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June 2, 2010

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

Re: BOP Docket No. 1148-P

Dear Ms. Qureshi:

Raul S. Banasco, Steve J. Martin, Ron McAndrew, and the Brennan Center for Justice at New York University School of Law submit these comments in response to the pending Notice of Proposed Rulemaking titled *Communication Management Units*, issued by the Federal Bureau of Prisons (BOP).¹ We believe that modifications to the proposed rule would substantially improve Communication Management Units (CMUs), making them both more effective and less harsh.

IDENTITY AND INTEREST OF THE COMMENTERS

The Brennan Center for Justice at New York University School of Law is a non-partisan public policy and law institute that focuses on the fundamental issues of democracy and justice. Our work ranges from voting rights to campaign finance reform, from racial justice in criminal law to presidential power in the fight against terrorism. A singular institution – part think tank, part public interest law firm, part advocacy group – the Brennan Center combines scholarship, legislative and legal advocacy, and communications to win meaningful, measurable change in the public sector. The Brennan Center advocates for national security policies that respect the rule of law, constitutional and human rights, and fundamental freedoms.

Raul Banasco began his career in the juvenile justice/corrections field in 1986 with the New York State Juvenile Justice Department. In 1988, he joined the Florida State Department of Corrections (FDOC) as a Correctional Officer at the Central Florida Reception Center. During his 19 years with FDOC, he served as a Correctional Officer, Classification Officer, Probation Officer, Probation Supervisor,

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

Classification Supervisor, Assistant Warden of Operations and Programs, Warden and Director of Staff Development of over 28,000 employees throughout the State of Florida both for Institutions and Probation & Parole services. In October 2006, he was appointed by Orlando's Mayor Richard Crotty to be the Major at the Orange County Corrections Department in Orlando, Florida. As the Major, he was responsible for daily operations of 4,200 inmates and 600 certified and civilian staff. In September 2008, he was appointed to the position of Deputy Chief of the Osceola County Corrections Department.

Steve J. Martin is a career corrections professional currently engaged in private practice as a corrections consultant. He is actively involved in a variety of roles as a consulting expert, federal court monitor and court appointed expert in 15 states, Puerto Rico and the Virgin Islands. He served as a corrections expert for the U.S. Department of Justice, Civil Rights Division, for approximately 15 years. He has worked as a consultant in more than forty states and has visited or inspected more than 700 confinement facilities in the U.S., Guam, Saipan, Jamaica, Puerto Rico, and the Virgin Islands. He has served or currently serves as a federal court monitor in three prison systems and four large metropolitan jail systems. During more than thirty-seven years in the criminal justice field, he has worked as a correctional officer, probation and parole officer and prosecutor. He is the former General Counsel/Chief of Staff of the Texas prison system and has served gubernatorial appointments in Texas on both a sentencing commission and a council for mentally impaired offenders. He has appeared/testified before a large variety of oversight entities including the U.S. Congress. He has extensive experience in the development of correctional standards, policies, procedures and guidelines for confinement operations across the United States.

Ron McAndrew began his more than 20-year career with the Florida Department of Corrections in 1979 as a Correctional Officer at Dade Correctional Institution. From 1992 to 1996, he served as Warden of Gulf Correctional Institution, a facility consisting of five units and housing 3300 inmates. From 1996 to 1998, he served as Warden of Florida State Prison, supervising all aspects of the facility, including the execution of inmates on Florida's death row, as ordered by the Governor. From 1998 to 2001, he served as Warden of Central Florida Reception Center, overseeing a population of approximately 3000 inmates. Upon retirement from the Florida Department of Corrections, Mr. McAndrew served as Interim Director of Corrections for Orange County, Florida.

INTRODUCTION AND SUMMARY

Corrections officials can – and should – limit inmates’ communications as necessary to preserve order in prisons, to protect the safety of inmates and staff, and to block communications that could facilitate crime. Overly restrictive limitations, however, are counterproductive. As detailed below, they make prisons more dangerous, increase recidivism, and harm inmates and their families.

