

STATESIDE GUANTANAMO: BREAKING THE SILENCE

Luke A. Beata[†]

CONTENTS

| | |
|--|-----|
| INTRODUCTION | 281 |
| I. BACKGROUND: A POST 9/11 FRAMEWORK | 284 |
| II. THE HISTORY AND CREATION OF THE CMU | 285 |
| III. FAILURE TO COMPLY WITH THE APA | 289 |
| IV. THE DENIAL OF PROCEDURAL DUE PROCESS..... | 291 |
| A. <i>Identifying a Protected Liberty Interest</i> | 291 |
| B. <i>Due Process Analysis under Mathews v. Eldridge</i> | 294 |
| V. THE POTENTIAL FOR DISCRIMINATION | 297 |
| VI. RECOMMENDATIONS TO IMPROVE THE CURRENT CMU REGIME | 298 |
| CONCLUSION..... | 300 |

INTRODUCTION

On December 11, 2006, the Department of Justice quietly began to execute the initial stages of a secret new program, the Communication Management Unit (CMU).¹ At 7:00 A.M., seventeen federal prisoners from across the country were removed from their cells without warning or explanation.² They were held in isolation for two days and then transferred to the Federal Correction Complex (FCC) in Terre Haute, Indiana.³ There, they were notified of their transfer to the CMU—a “completely self-contained unit” designed to severely limit a prisoner’s ability to communicate with the outside world.⁴

[†] J.D. Candidate, Syracuse University College of Law, 2012; B.A. International Relations and Economics, Boston University, 2002. Many thanks to Brian and to my family for their love and support and a special thank you to Professor Tucker B. Culbertson for his assistance during the writing of this Note.

1. Katherine Hughes, *Dr. Rafil A. Dhafir at Terre Haute Prison’s New Communications Management Unit*, WASH. REP. OF MIDDLE EAST AFFAIRS, 12-13 (May-June 2007), available at <http://www.wrmea.com/component/content/article/310-2007-may-june/9186-dr-rafil-a-dhafir-at-terre-haute-prisons-new-communications-management-unit.html>.

2. *Id.*; Nick Meyer, *Local former U.S. Navy man locked in isolation unit “without explanation,”* THE ARAB AM. NEWS (Jan. 15, 2011, 2:22 AM), <http://www.arabamericannews.com/news/index.php?mod=article&cat=Community&article=3823>.

3. Hughes, *supra* note 1.

4. *Id.*

Unlike other prisons in the United States, the CMUs have been operating in relative secrecy.⁵ Official comment from the Bureau of Prisons states that the program is part of an ongoing effort to monitor the mail and other communications of “terrorist inmates” within the federal prison system.⁶ The government asserts that CMUs were designed to allow for a concentration of resources in an effort to “greatly enhance the agency’s capabilities for language translation, content analysis and intelligence sharing.”⁷

All forms of communication in the CMU are monitored and severely restricted.⁸ CMU inmates are subjected to twenty-four hour surveillance.⁹ Every word they utter is recorded and remotely monitored by a counter-terrorism team.¹⁰ Conversation among inmates must be conducted in English, unless otherwise negotiated.¹¹ Restrictions on visiting time and phone calls are more severe than in most maximum security prisons.¹² Although most of the prisoners are not considered high security risks, the units also impose a categorical ban on any physical contact with visitors, including family.¹³

Although the U.S. government contends that the units were created to house terrorist prisoners, many CMU detainees have never been convicted of terrorism related offenses.¹⁴ Take CMU inmate Sabri Benkahla, who was born in Virginia and graduated from George Mason University.¹⁵ While studying in Saudi Arabia, he was arrested and charged with aiding the Taliban.¹⁶ A Virginia court found him not guilty in 2004.¹⁷ Despite the acquittal, prosecutors forced him to testify

5. *See id.*; *see also* Basil Katz, *Special U.S. prisons unconstitutional: lawsuit*, REUTERS (Mar. 30, 2010), <http://www.reuters.com/article/2010/03/31/us-usa-prisons-rights-lawsuit-idUSN3014363320100331>.

6. Communication Management Units, 75 Fed. Reg. 17,324, 17,324-26 (Apr. 6, 2010) (to be codified at 28 C.F.R. pt. 540).

7. Dan Eggen, *Facility Holding Terrorist Inmates Limits Communication*, WASH. POST, Feb. 25, 2007, at A7, available at <http://www.washingtonpost.com/wp-dyn/content/article/2007/02/24/AR2007022401231.html>.

8. *See id.*

9. Carrie Johnson & Margot Williams, *Guantanamo North: Inside Secretive U.S. Prisons*, NAT'L PUB. RADIO (NPR) (Mar. 3, 2011), <http://www.npr.org/2011/03/03/134168714/guantanamo-north-inside-u-s-secretive-prisons>.

10. *Id.*

11. Eggen, *supra* note 7.

12. Johnson, *supra* note 9.

13. Hughes, *supra* note 1; Meyer, *supra* note 2.

14. Meyer, *supra* note 2.

15. *Benkahla v. Federal Bureau of Prisons, et al.*, AM. CIV. LIBERTIES UNION (ACLU) (June 2, 2010), <http://www.aclu.org/prisoners-rights/benkahla-v-federal-bureau-prisons-et-al>.

16. *Id.*

17. *Id.*

before a grand jury, where he was accused and convicted of perjury.¹⁸ At Benkhali's sentencing, the presiding judge declared that he was "not a terrorist" and that his chances of "ever committing another crime were 'infinitesimal.'"¹⁹ Other CMU inmates include Enaam Arnaout, the founder of the Islamic charity Benevolence International Foundation, and Dr. Rafil Dhafir, a physician and the founder of the Iraqi charity Help the Needy.²⁰ Like Benkahla, Dhafir and Arnaout were initially accused of terrorist-related crimes, yet were ultimately imprisoned for far lesser charges.²¹

The CMUs have come under fire from civil rights organizations which argue that the units represent "an unwarranted expansion on the war on terrorism."²² The Federal Bureau of Prisons' (BOP or "Bureau") failure to establish meaningful criteria for inmate designation to a CMU coupled with the fact that the units house predominantly Muslim males indicates a strong presumption of racial profiling.²³ Equally troubling is the secretive manner in which the CMUs were established. The Administrative Procedures Act (APA) requires that prison regulations be promulgated under the law, yet the Bureau failed to notify the public of any changes to the prison program and did not afford the opportunity for opposition to comment prior to the creation of the CMUs.²⁴ Critics have dubbed the facilities a "stateside Guantanamo."²⁵

This Note will argue that the U.S. government's creation of the CMUs and the current policies under which the prison units operate violate established constitutional and statutory standards. Part I details the post-9/11 climate from which the CMUs arose. Part II attempts to expose the clandestine creation of the CMUs, while Part III argues that their establishment represented a marked change in federal policy which failed to comply with the APA. Part IV maintains that the rules which govern the operation of the CMUs deny inmates due process guarantees of the Fifth Amendment. Part V addresses the disproportionate

18. *Id.* Notably, the statements which he allegedly had misrepresented were related to the underlying offense of his earlier arrest of which he was acquitted. *Id.*

19. *Benkahla v. Federal Bureau of Prisons, et al.*, *supra* note 15.

