



June 2, 2010

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

**Re: BOP Docket No. 1148-P**

AMERICAN CIVIL  
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Dear Ms. Qureshi:

The American Civil Liberties Union and the undersigned organizations submit these comments in response to the pending Notice of Proposed Rulemaking titled *Communication Management Units*, issued by the Federal Bureau of Prisons (BOP).<sup>1</sup>

The American Civil Liberties Union (ACLU) is a nationwide, non-partisan organization with more than 500,000 members, dedicated to the principles of liberty and equality embodied in our Constitution and our civil rights laws. The ACLU's National Prison Project, founded in 1972, seeks to promote constitutional conditions of confinement in prisons, jails, juvenile facilities, and immigration detention facilities throughout the nation.

The ACLU and a broad coalition of civil rights organizations filed comments in response to the Bureau of Prisons' regulation on Limited Communication for Terrorist Inmates, proposed in April 2006 but never finalized.<sup>2</sup> The ACLU National Prison Project and the ACLU of Indiana currently represent the plaintiff in *Sabri Benkahla v. Federal Bureau of Prisons*, No. 2:09-cv-00025-WTL-DML (S.D. Ind. Jun. 18, 2009), a challenge to the Bureau's establishment of a Communications Management Unit (CMU) at FCC-Terre Haute. Mr. Benkahla, despite being found not guilty of all terrorism-related charges against him and praised by his sentencing judge as a "model citizen[]" and "not a terrorist," has been held at the Terre Haute CMU since October 2007.

<sup>1</sup> Communication Management Unit, 75 Fed. Reg. 17,324 (proposed Apr. 6, 2010) (to be codified at 28 C.F.R. pt. 540).

<sup>2</sup> Limited Communication for Terrorist Inmates, 71 Fed. Reg. 16,520 (proposed Apr. 3, 2006) (to be codified at 28 C.F.R. pt. 540) [hereinafter Limited Communication].

## Introduction

On April 6, 2010, the Bureau of Prisons proposed a new regulation governing “Communication Management Units” (hereinafter “the proposed regulation”). In fact, the Bureau has long been operating two CMUs without regulatory authority: one at the Federal Correctional Complex, Terre Haute, Indiana (established December 2006) and one at the United States Penitentiary, Marion, Illinois (established March 2008). The proposed regulation would authorize severe restrictions on the ability of persons confined in CMUs to communicate with the outside world.

The proposed regulation provides that the Bureau’s Assistant Director, Correctional Programs Division may decide, without external review, to transfer a person in Bureau custody to a CMU. Once there, the prisoner’s communications with the outside world are all but eliminated. More specifically, the prisoner may communicate only as follows:

- One fifteen-minute telephone call per month, with “immediate family members only.”
- One one-hour non-contact visit per month, with “immediate family members.”
- Written correspondence is limited to three pieces of paper (double-sided), once per week, to and from a single recipient, “at the discretion of the Warden.”

Proposed 28 C.F.R. §§ 540.203(a), 540.204(a), 540.205(a).<sup>3</sup> There is no provision for visiting or telephone contact with friends, relatives other than immediate family, clergy, or members of the news media. Nor is there any

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<sup>3</sup> The proposed regulation states that visiting and telephone calls are limited to “immediate family members;” no such limitation appears in the section regarding written correspondence. Because the stated purpose of the regulation is to “limit ... the communication of CMU inmates to immediate family members,” Communication Management Unit, 75 Fed. Reg. at 17,326, it is unclear whether this omission is an oversight and the proposed regulation is intended to limit correspondence, as well as visiting and telephone calls, to immediate family members.

