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I. INTRODUCTION

The decade since 9/11 witnessed a revolution in federal incarceration, ushering in major changes within the Federal Bureau of Prisons ("BOP" or the "Bureau"). Surprisingly, this transformation received little attention in the academic literature.[1] The limited discussion of changes in domestic incarceration becomes especially striking when compared to the extensive scholarship addressing detention beyond, or at the periphery of, American territory, in locations such as Abu Ghraib, CIA "black sites," Bagram Air Base, and Guantanamo Bay.[2]

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* Clinical Assistant Professor, Northwestern University School of Law. While employed by the American Civil Liberties Union, the author was lead counsel in *Benkahla v. Federal Bureau of Prisons*, No. 2:09-CV-00025 (S.D. Ind. Jan. 21, 2009), which challenged the creation of Communication Management Units. The author is grateful to Emily Berman, David Fathi, Jacob Fiddelman, and Jennifer Soble for their constructive suggestions.

1. *See infra* note 7 and accompanying text.

2. *See generally* Jonathan Hafetz, Habeas Corpus after 9/11: Confronting America's Global Detention System (2011); Benjamin Wittes et al., The Brookings Institution, The Emerging Law of Detention: The Guantánamo Habeas Cases as Lawmaking (Jan. 22, 2010), *available at* http://www.brookings.edu/~/media/Files/rc/papers/2010/0122_guantanamo_wittes_chesney/0122_guantanamo_wittes_chesney.pdf; Daniel J. Meltzer, *Habeas Corpus, Suspension, and Guantanamo: The Boumediene Decision*, 2008 Sup. Ct. Rev. 1 (2008); Robert Chesney & Jack Goldsmith, *Terrorism and the Convergence of Criminal Military Detention Models*, 60 Stan. L. Rev. 1079 (2008); Robert Chesney, *Iraq and the Military Detention Debate: Firsthand Perspectives from the Other War, 2003–2010*, 51 Va. J. Int'l L. 549 (2011); Matthew Waxman, *The Law of Armed Conflict and Detention Operations in Afghanistan*, *in* The War in Afghanistan: A Legal Analysis 343 (Michael Schmitt ed., 2009). It appears that not only domestic prison conditions, but also domestic investigations and federal prosecutions in terrorism-related cases, have received comparatively little attention. Criminal proceedings in such cases have been less closely analyzed

The War on Terror, however, affects domestic incarceration as surely as it influences detention abroad. For example, regulations promulgated shortly after 9/11 permit government officials to monitor communications between lawyers and federal prisoners purportedly connected to terrorist groups, a substantial limitation of the attorney-client privilege.[3] In 2005, the Department of Justice established the Correctional Intelligence Initiative,[4] a program whose functions include "[d]etecting, deterring, and disrupting efforts by terrorist, extremist, or radical groups to radicalize or recruit in federal, state, local, tribal, and privatized prisons."[5] In 2006, concerned with potential radicalization and terrorist recruitment in prison, BOP removed a host of religious texts from the shelves of prison libraries, generating an exclusive list of permissible books.[6] These

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than "[t]he rights violations of people detained at Guantanamo, in naval brigs, or subjected to rendition and torture in CIA black sites." Laura Rovner & Jeanne Theoharis, *Preferring Order to Justice*, 61 Am. U. L. Rev. 1331, 1333 (2012).

3. National Security: Prevention of Acts of Violence and Terrorism, 66 Fed. Reg. 55,062, 55,066 (Oct. 31, 2001) (interim rule that attorney-client communications of prisoners may be monitored where "[r]easonable suspicion exists to believe that a particular inmate may use communications with attorneys or their agents to further or facilitate acts of terrorism"); National Security: Prevention of Acts of Violence and Terrorism, 72 Fed. Reg. 16,271, 16,271 (Apr. 4, 2007) (codified at 28 C.F.R. pt. 501.3) (finalizing interim rule).

4. Letter from Joseph Billy, Acting Director, Counterterrorism Division, Fed. Bureau of Investigation, to Paul A. Price, Assistant Inspector General, U.S. Dep't of Justice (Sept. 22, 2006) (on file with author); Office of Inspector General, U.S. Dep't of Justice, A Review of the Federal Bureau of Prisons' Selection of Muslim Religious Services Providers 27–28 (2004) [hereinafter Muslim Religious Services Providers].

5. *Prison Radicalization: Are Terrorist Cells Forming in U.S. Cell Blocks?: Hearing Before the Senate Committee on Homeland Security and Governmental Affairs and Related Agencies*, 109th Cong. 25 (2006) (statement of Donald Van Duyn, Deputy Assistant Director, Counterterrorism Division, Fed. Bureau of Investigation).

6. Laurie Goodstein, *Prisons Purging Books on Faith from Libraries*, N.Y. Times, Sept. 10, 2007, http://www.nytimes.com/2007/09/10/us/10prison.html. The removal of certain publication was driven by concerns about religious radicalization and a fear that prisons could become "[r]ecruiting grounds for militant Islamic and other religious groups." *Id*. Congress later enacted a federal statute to ban this program. Second Chance Act of 2007, Pub. L. No. 110-199, 122 Stat. 683, Sec. 214(a) (codified at 42 U.S.C. 17534(a) (2008)) ("Not later than 30 days after the date of enactment of this Act, the Director of the Bureau of Prisons shall discontinue the Standardized Chapel Library project, or any other project by whatever designation that seeks to compile, list, or otherwise restrict prisoners' access to reading materials, audiotapes, videotapes, or any other materials made available in a chapel library . . . .").

transformations in federal incarceration rarely have been examined,[7] but they implicate rights ranging from the effective assistance of counsel[8] to the free exercise of religion.[9]

This Article addresses a component of BOP's response to 9/11 that has gone virtually unaddressed in the scholarly literature: the creation of Communication Management Units ("CMUs").[10] Prisoners incarcerated in CMUs face sweeping communication restrictions that all but eliminate contact with the outside world. In 2006, BOP issued a Notice of Proposed Rulemaking entitled "Limited Communication

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7. The Correctional Intelligence Initiative has never been mentioned in a law review article. The Standardized Chapel Library Project, see *supra* note 6 and accompanying text, has been discussed in two student notes and one student comment. Andrew Lincoln, Note, *Purging Religion from Prison: The Constitutionality of the Standardized Chapel Library Project*, 6 First Amend L. Rev. 312 (2008); Joanna E. Varner, Comment, *Battle of the Lists: The Use of Approved Versus Restricted Religious Book Lists in Prison*, 40 McGeorge L. Rev. 803 (2009); Aamir Wyne, Note, *Dear God, Give Me Back My Books: The Standardized Chapel Library Project and Free Exercise Rights*, 11 U. Pa. J. Const. L. 1135 (2009). Post-9/11 limitations on the attorney-client privilege in federal prison have received slightly greater attention. *See, e.g.*, Chris Ford, *Fear of a Blackened Planet: Pressured by the War on Terror, Courts Ignore the Erosion of the Attorney-Client Privilege and Effective Assistance of Counsel in 28 C.F.R. 501.3(D) Cases*, 12 Wash. & Lee J. Civil Rts. & Soc. Just. 51, 95 (2006); Marjorie Cohn, *The Evisceration of the Attorney-Client Privilege in the Wake of September 11, 2001*, 71 Fordham L. Rev. 1233, 1251 (2003); *see generally* Katherine Ruzenski, *Balancing Fundamental Civil Liberties and the Need for Increased Homeland Security: The Attorney-Client Privilege After September 11th*, 19 St. John's J. Legal Comment. 467 (2005); Akhil Reed Amar & Vikram David Amar, *The New Regulation Allowing Federal Agents To Monitor Attorney-Client Conversations: Why It Threatens Fourth Amendment Values*, 34 Conn. L. Rev. 1163 (2002).

8. *See* Ford, *supra* note 7, at 95 (arguing that monitoring the attorney-client communications of suspected terrorists pursuant to Special Administrative Measures trenches on the Sixth Amendment right to effective assistance of counsel).

9. *See* Lincoln, *supra* note 7, at 316, 339 (arguing that the Standardized Chapel Library Project violates the Free Exercise Clause).

10. Communication Management Units—the subject of this Article—have been examined closely only once in the scholarly literature, in a recent student note. Luke A. Beata, Note, *Stateside Guantanamo: Breaking the Silence*, 62 Syracuse L. Rev. 281 (2012) (arguing that the operation of CMUs violates due process requirements and the Administrative Procedure Act, and suggesting policy improvements). The analysis in this Article is consistent with that of the note, but goes on to consider in depth additional statutory and constitutional objections to CMUs as well as additional policy considerations and recommendations. CMUs are also discussed briefly in Sahar F. Aziz, *Caught in a Preventive Dragnet: Selective Counterterrorism in a Post-9/11 America*, 47 Gonz. L. Rev. 429, 453–56 (2012).

for Terrorist Inmates" ("2006 NPRM"), setting forth a proposed rule that would empower the Bureau to severely restrict the communications of prisoners "who have an identifiable link to terrorist-related activity."[11] The Bureau, however, never promulgated a final rule based on the 2006 NPRM, essentially abandoning the proposed rulemaking. Nonetheless, seven months later, the Bureau converted the former federal death row in Terre Haute, Indiana—the unit that housed Oklahoma City bomber Timothy McVeigh until his execution—into the first CMU.[12] The following month, seventeen prisoners, all but two of them Muslims, arrived at the unit.[13] As a notice issued to CMU inmates would later state, reasons for placement in a CMU include "association, communication, or involvement related to international or domestic terrorism."[14]

The Terre Haute CMU was created through an unusual procedure. The Bureau captioned the document that established the new unit and set forth the governing rules as an "Institution Supplement." This is a policy document that the Bureau uses to establish rules that apply to a single facility, and it is issued without notice-and-comment rulemaking.[15] The Institution Supplement provided that CMU prisoners would be cordoned off from other inmates and face sweeping restrictions on communications with the outside world.[16]

Less than two years later, an internal BOP memo stated that "the need for CMU bed space ha[d] exceeded the capacity" of the Terre Haute CMU.[17] Through the issuance of a second Institution

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11. Limited Communication for Terrorist Inmates, 71 Fed. Reg. 16,520, 16,523 (proposed Apr. 3, 2006).

12. Christopher S. Stewart, *Little Gitmo*, N.Y. Mag., Jul. 10, 2011, http://nymag.com/news/features/yassin-aref-2011-7/.

13. Carrie Johnson & Margot Williams, *Guantanamo North: Inside Secretive U.S. Prisons*, Nat'l Pub. Radio, Mar. 3, 2011, http://www.npr.org/2011/03/03/134168714/guantanamo-north-inside-u-s-secretive-prisons.

14. Fed. Bureau of Prisons, U.S. Dep't of Justice, Notice to Inmates: Review of Inmates for Continued Communication Management Unit (CMU) Designation 1 (on file with author), *available as* Exhibit F to Complaint, Aref v. Holder, 774 F. Supp. 2d 147 (D.D.C. 2011) (No. 10-0539) [hereinafter Review of Inmates].

15. Fed. Bureau of Prisons, Institution Supplement THX-5270.07A, at 1 (Nov. 30, 2006) (on file with author), *available as* Exhibit A to Complaint, Aref v. Holder, 774 F. Supp. 2d 147 (D.D.C. 2011) (No. 10-0539) [hereinafter Terre Haute CMU Institution Supplement].

16. Terre Haute CMU Institution Supplement, *supra* note 15, at 3.

17. Memorandum from Joyce K. Conley, Assistant Director, Fed. Bur. of Prisons, to All Regional Directors 1 (Mar. 5, 2011) (on file with author), *available*

Supplement, virtually identical to the one used in Terre Haute, the Bureau then created the second CMU at the United States Penitentiary in Marion, Illinois.[18] In 2010, and following the filing of two lawsuits challenging the establishment of CMUs on administrative law grounds, BOP issued a second notice of proposed rulemaking, this time entitled "Communication Management Units" ("2010 NPRM").[19] The Bureau, however, has yet to promulgate a final regulation, and the two CMUs continue to be governed only by the Institution Supplements.