20. Karen Friedemann, *The CMU Black Hole*, THE MUSLIM OBSERVER (Aug. 6, 2009), <http://muslimmedianetwork.com/mmn/?p=4426>.

21. *Id.*

22. Dean Kuipers, *Isolation Prisons Under Fire, An ACLU Lawsuit will Challenge the Transfer of an Inmate to a Facility that Drastically Limits Outside Contact*, L.A. TIMES (June 18, 2009), <http://articles.latimes.com/2009/jun/18/nation/na-terror18>.

23. Eggen, *supra* note 7.

24. Hughes, *supra* note 1; *see also* Katz, *supra* note 5.

25. Katz, *supra* note 5.

percentage of Muslims housed in CMUs. Finally, Part VI offers recommendations aimed at resolving the CMU regime's current inadequacies.

I. BACKGROUND: A POST 9/11 FRAMEWORK

On October 26, 2001, little more than one month after the September 11th terrorist attacks, President Bush signed into law the U.S.A. Patriot Act (USAPA) which granted "law enforcement officials expansive powers and security agencies increased resources to fight terrorism."²⁶ In the years following the enactment of the USAPA, the government has consistently maintained the secrecy of the Act's reach on the grounds of "national security, executive privilege, [and] operational secrecy."²⁷ Nevertheless, the collateral consequences of the USAPA and other anti-terrorism measures have surfaced; the effects of which increasingly resonate throughout American society.²⁸

As a complement to the USAPA, Attorney General Ashcroft "achieved complete information blackout of [Department of Justice] enforcement operations."²⁹ On October 12, 2001, Ashcroft announced new Administration policy concerning the Freedom of Information Act (FOIA), superseding the old FOIA policy which had been in favor of liberal information release.³⁰ Public Citizen, a national non-profit advocacy organization, observed that from the beginning the Bush Administration had "taken steps to tighten the government's hold on information and limit public scrutiny of its activities."³¹ This response was largely supported by sympathetic courts that expressed hesitancy in liberalizing access to government information when issues of national security were involved.³²

Restrictive post-9/11 policies have not only had a radical impact on the availability of information, but also have worked to exacerbate public sentiment in the United States toward Muslim and Arab populations.³³ Top U.S. government officials have recognized that many federal policies have fueled anti-Muslim sentiment.³⁴ In a

26. Kam C. Wong, *The USA Patriot Act: A Policy of Alienation*, 12 MICH. J. RACE & L. 161, 162 (2006).

27. *Id.* at 164.

28. *Id.*

29. *Id.* at 174.

30. *Id.*

31. Wong, *supra* note 26, at 174.

32. *Id.* at 175; Mary-Rose Papandrea, *Under Attack: The Public's Right to Know and the War on Terror*, 25 B.C. THIRD WORLD L.J. 35, 36 (2005).

33. *See generally* Wong, *supra* note 26, at 164.

34. *See* Community and Faith-Based Organizations, Communication Management

2011]

Stateside Guantanamo

285

February 2010 speech, John Brennan, Deputy National Security Advisor for Homeland Security and Counterterrorism, reflected that Muslims have “been targeted by ‘inexcusable ignorance and prejudice’ . . . and that there has been a rise in ‘scapegoating and fearmongering.’”³⁵ Indeed, many have a “distorted view” of Islam because discussion of the religion often occurs in the context of terrorism.³⁶ It has been conceded that government actions have “at times perpetuated ignorance and prejudice toward Muslims . . . [through] violations of the Patriot Act, surveillance that has been excessive and policies perceived as profiling.”³⁷

Unmistakably, 9/11 was a “transformational event,” not only in terms of government response, but also in terms of societal views.³⁸ Observers have noted that “the biggest discernable change after 9/11 was the nation’s dismissive attitude towards human, civil and constitutional rights in the face of terrorist threats.”³⁹ “After 9/11, it came to be considered acceptable . . . to torture suspected terrorists for information, to imprison terrorists . . . without due process, [and] to compromise citizens’ privacy rights in the name of security.”⁴⁰ Although this Note focuses primarily on the procedural shortcomings of the CMU prison facilities, it is important to acknowledge the social and political climate from which the CMUs emerged.

II. THE HISTORY AND CREATION OF THE CMU

In 2006, the BOP proposed rules to manage the communications of prisoners who had been charged or convicted of terrorism-related offenses.⁴¹ The proposal sought to severely restrict non-legal telephone calls and visitation for certain prisoners associated with terrorist activities.⁴² The BOP rationalized that “[p]ast behaviors of terrorist

Units: Comments Submitted to the Federal Bureau of Prisons, 99-100 (June 2010), http://ccrjustice.org/files/Complete_Selection_Comments-2010.0618.pdf.

35. *Id.* at 99.

36. *Id.*

37. *Id.*

38. Wong, *supra* note 26, at 199.

39. *Id.*

40. *Id.* at 199-200.

41. Limited Communication for Terrorist Inmates, 71 Fed. Reg. 16,520, 16,520 (Apr. 3, 2006) (to be codified at 28 C.F.R. pt. 540). In order to promulgate rules, federal administrative agencies must, pursuant to section 3 of the Administrative Procedure Act, 5 U.S.C.A. § 553, “provide notice of the proposed rule and accept and consider comments from interested persons.” Elizabeth Williams, Annotation, *What Constitutes “Interpretive Rule” of Agency so as to Exempt Such Action from Notice Requirements of Administrative Procedure Act (5 U.S.C.A. § 553(b)(3)(a))*, 126 A.L.R. FED. 347, 347 (1995).