Consistent with the language of the proposed regulation as set forth in the NPRM, these Comments assume that correspondence would not be limited to immediate family members in every case, although the provision that correspondence is permitted only “at the discretion of the Warden” would allow such a limitation to be imposed in individual cases. Obviously the constitutional and other concerns set forth in these Comments would be even more serious if the proposed regulation were in all cases to bar correspondence with all persons other than members of a prisoner’s immediate family.

provision for prisoners who are foreign nationals to visit or communicate by telephone with consular officials.<sup>4</sup>

The proposed regulation is substantially similar to a regulation on Limited Communication for Terrorist Inmates, proposed by the Bureau in April 2006 but never finalized.<sup>5</sup> That regulation suffered from numerous constitutional infirmities, and a broad coalition of civil rights organizations urged that it be withdrawn. However, the 2006 proposed regulation was limited in scope – the Bureau justified it as necessary to “minimize the risk of terrorist-related communication being sent to or from inmates in Bureau custody,” and the regulation was accordingly limited in its application to persons with “an identifiable link to terrorist-related activity,” Limited Communication, 71 Fed. Reg. at 16,522-23.

AMERICAN CIVIL LIBERTIES  
UNION FOUNDATION

By contrast, the 2010 proposed regulation contains no such limitation. While the NPRM purports to quote “an Al Qaeda training manual” and raises the specter of “imprisoned terrorists communicating with their followers regarding future terrorist activity” – language copied verbatim from the 2006 NPRM<sup>6</sup> – the 2010 proposed regulation itself is in no way limited to persons with proven or even suspected terrorist ties. Rather, the criteria for CMU placement are so broad as to apply potentially to almost any person in Bureau custody.

The proposed regulation’s severe restrictions on communications with the news media and with most family members are unprecedented and almost certainly unconstitutional. The ban on confidential communication with consular officials violates US treaty obligations. Moreover, these restrictions will be imposed by prison officials, with no outside review, applying criteria that are so vague as to provide no meaningful limits on official discretion. Finally, the proposed regulation is completely unnecessary, as existing law allows the Bureau to monitor the mail, telephone calls, and visits of persons in its custody. Such monitoring fully accommodates legitimate security concerns without trenching so heavily on the rights of prisoners and those in the outside world who wish to communicate with them.

For all of these reasons, the proposed regulation should be withdrawn, and the Bureau should immediately cease to operate CMUs.

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<sup>4</sup> Separate provision is made for communication with counsel and certain federal officials. Proposed 28 C.F.R. §§ 540.203(c), 540.204(b), 540.205(b).

<sup>5</sup> Limited Communication, 71 Fed. Reg. 16,520.

<sup>6</sup> *Compare* Limited Communication, 71 Fed. Reg. at 16,521, *with* Communications Management Unit, 75 Fed. Reg. at 17,326.

**The proposed regulation applies to persons who have not been charged with any crime.**

The proposed regulation applies not only to convicted prisoners, but to “[a]ny inmate (as defined in 28 CFR § 500.1(c)) meeting the criteria prescribed by this subpart.” Proposed 28 C.F.R. § 540.200(d). Section 500.1(c) in turn defines “inmate” as “all persons in the custody of the Federal Bureau of Prisons or Bureau contract facilities,” including “persons held as witnesses, detainees, or otherwise.” The proposed regulation may accordingly be applied to persons who have not been convicted of, or even charged with, any crime. Thus, while these Comments use the term “prisoner” for ease of reference, the proposed regulation’s reach is in fact far broader than convicted prisoners, extending even to witnesses, pretrial detainees clothed with the presumption of innocence, and civil immigration detainees who are not charged with any crime.

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**The proposed regulation severely burdens the First Amendment rights both of prisoners and of non-prisoners who wish to communicate with them.**

At the outset it must be clearly understood that the proposed regulation, by barring prisoners from communicating with virtually all persons in the outside world, severely burdens the First Amendment rights of innocent third parties. The Supreme Court has long recognized that restrictions on prisoners' communications implicate the First Amendment rights of those free persons who wish to communicate with them:

Communication by letter is not accomplished by the act of writing words on paper. Rather, it is effected only when the letter is read by the addressee. Both parties to the correspondence have an interest in securing that result, and censorship of the communication between them necessarily impinges on the interest of each. Whatever the status of a prisoner's claim to uncensored correspondence with an outsider, it is plain that the latter's interest is grounded in the First Amendment's guarantee of freedom of speech. And this does not depend on whether the nonprisoner correspondent is the author or intended recipient of a particular letter, for the addressee as well as the sender of direct personal correspondence derives from the First and Fourteenth Amendments a protection against unjustified governmental interference with the intended communication. We do not deal here with difficult questions of the so-called 'right to hear' and third-party standing but with a particular means of communication in which the interests of both parties are inextricably meshed. The wife of a prison inmate who is not permitted to read all that her husband wanted to say to her has suffered an abridgment of her interest in communicating with him as plain as that which results from censorship of her letter to him. *In either event, censorship of prisoner mail works a consequential restriction on the First and Fourteenth Amendments rights of those who are not prisoners.*

*Procunier v. Martinez*, 416 U.S. 396, 408-09 (1974) (emphasis added), *overruled in part on other grounds, Thornburgh v. Abbott*, 490 U.S. 401 (1989).