CMU prisoners face broad restrictions on their communications with the outside world. These inmates may make only two fifteen-minute telephone calls per week and may only receive two visits per month—far less contact with the outside world than BOP permits for virtually all other federal prisoners.[20] The Bureau forbids all physical contact (including hugs, kisses, and handshakes) between CMU prisoners and their visitors, completely isolates CMU prisoners from non-CMU prisoners, and uses special equipment to monitor and record all conversations among CMU prisoners.[21] The pending regulation proposed in the 2010 NPRM would limit communication even further.[22]

The Bureau's operation of CMUs has been the subject of three major lawsuits. The first of these, *Benkahla v. Federal Bureau of Prisons*, which was litigated by counsel at the American Civil Liberties Union ("ACLU"), challenged the creation of CMUs on administrative law grounds, asserting that BOP failed to engage in mandatory notice-and-comment procedures prior to establishing the new units.[23] The ACLU of Indiana filed a second case, *Lindh v. Warden*, which asserted that CMUs violate the Religious Freedom

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as Exhibit G to Amended Complaint, Benkahla v. Fed. Bureau of Prisons, No. 2:09-CV-00025 (S.D. Ind. July 27, 2009).

18. U.S. Dep't of Justice, Fed. Bur. of Prisons, Institution Supplement MAR-5270.07A, at 1 (Nov. 13, 2008) [hereinafter Second Marion CMU Institution Supplement].

19. Communication Management Units, 75 Fed. Reg. 17,324 (proposed Apr. 6, 2010) (to be codified at 28 C.F.R. pt. 540); Complaint at 65, Aref v. Holder, 774 F. Supp. 2d 147 (D.D.C. 2011) (No. 10-0539) [hereinafter *Aref* Complaint]; Amended Complaint at 11, Benkahla v. Fed. Bureau of Prisons, No. 2:09-CV-00025 (S.D. Ind. July 27, 2009) [hereinafter *Benkahla* Complaint].

20. *See infra* notes 73–92 and accompanying text.

21. *See infra* notes 78–79, 98–103, and accompanying text.

22. Communication Management Units, 75 Fed. Reg. at 17,326–27.

23. *Benkahla* Complaint, *supra* note 19, at 1.

Restoration Act ("RFRA")[24] by denying prisoners adequate opportunities for congregate prayer.[25] The Center for Constitutional Rights filed a third case, *Aref v. Holder*, challenging the operation of CMUs on administrative law, due process, equal protection, Eighth Amendment, and First Amendment grounds.[26] The *Benkhala* case was voluntarily dismissed after BOP transferred the plaintiff to a different unit; *Lindh* and *Aref* remain pending as of this writing.

This Article asserts that BOP's operation of CMUs is greatly flawed, both legally and from the perspective of sound policy. CMUs were created without public notice-and-comment; the Bureau dispatches prisoners to these units without adequate procedures and on the basis of vague and overbroad criteria; unnecessarily severe restrictions all but eliminate the communications of CMU prisoners with the outside world; and limitations on congregate prayer in CMUs severely inhibit religious exercise.

Part II of this Article examines the government's rationales for establishing CMUs. Part III describes conditions in CMUs and the criteria and procedures governing the assignment of prisoners to these units. Part IV argues that CMUs rest on questionable legal footing under several federal statutes and constitutional provisions. Part V examines CMUs from a policy standpoint, proposing improvements that would clarify the criteria for placing prisoners in CMUs and increase CMU prisoners' contact with the outside world, all without jeopardizing prison security or compromising the principal functions of these units.

II. THE GOVERNMENT'S RATIONALES FOR CREATING COMMUNICATION MANAGEMENT UNITS

The Bureau of Prisons created CMUs for five principal reasons. First, the Bureau believes that communications between certain prisoners and the outside world require heightened monitoring, and that reducing the volume of such communications makes monitoring easier.[27] Second, concentrating prisoners in CMUs, as opposed to dispersing them throughout various general population units, makes it more difficult for CMU prisoners to evade

24. 42 U.S.C. §§ 2000bb–2000bb-4 (2006).

25. Complaint at 1, Lindh v. Warden, No. 2:09-CV-0215, 2012 WL 379737 (S.D. Ind. Feb. 3, 2012).

26. *Aref* Complaint, *supra* note 19, at 2–5.

27. *See infra* notes 32–40 and accompanying text.

communication restrictions.[28] Third, concentrating prisoners in CMUs facilitates monitoring of the cellblock and visiting room conversations of these inmates: most non-CMU facilities lack the equipment to monitor such communications.[29] Fourth, CMUs provide the Bureau with an alternative to an even more draconian set of limitations—Special Administrative Measures ("SAMs")—when BOP believes an inmate poses a significant threat but one that would not warrant the imposition of SAMs.[30] Fifth, CMUs exist to cordon off certain prisoners, thereby inhibiting terrorist "radicalization" and recruitment in federal prisons.[31] Each of these rationales is examined below in greater detail.

A. Reducing the Volume of Communications To Improve Monitoring

The government's principal rationale for establishing CMUs appears to be that limiting the communications of certain prisoners, primarily those thought to have connections with terrorists, facilitates careful monitoring. On April 3, 2006, BOP published a Notice of Proposed Rulemaking entitled "Limited Communication for Terrorist Inmates."[32] The 2006 NPRM set forth the central concern that ultimately resulted in the creation of CMUs:

> Past behaviors of terrorist inmates provide sufficient grounds to suggest a substantial risk that they may inspire or incite terrorist-related activity, especially if communicated to groups willing to become martyrs, or to provide equipment or logistics to carry out terrorist-related activities. The potential ramifications of this activity outweigh the inmate's interest in unlimited communications with persons in the community . . . .[33]

The 2006 NPRM cited examples in which prisoners have attempted to further terrorist acts while incarcerated, noting, for example, that Sheikh Abdel Rahman, who was incarcerated for

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28. *See infra* notes 41–43 and accompanying text.
29. *See infra* notes 44–47 and accompanying text.
30. *See infra* notes 48–56 and accompanying text.
31. *See infra* notes 57–62 and accompanying text.
32. Limited Communication for Terrorist Inmates, 71 Fed. Reg. 16,520 (proposed Apr. 3, 2006).
33. *Id.* at 16,521.

involvement in the 1993 World Trade Center bombing,[34] "had urged his followers to wage jihad to obtain his release."[35] The 2006 NPRM also asserted that the communications of imprisoned terrorists "acquire a special level of inspirational significance for those who are already predisposed to [extremist] views, causing a substantial risk that such recipients of their communications will be incited to unlawful terrorist-related activity."[36]

According to the 2006 NPRM, limiting visits, telephone calls, and correspondence would facilitate monitoring of inmates whose communications could pose substantial dangers by reducing the volume of communications necessary to monitor.[37] Specifically, the 2006 NPRM states:

> By limiting the frequency and volume of the communication to/from inmates identified under this regulation, we will reduce the amount of communication requiring monitoring and review. Reducing the volume of communications will help ensure the Bureau's ability to provide heightened scrutiny in reviewing communications, and thereby reducing [sic] the terrorism threat to the public and national security.[38]

Like the 2006 NPRM, both the Terre Haute and Marion Institution Supplements, issued in 2006 and 2008 respectively, state that communications will be limited to facilitate monitoring. Specifically, the Institution Supplements inform prisoners: "[y]our communication . . . may be limited as necessary to allow effective monitoring."[39] The second NPRM, issued in 2010, also contains the same principal justification: additional restrictions on the communications of certain "high risk" prisoners will facilitate careful monitoring.[40]

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34. Alia Malek, *Gitmo in the Heartland*, The Nation, Mar. 28, 2011, at 17; Attorney Gen. John Ashcroft, Prepared Remarks, Islamic Group Indictment/SAMs (Apr. 9, 2002).

35. Limited Communication for Terrorist Inmates, 71 Fed. Reg. at 16,522.

36. *Id.* at 16,521.

37. *Id.* at 16,522.

38. *Id.*

39. Terre Haute CMU Institution Supplement, *supra* note 15, Attachment A, at 1; Second Marion Institution Supplement, *supra* note 18, Attachment A, at 1.

40. Communication Management Units, 75 Fed. Reg. 17,324, 17,325 (proposed Apr. 6, 2010) (to be codified at 28 C.F.R. pt. 540) ("The volume,

B. Preventing Prisoners from Circumventing Communication Restrictions

Concentrating prisoners subject to communication restrictions in specialized units, and forbidding all contact between CMU prisoners and non-CMU prisoners, is also designed to prevent CMU prisoners from evading monitoring. As the 2010 NPRM states, if BOP monitored all communications of a high-risk prisoner in a general population unit but did not rigorously monitor the communications of other prisoners in the same unit, the high-risk prisoner might evade monitoring by sending a letter under another inmate's name or by making a telephone call with the PIN number for another inmate's telephone account.[41]

This concern helps to explain BOP's decision not merely to limit the communications of certain prisoners but to concentrate these prisoners in specialized units. In a CMU, as distinguished from a typical unit, BOP rigorously monitors the communications of all prisoners,[42] which may decrease opportunities to circumvent monitoring through collaboration with other prisoners.[43]

C. Monitoring Cellblock and Visiting Room Conversations

In addition to facilitating the monitoring of telephone calls and correspondence, concentrating prisoners in CMUs also allows BOP, using equipment not available in most federal prisons, to record both communications among prisoners and communications between prisoners and visitors. Shortly before the creation of CMUs, the Justice Department's Inspector General criticized BOP for failing to monitor the cellblock and visiting room communications of high-risk prisoners:

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frequency, and methods of CMU inmate contact with persons in the community may be limited as necessary to achieve the goal of total monitoring . . . .").

41. *Id.* ("It is difficult to police inmate communication in the 'open' context of a general population setting because it is harder to detect activity such as inmates sending mail under another inmate's name, or using another's PIN number, without constant monitoring.").

42. *Id.* (stating that CMU prisoners will be subject to "complete monitoring of telephone use, written correspondence, and visiting"); Terre Haute CMU Institution Supplement, *supra* note 15, at 2 (stating that all calls and visits will be "live-monitored by staff").

43. *See* Terre Haute CMU Institution Supplement, *supra* note 15, at 1 ("By operating a self-contained housing unit, staff may adequately regulate and monitor all communications between inmates and persons in the community.").

> [T]he BOP may be missing opportunities to gather intelligence about terrorist and other high-risk inmates by monitoring their conversations with visitors in the visiting rooms and with other inmates in the cellblocks. Monitoring verbal exchanges in these settings poses challenges to the BOP, but inmates may plan and conduct illegal activities during visits or in the housing units if they know their mail and telephone calls are being monitored.[44]

BOP has the ability to monitor both the cellblock and visiting room communications of CMU prisoners. Although most BOP facilities lack the ability to monitor cellblock conversations among prisoners,[45] BOP now monitors all such communications among CMU prisoners: "[T]here are cameras and listening devices throughout the [Terre Haute CMU]. Some of these are visible to prisoners, and some are not."[46] Similarly, monitoring conversations in a typical visiting room, in which multiple prisoners meet simultaneously with multiple visitors, is often difficult because many conversations occur at the same time. In contrast, prisoners in a CMU speak to visitors through telephones with BOP monitoring the line.[47]

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44. Office of Inspector General, U.S. Dep't of Justice, The Federal Bureau of Prisons' Monitoring of Mail for High-Risk Inmates 68 (2006) [hereinafter Monitoring of Mail].

45. Prior to the establishment of CMUs:

> [T]he BOP did not monitor the cellblock conversations of SAMs inmates or the visiting room conversations of international terrorist and other high-risk inmates who were not under SAMs. In addition, a lack of audio recording equipment was a further barrier to recording cellblock and visiting room conversations at most institutions.

Monitoring of Mail, *supra* note 44, at vii.

46. Plaintiffs' Memorandum in Support of Second Motion for Summary Judgment at 5, Lindh v. Warden, No. 2:09-CV-0215, 2012 WL 379737 (S.D. Ind. Feb. 3, 2012) (citations omitted) [hereinafter *Lindh* Plaintiffs' S.J. Memorandum]. *See also* Carrie Johnson & Margot Williams, *Guantanamo North: Inside Secretive U.S. Prisons*, Nat'l Pub. Radio, Mar. 3, 2011, *available at* http://www.npr.org/2011/03/03/134168714/guantanamo-north-inside-u-s-secretive-prisons ("Every word [CMU prisoners] speak is picked up by a counterterrorism team that eavesdrops from West Virginia.").

47. Communication Management Units, 75 Fed. Reg. 17,324, 17,325 (proposed Apr. 6, 2010) (to be codified at 28 C.F.R. pt. 540) (stating that CMU prisoners will be subject to "complete monitoring of . . . visiting."); Terre Haute CMU Institution Supplement, *supra* note 15, at 2 (stating that visits will be "live-monitored by staff").