42. *See* Limited Communication for Terrorist Inmates, 71 Fed. Reg. at 16,524

inmates provide[d] sufficient grounds to suggest a substantial risk that they may inspire or incite terrorist-related activity.”⁴³ Adhering to the requirements of the APA, the BOP sought public response regarding the proposed rules.⁴⁴

On June 2, 2006, eighteen civil rights and civil liberties groups submitted comments and responses to the proposed rule, including the American Civil Liberties Union, the Center for National Security Studies, the Legal Aid Society, and the National Lawyers Guild.⁴⁵ The Bureau’s proposal was widely criticized as “poorly conceived, almost certainly unconstitutional, and entirely unnecessary.”⁴⁶ Amid such intense criticism, the BOP abandoned the rulemaking process and did not proceed to take final action on the 2006 proposal.⁴⁷

Less than six months later, the BOP “quietly issued the Terre Haute CMU Institution Supplement” which purported to establish the procedures for the operation of the first CMU in Terre Haute, Indiana.⁴⁸ The Institution Supplement outlined communication restrictions that were fundamentally indistinguishable from those proposed in the earlier 2006 Notice, but which bypassed the formal rulemaking procedures required under the APA.⁴⁹ Notably, however, the Institution Supplement did not include any reference to “terrorism” related offenses.⁵⁰ Unlike the earlier Notice, the Institution Supplement did not require the BOP to solicit the public for comment.⁵¹ Given the criticism of the 2006 Notice, the BOP appears to have issued the Institution Supplement in order to evade public scrutiny.⁵² Fifteen months later, the BOP issued an additional Institution Supplement which created a

(proposing to limit inmates to one fifteen minute telephone call to immediate family members per month, and one visit of one hour by immediate family members per month, but allowing contact visits “at the discretion of the Warden”).

43. *Id.* at 16,521.

44. *See id.*; *see also* Administrative Procedure Act, 5 U.S.C. § 553 (2010).

45. Complaint at ¶ 237, *Aref v. Holder*, 774 F. Supp. 2d 147 (D.D.C. 2011) (No. 1:10-cv-00539), 2010 WL 1371980, at *28.

46. *Id.*

47. *Id.* ¶ 238.

48. Plaintiffs’ Memorandum in Opposition to Defendants’ Motion to Dismiss at 63, *Aref v. Holder*, 774 F. Supp. 2d 147 (D.D.C. 2011) (No. 1:10-cv-00539), 2010 WL 3514958, at *31.

49. *See U.S. Dep’t of Justice, Fed. Bureau of Prisons, THX-5270.07A, Institution Supplement* (2006), 1-5, *available at* http://www.aclu.org/files/pdfs/prison/benkahlavbop_institutionalsupplement.pdf; 5 U.S.C. § 553 (2010); *see also* Limited Communication for Terrorist Inmates, 71 Fed. Reg. 16,520, 16,520-24 (Apr. 3, 2006) (to be codified at 28 C.F.R. pt. 540).

50. *See Institution Supplement*, *supra* note 49.

51. *See Plaintiffs’ Memorandum*, *supra* note 48, at 63.

52. *Id.*

second CMU facility in Marion, Illinois.⁵³

The actual creation of the CMUs remains a mystery.⁵⁴ The Institution Supplements established the guidelines and procedures for the operation of the CMUs, but did not expressly create the units.⁵⁵ Only three government offices—all within the Department of Justice—have the authority to implement changes to federal prison operations: the Office of the Director of the Prisons Bureau, the Office of Legal Counsel, and the Office of the U.S. Attorney General.⁵⁶ It remains unknown which office authorized the creation of the CMUs.⁵⁷ The Institution Supplements explain that CMUs were established in order to provide an inmate housing environment that enables staff monitoring of all communication between CMU inmates and persons in the community.⁵⁸ The documents further state that the ability to monitor such communication is crucial to ensure the “safety, security, and orderly operation of correctional facilities, and [to] protect the public.”⁵⁹ Significantly, the Institution Supplements fail to disclose the criteria used to transfer an inmate to the CMUs.⁶⁰

Four years after the first CMU was established, the BOP once again attempted to provide substantive rules regarding the management of the CMUs.⁶¹ In April of 2010, the BOP proposed formal rulemaking procedures in a renewed effort to legitimize the existing CMUs.⁶² The proposed rules offer detailed policy regulations previously unavailable.⁶³ Although the 2010 Notice has not been finalized by the BOP, its provisions will serve as a proxy for the conditions currently endured by CMU detainees for the purposes of this Note.⁶⁴

The 2010 Notice details the criteria employed to justify CMU

53. *Id.*

54. *See* Hughes, *supra* note 1.

55. *See Institution Supplement*, *supra* note 49.

56. Hughes, *supra* note 1.

57. *Id.* In a letter written shortly after his arrival, CMU inmate, Dr. Rafil A. Dhafir wrote: “[n]o one seems to know about this top-secret operation until now The order came from the Attorney General himself We are told this is an experiment, so the whole concept is evolving on a daily basis.” *Id.* (emphasis omitted).

58. *Institution Supplement*, *supra* note 49.

59. *Id.*

60. *See id.*

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

62. *See id.*

63. *Id.*

64. *Id.* Because CMUs have been operating four years without having undergone any formal rule-making process, actual conditions and restrictions faced by CMU inmates remain largely anecdotal. *See, e.g.,* Meyer, *supra* note 2.

designation.⁶⁵ A prisoner may be transferred to a CMU if the inmate's current offense of conviction involves association or involvement in international or domestic terrorism; if there is evidence indicating a propensity to encourage furtherance of an illegal activity; if the inmate has attempted to contact victims of the inmate's current offense; or if the inmate has abused approved communication methods while incarcerated.⁶⁶ The proposal also includes a broad provision permitting CMU designation of any inmate deemed "a potential threat to the safe, secure, orderly operation of prison facilities."⁶⁷ The Bureau's proposal does not define with any specificity the nature of the evidentiary standard required.⁶⁸

Only the Bureau's Assistant Director of Correctional Programs Division has the authority to approve CMU designations.⁶⁹ A decision by the Assistant Director is made based on a review of the evidence and a finding that the transfer of an inmate to a CMU is necessary to ensure either the security of the correctional facility or to protect the public.⁷⁰ Inmates transferred to a CMU receive written notice of the decision only *upon arrival* at the designated CMU.⁷¹ The single-page notice outlines the general conditions of CMU confinement and the restrictions they can expect.⁷²

An inmate transferred to a CMU faces severe restrictions on his ability to communicate with the outside world which depart dramatically from those that apply to other federal prisoners.⁷³ Inmates are permitted to make one fifteen-minute telephone call and to receive one-hour long visit per month.⁷⁴ Written correspondence is limited to one double-sided, three-page letter per week.⁷⁵ According to the Bureau, reducing the frequency and volume of the communication to

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

66. *Id.*

67. *Id.*

68. *See id.*

69. *Id.*

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

71. *Id.*

72. *Id.*; *see also* Plaintiffs' Memorandum, *supra* note 48, at 32.

