOP policy, McGowan received no explanation for his continued CMU designation. SUF 448-451. McGowan used the Administrative Remedy process to appeal his transfer denial, to ask why he was denied, and to ask how he could change his behavior to earn his way out of the CMU. SUF 453, 454. The BOP's responses ignored these questions. SUF 455.

[36] Tellingly, when first produced to Plaintiffs, some of this information was redacted, allegedly pursuant to the law enforcement privilege. SUF 443.

[37] The correctional programs summary on McGowan's NCRO CMU review form indicates that he was considered "the leader/organizer of the groups ALF/ELF," even though the BOP had no evidence that McGowan was the overall leader of either group, or even that the groups had an overall leader. SUF 444, 437. NCRO staff interpreted the CTU's memo recommending against McGowan's transfer to mean that McGowan continued to correspond with and provide guidance to ELF and ALF, and the Regional Director interpreted it to indicate that McGowan continued to correspond with ELF and ALF in code from prison. SUF 446, 447. McGowan had no chance to challenge these erroneous assertions, as he never learned of them. SUF 451.

At his next program review, McGowan's unit team again recommended him for transfer, and again the CTU recommended otherwise. SUF 456-459. This time, the Regional Director granted McGowan's transfer. SUF 460, 461. McGowan was not told why he was being transferred out of the CMU, nor what he needed to do to avoid being transferred back. SUF 463. As discussed in section B(3), below, McGowan was re-designated to the CMU less than four months later. SUF 462, 464-466, 468-472.

As these three detailed examples show, CMU reviews are a sham. For years, prisoners were baldly lied to, and told they could get out of the CMU after 18 months of clear conduct, when really they could not. Review after three years, or even after 18 months, is insufficient to provide due process. *See McQueen*, 839 F.2d at 1529; *Toussaint*, 801 F.2d at 1101. When the BOP finally did implement a process, those responsible for carrying it out did not understand how it was supposed to work. Given these stark failures, it is unsurprisingly that prisoners still receive *no* information about what they need to do to achieve transfer, *cf. Wilkinson*, 545 U.S. at 225-226, nor do the BOP's decisions admit any discernible pattern. Some prisoners, like Jayyousi and Aref, spend years on end in the CMU with clear conduct, while others, like McGowan, are retained because they have failed to change behavior that they have never been told to change. [38] To this day, CMU prisoners receive *no information* about how long they can

[38] It is possible that release from the CMU is based less on clear conduct, and more on ideological and religious acquiescence. Prisoner E, for example, received three incident reports while in the CMU, one for assault, one for fighting, and one for telephone abuse, yet he was a proved for a transfer out of the CMU. SUF 479, 480. Prisoner J, who was designated to the CMU after he attempted to contact a hit man to murder a witness from inside prison, was redesignated out of the CMU and then sent back in after another communications related infraction. SUF 481, 482, 483. After only eight months back in the CMU, Prisoner J was redesignated again to general population. SUF 484, 486. CTU and Regional staff tasked with providing recommendations to the Regional Director noted that prisoner J "was at odds with the Muslim population" and had "distanced himself from the Muslim community." SUF 484, 485. Similarly, North Central Regional Staff opined that prisoner L required CMU designation due to his offense conduct and "continued militant beliefs." SUF 492. The staff member indicated that prisoner L would have to "change the militant portion of those beliefs" to be eligible for release from the CMU. SUF 493.

expect to spend in the CMU, because the BOP has no general expectation as to the appropriate duration of CMU placement. SUF 275, 276.

3. The Probable Value of Additional Procedures.

Matthews next instructs the court to consider "the probable value, if any, of additional or alternative procedural safeguards." *Wilkinson*, 545 U.S. at 225. At the very least, the kind of *meaningful* notice, hearing, and periodic review associated with administrative determinations would have significant value in reducing the pattern of arbitrary CMU designations and reviews. *Id*. As Plaintiffs' expert Walter Kautzky, a 40-year veteran of the criminal justice and corrections field, has opined, this would bring CMU procedures in line with accepted contemporary correctional practice. SUF 499, 500.

