209; fax: (972) 248–3321; Internet: *http://mu-2aircraft.com.*

(4) You may view this service information at the FAA, Small Airplane Directorate, 901 Locust, Kansas City, Missouri 64106. For information on the availability of this material at the FAA, call (816) 329–4148.

(5) You may view this service information that is incorporated by reference at the National Archives and Records Administration (NARA). For information on the availability of this material at NARA, call 202–741–6030, or go to: *http://www.archives.gov/federal-register/cfr/ibr-locations.html.*

Issued in Kansas City, Missouri, on December 30, 2014.

Robert Busto,

Acting Manager, Small Airplane Directorate, Aircraft Certification Service.

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DEPARTMENT OF JUSTICE

Bureau of Prisons

28 CFR Part 540

[BOP Docket No. 1148–F]

RIN 1120–AB48

Communications Management Units

AGENCY: Bureau of Prisons, Justice.

ACTION: Final rule.

SUMMARY: In this document, the Bureau of Prisons (Bureau) finalizes regulations that establish and describe Communications Management Units (CMUs) by regulation. The CMUs regulations serve to detail the specific restrictions that may be imposed in the CMUs in a way that current regulations authorize but do not detail. CMUs are designed to provide an inmate housing unit environment that enables staff monitoring of all communications between inmates in a Communications Management Unit (CMU) and persons in the community. The ability to monitor such communication is necessary to ensure the safety, security, and orderly operation of correctional facilities, and protection of the public. These regulations represent a ''floor'' beneath which communications cannot be further restricted. The Bureau currently operates CMUs in two of its facilities. This rule clarifies existing Bureau practices with respect to CMUs.

DATES: This rule is effective on February 23, 2015.

FOR FURTHER INFORMATION CONTACT: Sarah Qureshi, Office of General Counsel, Bureau of Prisons, phone (202) 307–2105.

SUPPLEMENTARY INFORMATION: This final rule codifies and describes the Bureau's procedures for designating inmates to, and limiting communication within, its CMUs. Currently, the Bureau operates two CMUs, separately located at the Federal Correctional Complex (FCC), Terre Haute, Indiana (established in December 2006), and the United States Penitentiary (USP), Marion, Illinois (established in March 2008). A proposed rule was published on April 6, 2010 (75 FR 17324). We received 733 comments during the 2010 comment period. We later reopened the comment period on March 10, 2014, for 15 days (79 FR 13263). We received an additional 443 comments during the 2014 comment period. Similar issues were raised by most of the commenters. We respond below to the issues raised.

Designation to a CMU Is Not Discriminatory or Retaliatory

Several commenters felt that there exists in CMUs an ''overrepresentation of Muslim and political prisoners, showing that CMUs are not designed for legitimate purposes, but rather to discriminate and remove and isolate politically active members of society.''

The Bureau does not use religion or political affiliation as a criterion for designation to CMUs. 28 CFR 551.90 states the Bureau's non-discrimination policy: ''Bureau staff shall not discriminate against inmates on the basis of race, religion, national origin, sex, disability, or political belief. This includes the making of administrative decisions and providing access to work, housing and programs.'' Further, § 540.201, which describes the designation criteria, must be read in tandem with § 540.202, particularly subparagraph (b), which states that after the Bureau becomes aware of one or more of the criteria described in § 540.201, the Bureau's Assistant Director for the Correctional Programs Division must conduct a review of the evidence found and make a finding that designation to the CMU is necessary to ensure the safety, security, and orderly operation of correctional facilities or protection of the public. An inmate cannot, therefore, be designated to a CMU based upon religious or political affiliation, both because neither are part of the stated criteria, and because it is also necessary to have credible evidence of a threat to the safety, security, and good order of the institution or protection of the public to support designation to a CMU.

Instead, an important category of inmates that might be designated to a CMU is inmates whose current offense(s) of conviction, or offense conduct, included association, communication, or involvement, related to international or domestic terrorism. Past behaviors of terrorist inmates provide sufficient grounds to suggest a substantial risk that they may inspire or incite terrorist-related activity, especially if ideas for or plans to incite terrorist-related activity are communicated to groups willing to engage in or to provide equipment or logistics to facilitate terrorist-related activity. The potential ramifications of this activity outweigh the inmate's interest in unlimited communication with persons in the community.