73. Letter from David Shapiro, Counsel, Brennan Ctr. for Justice, to Sarah Qureshi, Office of Gen. Counsel, Bureau of Prisons (June 2, 2010), *available at* http://www.brennancenter.org/content/resource/CMU_letter/. The BOP generally allows prisoners a minimum of 300 minutes of telephone calls per month. *Id.* General population inmates at Terre Haute are permitted up to seven visits per month. *Id.* The Bureau typically does not restrict the amount of correspondence that general population inmates may send and receive. *Id.*

74. *Id.*

75. Letter from David Shapiro to Sarah Qureshi, *supra* note 73.

2011]

Stateside Guantanamo

289

and from inmates “will help ensure the Bureau’s ability to provide heightened scrutiny in reviewing communications, and thereby increas[e] both [the] internal security [of] correctional facilities, and the security of members of the public.”⁷⁶

In seeking public comment and in clarifying CMU procedures, the 2010 Proposal is “a step in the right direction.”⁷⁷ However, the proposal has adopted many of the deficiencies of the existing regime and merely attempts to codify current inadequacies which ultimately work to strip inmates of their constitutional protections.⁷⁸

III. FAILURE TO COMPLY WITH THE APA

The APA requires that federal agencies, including the BOP, comport with notice and rulemaking procedures before any legislative rule is promulgated.⁷⁹ This process is intended to notify interested parties and the public at large of proposed changes and affords an opportunity for opposition to comment.⁸⁰ Accordingly, the BOP issues three levels of rules and policy statements.⁸¹ At the highest level, the BOP releases “substantive regulations” subject to public notice and comment rulemaking which are later codified in the Code of Federal Regulations.⁸² At the secondary level, the Bureau issues “Program Statements,” which do not require the Bureau to engage in notice and comment rulemaking procedures.⁸³ These program statements “reproduce the rules contained in the Code of Federal Regulations and provide additional interpretation and commentary regarding [the BOP’s] national policies.”⁸⁴ Finally, at the lowest level, the BOP releases “Institution Supplements,” which are “issued without notice and comment rulemaking, which apply the policies contained in Program Statements to single facilities.”⁸⁵

The Bureau of Prisons violated the APA by issuing the CMU Institution Supplements in lieu of following prescribed rulemaking

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

77. David Shapiro, *Time to Fix Communication Management Units in Prisons*, BRENNAN CENTER FOR JUST. (Apr. 6, 2010), http://www.brennancenter.org/blog/archives/time_to_fix_communication_management_unit_s_in_prisons/.

78. *Id.*

79. Plaintiffs’ Memorandum, *supra* note 48, at 62.

80. Hughes, *supra* note 1.

81. Complaint, *supra* note 45, ¶ 233.

82. *Id.*

83. *Id.*

84. *Id.*

85. *Id.*

procedures.⁸⁶ The Institution Supplements were an attempt to bypass the APA's requirement that agencies follow notice and comment rulemaking procedures before promulgating new rules.⁸⁷ It appears that the government itself initially recognized that the CMUs could only be established after providing notice and inviting public comment when it issued the earlier 2006 Notice of Proposed Rulemaking.⁸⁸ However, after the 2006 proposal received considerable opposition from the public, the BOP abandoned the rulemaking process and instead issued the CMU Institution Supplements.⁸⁹

The CMU Institution Supplements contain "rules" which require the BOP to follow notice and comment gathering procedures.⁹⁰ The APA defines rules as "agency statement[s] of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or describing the organization, procedure, or practice requirements of an agency."⁹¹ The Institution Supplements established the procedures for the operation and management of the CMUs and imposed new requirements governing restrictions placed on the communication of inmates.⁹²

The BOP argues that "[t]he CMU Institution Supplements are not 'rules' within the meaning of the APA, but are akin to interpretive rules or agency policy statements' that are exempt from notice and comment requirements."⁹³ However, courts have held that an agency may not eschew APA requirements simply "by labeling a major substantive legal addition to a rule a mere interpretation."⁹⁴ The Institution Supplements are not simply policy statements that interpret the BOP's position on an existing governing rule.⁹⁵ Rather, they are compulsory pronouncements authorizing the creation and management of the CMUs.⁹⁶ The CMU Institution Supplements issue substantive rules, never before implemented or finalized, and must therefore be promulgated in accordance with the APA.⁹⁷ As part of the rulemaking procedure, the

86. See Hughes, *supra* note 1.

87. Plaintiffs' Memorandum, *supra* note 48, at 62.

88. *Id.*

89. *Id.* at 63.

90. *Id.*

91. 5 U.S.C. § 551(4) (2006).

92. See generally *Institution Supplement*, *supra* note 49, at 63.

93. Plaintiffs' Memorandum, *supra* note 48, at 63.

94. *Id.* at 63-64 (quoting *Appalachian Power Co. v. Env'tl. Prot. Agency*, 208 F.3d 1015, 1024 (D.C. Cir. 2000)).

95. Plaintiffs' Memorandum, *supra* note 48, at 65.

96. *Id.*; see generally *Institution Supplement*, *supra* note 49.