We believe that the proposed rule would impose overly harsh restrictions on CMU inmates, and we recommend several revisions that would improve the rule. Our recommendations flow from two basic principles. First, prisons must always preserve security, but inmates must be accorded meaningful opportunities for contact with the outside world, consistent with measures sufficient to maintain security. Second, procedures should ensure that BOP sends inmates to a CMU only when their communications create genuine risks.

In keeping with these principles, we recommend the following revisions to the proposed rule, each discussed below in greater detail:

- Refine the standard for CMU designation.
- Increase phone, visitation, and correspondence opportunities for CMU inmates.
- Authorize contact visits between CMU inmates and family members, consistent with BOP policies that apply to most inmates, unless specific evidence shows a risk that inmates will abuse contact visits.
- Allow inmates to challenge initial CMU designation through meaningful hearings.
- Establish clear mechanisms for challenges to ongoing CMU placement.

BOP can implement such changes without compromising the stated purpose of the proposed rule which, according to the Notice of Proposed Rulemaking (NPRM), is to facilitate total monitoring of certain inmates’ communications.² BOP could make the recommended changes while still operating the CMUs to monitor all communications of designated inmates.³

² 75 Fed. Reg. at 17325.

³ The proposed rule would not entail monitoring or limitation of attorney-client communications. Proposed 28 C.F.R. §§ 540.203(c); 540.204(b); 540.205(b).

THE EFFECT OF EXCESSIVE RESTRICTIONS ON COMMUNICATION

BOP should avoid overbroad restrictions on communications between inmates and family members. While imprisonment does not deprive a prisoner of all constitutional entitlements, it permits greater restriction of inmates' constitutional rights than the rights of people who are not incarcerated. Consequently, the dangers that particular inmates pose sometimes require corrections officials to restrict those inmates' communications as necessary to maintain safety and order. At the same time, overly harsh restrictions on communications can undermine prison order, cause higher rates of recidivism, and exact a high cost on inmates and their families.

Cutting off communication between inmates and their families makes our streets and our prisons less safe. Time and again, empirical research has shown that inmates who maintain strong connections with their families are less likely to make criminal activity a way of life. "Inmates who maintain family ties are less likely to accept norms and behavior patterns of hardened criminals and become part of a prison subculture."⁴ As a result, preserving lines of communication between inmates and family promotes order and security in prison. The positive effects of family connections also continue after release from prison: "With remarkable consistency, studies have shown that family contact during incarceration is associated with lower recidivism rates."⁵

Severe restrictions on communication also take a harsh toll on inmates and their families. More than half of inmates in American prisons have children, and 80% of those parents stay in touch with their children while incarcerated.⁶ Blocking communication increases the pain that spouses, children, and parents feel when they lose a member of their family to the penal system. Letters, visits, and telephone calls create a lifeline between inmates and their families.

⁴ Shirley R. Klein et al., *Inmate Family Functioning*, 46 INT'L J. OF OFFENDER THERAPY AND COMP. CRIMINOLOGY 95, 99 (2002) (citations omitted).

⁵ Nancy G. La Vinge, et al., *Examining the Effect of Incarceration and In-Prison Family Contact on Prisoners' Family Relationships*, 21 J. OF CONTEMP. CRIM. JUST. 314, 316 (2005) (citations omitted); *see also* Rebecca L. Naser & Christy A. Visher, *Family Members Experiences with Incarceration and Reentry*, 7 W. CRIMINOLOGY REV. 20, 21 (2006) ("[A] remarkably consistent association has been found between family contact during incarceration and lower recidivism rates.") (citations omitted).

⁶ Nasser & Visher, *supra* n.5 at 20-21.