**The proposed regulation's limitations on communication with clergy and other religious communications violate the Religious Freedom Restoration Act.**

Congress has made clear its intent to provide ample protection for the religious rights of prisoners. The Religious Freedom Restoration Act of 1993 (RFRA) provides that government may substantially burden a person's exercise of religion only if it demonstrates that the burden is in furtherance of a compelling governmental interest, and is the least restrictive means of furthering that interest.<sup>7</sup> RFRA was held to protect prisoners,<sup>8</sup> an interpretation Congress did not overturn. Indeed, when the Supreme Court invalidated RFRA in its application to states and localities,<sup>9</sup> Congress responded by enacting the Religious Land Use and Institutionalized Persons Act,<sup>10</sup> which, *inter alia*, specifically restores the protections of RFRA to state and local prisoners.

RFRA's application to persons in federal custody is unaffected by the Court's decision in *City of Boerne* and has never been in doubt.<sup>11</sup> Accordingly, the Bureau has the burden of justifying any policy that substantially burdens prisoners' exercise of religion under the compelling governmental interest/least restrictive means test.

There are many prisoners whose religious beliefs require communication with clergy, or other communications of a religious nature with persons in the outside world. The proposed regulation allows such communications in writing only "at the discretion of the Warden," and imposes a ban on all such communications via telephone or personal visit. It is highly unlikely that this absolute ban, which takes no account of the content of the individual communication or the identity of the prisoner's interlocutor, will be found to be the least restrictive means of furthering a compelling governmental interest. Accordingly, in such cases, the regulation will run afoul of the Religious Freedom Restoration Act.

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<sup>7</sup> 42 U.S.C. § 2000bb-1 (2006).

<sup>8</sup> See, e.g., *Small v. Lehman*, 98 F.3d 762, 766 (3d Cir. 1996); *Ochs v. Thalacker*, 90 F.3d 293 (8th Cir. 1996); *Hicks v. Garner*, 69 F.3d 22 (5th Cir. 1995).

<sup>9</sup> *City of Boerne v. Flores*, 521 U.S. 507 (1997).

<sup>10</sup> 42 U.S.C. § 2000cc (2006).

<sup>11</sup> See, e.g., *O'Bryan v. Bureau of Prisons*, 349 F.3d 399, 401 (7th Cir. 2003); *Kikumura v. Hurley*, 242 F.3d 950, 960 (10th Cir. 2001).

**The proposed regulation's ban on visiting and telephone contact with consular officials violates US treaty obligations.**

In 1969, the United States ratified the Vienna Convention on Consular Relations, Article 36 of which provides:

**Article 36 - Communication and contact with nationals of the sending State**

1. With a view to facilitating the exercise of consular functions relating to nationals of the sending State:

\* \* \*

(c) consular officers shall have the right to visit a national of the sending State who is in prison, custody or detention, to converse and correspond with him and to arrange for his legal representation. They shall also have the right to visit any national of the sending State who is in prison, custody or detention in their district in pursuance of a judgement. ...

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UNION FOUNDATION

Although more than one-quarter of the Bureau's prisoners are foreign nationals,<sup>12</sup> the proposed regulation makes no provision for compliance with the Vienna Convention's requirements that consular officials be allowed to converse with and visit such prisoners. While the 2006 proposed regulation on Limited Communication for Terrorist Inmates provided for confidential mail, telephone, and in-person communication with consular officials for prisoners who are foreign nationals, 71 Fed. Reg. at 16,524, these provisions have been deleted from the 2010 proposed regulation.