97. See Plaintiffs' Memorandum, *supra* note 48, at 65; see generally *Institution Supplement*, *supra* note 49.

2011]

Stateside Guantanamo

291

APA requires that a general Notice of a Proposed Rule be published in the Federal Register, unless interested parties are personally served or otherwise provided with actual notice.⁹⁸ The notice must include “a statement of the time, place, and nature of [the] public rule making proceedings”; “reference to the legal authority under which the rule is proposed”; and “the terms or substance of the proposed rule.”⁹⁹ Prior to issuing the Institution Supplements and establishing the CMU facilities, the BOP failed to publish a general notice in the Federal Register.¹⁰⁰ In addition, the BOP did not identify, personally serve, or otherwise give notice to persons affected by the either the Terre Haute CMU Institution Supplement or the Marion CMU Institution Supplement.¹⁰¹ Then on April 6, 2010, the BOP published a proposed rule to “establish” and codify the procedures governing CMUs.¹⁰² After years of refusing to seek public review as required under the APA, the government finally invited the public to comment on the proposed rule.¹⁰³ Just as in 2006, however, the 2010 proposal has been widely criticized and the government has yet to take final action.¹⁰⁴ By initiating formal rulemaking procedures, however belatedly, the BOP has apparently conceded that its initial creation of the CMUs was in violation of the APA.¹⁰⁵ Nevertheless, such a delayed attempt to comply with the APA does little to undo the constitutional wrongs inflicted upon CMU detainees, past and present.

IV. THE DENIAL OF PROCEDURAL DUE PROCESS

“There is no iron curtain drawn between the Constitution and the prisons of this country.”¹⁰⁶

A. Identifying a Protected Liberty Interest

The Fifth Amendment provides that the government shall not deprive *any* person “of life, liberty, or property without due process of law” and is meant to protect the individual against *arbitrary* action of the government.¹⁰⁷ Imprisonment may limit, but does not completely

98. 5 U.S.C § 553(b) (2006).

99. *Id.* § 553(b)(1)-(3).

100. Complaint, *supra* note 45, ¶ 87; *see also* 5 U.S.C. § 553(b).

101. Complaint, *supra* note 45, ¶ 87.

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

103. *Id.*

104. Plaintiffs’ Memorandum, *supra* note 48, at 67-68.

105. *Id.* at 62-63.

106. *Wolff v. McDonnell*, 418 U.S. 539, 555-56 (1974).

107. U.S. CONST. amend. V.

strip away the constitutional rights of individuals lawfully incarcerated.¹⁰⁸ To suggest otherwise would undermine the integrity of the U.S. Constitution. Accordingly, prisoners retain the right of procedural due process.¹⁰⁹ Procedural due process claims are examined as a two-part undertaking.¹¹⁰ First, the Court asks whether there exists a liberty or property interest which the State has interfered with and then “examines whether the procedures attendant upon that deprivation were constitutionally sufficient.”¹¹¹ Individuals asserting a protected interest must demonstrate “a legitimate claim of entitlement to it.”¹¹² A protected “interest may arise from the Constitution itself, by reason of guarantees implicit in the word ‘liberty’ or it may arise from an expectation or interest created by state laws or policies.”¹¹³

The Supreme Court culminated a twenty-year effort to clarify whether and when restrictions imposed on inmates constitute a deprivation of “liberty” in *Sandin v. Conner*.¹¹⁴ There, the Court found that the government may create a liberty interest when it subjects a prisoner to forms of “restraint which . . . imposes atypical and significant hardship on the inmate in relation to the ordinary incidents of prison life.”¹¹⁵ Even state created liberty interests must be afforded the protections of the Due Process Clause.¹¹⁶

The *Sandin* Court concluded that a thirty-day assignment to segregated confinement did not create a liberty interest.¹¹⁷ The Court reviewed both the nature and duration of the restriction at issue and found that the thirty-day confinement did not “present a dramatic departure from the basic conditions of the inmate’s sentence.”¹¹⁸ The degree of confinement in disciplinary segregation was not deemed excessive because the general prison population experienced a considerable amount of “lockdown time.”¹¹⁹ In addition, the Court determined the segregation did not represent “a major disruption in the inmate’s environment” because it was of a limited duration.¹²⁰ “After

108. *Wolff*, 418 U.S. at 555.

109. *Id.* at 556.

110. *Ky. Dep’t of Corr. v. Thompson*, 490 U.S. 454, 460 (1989).

111. *Id.* (citing *Bd. of Regents of State Colls. v. Roth*, 408 U.S. 564, 571(1972); *Hewitt v. Helms*, 459 U.S. 460, 472 (1983)).

112. *Id.*

113. *Wilkinson v. Austin*, 545 U.S. 209, 221 (2005) (citations omitted).

114. *See* 515 U.S. 472 (1995).

115. *Id.* at 484.

116. *Id.*

117. *Id.* at 476-77.

118. *Id.* at 485.

119. *Sandin*, 515 U.S. at 486.

120. *Id.* (emphasis added).

Sandin, it is clear that the touchstone of the inquiry into the existence of a protected, state-created liberty interest in avoiding restrictive conditions of confinement . . . is the *nature* of those conditions themselves.”¹²¹

In *Wilkinson v. Austin*, the Supreme Court affirmed the test laid out in *Sandin* and added that the prison conditions should be assessed in the aggregate and not in isolation.¹²² The Court held that inmates had a liberty interest in avoiding assignment to the “Supermax” prison facility at the Ohio State Penitentiary (OSP).¹²³ Inmates designated to the OSP face severe restrictions—virtually all human contact is prohibited.¹²⁴ OSP placement is indefinite and disqualifies an otherwise eligible inmate from parole consideration.¹²⁵ The Court held that these conditions, when “taken together . . . impose an atypical and significant hardship within the correctional context.”¹²⁶ The Court conceded that such harsh conditions may be appropriate in light of the danger high-risk inmates may pose to prison officials and to other prisoners, but that nonetheless, the avoidance of such conditions gave rise to a liberty interest.¹²⁷ In its decision, the Court recognized the difficulty in determining an “appropriate baseline,” but held that the particularly “severe limitations” of the segregation were sufficient to implicate a liberty interest “under any plausible baseline.”¹²⁸ Applying the *Sandin* test to the restrictions inflicted upon CMU detainees, avoidance of CMU designation arguably creates a liberty interest which warrants constitutional protection.¹²⁹ CMU restrictions inflict “unique and unparalleled hardships” on inmates.¹³⁰ Certainly, the most startling hardship imposed on CMU detainees is a severely limited ability to communicate with the outside world.¹³¹ Telephone communication is restricted to immediate family members and may be limited to a single telephone call per month, lasting no longer than fifteen minutes.¹³² In contrast, inmates held in general population prison facilities enjoy telephone privileges amounting to 300 minutes of call time per

121. *Wilkinson v. Austin*, 545 U.S. 209, 223 (2005).