RECOMMENDATIONS

Recommendation #1

Refine the Standard for CMU Designation

In recognition of the extreme isolation that CMUs entail, the standard for designation must limit the CMU population to prisoners whose communications pose a genuine threat. Such a standard should reflect the basic purpose of CMUs – monitoring the communications of prisoners likely to use communications in furtherance of serious conduct that is illegal or prohibited. As written, the criteria in the proposed rule – any one of which would permit placement in a CMU – are overbroad.

We propose the following standard in place of the current proposed section on designation criteria:

Sec. 540.201 Designation criteria.

(a) An inmate may be designated to a Communication Management Unit if the Bureau establishes, by a preponderance of the evidence:

(1) a substantial likelihood that the inmate will use communications with non-inmates in furtherance of serious illegal conduct; or

(2) a recurring pattern of behavior in which the inmate violates rules governing inmate communications.

(b) The Bureau may continue an inmate's placement in a Communication Management Unit when:

(1) in the case of an inmate designated to a Communication Management Unit under Section (a)(1), there remains a substantial likelihood that the inmate will use communications with non-inmates in furtherance of serious illegal conduct; or

(2) in the case of an inmate designated to a Communication Management Unit under Section (a)(2), a substantial likelihood exists that the inmate will continue to violate the rules regarding inmate communications.

As written, each of the criteria proposed by the Bureau is overbroad. Proposed Section 540.201(a) would allow CMU placement based on an offense or offense conduct that “included association, communication, or involvement, related to international or domestic terrorism.”⁷ The failure to define “related to international or domestic terrorism,” combined with the fact that inmates could face CMU placement

⁷ Proposed § 540.201(a).

based on offenses or offense conduct that involve mere “association” or “communication” renders the subsection susceptible to overbroad interpretation. Consider, for example, an individual who stole from a convenience store with an accomplice who attended a mosque that was also frequented by suspected terrorists. Under the proposed standard, mere “association” or “communication” with the accomplice arguably could suffice for CMU placement.

Proposed Section 540.201(b) would permit CMU placement where a prisoner’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 communication with persons in the community.”⁸ The provision defines neither how great the “propensity” must be nor the quantum of proof necessary to “indicate[]” such a propensity. Moreover, the offense of conviction or offense conduct alone may “indicate[] ... [t]he propensity,” meaning that prisoners convicted 30 years ago – and never charged with disciplinary violations while in prison – could land in a CMU now and remain there indefinitely based on actions they took decades in the past.

Proposed Section 540.201(c) would permit BOP to place in a CMU any prisoner who “has attempted, or indicates a propensity, to contact victims of the inmate’s current offense(s) of conviction.”⁹ The “indicates a propensity” language suffers from the same infirmity as the previous subsection. The “has attempted” language suggests that a prisoner may be placed in a CMU indefinitely for a single attempted communication. Furthermore, the provision fails to specify whether the contemplated contact must be prohibited, or even unwanted.

Proposed Section 540.201(d) would empower BOP to send prisoners to the CMU if they “committed prohibited activity related to misuse/abuse of approved communication methods while incarcerated.”¹⁰ The standard, which does not specify whether the “misuse/abuse” must be serious or recurring, would sweep in a prisoner who commits a trifling violation. Such placement, moreover, could be indefinite. The standard does not require that the Bureau justify ongoing placement by showing a continuing risk of abuse.

Finally, Proposed Section 540.201(e), a catch-all provision, would enable BOP to place prisoners in a CMU where “[t]here is any other evidence of a potential threat to the safe, secure, and orderly operation of prison facilities, or protection of the public, as a result of the inmate’s communication with persons in the community.”¹¹ This remarkably low bar – “any ... evidence” – would permit CMU placement even when the evidence lacks credibility or is contradicted by more

⁸ Proposed § 540.201(b).

⁹ Proposed § 540.201(c).

¹⁰ Proposed § 540.201(d).

¹¹ Proposed § 540.201(e).

compelling evidence. Moreover, the vagueness of the contemplated harm would place few meaningful limits on prison officials' discretion to deem an inmate a "threat." For example, an inmate who had an unusually large number of visitors could be deemed a threat to the "orderly operation of prison facilities" due to the minor disruption caused by the visits.