Violation of US treaty obligations under the Vienna Convention has resulted in substantial disruption in both law enforcement and foreign relations. In *Case Concerning Avena and Other Mexican Nationals (Mex. v. U.S.)*, 2004 I.C.J. 12 (Mar. 31), the International Court of Justice (ICJ) ruled in a case brought by the government of Mexico that the United States had violated Article 36 of the Vienna Convention by failing to inform 51 named Mexican nationals of their Vienna Convention rights. The ICJ accordingly ruled that those named individuals were entitled to review and reconsideration of their US state court convictions and sentences. The Bureau should not promulgate a rule that ensures that similar treaty violations will occur in the future.

**The proposed regulation severely restricts prisoners from communicating with the news media.**

"The constitutional guarantee of a free press assures the maintenance of our political system and an open society, and secures the paramount public interest in

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<sup>12</sup> FED. BUREAU OF PRISONS, U.S. DEP'T OF JUSTICE, STATE OF THE BUREAU 2008: THE BUREAU'S CORE VALUES 2 (2009), available at <http://www.bop.gov/news/PDFs/sob08.pdf>.

a free flow of information to the people concerning public officials.” *Pell v. Procunier*, 417 U.S. 817, 832 (1974) (internal quotation marks, citations omitted) (prison case). But now the government proposes to completely bar a class of persons from communicating with the news media via personal visit and telephone, and leaves open the possibility that they will be barred from communicating via letter as well.

The Supreme Court has consistently assumed that communications between prisoners and members of the news media enjoy constitutional protection. *See Houchins v. KOED, Inc.*, 438 U.S. 1, 15 (1978) (“[News organizations] have a First Amendment right to receive letters from inmates criticizing jail officials and reporting on conditions”) (plurality opinion). When the Court has sustained limitations on certain forms of media access to correctional facilities, it has always emphasized that alternative means of communication between prisoners and the press remained open and unrestricted. *See, e.g., Saxbe v. Washington Post Co.*, 417 U.S. 843, 847 (1974) (upholding restrictions on media interviews with prisoners) (“In addition, newsmen and inmates are permitted virtually unlimited written correspondence with each other. Outgoing correspondence from inmates to press representatives is neither censored nor inspected. Incoming mail from press representatives is inspected only for contraband or statements inciting illegal action”); *Pell*, 417 U.S. at 824 (same) (“Thus, it is clear that the medium of written correspondence affords inmates an open and substantially unimpeded channel for communication with persons outside the prison, including representatives of the news media”); *see also Hammer v. Ashcroft*, 570 F.3d 798, 804 (7th Cir. 2009) (en banc) (“It was important to both decisions [*Saxbe* and *Pell*] that all prisoners could correspond freely with reporters, even though face-to-face interviews were impossible”).

On those few occasions when prison officials attempted to restrict prisoners’ written communications with the news media, the restrictions were held to be unconstitutional. *See, e.g., Owen v. Lash*, 682 F.2d 648, 650-53 (7th Cir. 1982) (ban on correspondence with newspaper reporter was unconstitutional); *Mujahid v. Sumner*, 807 F. Supp. 1505, 1509-11 (D. Haw. 1992) (ban on correspondence with members of the press unless they had been friends before the prisoner’s incarceration was unconstitutional), *aff’d*, 996 F.2d 1226 (9th Cir. 1993); *cf. Abu-Jamal v. Price*, 154 F.3d 128, 136 (3d Cir. 1998) (enjoining application of rule against “engaging in a business or profession” to prisoners writing for publication); *Jordan v. Pugh*, 504 F.Supp.2d 1109 (D. Colo. 2007) (Bureau of Prisons rule barring prisoners from publishing under a byline violates First Amendment).