122. *Id.* at 224.

123. *Id.*

124. *Id.*

125. *Id.*

126. *Wilkinson*, 545 U.S. at 224.

127. *Id.*

128. *Id.* at 223.

129. *See Sandin v. Conner*, 515 U.S. 472, 484 (1995).

130. Plaintiffs’ Memorandum, *supra* note 48, at 10.

131. Communications Management Units, 75 Fed. Reg. 17,324, 17,328-29 (Apr. 6, 2010) (to be codified at 28 C.F.R. pt. 540).

132. *Id.* at 17,328.

month.¹³³ Visitation privileges are also restricted for CMU detainees.¹³⁴ No other general population prison unit imposes a permanent blanket ban on contact visitation.¹³⁵ Further, the “indeterminacy of confinement at the CMU . . . and the threat that [inmates] will serve their entire sentences there, combine to form an atypical and significant hardship.”¹³⁶ CMU conditions qualify as an extreme deprivation that is both atypical and significant when compared with other general prison populations.

B. Due Process Analysis under Mathews v. Eldridge

Once a state-created liberty interest has been identified, the inquiry turns to what process is due an inmate whom the government seeks to transfer to a CMU.¹³⁷ The requirements of due process call for procedural safeguards that are context-specific.¹³⁸ The framework employed to assess the sufficiency of procedural due process was laid forth by the Supreme Court in *Mathews v. Eldridge*.¹³⁹ The *Mathews* decision requires an evaluation of three distinct factors: the private interest affected by the state action; the risk of an erroneous deprivation of the interest “through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards”; and finally, the Government’s interest, taking into account the fiscal and administrative burdens that the procedural requirements would impose.¹⁴⁰ The Bureau’s current policies fail to provide a sufficient level of due process to CMU detainees when evaluated against the *Mathews* rubric.¹⁴¹

The first *Mathews* factor requires a review of the significance of the inmate’s interest in avoiding an erroneous designation to a CMU.¹⁴² The prisoner’s interest in avoiding CMU designation is great because of the severe restrictions on communication compared to that of other general prison populations.¹⁴³ Most CMU detainees were transferred

133. Letter from David Shapiro to Sarah Qureshi, *supra* note 73, at 7.

134. Communications Management Units, 75 Fed. Reg. at 17,329.

135. Plaintiffs’ Memorandum, *supra* note 48, at 11.

136. *Id.* at 13-14.

137. *Wilkinson v. Austin*, 545 U.S. 209, 224 (2005). “Prisoners held in lawful confinement have their liberty curtailed by definition, so the procedural protections to which they are entitled are more limited than in cases where the right at stake is the right to be free from confinement at all.” *Id.* at 225.

138. *Id.* at 224 (citing *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972)).

139. 424 U.S. 319, 334 (1976).

140. *Id.* at 335.

141. See generally Communications Management Units, 75 Fed. Reg. 17,324, 17,324 (Apr. 6, 2010) (to be codified at 28 C.F.R. pt. 540); see also *Mathews*, 424 U.S. at 335.

142. See *Mathews*, 424 U.S. at 335.

143. Letter from David Shapiro to Sarah Qureshi, *supra* note 73, at 7-8.

2011]

Stateside Guantanamo

295

from other general population prisons where they enjoyed substantially greater communication privileges.¹⁴⁴ CMU confinement uniquely limits a prisoner's ability to communicate with family.¹⁴⁵ One CMU detainee wrote:

The most painful aspect . . . is how the CMU restricts my contact with the world beyond these walls. It is difficult for those who have not known prison to understand what a lifeline contact with our family and friends is to us. It is our link to the world—and our future.¹⁴⁶

CMUs have been described as an “experiment in social isolation.”¹⁴⁷ Although, the BOP categorizes the CMU “as a self contained general population unit,” it is the only general population unit which maintains a categorical ban on contact visits.¹⁴⁸ Generally, the BOP encourages contact visitation by family and friends in an effort to maintain morale of the inmates and to facilitate rehabilitation.¹⁴⁹ Yet CMU detainees are banned from any physical contact during their already restricted social visitation.¹⁵⁰

The second *Mathews* factor addresses the risk of an erroneous CMU designation under the procedures in place and the probable value of additional safeguards.¹⁵¹ The Supreme Court has consistently held that notice and a fair opportunity for rebuttal are “among the most important procedural mechanisms for purposes of avoiding erroneous deprivations.”¹⁵² Individuals designated to a CMU do not receive prior notice.¹⁵³ Written notice of CMU designation is given *after* a prisoner has already been transferred to a CMU.¹⁵⁴ This is in stark contrast to transfers to Special Management Units, which include “a hearing, a detailed pre-hearing notice, a detailed post-hearing explanation and the right to appeal.”¹⁵⁵ In place of meaningful notice and procedure, CMU detainees receive a one-page Notice of Transfer stating:

This notice informs you of your transfer to a Federal Bureau of

144. *Id.*

145. *Id.* at 7-8.

146. Friedemann, *supra* note 20.

147. Complaint, *supra* note 45, ¶ 36.

148. *Id.* ¶ 37.

149. *Id.*

150. *Id.*

151. *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976).

152. *Wilkinson v. Austin*, 545 U.S. 209, 226 (2005); *see also* *Greenholtz v. Inmates of Neb. Penal and Corr. Complex*, 442 U.S. 1, 15 (1979); *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 542 (1985); *Fuentes v. Shevin*, 407 U.S. 67, 79-80 (1972).