These criteria would empower BOP to send prisoners to a CMU without sufficient justification. BOP should revise the proposed rule to eschew vague and minimal standards, to ensure that placement in a CMU occurs only on the basis of serious risks, and to allow for transfer out of a CMU if such risks dissipate over time.

Recommendation # 2: Increase Phone, Visitation, and Correspondence Opportunities for CMU Inmates

There is some ambiguity as to whether the restrictions in the proposed rule set a minimum standard for communications by CMU prisoners or establish a norm that will apply to all CMU prisoners, except those subject to discipline¹² – but to the extent the limitations are meant to establish a norm that will apply to ordinary CMU prisoners, they are too restrictive. The proposed rule would allow inmates to make a single fifteen-minute telephone call and to receive a single hour-long visit per month.¹³ CMU inmates would be limited to one double-sided three-page letter per week.¹⁴ These limitations would all but eliminate CMU inmates' contact with the outside world, leading to the adverse effects on inmates, families, and prison order described above.

The restrictions depart dramatically from those that apply to other BOP prisoners. BOP generally allows prisoners at least 300 minutes of telephone calls per

¹² The NPRM characterizes the limitations on communication in the proposed rule as a minimum standard, but then throws that description into question by stating that BOP can depart *below* the purported floors. Specifically, the NPRM describes the regulations as "a floor of limited communication, beneath which the Bureau cannot restrict *unless precipitated by the inmate's violation of imposed limitations.*" 75 Fed. Reg. at 17325 (emphasis added). The NPRM also states that CMUs may have cells for administrative and disciplinary segregation, Proposed 28 C.F.R. § 540.200(b), which presumably also entail restrictions beneath the "floors."

The so-called "floors," then, may actually describe the level of communications that BOP will authorize for most CMU inmates. After all, inmates who have neither broken rules nor been placed in administrative or disciplinary segregation are *ordinary* CMU inmates. As the rule is written, the restrictions could actually operate as ceilings, applicable to all or most CMU inmates, except those subject to disciplinary measures resulting in even greater restrictions.

¹³ Proposed 28 C.F.R. §§ 540.204(a) & 540.205(a).

¹⁴ Proposed 28 C.F.R. § 540.203(a).

month.¹⁵ General population inmates at Federal Correctional Institution (FCI) Terre Haute (which also includes one of the CMUs) are allowed up to seven visits per month.¹⁶ BOP does not ordinarily limit the amount of correspondence that general population inmates may send and receive.¹⁷

The restrictions will also leave CMU prisoners with almost nothing to lose. The threat of losing communication privileges helps incentivize good behavior by inmates. If the norms are set at the proposed levels, correctional officers will have virtually no options for punishment, other than complete elimination of an inmate's contact with the outside world.

Although the current restrictions that apply to most CMU prisoners (described in Institution Supplements issued for the two facilities that contain CMUs) allow more communication than the restrictions contemplated by the proposed rule, the current limitations also fall well below the standards for most prisoners and do not allow sufficient communication. At present, BOP apparently limits CMU inmates to two fifteen-minute telephone calls per month and four two-hour visits a month. While it is possible that communication at the general-population level may be impracticable for CMU inmates, the divergence between these allowances and those contemplated in the proposed rule is simply too great.

The primary purpose of CMUs is to monitor – not limit – prisoners' communications. BOP should increase CMU prisoners' opportunities for communications to the greatest extent practicable. In no way would increased communications conflict with the goal of the proposed rule – achieving “total monitoring” of the communications of designated inmates.¹⁸ Monitoring a greater number of communications could require more staff time and require BOP to hire additional officers, but the investment would be well worth it, given that preventing communication increases recidivism and prison disorder, while harming inmates and their families.