D. Providing an Alternative to Special Administrative Measures

While CMU prisoners face severe communication restrictions, federal regulations give the Attorney General authority to impose even more sweeping limitations through Special Administrative Measures.[48] The federal regulations governing SAMs permit virtually any restrictions on communications believed to be "reasonably necessary to protect persons against the risk of acts of violence or terrorism,"[49] and the Bureau has asserted that SAMs could even be used to eliminate a prisoner's communications with the outside world entirely.[50] Prisoners subject to SAMs typically are held in isolated confinement,[51] meaning that restrictions on communications with the outside world are compounded by the elimination of contact with other prisoners. The SAM regulations, unlike the rules governing CMUs, also allow for monitoring of attorney-client communications. Specifically, when there exists "reasonable suspicion . . . to believe that a particular inmate may use communications with attorneys or their agents to further or facilitate acts of terrorism," BOP must, upon order of the Attorney General, "provide appropriate procedures for the monitoring or review of communications between [an] inmate and attorneys or attorneys' agents."[52] Prisoners subject to SAMs currently include Richard Reid (the "Shoe Bomber") and Sheikh Abdel Rahman, among many others.[53]

CMU placement triggers severe limitations on communication but does not result in restrictions as extreme as the limitations to which most SAM prisoners are subjected.[54] Thus, CMUs create an alternative to SAMs, enabling BOP to impose substantial communication restrictions in cases where the evidence does not warrant the imposition of a SAM and where officials believe that a prisoner's communications pose a lesser, but still significant, risk.[55] As the 2010 NPRM states, BOP may send prisoners to a CMU based

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48. 28 C.F.R. § 501.3 (2006).

49. *Id.*

50. Communication Management Units, 75 Fed. Reg. at 17,235 (stating that SAMs "have the potential to restrict communication entirely").

51. Frank Dunham, *When Yasir Esam Hamdi Meets Zacarias Moussaoui*, 4 Rich. J. Global L. & Bus. 21, 32 (2004).

52. 28 C.F.R. § 501.3(d).

53. Alia Malek, *Gitmo in the Heartland*, Nation, Mar. 10, 2011, at 17; Attorney General John Ashcroft, Remarks on Islamic Group Indictment/SAMs (Apr. 9, 2002).

54. Communication Management Units, 75 Fed. Reg. at 17,235.

55. *Id.*

on "evidence which does not rise to the same degree of potential risk to national security or risk of acts of violence or terrorism which would warrant the Attorney General's intervention by issuance of a SAM."[56]

E. Inhibiting "Radicalization" and Terrorist Recruitment

CMUs are also used to cordon off inmates that the Bureau believes may seek to radicalize other prisoners or recruit them to terrorist groups.[57] For example, in one high-profile case, California prisoners "recruited more than a dozen fellow prisoners into a group called the JIS (Jamiyyat Ul-Islam Is-Saheed, roughly translated as the Assembly of Authentic Islam)" and contemplated attacks on targets including national guard recruiting centers and a synagogue.[58] The plan was exposed in 2005, however, when a follower who had been released from prison was arrested after robbing a gas station in an attempt to fund the attacks.[59]

BOP has not stated publicly that CMUs exist in part to isolate prisoners with a tendency to radicalize or recruit other inmates, but the reasons for CMU placement given to individual inmates suggest as much. For example, one Notice of Transfer states: "Reliable evidence indicates your incarceration conduct has included

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56. *Id.*

57. "Radicalization" and terrorist recruitment are separate concepts. Radicalization has been defined as "the process by which inmates who do not invite or plan overt terrorist acts adopt extreme views, including beliefs that violent measures need to be taken for political or religious purposes." Muslim Religious Services Providers, *supra* note 4, at 6 n.6 (2004). Recruitment, in contrast, refers to "the solicitation of individuals to commit terrorist acts or engage in behavior for a terrorism purpose." *Id.* While some law enforcement agencies subscribe to the view that being radicalized often leads, in a linear fashion, to being recruited to participate in terrorist acts, this model has been criticized as oversimplified: there is no standard pattern in which increasingly impassioned political or religious views lead to acts of terrorism. Faiza Patel writes:

> Overall, the available research does not support the view that Islam drives terrorism or that observing the Muslim faith—even a particularly stringent or conservative variety of that faith—is a step on the path to violence. In fact, that research suggests the opposite: Instead of promoting radicalization, a strong religious identity could well serve to inoculate people against turning to violence in the name of Islam.

Faiza Patel, Brennan Center for Justice, Rethinking Radicalization 10 (2011).

58. Mark S. Hamm, Terrorist Recruitment in American Correctional Institutions: An Exploratory Study of Non-Traditional Faith Groups 27 (2007).

59. *Id*. at 28.

involvement in recruitment and radicalization efforts of other inmates through extremist, violence-oriented indoctrination methods to intimidate or coerce others."[60]

The radicalization and recruitment justification is also evident in statements made by lawmakers and government officials in the years before the creation of CMUs. During an October 2003 Senate Judiciary Committee hearing entitled *Terrorism: Growing Wahhabi Influence in the United States*, Senator Chuck Schumer asserted: "[Wahhabi] imams flood the prisons with anti-American, pro-bin Laden videos, literature, sermons, and tapes . . . . [T]he Wahhabi influence is inculcating [prisoners] with the same kind of militant ideas that drove the 9/11 hijackers to kill thousands of Americans."[61] In 2006, the Director of the Federal Bureau of Investigation asserted: "Prisons are . . . fertile ground for extremists. Inmates may be drawn to an extreme form of Islam because it may help justify their violent tendencies. These persons represent a heightened threat because of their criminal histories, their propensity for violence, and their contacts with fellow criminals."[62]

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60. Fed. Bureau of Prisons, U.S. Dep't of Justice, Notice of Transfer to Avon Twitty, May 30, 2007; Fed. Bureau of Prisons, U.S. Dep't of Justice, Notice of Transfer to Royal Jones, June 17, 2008 (both on file with author), *both available as* Exhibit E to *Aref* Complaint, *supra* note 19.

61. *Terrorism: Growing Wahhabi Influence in the United States: Hearing Before the Subcommittee on Terrorism, Technology, and Homeland Security of the Senate Committee on the Judiciary*, 108th Cong. 6 (2003) (statement of Senator Schumer, Member, Senate Committee on the Judiciary). *But see Radical Islamic Influence of Chaplaincy of the U.S. Military and Prisons: Hearing before the Subcommittee on Terrorism, Technology and Homeland Security of the Senate Committee on the Judiciary*, 108th Cong. 32 (2003) [hereinafter *Radical Islamic Influence*] (statement of Paul E. Rogers, President, American Correctional Chaplains Association) ("Regarding reports of prisons being infiltrated by terrorists or terrorist organizations via prison religious programs, I think these have been blown out of proportion. Yes, some relatively minor situations have been identified, but they were stopped before escalating to dangerous levels.").

62. Robert S. Mueller, III, Director, Fed. Bureau of Investigation, Remarks at The City Club of Cleveland, Ohio (June 23, 2006); *see also* Attorney General Alberto R. Gonzales, Prepared Remarks at the World Affairs Council of Pittsburgh on Stopping Terrorists Before They Strike: The Justice Department's Power of Prevention (Aug. 16, 2006) ("The threat of homegrown terrorist cells—radicalized online, in prisons and in other groups of socially isolated souls—may be as dangerous as groups like al Qaeda, if not more so. They certainly present new challenges to detection."); *Radical Islamic Influence*, *supra* note 61, at 9 (statement of John S. Pistole, Assistant Director, Counterterrorism Division, Fed. Bureau of Investigation) ("Recruitment of inmates, we believe, within the prison system will continue to be a problem throughout our country. Inmates are often ostracized, abandoned by, or isolated from their family and friends, leaving them

III. CONFINEMENT IN A COMMUNICATION MANAGEMENT UNIT

A. Designation to a Communication Management Unit

According to a BOP memorandum, CMU placement occurs on the basis of the following criteria:

> (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 though 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.[63]

Within five days after being transferred to a CMU, inmates receive a document captioned "Notice to Inmate of Transfer to

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susceptible to recruitment. Membership in the various radical groups offer inmates protection, positions of influence, and a network they can correspond with both inside and outside of prison."); Muslim Religious Services Providers, *supra* note 4, at 8 ("The BOP Muslim chaplains stated that some inmates are radicalized in prison by other inmates . . . Other chaplains told us that convicted terrorists from the 1993 World Trade Center bombing were put into their prisons' general population where they radicalized inmates and told them that terrorism was part of Islam.").

63. Review of Inmates, *supra* note 14, at 1. BOP's pending proposed rule on CMUs sets forth the same criteria for CMU designation. Communication Management Units, 75 Fed. Reg. 17,324, 17,328 (proposed Apr. 6, 2010) (to be codified at 28 C.F.R. pt. 540).

Communication Management Unit."[64] The Notice of Transfer is a one-page form, which leaves enough blank space for only a short paragraph explaining the basis for CMU designation.[65] A fairly typical Notice of Transfer states: "Your current offenses of conviction include Providing Material Support & Resources to a Foreign Terrorist Organization, & Conspiracy to Use a Weapon of Mass Destruction. Your offense conduct included significant communication, association and assistance to Jaish-e-Mohammed (JeM), a group which has been designated as a foreign terrorist organization."[66] A prisoner assigned to a CMU may file an administrative appeal through BOP's Administrative Remedy Program (the general avenue for prisoner grievances) but is not entitled to contest CMU placement through a live hearing.[67] The Administrative Remedy Program is a purely written process in which BOP prisoners may submit complaints to BOP officials and appeal the rejection of complaints through the chain of command, and ultimately to the agency's Office of General Counsel.[68]

Releasing a prisoner from a CMU involves a complicated review process, and ultimately the approval of the appropriate BOP Regional Director. Lower-level staff members working in a CMU first make a recommendation to the warden of the institution where the prisoner is incarcerated.[69] The warden then decides whether to forward the recommendation to BOP's Counterterrorism Unit, a division with functions that include "identifying inmates involved in terrorist activities" and monitoring "terrorist inmate communications."[70] The Counterterrorism Unit then forwards its own recommendation to the Regional Director "for further review

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64. Terre Haute CMU Institution Supplement, *supra* note 15, Attachment A, at 1; Aref v. Holder, 774 F. Supp. 2d 147, 154 (D.D.C. 2011).

65. Terre Haute CMU Institution Supplement, *supra* note 15, Attachment A, at 1.

66. Fed. Bureau of Prisons, Notice of Transfer to Yassin Muhiddin Aref 1 (2007) (on file with author), *available as* Exhibit E to *Aref* Complaint, *supra* note 19.

67. Terre Haute CMU Institution Supplement, *supra* note 15, at 5; Fed. Bur. of Prisons, U.S. Dep't of Justice, Institution Supplement MAR-5270.07A, at 4 (Mar. 20, 2008) [hereinafter First Marion CMU Institution Supplement]; Second Marion CMU Institution Supplement, *supra* note 18, at 5; 28 C.F.R. § 542.10–542.19 (2006) (regulations regarding Administrative Remedy Program).

68. 28 C.F.R. § 542.10–542.19 (2006).

69. Review of Inmates, *supra* note 14, at 2.

70. *The Bureau Celebrates 80th Anniversary*, Fed. Bureau of Prisons, http://www.bop.gov/about/history/first_years.jsp (last visited Sep. 9, 2012).

and consideration."[71] The Regional Director "has final authority to approve an inmate's re-designation from a CMU."[72]

B. Conditions in Communication Management Units

CMU inmates are subject to far greater restrictions on communications than nearly all other prisoners in BOP custody. All told, a prisoner assigned to a CMU may make two fifteen-minute telephone calls per week, may see visitors for eight hours per month, cannot receive contact visits, will remain in the unit at virtually all times, will never interact with non-CMU prisoners, and will never speak a word without monitoring by government officials. A pending proposed regulation would restrict communications even further. The current restrictions, and those proposed in the pending regulation, are discussed below in greater detail.

1. Telephone Calls

Current, former, and proposed future rules regarding CMUs all significantly restrict prisoners' phone usage. Inmates may make only two fifteen-minute telephone calls each week (with the exception of legal calls with attorneys).[73] A more restrictive limitation applied when BOP established the first CMU: CMU prisoners could make only one fifteen-minute call each week.[74] The pending regulation regarding CMUs would allow BOP officials to limit prisoners to one fifteen-minute telephone call per month.[75]

In contrast to these strict limitations, non-CMU prisoners in BOP custody generally are allowed 300 minutes of outgoing calls per month, assuming they have sufficient funds in their inmate accounts to pay for such calls.[76] For non-CMU prisoners, the warden of each

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71. Review of Inmates, *supra* note 14, at 2. The Bureau established the Counterterrorism Unit in 2006. The units' functions include "identifying inmates involved in terrorist activities" and monitoring "terrorist inmate communications." *The Bureau Celebrates 80th Anniversary*, *supra* note 70.