Under the proposed regulation, prisoners in the CMU are completely barred from communicating with the news media by telephone or via personal visits. Although they are not categorically barred from writing to news reporters, the regulation provides that such correspondence is allowed only “at the discretion of the Warden.” Thus, the regulation allows for the possibility that CMU prisoners

will be barred from communicating with the news media in any form – a result that is almost certainly unconstitutional under existing case law.<sup>13</sup>

**The proposed regulation imposes a total ban on visiting and telephone communication with most family members.**

The Supreme Court has long recognized a right to intimate family association. *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923); *see also M.L.B. v. S.L.J.*, 519 U.S. 102, 116 (1996) (noting the importance of associational rights including choices about marriage, family life and the upbringing of children); *Moore v. City of East Cleveland*, 431 U.S. 494, 499 (1977) (plurality opinion) (collecting cases regarding the constitutional protection afforded choices in matters of marriage and family life). Moreover, the Court has declined invitations to hold that this right is extinguished by incarceration. *See Overton v. Bazzetta*, 539 U.S. 126, 131-32 (2003) (“We do not hold, and we do not imply, that any right to intimate association is altogether terminated by incarceration or is always irrelevant to claims made by prisoners”).

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UNION FOUNDATION

The proposed regulation provides that the affected prisoners will be cut off from *all* visiting and telephone communication with family members, except for “immediate family members.” The only definition of “immediate family” that appears in 28 C.F.R. Part 540 is found in § 540.44(a), and defines the term to include only spouses, parents (including step-parents and foster parents), siblings, and children. In light of the proposed regulation’s failure to define this central term, these Comments assume that the definition in § 540.44(a) will govern.

Even with these immediate family members, communication is limited to one 15-minute telephone call per month; one one-hour non-contact visit per month; and one three-page letter per week. Proposed 28 C.F.R. §§ 540.203(a), 540.204(a), 540.205(a). The proposed regulation’s provision that telephone conversations and visits may be required to be conducted in English, or simultaneously translated by an approved interpreter, will mean that some prisoners are unable to enjoy even the extremely limited communication permitted.

Once again, this blanket ban on all visiting and telephone contact with grandparents, grandchildren, aunts, uncles, cousins, and other relatives, and severe restrictions on the ability to communicate by letter, is unprecedented. In *Bazzetta*, the Supreme Court upheld various restrictions on prison visiting, including a two-year ban on all visits for prisoners who engaged in certain misconduct. The Court noted that, even for those prisoners denied all visiting, alternatives were available; “they and other inmates may communicate with persons outside the prison by letter and telephone.” *Bazzetta*, 539 U.S. at 135.

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<sup>13</sup> By contrast, prisoners on the federal death row are permitted unlimited, uncensored correspondence, as well as telephone contact, with the news media. *Hammer*, 570 F.3d at 799-800.



Those alternatives are not available under the proposed regulation.

The regulation's severe limitation on contact with relatives other than members of the nuclear family is almost certainly unconstitutional. "Ours is by no means a tradition limited to respect for the bonds uniting the members of the nuclear family. The tradition of uncles, aunts, cousins, and especially grandparents sharing a household along with parents and children has roots equally venerable and equally deserving of constitutional recognition." *Moore*, 431 U.S. at 504 (holding that constitution was implicated by ordinance that prevented a grandmother from living with her grandchild). Moreover, these restrictions are likely to fall with disproportionate weight upon members of racial and ethnic minorities.<sup>14</sup>

**The proposed regulation is vague and overbroad, and contains no meaningful standards.**

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As already noted, the proposed regulation may be applied to persons who have not been convicted of, or even charged with, any crime. And unlike the 2006 proposed regulation, which was limited to persons having "an identifiable link to terrorist-related activity,"<sup>15</sup> the regulation as currently proposed is so broad that it could be applied to virtually any person in Bureau custody.

Under the proposed regulation:

Inmates may be designated to a CMU if evidence of the following criteria exists:

- (a) The inmate's current offense(s) of conviction, or offense conduct, included association, communication, or involvement, related to international or domestic terrorism;
- (b) The inmate's current offense(s) of conviction, offense conduct, or activity while incarcerated, indicates a propensity to encourage, coordinate, facilitate, or otherwise act in furtherance of, illegal activity through communication 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;

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<sup>14</sup> See Ken Bryson & Lynn M. Casper, U.S. Dep't of Commerce, Economics and Statistic Administration, *Coresident Grandparents and Grandchildren* 5 (1999), available at <http://www.census.gov/prod/99pubs/p23-198.pdf> (Black children are more likely than others to be raised by grandparents).