Recommendation # 3: **Authorize Contact Visits Between CMU Inmates and Family Members, Consistent with BOP Policies that Apply to Most Inmates, Unless Specific Evidence Shows A Risk that Inmates Will Abuse Contact Visits**

The proposed rule would permit only non-contact visits – visits that occur across telephones and through a sheet of glass.¹⁹ This provision would prevent

¹⁵ BOP Program Statement 5264.08, at 9.

¹⁶ Institution Supplement THX-5267.08C § V.E.

¹⁷ *See generally* BOP Program Statement 5265.11.

¹⁸ 75 Fed. Reg. at 17328.

¹⁹ Proposed § 540.205(a).

inmates from hugging, kissing, or even shaking hands with family members and friends during their entire period of incarceration in a CMU. The final rule should authorize contact visits, in keeping with general BOP policy, except when specific evidence shows a risk that inmates will abuse such visits. Under BOP policy, most inmates are allowed to sit in the same room as their visitors, and “[i]n most cases, handshakes, hugs, and kisses (in good taste) are allowed at the beginning and end of a visit.”²⁰

We acknowledge the force of arguments that *unmonitored* contact visits could jeopardize security by allowing weapons, narcotics, and other dangerous contraband to enter prisons. Monitored contact visits, however, do not pose the same risk and should be permitted, except for the most dangerous inmates, and the proposed rule already requires monitoring of all visits.²¹ While the appropriateness of strip searches after contact visits is beyond the scope of these comments, both institutions that have CMUs routinely conduct strip searches of general population inmates after contact visits.²² Except in the case of the most dangerous inmates, monitored contact visits followed by strip searches all but eliminate the risk posed by contact visits.

Recommendation # 4: Allow Inmates To Challenge Initial CMU Designation Through Meaningful Hearings

The proposed rule would deny inmates a meaningful opportunity to challenge CMU designation. In modifying the rule, BOP should look to one of its own models – the regulations governing placement in control units, which house inmates thought to pose a threat to prison order.²³ Current BOP regulations grant meaningful procedures to inmates placed in control units, and the Bureau should extend similar processes to CMU prisoners.

Under BOP regulations, an inmate has the right to the following procedures before placement in a control unit:

²⁰ See Visiting Room Procedures: General Information, available at www.bop.gov/in-mate_locator/procedures.jsp.

²¹ Proposed 28 C.F.R. § 540.205(a)(1).

²² Institution Supplement THX-5267.08C, § VI.F (“All inmates at the USP and FCI will be strip searched before going into the Visiting Room and when coming out.”); Institution Supplement MAR-5267.08C, § 18B (“USP inmates will be ... visually search[ed] when exiting the visiting room.”); 28 C.F.R. 552.11(c) (defining a “visual search” as “a visual inspection of all body surfaces and body cavities”). And the Supreme Court has upheld BOP’s policy of strip searching inmates, without requiring any level of suspicion, after such visits. *Bell v. Wolfish*, 441 U.S. 520, 558-560 (1979).

²³ 28 C.F.R. § 541.40(a).

- A live hearing.²⁴
- Twenty-four hour advance notice of the charges and the acts or evidence in issue.²⁵
- Representation by a staff member at the hearing. The staff member has the right to interview witnesses prior to the hearing.²⁶
- The right to call witnesses and present documentary evidence at the hearing.²⁷
- A written decision issued by the hearing administrator.²⁸
- The right to appeal the hearing administrator's decision to an executive panel.²⁹

These procedures for control units stand in stark contrast to the limited process contemplated before CMU placement. Under the proposed rule, the Assistant Director for the Correctional Programs Division approves CMU designations without giving inmates any input into the decision.³⁰ BOP then transports the inmate hundreds if not thousands of miles, prepares a CMU cell, and begins integrating the inmate into the new environment – all before giving the inmate the chance to challenge CMU designation.³¹ In practice, allowing challenges to occur only after a CMU placement will make CMU designation a *fait accompli*, creating strong incentives not to send inmates back to the less restrictive facilities from which they came.