72. *Id*.

73. Aref v. Holder, 774 F. Supp. 2d 147, 154 (D.D.C. 2011).

74. *Id.* at 154 n.2.

75. Communication Management Units, 75 Fed. Reg. 17,324, 17,328 (proposed Apr. 6, 2010) (to be codified at 28 C.F.R. pt. 540).

76. *See* Fed. Bureau of Prisons, U.S. Dep't of Justice, Program Statement 5264.08: Inmate Telephone Regulations 14 (2008), *available at* http://www.bop.gov/policy/progstat/5264_008.pdf.

facility also has discretion to allow an inmate to place outgoing calls exceeding 300 minutes per month.[77]

2. Visitation

CMU prisoners are permitted to see their visitors only thorough non-contact visits, meaning the prisoner and the visitor sit in separate rooms partitioned by glass and communicate by speaking through telephone receivers.[78] In contrast, most BOP prisoners sit in the same room as their visitors. BOP's general visiting room procedures state: "[i]n most cases, handshakes, hugs, and kisses (in good taste) are allowed at the beginning and end of a visit."[79]

According to the complaint in *Aref v. Holder*, a challenge to CMUs brought by attorneys at the Center for Constitutional Rights ("CCR"), the space where non-contact visits with friends and family occur is "tiny, cramped, and poorly ventilated."[80] The complaint in *Aref* alleges that the denial of contact visits has devastating effects on the families of some CMU prisoners:

> More than anything, the lack of physical contact is devastating to the younger children [of Kifah Jayyousi, a CMU prisoner]. At the end of their first visit, [his] youngest daughter, then ten years old, screamed that she wanted to hug her father, and began to cry uncontrollably. [Mr. Jayyousi's wife] tried to calm her daughter down, hugging her and saying that it was the same as her father doing so. Her daughter pushed her away and screamed for her father, who began crying as well as he was forced to watch his family's pain and was unable to comfort them.[81]

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77. *Id.* at 9.

78. Terre Haute CMU Institution Supplement, *supra* note 15, at 2 (stating that visits will be "conducted using non-contact facilities (i.e., secure partitioned rooms, telephone voice contact)"); *Aref*, 774 F. Supp. 2d at 154.

79. Fed. Bureau of Prisons, U.S. Dep't of Justice, Visiting Room Procedures: General Information, http://www.bop.gov/inmate_locator/procedures.jsp (last visited Oct. 9, 2012). The one exception to the rule against contact visits for CMU prisoners is that contact visits with attorneys are permissible. *Terre Haute CMU Institution Supplement*, *supra* note 15, at 2; *Aref*, 774 F. Supp. 2d at 154.

80. *Aref* Complaint, *supra* note 19, at 65.

81. *Id.* at 65–66.

Designation to a CMU also limits the duration of visits. When BOP established the first CMU, prisoners could receive only two visits per month, with each visit lasting two hours or less.[82] The Bureau later increased the limit to eight hours of visitation per month, with no single visit permitted to exceed four hours.[83] The pending proposed rule, however, would permit officials to restrict visitation to a one hour-long visit per month.[84]

In contrast to these caps on visitation hours for CMU prisoners, no national policy limits the number or duration of visits that non-CMU prisoners in BOP custody may receive. National policy, instead, grants each warden the discretion to establish the extent of visitation at each institution.[85] In practice, virtually all prisoners in BOP custody are permitted greater visitation hours than CMU prisoners. For example, even the Federal Supermax prison in Florence, Colorado, the highest-security prison in the United States, allows inmates five monthly visits, each of which may last up to seven hours.[86]

The location of the CMUs imposes an additional burden on visitation. BOP generally attempts to assign a prisoner to a facility within 500 miles of the address where the prisoner expects to reside upon release.[87] This policy presumably exists to promote community ties and reduce the distance family members must travel to visit loved ones in prison. BOP, however, operates only two CMUs, and they are located near each other (in Terre Haute, Indiana and Marion, Illinois).[88] As a result, any prisoner designated to a CMU must be confined in one of these two midwestern locations, and many family members (such as those who live on the East Coast or West Coast) must travel distances greatly exceeding 500 miles to visit CMU prisoners.

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82. *Benkahla* Complaint, *supra* note 19, at 11.

83. *Aref* Complaint, *supra* note 19, at 19.

84. Communication Management Units, 75 Fed. Reg. 17,324, 17,327 (proposed Apr. 6, 2010) (to be codified at 28 C.F.R. pt. 540).

85. Fed. Bureau of Prisons, U.S. Dep't of Justice, Program Statement 5267.08: Visiting Regulations, at 5 (2006), *available at* http://www.bop.gov/policy/progstat/5267_008.pdf.

86. Fed. Bureau of Prisons, U.S. Dep't of Justice, Institution Supplement FLM 5267.08B, at 2 (2011). These are non-contact visits. *Id*. at 1.

87. Fed. Bureau of Prisons, U.S. Dep't of Justice, Designations, *available at* http://www.bop.gov/inmate_programs/designations.jsp. ("If an inmate is placed at an institution that is more than 500 miles from his/her release residence, generally, it is due to specific security, programming, or population concerns.").

88. Communication Management Units, 75 Fed. Reg. at 17,324.

Finally, prisoners in CMUs initially were not allowed to see visitors on weekends.[89] Prohibiting weekend visits is difficult for family members who must report to work, and children who must attend school, during the week. Most BOP prisoners can receive weekend visits; indeed, a federal regulation mandates that BOP allow weekend visits.[90] After the filing of the complaint in the *Benkahla* litigation, which noted that BOP's prohibition on weekend visits violated the regulation,[91] BOP changed course and now allows CMU prisoners to see visitors on weekdays and Sundays.[92]

3. Written Communication

The Bureau does not limit the volume of letters and email correspondence that CMU prisoners may send and receive. Like other BOP inmates, CMU prisoners may send and receive email correspondence through the Trust Fund Limited Inmate Computer System ("TRULINCS"), provided they pay the applicable fees.[93] Likewise, neither national BOP policy nor the current rules governing CMUs limit the amount of mail an inmate may send or receive.[94]

CMU prisoners have extensive access to written correspondence, but as the Complaint in *Aref v. Holder* asserts, written communication "does not substitute for physical contact." Such contact is important to "the maintenance of close family relationships, especially those between husbands and wives, and parents and children. With respect to young children, it is the *only* means of effective association."[95]

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89. Aref v. Holder, 774 F. Supp. 2d 147, 154 n.3 (D.D.C. 2011).

90. 28 C.F.R. § 540.42 (2006).

91. *Benkahla* Complaint, *supra* note 19, at 11.

92. *Aref*, 774 F. Supp. 2d at 154.

93. Fed. Bureau of Prisons, U.S. Dep't of Justice, TRULINCS FAQs, http://www.bop.gov/inmate_programs/trulincs_faq.jsp (describing the TRULINCS system); Terre Haute CMU Institution Supplement, *supra* note 15, at 1 (no provision limiting email correspondence); First Marion CMU Institution Supplement, *supra* note 67, at 1 (no provision limiting email correspondence).

94. Fed. Bureau of Prisons, U.S. Dep't of Justice, Program Statement 5265.14: Correspondence (2011), *available at* http://www.bop.gov/policy/progstat/5265_014.pdf; Terre Haute CMU Institution Supplement, *supra* note 15, at 1 (no provision limiting mail); First Marion CMU Institution Supplement, *supra* note 67, at 1 (no provision limiting mail).

95. *Aref* Complaint, *supra* note 19, at 16.

In contrast to the current rules, the pending proposed regulation would severely limit written communication for CMU prisoners. With exceptions for correspondence with persons such as attorneys, the proposed rule states that letters "may be limited to three pieces of paper (not larger than 8.5 x 11 inches), double-sided writing permitted, once per calendar week, to and from a single recipient . . . ."[96] The proposed rule also appears to authorize the elimination of all email correspondence by CMU prisoners.[97]

4. Monitoring

Despite the existence of authority to monitor nearly every contact—including written correspondence, telephone conversations, and visits—between all BOP prisoners and anyone (except attorneys) in the outside world,[98] the Bureau does not in practice monitor most communications. For most prisoners, a limited number of communications are monitored, largely at random.[99] In the case of CMU prisoners, however, BOP fully exercises its monitoring authority. In a CMU, every communication made by a prisoner, except with an attorney, is actively monitored.[100] BOP also records all conversations among prisoners that occur in CMUs through cameras

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96. Communication Management Units, 75 Fed. Reg. 17,324, 17,328 (proposed Apr. 6, 2010) (to be codified at 28 C.F.R. pt. 540).

97. The proposed rule makes no mention of email. *Id.* at 17,328–29. Combined with the statement, "[w]ritten correspondence may be limited to three [double-sided] pieces of paper . . . once per calendar week, to and from a single recipient," the absence of any reference to email suggests that email communication may be eliminated if the proposed rule goes into effect. *Id.* at 17,328.

98. 28 C.F.R. § 540.102 (2012) ("The Warden shall establish procedures that enable monitoring of telephone conversations on any telephone located within the institution, said monitoring to be done to preserve the security and orderly management of the institution and to protect the public."); *id.* § 540.14(a) ("Institution staff shall open and inspect all incoming general correspondence. Incoming general correspondence may be read as frequently as deemed necessary to maintain security or monitor a particular problem confronting an inmate."); *id.* § 540.51(h) ("The Warden may establish procedures to enable monitoring of the visiting area, including restrooms located within the visiting area."); *id.* §§ 540.102, 540.2(c), 540.18(a); Fed. Bureau of Prisons, U.S. Dep't of Justice, Program Statement 5267.08: Visiting Regulations, at 10 (2006), *available at* http://www.bop.gov/policy/progstat/5267_008.pdf.

99. Monitoring of Mail, *supra* note 44, at 9 n.41.

100. Communication Management Units, 75 Fed. Reg. at 17,325 (stating that CMU prisoners will be subject to "complete monitoring of telephone use, written correspondence, and visiting"); Terre Haute CMU Institution Supplement, *supra* note 15, at 2 (stating that all calls and visits will be "live-monitored by staff").

and listening devices, some of which are hidden.[101] This is not the case in the vast majority of BOP facilities, which lack the equipment for monitoring cellblock conversations.[102]

5. Segregation from non-CMU Prisoners

The Bureau prevents prisoners housed in CMUs from having any contact with non-CMU prisoners. The Institution Supplement that established the Terre Haute CMU describes the unit as "self-contained" and stresses that contact between CMU prisoners and non-CMU prisoners cannot occur, even when a CMU prisoner must exit the unit for a medical visit: "Specialized services may be provided in the institution's main health services units as needed, under conditions which ensure [the CMU] inmate's lack of contact with non-[CMU] inmates."[103] In contrast, for most non-CMU prisoners, it is entirely commonplace to come into contact with inmates from other units, during activities such as classes, meals, medical visits, and religious programming.

6. Summary of Communication Restrictions

The table below summarizes the communication restrictions CMU prisoners face, as compared to most BOP inmates.

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101. *Lindh* Plaintiffs' S.J. Memorandum, *supra* note 46, at 5 ("[T]here are cameras and listening devices throughout the [Terre Haute CMU]. Some of these are visible to prisoners, and some are not.") (internal citations omitted); Carrie Johnson & Margot Williams, *Guantanamo North: Inside Secretive U.S. Prisons*, Nat'l Pub. Radio, Mar. 3, 2011, *available at* http://www.npr.org/2011/03/03/134168714/guantanamo-north-inside-u-s-secretive-prisons ("Every word [CMU prisoners] speak is picked up by a counterterrorism team that eavesdrops from West Virginia.").

102. Monitoring of Mail, *supra* note 44, at vii (stating that prior to the establishment of CMUs, the Bureau "did not monitor the cellblock conversations of SAMs inmates or the visiting room conversations of international terrorist and other high-risk inmates who were not under SAMs. In addition, a lack of audio recording equipment was a further barrier to recording cellblock and visiting room conversations at most institutions").