153. Communications Management Units, 75 Fed. Reg. 17,324, 17,325 (Apr. 6, 2010) (to be codified at 28 C.F.R. pt. 540).

154. *Id.*

155. Complaint, *supra* note 45, ¶ 75.

Prisons facility that allows greater management of your communication with persons in the community through more effective monitoring of your telephone use, written correspondence, and visiting. Your communication by these methods may be limited as necessary to allow effective monitoring.¹⁵⁶

In addition, the one-page notice also purports to explain why the prisoner has been transferred to a CMU.¹⁵⁷ Official comment explains that the “inmate will be provided an explanation of the decision in sufficient detail, unless providing specific information would jeopardize the safety, security, or orderly operation of the facility, or protection of the public.”¹⁵⁸ However, the reasons given are often so unclear and vague as to provide no indication of the underlying facts which actually resulted in CMU designation.¹⁵⁹ Such a lack of notice implicates the potential for arbitrary decision-making and precludes the inmate from preparing an adequate basis for objection.¹⁶⁰

As the regulations stand, the Assistant Director for the Correctional Programs Division approves CMU designations without permitting inmates any opportunity to affect the decision.¹⁶¹ Once the decision is made, the BOP “then transports the inmate hundreds if not thousands of miles, prepares a CMU cell, and begins integrating the inmate into the new environment—all before giving the inmate the chance to challenge CMU designation.”¹⁶² Critics argue that such a practice makes CMU designation a *fait accompli*, and provides prison officials a strong incentive not to return inmates to the less restrictive units from which they came.¹⁶³ Moreover, the process by which an inmate can challenge a CMU designation is a purely written procedure.¹⁶⁴ A detainee challenging his CMU designation “has no right to a live hearing, no right to call witnesses, and no right to representation by a staff member.”¹⁶⁵

The third *Mathews* factor addresses the government’s interest.¹⁶⁶ The Supreme Court has held that “[i]n the context of prison

156. *Institution Supplement*, *supra* note 49.

157. *Id.*

158. Communication Management Units, 75 Fed. Reg. at 17,325.

159. Complaint, *supra* note 45, ¶ 77.

160. See *Wilkinson v. Austin*, 545 U.S. 209, 226 (2005).

161. Letter from David Shapiro to Sarah Qureshi, *supra* note 73, at 10.

162. *Id.*

163. *Id.*

164. *Id.*

165. *Id.*

166. *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976).

management . . . this interest is a dominant consideration.”¹⁶⁷ Nevertheless, given the small size of CMUs, the costs associated with implementing additional safeguards, such as providing inmates with advance notice, would be minimal.¹⁶⁸ A recent investigation of CMUs revealed that the two facilities currently hold a total of seventy-one men.¹⁶⁹ The Terre Haute CMU’s total capacity is just eighty-five prisoners.¹⁷⁰ Undoubtedly, the government has an interest in ensuring the safety of its prison personnel and the public.¹⁷¹ However, many CMU detainees are not high-risk prisoners while others have never been disciplined for behavioral violations.¹⁷² A review of the *Mathews* factors leads to the determination that the current BOP regulations, as proposed in the 2010 Notice, are wholly inadequate in protecting an inmate’s liberty interest in avoiding CMU designation.¹⁷³ The BOP’s failure to provide detainees with adequate notice or a meaningful opportunity to challenge CMU designation is almost certainly violative of their entitlement to procedural due process.¹⁷⁴

V. THE POTENTIAL FOR DISCRIMINATION

The denial of due process safeguards creates the potential for exploitation through “retaliatory and discriminatory designation . . . to the CMU[s].”¹⁷⁵ Although approximately two-thirds of the current CMU inmates are U.S. citizens, between sixty-six and seventy-two percent of the inmates are Muslim.¹⁷⁶ Notably, of the first seventeen prisoners transferred to the Terre Haute CMU, fifteen were Muslim.¹⁷⁷ By March 2007, CMU prisoners reported that there were forty-eight prisoners at Terre Haute, thirty-seven of whom were Muslim.¹⁷⁸ In the last several years, subsequent to public scrutiny, more non-Muslims inmates have been transferred to the CMUs.¹⁷⁹ Prison guards have labeled these non-Muslim prisoners “balancers.”¹⁸⁰ According to recent

167. *Wilkinson v. Austin*, 545 U.S. 209, 227 (2005).

168. Plaintiffs’ Memorandum, *supra* note 48, at 16.

169. Johnson, *supra* note 9.

170. Hughes, *supra* note 1.

171. *Wilkinson*, 545 U.S. at 227.

172. Hughes, *supra* note 1; Plaintiffs’ Memorandum, *supra* note 48, at 2-3.

173. See Communications Management Units, 75 Fed. Reg. 17,324, 17,327-29 (Apr. 6, 2010) (to be codified at 28 C.F.R. pt. 540).

174. Plaintiffs’ Memorandum, *supra* note 48, at 15.

175. Complaint, *supra* note 45, ¶ 75.

176. Johnson, *supra* note 9.

177. *Id.*

178. Complaint, *supra* note 45, ¶ 96.

179. Johnson, *supra* note 9.

180. Complaint, *supra* note 45, ¶ 96.

BOP statistics, “a total of [thirty-six] prisoners had been held in the Marion CMU by April 2009,” of whom twenty-six were classified as Muslim.¹⁸¹ The Marion CMU is seventy-two percent Muslim, which is a 1200% overrepresentation compared against the national average.¹⁸² BOP statistics for Terre Haute show that the population of Muslim prisoners in that unit exceeds the national average by 367%.¹⁸³

Explanation of such a discrepancy on grounds other than a discriminatory purpose is difficult to make.¹⁸⁴ The statistics lead to the “inescapable inference that the CMUs were created to allow for the segregation and restrictive treatment of Muslim prisoners based on [the BOP’s] discriminatory belief that Muslim prisoners are more likely than others to pose a threat to institution security.”¹⁸⁵

VI. RECOMMENDATIONS TO IMPROVE THE CURRENT CMU REGIME

In order to maintain safe prisons, corrections officers should be permitted to limit the communications of prisoners who may pose a threat to other inmates, to prison personnel, or to the public.¹⁸⁶ When issues of national security are implicated, the need to place restrictions on inmate communication increases. However, the procedures set forth by the Bureau raise serious constitutional concerns, especially when viewed in light of the overwhelming impact borne by Muslim men.¹⁸⁷ CMU inmates should be afforded “meaningful opportunities for contact with the outside world,” in balance with the government’s interest in maintaining security.¹⁸⁸

The BOP must ensure that the rules which govern CMU designation apply only to those inmates whose communications actually pose a genuine risk.¹⁸⁹ The current standard governing CMU designation is overbroad.¹⁹⁰ The 2010 Rules permit CMU designation based on an offense that included “association, communication, or involvement, related to international or domestic terrorism.”¹⁹¹ The

181. *Id.* ¶ 97.

182. *Id.* ¶ 101.

183. *Id.*

184. *Id.* ¶ 102.

185. Complaint, *supra* note 45, ¶ 95. Although beyond the scope of this Note, evidence of a disproportionate number of Muslim inmates may give rise to potential Equal Protection claims.