Even after arrival, an inmate can challenge CMU placement only through BOP's administrative remedy program,³² a purely written process that bears no resemblance to the control unit procedures. An inmate has no right to a live hearing, no right to call witnesses, and no right to representation by a staff member. Rather,

²⁴ 28 C.F.R. § 541.43(b).

²⁵ 28 C.F.R. § 541.43(b).

²⁶ 28 C.F.R. § 541.43(b)(2).

²⁷ 28 C.F.R. § 541.43(b)(4).

²⁸ 28 C.F.R. § 541.44(a).

²⁹ 28 C.F.R. § 541.45.

³⁰ Proposed 28 C.F.R. § 541.202(b).

³¹ Proposed 28 C.F.R. § 540.202(c) (“*Upon arrival at the designated CMU, inmates will receive written notice from the facility’s Warden...*”) (emphasis added).

³² Proposed 28 C.F.R. § 540.202(c)(6).

the inmate is limited to completing a grievance form challenging CMU placement, and further forms necessary to appeal any unfavorable initial decision to regional directors and, ultimately, BOP's Office of General Counsel.³³ To our knowledge, these bare bones procedures (which BOP began applying to CMUs several years before opening the current notice and comment process) have never resulted in a reversal of CMU placement.

Nor is that surprising. Not only does review occur after inmates arrive at the CMUs, but most of the decisionmakers in the administrative remedy process are subordinate to the Assistant Director for the Correctional Programs Division, who approves the designation in the first place. Surely wardens and regional directors will not, in practice, overrule a decision by one of BOP's highest-ranking officials. For CMU prisoners, this renders the first two steps of the administrative remedy process meaningless. Nor is it clear that even the final authority in the administrative remedy process – BOP's General Counsel – has the power to overrule the Assistant Director.

The thin procedures contemplated by the proposed rule will land inmates in CMUs whose presence there is unjustified, and leave them with no meaningful way to challenge their designation. The lack of procedures may also reinforce in inmates a sense that they are being treated unfairly, making such inmates more difficult for correctional officers to manage.

BOP should revise the rule to allow CMU placement only after an inmate has a live hearing before an official with clear decisionmaking authority. We recommend that the Bureau, in revising the rule, look to its own procedures for control unit placement.

Recommendation # 5: Establish Clear Mechanisms for Challenges to Ongoing CMU Placement

BOP's obligation to avoid housing inmates in CMUs without sound reason continues after the initial placement. An inmate may reach a point where a less restrictive unit becomes appropriate, and BOP must ensure that mechanisms for ongoing review allow transfer to occur at that stage. Creating a real possibility for transfer to a less restrictive unit also gives inmates an incentive to improve their behavior.

The proposed rule, however, relies on an informal process that fails to provide for clear transfer authority. In refining the rule, BOP should allow CMU inmates to challenge ongoing CMU designation by periodically making their case to officials with the power to order a transfer.

Under the proposed rule, review must occur "regularly" and follow the "Bureau's policy on Classification and Program Review of Inmates," which refers to

³³ 28 C.F.R. §§ 542.14 & 542.15.

BOP Program Statement 5322.12. Not only does the proposed rule fail to define the term “regularly,” but it involves only officials at the institution level, such as the unit manager, case manager, and correctional counselor, in the classification review process.³⁴ The proposed rule fails to specify when – if ever – such officials can override the original placement decision by the Assistant Director for the Correctional Programs Division. In practice, we suspect that institution-level officials generally will not attempt to reverse decisions by the Assistant Director.

The final rule should contain clear mechanisms for ongoing review of CMU placement and provide unambiguous authority to transfer inmates out of CMUs. Consistent with the control unit regulations, the final rule should require review every 30 days.³⁵

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

Sincerely,



David M. Shapiro
Counsel, Liberty and National Security Project

Raul J. Banasco

Steve J. Martin

Ron McAndrew

³⁴ BOP Program Statement 5322.12.

³⁵ 28 C.F.R. § 541.49(a).