103. Terre Haute CMU Institution Supplement, *supra* note 15, at 3.

	Typical BOP Prisioner	**CMU Prisoner (initial restrictions)**	**CMU Prisoner (current restrictions**	**CMU Prisoner (restrictions under proposed rule)**
Monitoring of telephone calls	Sporadic	Total	Total	Total
Contact visits	Yes	No	No	No
Visitation time	Varies; often more than 35 hours per month total	Two monthly visits, each two hours or less	Two monthly visits, each four hours or less	One monthly visit, one hour or less
Weekend visits	Yes	No	Yes	Yes
Distance family travels for visits	Less than 500 miles where possible	Often exceeds 500 miles	Often exceeds 500 miles	Often exceeds 500 miles
Monitoring of visits	Sporadic	Total	Total	Total
Volume of letters	No specific limitation	No specific limitation	No specific limitation	One three-page letter per week
Monitoring of letters	Sporadic	Total	Total	Total
Email	No specific limitation	No specific limitation	No specific limitation	Not allowed
Monitoring of cellblock conversations	No	Total	Total	Total
Contact with prisoners from other units	Yes	No	No	No

IV. LEGAL FLAWS IN THE OPERATION OF COMMUNICATION MANAGEMENT UNITS

A. Lack of Notice-and-comment Rulemaking: The Administrative Procedure Act

The Bureau issued the Institution Supplements that established the Terre Haute and Marion CMUs without engaging in notice-and-comment rulemaking.[104] Under the Administrative Procedure Act ("APA"), whether notice-and-comment procedures are required depends on the nature of the rule being promulgated. When issuing a "legislative rule," an agency must engage in notice-and-comment rulemaking, and a legislative rule promulgated without such procedures is invalid.[105] An agency may, however, issue non-legislative rules (such as interpretive rules or general statements of policy) without notice-and-comment procedures.[106] Whether the Bureau violated the APA in establishing CMUs depends, therefore, on the type of rule contained in the two Institution Supplements.

Although "[t]he distinction between legislative rules and interpretative rules or policy statements has been described at various times as 'tenuous,' 'fuzzy,' 'blurred,' and perhaps most picturesquely, 'enshrouded in considerable smog,'"[107] the rules contained in the Institution Supplements that establish CMUs appear to constitute legislative rules, as discussed below. It follows

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104. Terre Haute CMU Institution Supplement, *supra* note 15, at 1; First Marion CMU Institution Supplement, *supra* note 67, at 1.

105. 5 U.S.C. § 553(b) (2006); Lincoln v. Vigil, 508 U.S. 182, 195 (1993).

106. *Lincoln*, 508 U.S. at 196. While other exceptions to the notice-and-comment requirement exist, the government has put forward only the interpretive rule and general statement of policy exception in litigation regarding CMUs. Motion To Dismiss at 39–43, Aref v. Holder, No. 10-0539, 774 F. Supp. 2d 147 (D.D.C. 2011); Brief in Support of Motion to Dismiss at 10–20, Benkahla v. Fed. Bureau of Prisons, No. 2:09-CV-00025 (S.D. Ind. Nov. 17, 2009).

107. Comty. Nutrition Inst. v. Young, 818 F.2d 943, 946 (D.C. Cir. 1987) (quoting Chisholm v. FCC, 538 F.2d 349, 393 (D.C. Cir. 1976); Pacific Gas & Electric Co. v. FPC, 506 F.2d 33, 38 (D.C. Cir. 1974); Kevin W. Saunders, *Interpretative Rules With Legislative Effect: An Analysis and a Proposal For Public Participation*, 1986 Duke L.J. 346, 352; Noel v. Chapman, 508 F.2d 1023, 1030 (2d Cir. 1975)).

that BOP's failure to engage in notice-and-comment rulemaking violated the APA.[108]

1. The Interpretive Rules Exception to the Notice-and-comment Requirement

The Seventh Circuit has stated that "[a]n interpretive rule is a statement as to what [an] administrative officer thinks [a] statute means."[109] When an agency derives a rule through "reasoned statutory interpretation, with reference to the language, purpose, and legislative history of the statute,"[110] or engages in "cloistered, appellate-court type reasoning,"[111] the rule will be deemed interpretive. Likewise, the D.C. Circuit has stated that an interpretive rule "must be interpreting something. It must derive a proposition from an existing document whose meaning compels or logically justifies the proposition[,] . . . . [and] [t]he substance of the

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108. Because the two CMUs are located in Southern Indiana and Southern Illinois, and because the decision to establish these units emanated from the Bureau's headquarters in Washington, D.C., jurisdiction and venue in an APA suit would be proper in the United States District Courts for the Southern District of Illinois, the Southern District of Indiana, or the District of Columbia. *See* 28 U.S.C. § 1391(e)(1) (2006) (defining proper venue for civil actions against federal officials). Thus, the analysis below relies mainly on Seventh Circuit and D.C. Circuit jurisprudence. The principal cases raising APA challenges to CMUs, *Benkahla v. Fed. Bureau of Prisons*, *Aref v. Holder*, and *Lindh v. Warden*, were indeed filed in the Southern District of Indiana and the District of Columbia.

109. Bd. of Trs. of Knox Cnty. Hosp. v. Shalala, 135 F.3d 493, 501 (7th Cir. 1998). *See also* Mt. Sinai Hosp. v. Shalala, 196 F.3d 703, 711 (7th Cir. 1999) (noting that an interpretive rule "simply states what the administrative agency thinks the statute means") (internal citation omitted); Metro. Sch. Dist. of Wayne Twp. v. Davila, 969 F.2d 485, 490 (7th Cir. 1992) (finding that a letter issued by an agency was an interpretive rule where the letter used "the classic tools a reviewing body, be it a court or agency, relies upon to determine the meaning of a statute") (citation omitted); Allied Van Lines, Inc. v. ICC, 708 F.2d 297, 299 (7th Cir. 1983) (finding that an agency statement constituted an interpretive rule where "[t]he statement consisted primarily of an assessment of the jurisdictional reach of [a regulation] in light of the language and legislative history of the [Household Goods Transportation Act of 1980]"); Novelty, Inc. v. Tandy, No. 04-1502, 2008 WL 3835655, at *12 (S.D. Ind. Aug. 7, 2008) ("The rule is interpretive if the agency used appellate-court type reasoning, including reference to sources such as the text of the statute and regulations, the statute's legislative history, and case law.") (citations omitted).

110. *Davila*, 969 F.2d at 490.

111. Hoctor v. U.S. Dep't of Agric., 82 F.3d 165, 171 (7th Cir. 1996).

derived proposition must flow fairly from the substance of the existing [statute or regulation]."[112]

On the other hand, where a rule results not from the interpretation of a statute but from an agency's exercise of policy-making discretion, the rule is legislative. Thus, issuing a legislative rule requires an agency to exercise its "delegated policy expertise."[113] As the D.C. Circuit has stated, "a rule is legislative if it is based on an agency's power to exercise *its judgment* as to how best to implement a general statutory mandate, and if it has the binding force of law. By contrast, an interpretative rule is based on specific statutory provisions . . . ."[114]

These criteria for differentiating between legislative and interpretive rules flow from the purpose of notice-and-comment rulemaking. Public comment is more likely to be important when an agency is making a policy decision, rather than when it is determining the legal requirements of a statute. As one court has stated, "[t]he interpretive rule exception [to notice-and-comment rulemaking] reflects the idea that public input will not help an agency make the legal determination of what the law already is."[115]

In contrast, when agency officials make discretionary policy choices, they must "give members of the public an opportunity to communicate their concerns and suggestions to agencies that have

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112. Central Texas Tel. Coop. v. FCC, 402 F.3d 205, 212 (D.C. Cir. 2005) (internal citation omitted); *See also* Pickus v. U.S. Bd. of Parole, 507 F.2d 1107, 1113 (D.C. Cir. 1974) ("As the word interpretive suggests . . . interpretive rules consist of administrative construction of a statutory provision on a question of law reviewable in the courts.") (internal citation omitted).

113. *Allied Van Lines*, 708 F.2d at 300.

114. Kelley v. EPA, 15 F.3d 1100, 1108 (D.C. Cir. 1994) (quotations omitted). *See also* Dia Nav. Co. v. Pomeroy, 34 F.3d 1255, 1264 (3d Cir. 1994) ("If . . . the rule is based on an agency's power to exercise its judgment as to how best to implement a general statutory mandate, the rule is likely a legislative one.") (internal citation omitted); Chamber of Commerce v. OSHA, 636 F.2d 464, 469 (D.C. Cir. 1980) (holding that the rule was legislative because the agency made a "policy decision" not mandated by Congress); Novelty, Inc. v. Tandy, No. 04-1502, 2008 WL 3835655, at *12 (S.D. Ind. Aug. 7, 2008) ("If the agency created a specific rule from a vague standard . . . the rule is legislative.") (internal citation omitted); John F. Manning, *Nonlegislative Rules*, 72 Geo. Wash. L. Rev. 893, 920 (2004) ("[A]n interpretive rule cannot reflect an agency's exercise of independent policymaking discretion.").

115. Dismas Charities, Inc. v. U.S. Dep't of Justice, 401 F.3d 666, 680 (6th Cir. 2005).

been delegated legislative authority but are not elected by the public."[116]

Applying these criteria, the CMU Institution Supplements constitute legislative rules, rather than interpretive rules. Nothing on the face of the Institution Supplements suggests an attempt to interpret the requirements of a statute. The Institution Supplements merely list the rules that govern CMUs, with no "reference to the language, purpose, and legislative history of [any] statute,"[117] nor any "cloistered, appellate-court type reasoning."[118] While several statutes afford BOP broad *discretion* to operate the federal penal system, no such law can be interpreted to *require* the establishment of CMUs. For example, Title 18 U.S.C. § 4042(a)(2) grants BOP authority to "provide suitable quarters and provide for the safekeeping, care, and subsistence of all persons charged with or convicted of offenses against the United States," but that provision does not require BOP to establish any particular type of unit.[119] Along similar lines, Title 18 U.S.C. § 4042(a)(1) states that BOP shall "have charge of the management and regulation of all Federal penal and correctional institutions," but such general statutory authority cannot be interpreted to require BOP to establish CMUs.[120] Rather, in

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116. *Novelty, Inc.*, 2008 WL 3835655, at *9. *See also* Batterton v. Marshall, 648 F.2d 694, 703 (D.C. Cir. 1980) ("The essential purpose of according . . . notice-and-comment opportunities is to reintroduce public participation and fairness to affected parties after governmental authority has been delegated to unrepresentative agencies.").

117. Metro. Sch. Dist. of Wayne Twp. v. Davila, 969 F.2d 485, 490 (7th Cir. 1992) (quoting United Techs. Corp. v. EPA, 821 F.2d 714, 718 (D.C. Cir. 1987)).

118. Hoctor v. U.S. Dep't of Agric., 82 F.3d 165, 170 (7th Circ. 1996).

119. 18 U.S.C. § 4042(a)(2) (2006).

120. *Id.* §4042(a)(1). Arguments that the Institution Supplements "interpret" other relevant statutory provisions are equally unconvincing. Title 18 U.S.C. § 4081 requires federal prisons to be "so planned and limited in size as to . . . assure the proper classification and segregation of Federal prisoners" based on various broad factors, including "the nature of the offenses committed, the character and mental condition of the prisoners, and such other factors as should be considered in providing an individualized system of discipline, care, and treatment." *Id.* § 4081. This provision confers broad discretion to designate prisoners to particular institutions but does not impose a specific requirement that BOP create CMUs. Title 18 U.S.C. § 3621(b) gives BOP discretion to "designate the place of the prisoner's imprisonment" based on various factors. *Id.* § 3621(b). Again, nothing in the statute can be viewed as imposing a specific requirement that BOP create a CMU. Finally, Title 18 U.S.C. § 4001(b)(1) states that the "[t]he control and management of Federal penal and correctional institutions, except military or naval institutions, shall be vested in the Attorney General, who shall promulgate rules for the government thereof . . ." *Id.* §

establishing CMUs, BOP reached a policy decision based on the agency's view of how best to manage federal prisons—not a legal conclusion that a statute mandated the creation of these new units. Moreover, the momentous decision to create an unprecedented type of unit, based on administrative discretion rather than a statutory command, is precisely the sort of agency policymaking for which notice-and-comment procedures were designed.[121]

2. The General Statements of Policy Exception to the Notice-and-Comment Requirement

Like interpretive rules, "general statements of policy" do not require notice-and-comment rulemaking under the APA.[122] Thus, assuming the Institution Supplements cannot be classified as interpretive rules, BOP could still avoid the notice-and-comment requirement by showing that the Institution Supplements constitute general statements of policy. The distinction between legislative rules and general statements of policy turns on whether the provisions in question bind the agency: Legislative rules are "intended to bind" the agency, whereas a general statement of policy is "merely . . . a tentative statement of the agency's view."[123]

The Institution Supplements cannot be classified as general statements of policy because they express far more than tentative views—they create binding rules for the establishment and operation of CMUs. Whereas "[a] general statement of policy, like a press release, presages an upcoming rulemaking or announces the course which the agency intends to follow in future adjudications,"[124] no one could read the CMU Institution Supplements and conclude that they leave open the decision whether or not to establish CMUs. Where an agency's statement is "laden with mandatory language,"[125] as is the case with the CMU Institution Supplements, the general statement of

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4001(b)(1). Such general language cannot be interpreted to mandate the creation of any particular unit.