But as Kautzky has also explained, more robust procedures than these would add appropriate value in this context. SUF 503. The informal process described in *Wilkinson* is only appropriate where the decision to segregate a prisoner in a restrictive unit is purely administrative in nature; where segregation is disciplinary or punitive, more process is due. *See Wolff v. McDonnell*, 418 U.S. 539, 557, 563, 566 (1974) (holding that where a prisoner faces punitive sanctions, he is entitled to process that includes: 1) advance written notice of the claimed violation and a written statement as to the evidence relied upon and the reasons for the action taken, and 2) an opportunity for the prisoner to call witnesses and present documentary evidence in his defense); *see also Wilkinson*, 545 U.S. at 228 (citing *Wolff* for the proposition that actions taken in response to a prisoner's specific misbehavior call for "more formal, adversary-type procedures").

In *Brown*, the D.C. Circuit emphasized that *Wolff* only applies where a prisoner's "treatment was disciplinary in nature." 131 F.3d at 170. But this distinction does not simply turn

on the label prison officials place upon the action taken. If "administrative segregation [is] so widely used as a substitute for punishment that it carrie[s] the same stigma as disciplinary segregation, this might indicate that more extensive procedural protections [are] warranted." *Id.* at 171 n.8.

Given that high-level officials such as the Attorney General refer to the CMU as a unit appropriate for terrorists, the stigma associated with CMU designation is self-evident. SUF 18; *Tabbaa*, 509 F.3d at 98. Moreover, it is clear that CMU designation is frequently used as a substitute for disciplinary measures. This is apparent from the very criteria for CMU designation, which include behavior for which a prisoner could be punished through the disciplinary system. SUF 126, 471. CMU designation, however, does not require a proven disciplinary infraction. SUF 126. In other words, CMU designation can substitute for and thus carry the same stigma as disciplinary segregation. *Brown*, 131 F.3d at 171 n.8.

Plaintiffs' experience confirms this. McGowan was redesignated to the CMU in 2012 based on his alleged "attempts to circumvent communication monitoring policies, specifically those governing attorney-client privileged correspondence."[39] SUF 468. Such conduct violates BOP rules. SUF 471. However, he did not receive an incident report, nor any disciplinary process, for this alleged misconduct. SUF 472. Instead, he was simply sent to the CMU. SUF 464. Similarly, Twitty was purportedly designated to the CMU for recruitment and radicalization of other inmates. SUF 214. His transfer form indicated that he was being sent to the CMU pursuant to a "close supervision" transfer. SUF 219. Such a transfer is disciplinary in nature, and BOP policy indicates that it is to be based on a documented act of misconduct. SUF 220. But

[39] Plaintiffs brought these allegations to the Court's attention upon Mr. McGowan's redesignation to the CMU, and fervently refuted them. *See* Dkt. #35.

Twitty never received any inmate discipline for recruitment and radicalization. SUF 221. Instead of such discipline, he was sent to the CMU.

Finally, the CTU recommended against Jayyousi's transfer from the CMU based in part on a 2008 Jumah prayer led by Jayyousi while at the USP Terre Haute. SUF 405. As noted above, Jayyousi received disciplinary charges for this incident, but they were not sustained and the charge was expunged. SUF 404. In all these instances, CMU designation or retention functioned as a "substitute for punishment." *Brown*, 131 F.3d at 171 n.8. Hence, "more extensive procedural protections [than those required for administrative segregation are] warranted." *Id*.

This analysis conforms with Kautzky's conclusion that more than minimal process is needed at the CMU. The loss of contact visitation or telephone access, he explains, is usually associated with disciplinary (rather than administrative) notice documenting the reasons that the prisoner is being subjected to the restrictions, and a hearing at which those reasons can be addressed. SUF 501. Kautzky explains that such procedures would provide a prisoner being considered for CMU designation with a means to demonstrate that such a designation is unnecessary, and to familiarize that inmate with specific behavioral objectives of the CMUs – in other words, explain the requirements for successfully transitioning out of the CMUs. SUF 502. Process of this kind would bring the CMUs into line with sound correctional practice. SUF 503.