<sup>15</sup> Limited Communication, 71 Fed. Reg. at 16,523.

(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 communication with persons in the community.<sup>16</sup>

Under paragraph (d) (“prohibited activity related to misuse/abuse of approved communication methods while incarcerated”), a prisoner can become eligible for CMU transfer based on a single trivial act of misconduct. The Bureau’s disciplinary code defines “unauthorized use of mail” and “use of telephone for abuses other than criminal activity” as infractions of “low moderate” severity -- the least serious of the four categories of infractions. Examples of the latter infraction include “exceeding the 15-minute time limit for telephone calls” and “using the telephone in an unauthorized area.”<sup>17</sup> But under the proposed regulation, either of these infractions could subject a prisoner to CMU placement.

AMERICAN CIVIL LIBERTIES  
UNION FOUNDATION

More fundamentally, the fact that a prisoner could face indefinite assignment to a CMU based not upon past behavior, but rather as a result of some unspecified “potential threat” or “propensity” to engage in future misconduct, inspires little confidence that the regulation will be applied in an intelligible and evenhanded matter. Rather, such vague, standardless language invites arbitrary, inconsistent, and discriminatory application.

Unfortunately, there is a well-known pattern of retaliation against prisoners who complain about conditions of confinement, file grievances, or engage in litigation against correctional officials.<sup>18</sup> Such retaliation not infrequently takes the form of

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<sup>16</sup> Communication Management Unit, 75 Fed. Reg. at 17,328 (Proposed 28 C.F.R. § 540.201).

<sup>17</sup> 28 C.F.R. § 541.13, Table 3.

<sup>18</sup> See *Haynes v. Stephenson*, 588 F.3d 1152 (8th Cir. 2009) (upholding damages award where officer wrote disciplinary report against prisoner for statements made in a grievance, resulting in six days in segregation before dismissal and return to regular housing); *Dannenberg v. Valadez*, 338 F.3d 1070, 1071-72 (9th Cir. 2003) (noting jury verdict for plaintiff on claim of retaliation for assisting another prisoner with litigation); *Walker v. Bain*, 257 F.3d 660, 663-64 (6th Cir. 2001) (noting jury verdict for plaintiff whose legal papers were confiscated in retaliation for filing grievances); *Gomez v. Vernon*, 255 F.3d 1118 (9th Cir. 2001) (affirming injunction protecting prisoners who were the subject of retaliation for filing grievances and for litigation); *Hines v. Gomez*, 108 F.3d 265 (9th Cir. 1997) (affirming jury verdict for plaintiff subjected to retaliation for filing grievances); *Cassels v. Stalder*, 342 F.Supp.2d 555, 564-67 (M.D. La. 2004) (striking down disciplinary conviction for “spreading rumors” of prisoner whose mother had

transferring the prisoner to segregation or other restricted housing unit.<sup>19</sup> The proposed regulation's overbreadth and its failure to include objective, intelligible standards pose a grave risk that prisoners will be sent to CMUs not for terrorist or criminal activity but because they annoy or embarrass prison staff with lawsuits, communications with the news media, or other protected expressive activity.

**The proposed regulation is unnecessary, as current law allows monitoring of prisoners' communications for criminal activity.**

Existing Bureau regulations allow prison officials to control and limit prisoners' correspondence, telephone calls, and visits, and to monitor those communications to detect and prevent possible criminal activity. For example, prison staff must approve a prisoner's visitor lists; they may conduct background checks for that purpose, and may disapprove any visitor. 28 C.F.R. § 540.51(b). Visiting areas may be monitored. 28 C.F.R. § 540.51(h). Prison officials may deny placement of a given telephone number on a prisoner's telephone list if they determine that there is a threat to security. 28 C.F.R. § 540.101(a)(3). Telephone calls are also monitored. 28 C.F.R. § 540.102. Prison officials have the authority to open and read all non-privileged prisoner mail. 28 C.F.R. §§ 540.12, 540.14.