121. *See supra* notes 115–116 and accompanying text.

122. 5 U.S.C. § 553(b) (2006).

123. *Hoctor*, 82 F.3d at 169. *See also* General Electric Co. v. EPA, 290 F.3d 377, 383 (D.C. Cir. 2002) (citing Appalachian Power Co. v. EPA, 208 F.3d 1015, 1023 (D.C. Cir. 2000) (stating that a rule cannot qualify as a mere statement of policy if it "appears on its face to be binding")).

124. Batterton v. Marshall, 648 F.2d 694, 706 (D.C. Cir. 1980). *See also* Am. Bus. Ass'n v. United States, 627 F.2d 525, 529 (D.C. Cir. 1988) ("A policy statement announces the agency's tentative intentions for the future.").

125. Cohen v. United States, 578 F.3d 1, 7 (D.C. Cir. 2009).

policy exception does not apply. The Institution Supplements do not say that BOP *might* create CMUs. The Terre Haute Institution Supplement, for example, uses the word "will" forty-one times, and courts have "given decisive weight to agencies' use of mandatory words like 'will' instead of permissive words like 'may,'" in deciding whether a provision has binding effect or is instead a general statement of policy.[126]

3. An Ongoing Violation

Although two lawsuits, *Benkahla v. Federal Bureau of Prisons* and *Aref v. Holder*, have challenged BOP's failure to engage in notice-and-comment rulemaking, no court has yet ruled on whether BOP violated the APA by establishing CMUs through Institution Supplements. This is due, in part, to BOP's assertion that the challenges are moot because the agency is currently engaged in notice-and-comment rulemaking. Recall that BOP issued a notice of proposed rulemaking in 2006 but that no final rule was promulgated, and the rulemaking apparently was abandoned.[127] Shortly after lawsuits brought by CCR and the ACLU were filed in 2009 and 2010, BOP issued the 2010 NPRM, restarting the notice-and-comment process. To date, no final rule has been promulgated. BOP contends, however, that its attempt to restart the notice-and-comment process renders CCR and the ACLU's APA claims moot.[128]

In *Aref v. Holder*, the district court agreed with the BOP that the APA claim was moot.[129] This mootness holding, however, is based upon an inapposite principle. The district court relied entirely upon the doctrine that a superseding rule issued through proper notice-and-comment procedures moots a claim that a previous rule was issued without notice-and-comment.[130] That doctrine does not apply in all circuits,[131] but, more fundamentally, it is not relevant to the

126. *Id*.

127. *See supra* notes 11–19 and accompanying text.

128. Aref v. Holder, 774 F. Supp. 2d 147, 171 (D.D.C. 2011).

129. The court dismissed this claim without prejudice and stated that the Plaintiffs could "renew such a claim in the event that the defendants again abandon the rulemaking process." *Aref*, 774 F. Supp. 2d at 171. The ACLU's case was voluntarily dismissed when the Plaintiff was transferred out of the Terre Haute CMU. Order, Benkahla v. Fed. Bureau of Prisons, No. 2:09-CV-00025 (S.D. Ind. Jul. 29, 2010).

130. *Aref*, 774 F. Supp. 2d at 171.

131. *See* Nat'l Res. Def. Council v. Nuclear Regulatory Comm., 680 F.2d 810, 813 (D.C. Cir. 1982) (stating that an agency's promulgation of a superseding

facts surrounding CMUs. BOP has merely begun a rulemaking regarding CMUs and has not issued any final rule through notice-and-comment procedures.[132] Because no final regulation has been issued based on the comments received, CMUs continue to be governed not by a rule informed by public input but by the two Institution Supplements issued without notice-and-comment procedures.[133]

Other factors also suggest that the APA claim is not moot. First, BOP has a history of failing to follow through on the issuance of a final regulation regarding CMUs. BOP not only abandoned the 2006 NPRM,[134] but the agency also missed its own projected date for promulgation of a final rule based on the 2010 NPRM. Specifically, the Justice Department's Fall 2010 Unified Regulatory Agenda stated that a final rule would be issued by October 2011, but no rule has been issued to date.[135] This calls into question when, if ever, a final rule will be promulgated.

Second, the government maintained in both the ACLU and CCR cases that the APA does not require notice-and-comment rulemaking because the Institution Supplements do not contain legislative rules.[136] At least one Circuit has held that in such a situation—where an agency belatedly completes notice-and-comment procedures but maintains in litigation that such procedures were

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rule with proper notice-and-comment procedures mooted a claim that the agency issued a prior rule without requesting or receiving comment). *But see* U.S. Steel Corp. v. EPA, 595 F.2d 207, 215 (5th Cir. 1979) (stating that inviting and receiving public comments after issuance of a rule does not moot a challenge to improper procedures surrounding initial promulgation of the rule because, if post-promulgation public comment could create mootness, "[a]n agency that wished to dispense with pre-promulgation notice-and-comment could simply do so, invite post-promulgation comment, and republish the regulation before a reviewing court could act."); *see also* Hemp Indus. Ass'n v. DEA, 333 F.3d 1082, 1085 n.3 (9th Cir. 2003) (stating that a superseding rule promulgated through notice-and-comment procedures did not moot a challenge to the lack of such procedures accompanying the issuance of the prior rule).

132. *See supra* notes 11–19 and accompanying text.

133. *Id.*

134. *Id.*

135. Office of Information and Regulatory Affairs, Unified Regulatory Agenda, Communication Management Units (2010), *available at* http://www.reginfo.gov/public/do/eAgendaViewRule?pubId=201010&RIN=1120-AB48.

136. Brief in Support of Motion to Dismiss at 1, Benkahla v. Fed. Bureau of Prisons, No. 2:09-CV-00025 (S.D. Ind. Nov. 17, 2009); Aref v. Holder, 774 F. Supp. 2d 147, 170 (D.D.C. 2011).

undertaken voluntarily and were not legally required—a challenge to procedural deficiencies accompanying the issuance of the old rule remains live.[137] More broadly, when the government changes course in the midst of litigation but maintains that its earlier actions were not illegal, courts may reject claims of mootness because denials of wrongdoing suggest that a prior course of conduct may be resumed.[138]

B. Denial of Congregate Prayer: The Religious Freedom Restoration Act

In the Terre Haute CMU, Muslim prisoners are allowed to pray as a group outside of their cells only once per week, during the Friday Jumu'ah prayer.[139] The Bureau requires these inmates to perform all other prayers in their cells.[140] The tenets of Islam, however, dictate that the five daily prayers must occur in a group setting, or, at minimum, that congregate prayer is preferable to solitary prayer.[141]

In *Lindh v. Warden*, a case brought by the ACLU of Indiana on behalf of prisoners in the Terre Haute CMU, the plaintiffs contend that the refusal to allow greater opportunities for group prayer violates the Religious Freedom Restoration Act ("RFRA").[142] While

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137. Conservation Law Found. v. Evans, 360 F.3d 21, 27 (1st Cir. 2004) (holding that a challenge to an agency's failure to follow rulemaking requirements was not moot, despite the issuance of a superseding rule through proper procedures, where the agency maintained in litigation that it followed such procedures "[o]ut of an abundance of caution" but did not consider the procedures to be required by law).

138. The court in *Sasnett v. Litscher* stated that:

> The state vigorously defends the old [prison] regulation as justified by security concerns, and if this defense is sincere, as we have no reason to doubt that it is, it implies a high likelihood of returning to the old regulation unless that regulation is enjoined. The probability of such a return is sufficiently high to prevent us from deeming the case moot.

Sasnett v. Litscher, 197 F.3d 290, 291–92 (7th Cir. 1999), *abrogated on other grounds by* Bridges v. Gilbert, 557 F.3d 541 (7th Cir. 2009); *see also* United States v. W. T. Grant Co., 345 U.S. 629, 632 n.5 (1953) ("It is the duty of the courts to beware of efforts to defeat injunctive relief by protestations of repentance and reform, especially when abandonment seems timed to anticipate suit, and there is probability of resumption.").

139. Lindh v. Warden, No. 2:09-CV-0215, 2012 WL 379737, at *3 (S.D. Ind. Feb. 3, 2012).

140. *Id.*

141. *Id.* at *2.

142. *Id.* at *4; *see* 42 U.S.C. §§ 2000bb–2000bb-4 (2006).

conceding that legitimate security concerns preclude group prayer during the hours when prisoners are locked in their cells, the plaintiffs argue that they have a right to congregate in small groups to pray during the hours when they are permitted to move freely throughout the unit and to interact with other CMU prisoners.[143] BOP, however, contends that prisoners should not be allowed to pray in groups during these hours, except during the Friday Jumu'ah prayer.[144]

RFRA provides that no government entity shall "substantially burden a person's exercise of religion" unless such a burden is both "in furtherance of a compelling governmental interest" and "the least restrictive means of furthering that compelling governmental interest."[145] In *City of Boerne v. Flores*, the Supreme Court struck down RFRA as applied to state governments, holding that Congress exceeded its power to enforce the Fourteenth Amendment against the states.[146] RFRA, however, continues to apply to the federal government, including BOP.[147]

Where a prison rule limits religious practice, RFRA's compelling interest test imposes a stricter standard on the government than the Free Exercise Clause of the federal Constitution. Under the Free Exercise Clause, a prison regulation limiting religious practice need only be reasonably related to a legitimate penological interest.[148] Nonetheless, even under RFRA's more exacting standard, in cases involving prisons and jails, courts must afford "due deference to the experience and expertise of prison and jail administrators in establishing necessary regulations and procedures to maintain good order, security and discipline, consistent with consideration of costs and limited resources."[149]

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143. Plaintiffs' Memorandum in Response and Opposition to Defendant's Second Cross-Motion for Summary Judgment and Reply Memorandum in Support of Plaintiffs' Second Motion for Summ. Judgment at 20–21, Lindh v. Warden, No. 2:09-CV-0215, 2012 WL 379737 (S.D. Ind. Feb. 3, 2012) [hereinafter *Lindh* Plaintiffs' S.J. Reply].

144. *Lindh*, 2012 WL 379737, at *2.

145. 42 U.S.C. § 2000bb-1(a) & (b) (2006).

146. 521 U.S. 507, 536 (1997).

147. Kikumura v. Hurley, 242 F.3d 950, 959 (10th Cir. 2001) ("[T]he separation of powers concerns expressed in *Flores* do not render RFRA unconstitutional as applied to the federal government.").

148. O'Lone v. Estate of Shabazz, 482 U.S. 342, 349 (1987) (citing Turner v. Safley, 482 U.S. 78, 89 (1987)).

149. Cutter v. Wilkinson, 544 U.S. 709, 723 (2005). Cutter addressed the Religious Land Use and Institutionalized Persons Act ("RLUIPA"), which protects

In *Lindh*, the district court denied both parties' cross motions for summary judgment in February 2012, finding two genuine issues of material fact: (1) whether preventing prisoners from praying together outside their cells imposes a substantial burden on religious exercise, and (2) whether the government's reasons for denial of congregate prayer satisfy the compelling interest standard.[150] Examining the substantial burden issue, the court underscored a factual question relevant to whether prayer in individual cells should be considered congregate: Are prisoners praying in their cells "isolated or are [they] able to see and hear each other"?[151] If prayer in individual cells, during periods when cell doors are open, allows enough interaction to be considered congregate, in the district court's view, no substantial burden has been imposed by preventing prisoners from praying in groups outside their cells.[152]

Assuming that CMU prisoners are indeed unable to see and hear each other while in their cells and that the government therefore has imposed a substantial burden on congregate prayer, it appears unlikely that BOP can show that its limitations on congregate prayer constitute the least restrictive means of furthering a compelling governmental interest.[153] Because CMU prisoners are free throughout much of the day to move about the unit and interact with each other, the government faces the difficult task of showing that inmates congregating to pray outside their cells presents a security danger not implicated by other permissible gatherings.[154]

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the free exercise rights of state, as opposed to federal, prisoners. *Id.* at 712. RFRA and RLUIPA, however, create similar standards in cases involving religious practice in prison: the government must demonstrate that a limitation is the least restrictive means of furthering a compelling governmental interest. 42 U.S.C. § 2000bb-1 (RFRA provision); *id.* § 2000cc-1 (RLUIPA provision); *see also Cutter*, 544 U.S. at 716–17 ("To secure redress for inmates who encountered undue barriers to their religious observances, Congress carried over from RFRA [to RLUIPA] the 'compelling governmental interest'/'least restrictive means' standard.").