The BOP already uses such procedures in comparable settings. Designation to ADX, for example, involves notice of a placement hearing, advising the prisoner of the specific act(s) or other evidence supporting the recommendation that he be transferred. SUF 10. He is provided with a staff member to represent him, has the right to be present throughout the hearing, and may present documentary evidence and witnesses, if security and safety allow. *Id.* The hearing administrator then prepares a written decision, including a summary of the hearing and indicating

the specific reasons for the decision, including a description of the act, or series of acts, or evidence on which it is based. *Id.* The prisoner receives a written decision that includes all this information, unless safety or security would be compromised. *Id.* The prisoner may submit an appeal to that Executive Panel, which reviews the decision itself along with and any information included in the inmate's appeal. *Id.* The panel rules on the decision, and the prisoner has a right to appeal directly to the Office of General Counsel. *Id.* Designation to a SMU involves similar process: pre-hearing notice, a hearing, a written report detailing the evidence used to support the designation, post-hearing notice, and the right to appeal to OGC. SUF 14.

It stands to reason that such procedures would have utility at the CMUs. SUF 38, 39. This too is Kautzky's conclusion. Having considered procedures used in other BOP settings, he concludes that CMU designation procedures should mirror those associated with the BOP's discipline program (requiring notice and a hearing prior to transfer to the CMU), and that reviews should replicate those used at SMUs (defining a level of expected behavior and the projected timeframe for an inmate to achieve redesignation). SUF 499. Process of this kind would bring the CMUs into line with sound correctional practice. SUF 499.

4. Government Interest

The final *Mathews* factor is "the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail." *Wilkinson*, 545 U.S. at 224-25. The undisputed evidence suggests three such interests with respect to CMU restrictions and processes, each of which would actually be *advanced* by additional procedures. First, the Government has an interest in the effective monitoring of communications of high-risk inmates, SUF 494, and in accurately identifying the right inmates to monitor, SUF 489. And, in light of its positive effect on prisoner morale and

successful reentry into society, the Government has an interest in returning inmates to full communication privileges when possible. SUF 19. Proper designation and review procedures at the CMU would further all these interests.

The Government has no interest in refusing additional procedures where they are due. *Mathews*, 424 U.S. at 335. Additional procedures would require some expenditure of staff time and resources. SUF 496. But the BOP already employs such procedures in analogous settings such as ADX and SMU, SUF 10, 14, 37-39, and the fiscal and administrative burdens involved are minimal. SUF 497. Such burdens do not defeat constitutional requirements. *See Frazier v. Manson*, 703 F.2d 30, 35 (2d. Cir. 1983) ("constitutional imperatives … cannot be satisfied by mere conjecture as to administrative inconvenience").

There is no dispute that implementing additional procedures would be consistent with well-tested correctional practices, SUF 503, as well as BOP practices and procedures in settings such as ADX and SMUs, where prisoners who present serious security concerns are housed. SUF 10, 11, 14. Consequently, it is no surprise that BOP officials acknowledge that such procedures could be used for CMU designation without presenting a problem. SUF 498.

CONCLUSION

For the reasons stated above, Plaintiffs have established a violation of the Due Process Clause as a matter of law, and summary judgment should be granted in their favor.

Dated: April 23, 2014

By: /s/ Alexis Agathocleous
ALEXIS AGATHOCLEOUS, *pro hac vice*
RACHEL MEEROPOL, *pro hac vice*
SHAYANA D. KADIDAL
(D.C. Bar No. 454248)
CENTER FOR CONSTITUTIONAL RIGHTS
666 Broadway, 7th Floor
New York, NY 10012

Tel: (212) 614-6478
Fax: (212) 614-6499
aagathocleous@ccrjustice.org

GREGORY SILBERT, *pro hac vice*
JOHN GERBA
LARA VEBLEN , *pro hac vice*
EILEEN CITRON (D.C. Bar No. 995117)
DANIEL J. RIEGEL
ROBYN LEWIS
WEIL, GOTSHAL & MANGES, LLP
767 Fifth Avenue
New York, NY 10153
Tel: (212) 310-1000
Fax: (212) 310-8007
gregory.silbert@weil.com

KENNETH A. KREUSCHER
Portland Law Collective, LLP
1130 SW Morrison Street, Suite 407
Portland, OR 97205
Tel: 503-228-1889
Fax: 503-223-4518
kenneth@portlandlawcollective.com

Attorneys for Plaintiffs