AMERICAN CIVIL LIBERTIES  
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publicized his medical care complaint on the Internet); *Atkinson v. Way*, 2004 WL 1631377 (D. Del., July 19, 2004) (upholding jury verdict for plaintiff subjected to retaliation for filing lawsuit); *Tate v. Dragovich*, 2003 WL 21978141 (E.D. Pa., Aug. 14, 2003) (upholding jury verdict against prison official who retaliated against plaintiff for filing grievances); *Hunter v. Heath*, 95 F.Supp.2d 1140 (D. Or. 2000) (noting prisoner's acknowledged firing from legal assistant job for sending "kyte" (officially sanctioned informal complaint) to the Superintendent of Security concerning the confiscation of a prisoner's legal papers), *rev'd on other grounds*, 26 Fed.Appx. 754, 2002 WL 112564 (9th Cir. 2002); *Maurer v. Patterson*, 197 F.R.D. 244 (S.D.N.Y. 2000) (upholding jury verdict for plaintiff who was subjected to retaliatory disciplinary charge for complaining about operation of grievance program); *Gaston v. Coughlin*, 81 F.Supp.2d 381 (N.D.N.Y. 1999) (awarding damages for trumped-up disciplinary charge made in retaliation for prisoner's complaining about state law violations in mess hall work hours), *motion for reconsideration denied*, 102 F.Supp.2d 81 (N.D.N.Y. 2000); *Alnutt v. Cleary*, 27 F.Supp.2d 395, 397-98 (W.D.N.Y. 1998) (noting jury verdict for plaintiff who was subject to verbal harassment, assault, and false disciplinary charges in retaliation for his work as an Inmate Grievance Resolution Committee representative).

<sup>19</sup> See, e.g., *Pearson v. Welborn*, 471 F.3d 732, 734 (7th Cir. 2006) (prisoner retained in "supermax" prison as a result of false and retaliatory disciplinary charge); *Royal v. Kautzky*, 375 F.3d 720, 722-24 (8th Cir. 2004) (prisoner placed in segregation for complaining about inadequate medical care); *Trobaugh v. Hall*, 176 F.3d 1087 (8th Cir. 1999) (directing award of compensatory damages to prisoner placed in isolation for filing grievances).

The NPRM offers no explanation why these existing methods do not fully accommodate legitimate security needs. If the volume of prisoner mail, telephone calls, or visits is too great to permit effective monitoring, Bureau officials may impose reasonable limits on those activities. *See, e.g.*, 28 C.F.R. § 540.40 ("The Warden may restrict inmate visiting when necessary to ensure the security and good order of the institution"). Such across-the-board limits would trench far less heavily on First Amendment rights than singling out a disfavored class of prisoners for a virtually complete ban on communications with the news media and with most family members. *See Crofton v. Roe*, 170 F.3d 957, 960 (9th Cir. 1999) (complete ban on gift subscriptions was not rationally related to government interest in efficiency of prison operations, as prison could instead limit the number of subscriptions prisoners could receive).

Indeed, there already exist specific provisions for limiting the communications of prisoners who are suspected of terrorist activity: the Special Administrative Measures (SAMs) set forth in 28 C.F.R. Part 501. The SAMs suffer from many of the same constitutional infirmities as the proposed regulation, and the undersigned organizations do not endorse them, but they do provide additional safeguards not present here. As explained in the NPRM:

Under 28 CFR part 501, SAMs are imposed after approval by the Attorney General and are generally based on information from the FBI and the U.S. Attorney's Office (USAO), but are typically not based solely on information from internal Bureau of Prisons sources. Unlike 28 CFR part 501, the proposed regulations allow the Bureau to impose communication limits based on evidence from FBI or other Federal law enforcement agency, or if Bureau of Prisons information indicates a similar need to impose communication restrictions, *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.*

Communication Management Unit, 75 Fed. Reg. at 17,325 (emphasis added). This admission that the proposed regulation will dilute the standard for imposing these extraordinary restrictions on communication is troubling, particularly in the absence of any claim that the SAMs have proven inadequate to serve legitimate security needs.

## **Conclusion**

The proposed regulation is poorly conceived, almost certainly unconstitutional, and entirely unnecessary. It should be withdrawn, and the Bureau should immediately cease to operate CMUs.

Very truly yours,

David C. Fathi, Director  
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Philip Fornaci, Director  
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