150. Lindh v. Warden, No. 2:09-CV-0215, 2012 WL 379737, at *10 (S.D. Ind. Feb. 3, 2012).

151. *Id.* at *6.

152. *Id.*

153. 42 U.S.C. § 2000bb-1(a) & (b) (2006).

154. *Lindh* Plaintiffs' S.J. Memorandum, *supra* note 46, at 1. As the district court stated in denying the parties' cross motions for summary judgment:

> During the times [prisoners] are allowed out of their cells, CMU inmates may gather together to talk, snack, play board games, play cards, watch current events on television, exercise, and even play semi-contact sports like basketball. They may

The government has put forth three principal rationales for prohibiting group prayer (with the exception of the Friday Jumu'ah prayer), but none of these rationales are convincing. First, the government cites a 2007 incident, during a fire at the prison, in which CMU prisoners, who were engaged in group prayer, ignored an order from correctional officers to stop praying and return to their cells.[155] For their part, the prisoners contend that noise from a loud ceiling fan prevented them from hearing the order, and they note that BOP, perhaps viewing the incident as trivial, opted at the time not to punish them for their alleged insubordination.[156] More broadly, the government puts forth this incident as evidence that CMU inmates' efforts to pray as a group constitute an expression of defiance against correctional officers and "an attempt on the part of . . . the CMU Muslim inmates to write their own rules and take control from staff."[157] The Bureau, however, already allows the Friday Jumu'ah prayer to occur in congregation, and these group prayers have occurred without incident since May 2007.[158] This fact undercuts the government's claim that group prayer leads to unmanageable acts of defiance.[159]

Second, the Bureau asserts that it lacks the staffing to supervise more frequent group prayers.[160] While the government contends that all group prayers in a CMU must be continuously supervised by correctional officers, BOP staff supervised a group Ramadan observance in the CMU only intermittently.[161] In any case,

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> congregate and discuss anything as long as their behavior is good, they do not cause much noise, and the conversation "doesn't escalate into a confrontation." Throughout the day, they may return to their cells and can have another prisoner in their cell at the same time. One thing they cannot do: recite the daily Muslim prayers in a group.

Lindh, 2012 WL 379737, at *6 (citations omitted).

155. Defendants' Response Opposing Plaintiffs' Second Motion for Summary Judgment and Memorandum in Support of Defendants' Second Cross Motion for Summary Judgment at 37–38, Lindh v. Warden, No. 2:09-CV-0215, 2012 WL 379737 (S.D. Ind. Feb. 3, 2012) [hereinafter *Lindh* Defendants' S.J. Response].

156. *Lindh* Plaintiffs' S.J. Reply, *supra* note 143, at 17.

157. *Lindh* Defendants' S.J. Response, *supra* note 155, at 9.

158. *Lindh* Plaintiffs' S.J. Reply, *supra* note 143, at 26.

159. *Id.* at 27.

160. *Lindh* Defendants' S.J. Response, *supra* note 155, at 42.

161. *Lindh* Plaintiffs' S.J. Reply, *supra* note 143, at 19, 29.

all conversations occurring within a CMU are recorded with special equipment.[162]

Third, the government argues that Muslims in the CMU could use group prayer as an opportunity to radicalize other CMU prisoners.[163] However, the Bureau regularly permits CMU inmates to move about the unit and converse with other CMU prisoners.[164] Thus, it is unclear how group prayer could create an additional risk of radicalization, especially since the five daily prayers do not include a sermon or other conversation.[165] As the district court stated in denying BOP's motion for summary judgment, academic articles submitted to the court by the government failed to "describe[] how rote recitation of a scripted prayer leads to radicalization."[166]

In short, while the district court denied both parties' motions for summary judgment, it appears probable that the plaintiffs ultimately will prevail, unless worship conducted in separate cells allows sufficient interaction to qualify as congregate prayer. The government is unlikely to demonstrate that the group prayer limitations imposed on CMU prisoners are "the least restrictive means of furthering [a] compelling governmental interest," as RFRA requires.[167]

C. Failure to Consider Statutory Placement Factors: 18 U.S.C. § 3621

The decision to assign certain prisoners to CMUs also violates the federal statute governing prisoner placement. Title 18 U.S.C. § 3621(b) sets forth the criteria that the BOP must consider in deciding where to house prisoners:

> Place of Imprisonment—The Bureau of Prisons shall designate the place of the prisoner's imprisonment. The Bureau may designate any available penal or correctional facility that meets minimum standards of health and habitability established by the Bureau, whether maintained by the Federal Government or otherwise and whether within or without the judicial district in which the person was convicted, that the

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162. *See supra* notes 44–46 and accompanying text.
163. *Lindh* Defendants' S.J. Response, *supra* note 155, at 14.
164. *Lindh* Plaintiffs' S.J. Memorandum, *supra* note 46, at 1.
165. *Lindh* Plaintiffs' S.J. Reply, *supra* note 143, at 28–29.
166. Lindh v. Warden, No. 2:09-CV-0215, 2012 WL 379737, at *7 (S.D. Ind. Feb. 3, 2012).
167. 42 U.S.C. § 2000bb-1(b).

> Bureau determines to be appropriate and suitable, considering—
>
> (1) the resources of the facility contemplated;
> (2) the nature and circumstances of the offense;
> (3) the history and characteristics of the prisoner;
> (4) any statement by the court that imposed the sentence—
> (A) concerning the purposes for which the sentence to imprisonment was determined to be warranted; or
> (B) recommending a type of penal or correctional facility as appropriate; and
> (5) any pertinent policy statement issued by the Sentencing Commission pursuant to section 994 (a)(2) of title 28.[168]

Section 3621 thus affords BOP wide discretion in deciding where to house prisoners. At the same time, the statute limits such discretion by requiring the Bureau to consider the five enumerated criteria in making placement decisions.[169] As one court has stated, "[a] common sense reading of the text . . . makes clear that the BOP is required to consider each factor."[170]

Nonetheless, the author, who has reviewed numerous CMU transfer notices, is unaware of any case in which such a notice evidenced consideration of a "statement of the court that imposed the sentence," one of the mandatory factors enumerated in § 3621.[171] It appears that when BOP decides to transfer prisoners to CMUs, the Bureau rarely—if ever—considers statements by the sentencing court.[172]

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168. 18 U.S.C. § 3621(b) (2006).

169. *Id.*

170. Woodall v. Fed. Bureau of Prisons, 432 F.3d 235, 245 (3d Cir. 2005).

171. 18 U.S.C. § 3621(b)(4) (2006).

172. It is conceivable that BOP might base a transfer decision on factors not specifically identified in a transfer notice, but such a practice would be problematic. The transfer notice form states that placement is "based on the following specific information." Terre Haute CMU Institution Supplement, *supra* note 15, Attachment A, at 1. The prisoner has the option to pursue an administrative appeal of the transfer decision. *See supra* notes 67–68 and accompanying text. For an appeal to be meaningful, the transfer notice must identify all reasons for the initial decision.

In one particularly egregious case, the BOP clearly ignored a highly relevant statement by the sentencing judge. In *United States v. Benkahla*, the sentencing judge granted a substantial departure below the applicable range under the Sentencing Guidelines, writing a detailed explanation of the reasons for the departure that included the following comments:

> Sabri Benkahla is not a terrorist. He does not share the same characteristics or the conduct of a terrorist, and in turn, he does not share the same likelihood of recidivism, the difficulty of rehabilitation, or the need for incapacitation. Again, outside of this case, Defendant has not committed any other criminal acts and there is no reason to believe he would ever commit another crime after his release from imprisonment. Defendant has engaged in model citizenry, receiving a Master's degree from The Johns Hopkins University, volunteering as a national elections officer in local, state, and national elections, and demonstrating his dedication to his four-year-old son. It is clear that, in the case of the instant defendant, his likelihood of ever committing another crime is infinitesimal.
>
> . . .
>
> As to the history and characteristics of the Defendant, as stated above, it appears that Defendant has never committed any criminal act outside the context of this case. He is an American citizen, born and raised in Northern Virginia. He attended a local high school and college, excelling at both, and received a Master's degree at The Johns Hopkins University. He has a significant number of strong, positive relationships with friends, family, and the community. In fact, the Court received more letters on Defendant's behalf than any other defendant in twenty-five years, all attesting to his honor, integrity, moral character, opposition to extremism, and devotion to civic duty. With respect to Defendant's history and characteristics, this factor weighs strongly in favor of a sentence outside the guideline range.[173]

The judge's explanation plainly constitutes a "statement of the court that imposed the sentence . . . concerning the purposes for which the sentence to imprisonment was determined to be

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173. United States v. Benkahla, 501 F. Supp. 2d 748, 759–61 (E.D. Va. 2007).

warranted"[174] under § 3621. Moreover, a statement such as this, and particularly the finding that "Sabri Benkahla is not a terrorist," surely should have been considered in deciding whether to place him in a CMU on the basis of alleged terrorist contacts. The Notice of Transfer issued to Mr. Benkahla, however, noted alleged communications with a terrorist group but contained no mention of this rather extraordinary discussion by the sentencing judge. The reason for placement in the notice states in full: "Your offense conduct included significant communication with and support to Lashkar-e-Taiba, an identified foreign terrorist organization, which is committed to engaging in violence and terrorist activity against the United States and its allies."[175]

V. POLICY CONCERNS RAISED BY COMMUNICATION MANAGEMENT UNITS

The manner in which BOP uses CMUs is flawed not only for legal reasons, as discussed above, but also from the perspective of sound policy. Some of the reasons for creating CMUs—for example, that the communications of certain prisoners require increased monitoring, and that concentrating such prisoners in a limited number of specialized units facilitates rigorous monitoring—may be valid.[176] The manner in which the Bureau operates CMUs, however,

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174. 18 U.S.C. § 3621(b)(4) (2006).

175. Fed. Bureau of Prisons, U.S. Dep't of Justice, Notice of Transfer to Sabri Benkahla (Oct. 17, 2007) (on file with author), *available as* Exhibit C to Amended Complaint, Benkahla v. Fed. Bureau of Prisons, No. 2:09-CV-00025 (S.D. Ind. July 27, 2009).

The placement of certain prisoners in CMUs may also violate the First Amendment, which shields prisoners against retaliation for protected speech. *See, e.g.*, Bridges v. Gilbert, 557 F.3d 541, 546 (7th Cir. 2009); Gill v. Pidlypchak, 389 F.3d 379 (2d Cir. 2004); Vance v. Barrett, 345 F.3d 1083, 1093 (9th Cir. 2003). Litigation in prison retaliation cases tends to be fact-intensive, requiring an inquiry into the motives for actions taken by prison officials. *See, e.g.*, Watison v. Carter, 668 F.3d 1108, 1114 (9th Cir. 2012) (stating that the plaintiff in a retaliation case must demonstrate "a causal connection between the adverse action and the protected conduct").

In *Aref v. Holder*, several prisoners allege that BOP officials transferred them to CMUs as punishment for protected speech, an allegation which, if proven, would constitute a First Amendment violation. Aref v. Holder, 774 F. Supp. 2d 147, 168 (D.D.C. 2011). For example, the plaintiffs allege that staff at a Colorado prison told an inmate, who had no serious infractions in his disciplinary record, that he would be "sent east" if he continued to file complaints. *Id.* at 169. After he filed a complaint about this threat, he was transferred to the Marion CMU. *Id.*

176. *See infra* Part II.

could be improved without compromising the objectives these units were created to achieve.

In operating CMUs, BOP should adhere to two principles. First, the Bureau should send prisoners to CMUs only when sound reason exists to believe that their communications pose a genuine threat. In operating CMUs, BOP has not always followed this genuine threat principle. Sabri Benkahla, for example, was sent to a CMU despite a clean disciplinary record in prison and a judicial finding that he was "not a terrorist" and that "his likelihood of ever committing another crime is infinitesimal."[177] Similarly, plaintiffs in *Aref* include individuals who are classified as low security prisoners and who have clean disciplinary records.[178] Second, where a prisoner's contacts with the outside world pose a potential threat, BOP should use the minimum restrictions necessary to eliminate the perceived threat.

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177. United States v. Benkahla, 501 F. Supp. 2d 748, 759 (E.D. Va. 2007).