186. Letter from David Shapiro to Sarah Qureshi, *supra* note 73, at 3.

187. See Katz, *supra* note 5.

188. Letter from David Shapiro to Sarah Qureshi, *supra* note 73, at 3.

189. *Id.*

190. *Id.* at 5.

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

BOP's failure to define the degree of relationship necessary to satisfy the clause "related to international or domestic terrorism" renders the provision vulnerable to overbroad application.¹⁹² In addition, allowing for mere "association" or "communication" permits prison officials to exercise considerable discretion in assigning inmates to CMUs.¹⁹³ Further troubling is the catch-all provision which allows the Bureau to transfer prisoners to a CMU if "there is *any* other evidence of a potential threat to the safe, secure and orderly operation of prison facilities, or protection of the public."¹⁹⁴ Given the consequences of CMU placement, the "any . . . evidence" standard is wholly inadequate, requires minimal justification, and would warrant CMU transfers even in situations "when the evidence lacks credibility or is contradicted by more compelling evidence."¹⁹⁵ The rules should be revised so as to avoid vague standards and ensure that prisoners are placed in CMUs only on the basis of serious risks to safety.¹⁹⁶ Although imprisonment allows for greater restriction of an inmate's constitutional rights, it does not deprive a prisoner of all constitutional entitlements.¹⁹⁷ In certain situations, it may be necessary and indeed proper for corrections officers to restrict the communications of inmates who pose a danger to safety and order.¹⁹⁸ At the same time, critics have argued that "overly harsh restrictions on communications [among detainees] can undermine prison order, cause higher rates of recidivism, and exact a high cost on inmates and their families."¹⁹⁹ "Empirical research has shown that inmates who maintain strong connections with their families are . . . 'less likely to accept norms and behavior patterns of hardened criminals and become part of a prison subculture.'"²⁰⁰ Maintaining family contact during incarceration has been overwhelmingly linked with lower recidivism rates.²⁰¹ The BOP has conceded that "[t]elephone privileges are a supplemental means of maintaining community and family ties

192. Letter from David Shapiro to Sarah Qureshi, *supra* note 73, at 5-6.

193. *See id.* at 6.

194. *Id.* (emphasis added).

195. *Id.* at 6-7.

196. *Id.* at 7.

197. Letter from David Shapiro to Sarah Qureshi, *supra* note 73, at 4; *see also* *Wilkinson v. Austin*, 545 U.S. 209, 224 (2005).

198. Letter from David Shapiro to Sarah Qureshi, *supra* note 73, at 3.

199. *Id.* at 4.

200. *Id.* (quoting Shirley Klein, *Inmate Family Functioning*, 46 INT'L J. OF OFFENDER THERAPY & COMP. CRIMINOLOGY 95, 99 (2002)).

201. *Id.* (quoting Nancy G. La Vinge, *Examining the Effect of Incarceration and In-Prison Family Contact on Prisoners' Family Relationships*, 21 J. OF CONTEMP. CRIM. JUST. 314, 316 (2005)).

that will contribute to an inmate's personal development."²⁰² Yet CMU regulations all but eliminate CMU inmates' contact with the outside world.²⁰³ Critics have denounced such communication restrictions as counterproductive because they "leave CMU prisoners with almost nothing to lose."²⁰⁴

The Bureau's official objective in creating the CMUs is to monitor, not restrict, the communication of inmates.²⁰⁵ Increasing permissible communication opportunities allowed by inmates would not hinder the Bureau's goal; that is, to achieve "total monitoring" of the CMU inmates at all times.²⁰⁶ By bringing the CMU inmates' allowable communication in line with general prison population standards,²⁰⁷ the Bureau may mitigate concerns of increased criminality, which restricting communication is likely to create, while preserving the constitutional rights of inmates. Further, detainees have been subjected to atypical and significant limitations on their ability to "communicate with loved ones, including the right to hug, touch, or embrace their family members, including children."²⁰⁸ As a result, detainees familial relationships and "rights of association with loved ones have been substantially impaired" and in some instances "completely destroyed."²⁰⁹ As they currently exist, CMU restrictions hamper detainees' ability to "engage in meaningful rehabilitation, and inflict pointless psychological pain."²¹⁰

CONCLUSION

The future is uncertain for prisoners currently housed in the nation's two known CMUs. As increased public scrutiny attempts to unravel the secrets of the CMU experiment, the U.S. government appears at least willing to acknowledge that some of its past decisions

202. Judicial Administration, 28 C.F.R. § 540.100 (2010).

203. See Hughes, *supra* note 1.

204. Letter from David Shapiro to Sarah Qureshi, *supra* note 73, at 8. The threat of losing communication privileges in prison populations has been shown to incentivize good behavior by inmates. *Id.*

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

206. See *id.*

207. Letter from David Shapiro to Sarah Qureshi, *supra* note 73, at 3.

208. Complaint, *supra* note 45, ¶ 9. In one case brought against the BOP by a CMU detainee, Yassin Muhiddin Aref will have to wait eight years before he can hug his four year-old daughter. *Id.* ¶ 44. Aref's complaint alleges that a ban on physical contact for such a long period of time serves no penological purpose and amounts to cruel and unusual punishment. *Id.*

209. *Id.* ¶ 9.

210. *Id.*

2011]

Stateside Guantanamo

301

may have been based on problematic assumptions. On April 6, 2010, the BOP issued a Notice of Proposed Rulemaking intended to codify CMU operations.²¹¹ Although the proposed rules retain most of the flaws of the existing CMU regime, its publication acts as an implicit acknowledgment on behalf of the government that initial attempts to bypass APA protocol were improper and perhaps more significantly suggests the potential for reform.

Certainly, the U.S. government has a compelling interest in limiting the communications of persons deemed to pose a palpable threat to prison safety and to greater national security. But government actions which threaten to restrict the rights of individuals, even those who have been incarcerated, must comport with established constitutional and statutory prescriptions. The Bureau failed to adequately adhere to the specific requirements of the APA and neglected to afford inmates the protections guaranteed under the Due Process Clause of the U.S. Constitution. Accordingly, CMU governing rules must be revised to ensure that prisoners are granted, at a minimum, the procedural protections of fair notice and a meaningful opportunity to appeal CMU placement. Until then, the CMU program forces us to question whether the objectives of national security are truly served by maintaining a regime which ignores constitutional mandates and threatens to impose complete silence.

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