178. More specifically, allegations in *Aref* include the following:

> Plaintiff YASSIN MUHIDDIN AREF is a 39-year-old refugee and published author from Iraqi Kurdistan who fled Saddam Hussein's regime, moving to Albany, New York, in 1999. Following a controversial and well-publicized sting operation, Mr. Aref was convicted of money laundering, material support for terrorism, conspiracy, and making a false statement to the FBI. Mr. Aref is classified as a low security prisoner. Despite the fact that Mr. Aref has no history of disciplinary infractions within the BOP, he was transferred to the CMU at FCI Terre Haute in May 2007 . . . . Mr. Aref has no affiliation with extremist or violence-oriented religious or political organizations. Indeed, Mr. Aref is opposed to violent or extremist religious and political ideologies.
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> Plaintiff AVON TWITTY (aka Abdul Ali) is a 55-year-old man from Washington, DC, an American citizen and a practicing Muslim. In 1984, Mr. Twitty was sentenced to 20 years to life imprisonment on one count of murder while armed and three to ten years imprisonment for one count of carrying a pistol without a license. He is classified as a medium security inmate. Despite the fact that Mr. Twitty has received no communications-related disciplinary infractions—and received only very minor disciplinary infractions overall—he was transferred to the CMU at FCI Terre Haute on May 30, 2007, and has been held there ever since. Mr. Twitty has no affiliation with extremist or violence-oriented religious or political organizations. His underlying conviction involved no allegations of terrorism. Indeed, Mr. Twitty is opposed to violent or extremist religious and political ideologies.

Aref Complaint, *supra* note 19, at 6–7.

These principles reflect two important considerations. First, the effects of contacts between prisoners and the outside world are generally salutary. Empirical research has shown that "[i]nmates who maintain family ties are less likely to accept norms and behavior patterns of hardened criminals and become part of a prison subculture."[179] 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."[180]

Second, severe restrictions on communication take a harsh toll on inmates and their families.[181] More than half of inmates in American prisons have children, and 80% of those parents stay in touch with their children while incarcerated.[182] 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.

The genuine threat and minimum restriction principles suggest three ways in which BOP should improve the operation of CMUs. First, BOP should substantially increase permitted contact between all CMU prisoners and the outside world. Such increased communication could be achieved while continuing to monitor all contacts between CMU prisoners and the outside world, thereby eliminating any potential threat. Second, BOP should refine the standard for CMU assignment to ensure that inmates are not placed in CMUs unnecessarily. Third, BOP should provide more robust procedures for challenging both initial CMU designation and

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179. Shirley R. Klein et al., *Inmate Family Functioning*, 46 Int'l J. of Offender Therapy and Comp. Crim. 95, 99 (2002).

180. 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); *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.") (internal citations omitted); Minnesota Dep't of Corrections, The Effects of Prison Visitation on Offender Recidivism 1 (2011) ("Offenders who were visited in prison were significantly less likely to recidivate.").

181. *See supra* notes 79–92 and accompanying text.

182. Nasser & Visher, *supra* note 180, at 20–21.

continued placement in a CMU.[183] These proposals are discussed below in greater detail.

A. Overly Severe Restrictions on Communication

While scaling back the communications of CMU prisoners means that the government has fewer communications to monitor rigorously,[184] the converse is also true: CMU prisoners could be allowed far more access to visits and telephone calls if greater resources were devoted to monitoring the increased volume of communications. Indeed, BOP has already increased—albeit minimally, and perhaps temporarily—the extent of visits and telephone calls allotted to CMU prisoners. Specifically, CMU prisoners are now allowed two (rather than one) fifteen-minute telephone calls per week and eight (rather than four) hours of visitation a month.[185] These changes suggest that there is no insurmountable obstacle to further increases in prisoners' communication.

Given the correlation between rehabilitation and contacts with family, and the devastating impacts that harsh restrictions on communication can have on family members,[186] allocating additional staff and resources to monitor a greater volume of communications would be worth the investment. With additional staffing, increased communications for CMU prisoners would in no way conflict with the fundamental purpose of CMUs—achieving "total monitoring" of the communications of certain inmates.[187]

Additionally, the decision to locate the CMUs in close proximity to each other imposes a burden on family members to travel long distances, creating a further obstacle to family contact.[188] It would be logical to relocate the CMUs to locations that allow

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183. The following discussion draws on comments regarding the proposed rule, Communication Management Units, 75 Fed. Reg. 17,324 (proposed April 6, 2010) (to be codified at 28 C.F.R. pt. 540), submitted by the author while employed by the Brennan Center for Justice at NYU School of Law.

184. Communication Management Units, 75 Fed. Reg. at 17,327 ("By limiting the frequency and volume of the communication to/from inmates [in CMUs], we will reduce the amount of communication requiring monitoring and review.").

185. *See supra* notes 73–74 and accompanying text.

186. *See supra* notes 179–182 and accompanying text.

187. Communication Management Units, 75 Fed. Reg. at 17,328.

188. *See supra* notes 87–88 and accompanying text.

prisoners to remain closer to their families.[189] At minimum, if the Bureau opens additional CMUs, careful thought should be given to locations that reduce travel burdens on family members.

B. Lack of a Clear Standard for CMU Designation

Given the extreme isolation that placement in a CMU entails, the standard for assignment to such a unit should limit the CMU population to prisoners whose communications pose a genuine danger. Yet the current criteria, which are set forth in BOP's memorandum on CMU designation, are overbroad.[190]

For example, the placement criteria allow assignment to a CMU if a prisoner "committed prohibited activity related to misuse/abuse of approved communication methods while incarcerated."[191] 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 related to communications, such as not immediately obeying a correctional officer's instruction to hang up the telephone while speaking with a family member. The criteria for CMU placement should make it clear that minor violations such as this provide no basis for the extreme isolation caused by transfer to a CMU.

A catchall provision also enables 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."[192] This remarkably low bar—"any . . . evidence"—would permit CMU placement even when the evidence lacks credibility or is contradicted by more compelling evidence. Moreover, the vagueness of the contemplated harm places no meaningful limit 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.

In short, the current criteria for CMU placement allow BOP to radically restrict a prisoner's communications without an adequate

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189. *See supra* notes 87–88 and accompanying text.
190. *See supra* note 63 and accompanying text.
191. *See supra* note 63 and accompanying text.
192. *See supra* note 63 and accompanying text.

rationale. This danger is not merely theoretical: some prisoners have been designated to CMUs without sufficient justification.[193] The lack of clear standards for who belongs in a CMU, combined with the disproportionate number of Muslims housed in these units, may also contribute to a perception that Muslims have been singled out for CMU placement based on stereotypes:[194] An appropriate rule would eschew vague standards and ensure that placement in a CMU occurs only on the basis of a serious risk.

The following is an example of a more narrow and clear standard that BOP could use for CMU placement:

> (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

193. *See supra* notes 177–178 and accompanying text.

194. *See* Scott Shane, *Beyond Guantánamo, A Web of Prisons for Terrorism Inmates*, N.Y. Times, Dec. 11, 2011, at A1 ("'The C.M.U.'s? You mean the Muslim Management Units?' said Ibrahim Hooper, a spokesman for the Council on American-Islamic Relations."); Christoper S. Stewart, *Little Gitmo*, N.Y. Magazine, Jul. 10, 2011, at 40 ("[B]alancers," as CMU guards call them, were reportedly blended into the [CMU] population—environmental activists, sexual predators, bank robbers, people who, prison officials claimed, 'recruit and radicalize'—in order to address the criticism that CMUs were housing only Muslims. The Bureau of Prisons says it doesn't use race or religion to decide placement, and it rejects claims of adding balancers, though Muslim inmates continue to be in the majority.").

> violate the rules regarding inmate communications.[195]

C. Lack of Meaningful Procedures Regarding CMU Designation

Extremely limited procedural protections accompany CMU placement. A prisoner receives a Notice of Transfer with the rationale for CMU designation only after being transferred.[196] The reasons provided for transfer typically are cursory,[197] and the Terre Haute and Marion Institution Supplements provide no mechanism for the prisoner to obtain a more detailed explanation, which would allow for a more meaningful appeal of the transfer decision.[198] Upon arrival at a CMU, an inmate can challenge CMU placement only through BOP's Administrative Remedy Program, a purely written process.[199] An inmate has no right to a live hearing, no right to call witnesses or present evidence, and no right to representation of any kind.[200] Rather, the inmate is limited to completing a grievance form challenging CMU placement, and further forms necessary to appeal an adverse decision to BOP Regional Directors and, ultimately, BOP's Office of General Counsel.[201]

BOP should craft more robust procedures for CMU placement, looking to one of the Bureau's own models—the regulations governing placement in control units, which house inmates thought to pose a threat to order within a prison.[202] Current BOP regulations grant meaningful procedures to inmates placed in control units, and the Bureau should extend similar processes to CMU prisoners. Under

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195. The author included this proposed standard in comments submitted to BOP regarding the pending CMU regulation. These comments were submitted on behalf of the Brennan Center for Justice. David M. Shapiro, Comments to *Communication Management Units*, Brennan Center for Justice (June 2, 2010), http://www.brennancenter.org/page/-/Justice/LNS/CMU%20Comments%20FINAL%20%283%29.pdf.

196. *See supra* note 64 and accompanying text.

197. *See supra* notes 65–66 and accompanying text.

198. Terre Haute CMU Institution Supplement, supra note 15; Second Marion CMU Institution Supplement, *supra* note 18.

199. Terre Haute CMU Institution Supplement, *supra* note 15, at 5; First Marion CMU Institution Supplement, *supra* note 67, at 4; Second Marion Institution Supplement, *supra* note 18, at 5; *see also* 28 C.F.R. 542.10–542.19 (2006) (regulations regarding Administrative Remedy Program).

200. 28 C.F.R. § 542.10–542.19 (2006).

201. *Id.* §§ 542.14–542.15.

202. *Id.* § 541.40(a).

BOP regulations, an inmate is entitled to the following procedures prior to placement in a control unit:

- A live hearing;[203]
- Twenty-four hour advance notice of the charges and the acts or evidence in issue;[204]
- Representation at the hearing by a staff member, who has the right to interview witnesses prior to the hearing;[205]
- The right to call witnesses and present documentary evidence at the hearing;[206]
- A written decision issued by the hearing administrator;[207] and
- Review of the hearing administrator's decision by an executive panel.[208]

Given the substantial restrictions that assignment to a CMU imposes on a prisoner and the serious consequences of erroneous placement in a CMU, BOP should provide more robust procedural checks, similar to those governing control unit placement. Such procedures should occur before, rather than after, physical transfer to a CMU occurs. In practice, the distances BOP must transport many inmates to reach the two CMUs in Indiana and Illinois vitiates the effectiveness of a post-transfer appeal: the Bureau is unlikely to grant any appeal that requires transporting a prisoner the hundreds, if not thousands, of miles back to the less restrictive facilities from which he came.[209]

BOP should also ensure rigorous review of the ongoing need for CMU 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. Neither the current criteria governing CMU placement nor the pending proposed rule, however, state how frequently review of ongoing

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203. *Id.* § 541.43(b).
204. *Id.* § 541.43(b)(1).
205. *Id.* § 541.43(b)(2).
206. *Id.* § 541.43(b)(4).
207. *Id.* § 541.44(a).
208. *Id.* § 541.45.
209. *See supra* notes 87–88 and accompanying text.

placement must occur.[210] The control unit regulations require review every thirty days.[211] It would be logical to review CMU placement at similar intervals.

VI. CONCLUSION

From the perspectives of both law and policy, the government's use of CMUs is flawed in several respects. While CMUs were created to serve important objectives, substantial modifications—ranging from the prompt promulgation of a federal regulation regarding CMUs, to increased opportunities for congregate prayer, to more lucid and narrow criteria for placement, to more robust procedural protections—are necessary, both to comply with the law and to improve these units from a policy standpoint.

More broadly, a fuller assessment of the Bureau of Prisons' role in the War on Terror is sorely needed. The topic has received little attention in the academic literature, despite important transformations in domestic federal incarceration.

It is hoped that the discussion of CMUs in this Article will spur additional inquiry and debate regarding CMUs and the post-9/11 revolution in domestic incarceration, including such recent changes as the Correctional Intelligence Initiative, limitations on access to religious texts implemented to prevent radicalization, and the use of Special Administrative Measures to curtail the attorney-client privilege. This much is certain: the War on Terror has transformed the nature of imprisonment not only for foreign nationals in far-flung locations such as Abu Ghraib and Guantanamo Bay but also for American citizens right here at home.

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210. Under the proposed rule, review must occur "regularly"—but the term "regularly" is not defined. Communication Management Units, 75 Fed. Reg. 17,324, 17,328 (proposed Apr. 6, 2010) (to be codified at 28 C.F.R. pt. 540); *see also* Review of Inmates, *supra* note 14, at 1.

211. 28 C.F.R. § 541.49(a) (2006).