Communication related to terrorist-related activity can occur in codes that are difficult to detect and extremely time-consuming to interpret. Inmates involved in such communication, and other persons involved or linked to terrorist-related activities, take on an exalted status with other like-minded individuals. Their communications acquire a special level of inspirational significance for those who are already predisposed to these views, causing a substantial risk that such recipients of their communications will be incited to unlawful terrorist-related activity.

The danger of coded messages from prisoners has been recognized by the courts. *See Turner* v. *Safley,* 482 U.S. 78, 93 (1987) (''In any event, prisoners could easily write in jargon or codes to prevent detection of their real messages.''); *United States* v. *Salameh,* 152 F.3d 88, 108 (2nd Cir. 1998) (''Because Ajaj was in jail and his telephone calls were monitored, Ajaj and Yousef spoke in code when discussing the bomb plot.''); *United States* v. *Johnson,* 223 F.3d 665, 673 (7th Cir. 2000) (''And we know that anyone who has access to a telephone or is permitted to receive visitors may be able to transmit a lethal message in code.''); *United States* v. *Hammoud,* 381 F.3d 316, 334 (4th Cir. 2004) (''A conversation that seems innocuous on one day may later turn out to be of great significance, particularly if the individuals are talking in code.''); *United States* v. *Moncivais,* 401 F.3d 751, 757 (6th Cir. 2005) (noting that seemingly nonsensical conversations could be in code and interpreted as indicative of drug dealing activity). Also, an Al Qaeda training manual contains the following advice regarding communications from prison: ''Take advantage of visits to communicate with brothers outside prison and exchange information that may be helpful to them in their work outside prison. The importance of mastering the art of hiding messages is self-evident here.''

There have been cases of imprisoned terrorists communicating with their followers regarding future terrorist activity. For example, after El Sayyid Nosair assassinated Rabbi Kahane, he was placed in Rikers Island, where ''he began to receive a steady stream of visitors, most regularly his cousin El-Gabrowny, and also Abouhalima, Salameh, and Ayyad. During these visits, as well as subsequent visits once Nosair was at Attica, Nosair suggested numerous terrorist operations, including the murders of the judge who sentenced him and of Dov Hikind, a New York City Assemblyman, and chided his visitors for doing nothing to further the jihad against the oppressors. Nosair also tape recorded messages while in custody . . .'' *United States* v. *Rahman,* 189 F.3d 88, 105–06 (2d Cir. 1999). Imprisoned, Sheikh Abdel Rahman had urged his followers to wage jihad to obtain his release. Violent attacks and murders followed. *United States* v. *Sattar,* 314 F.Supp.2d 279, 288–89 (S.D.N.Y. 2004).

To minimize the risk of terrorist-related communication and other similar dangerous communication to or from inmates in Bureau custody, this regulation clarifies the Bureau's current authority to limit and monitor the communication of inmates in CMUs to immediate family members, U.S. Courts, federal judges, U.S. Attorney's Offices, Members of U.S. Congress, the Bureau, other federal law enforcement entities, and the inmate's attorney. The Bureau allows communication with these individuals to help inmates maintain family ties, and protect inmates' access to courts and other government officials. This permits inmates to raise issues related to their incarceration or their conditions of confinement, while minimizing potential internal or external threats.

The presence of Muslim inmates in CMUs does not indicate discrimination, especially given the alternative explanations for designation of inmates to the CMU in § 540.201. In *Ashcroft* v. *Iqbal,* 129 S.Ct. 1937 (2009), the plaintiffs alleged that former FBI Director Mueller and Attorney General Ashcroft engaged in ''invidious discrimination'' against Muslims because the FBI ''arrested and detained thousands of Arab Muslim men'' following the 9/11 attacks. *Iqbal,* 129 S.Ct. at 1951. ''Taken as true, the Court found these allegations are consistent'' with Plaintiffs' claim that the men were detained ''because of their race, religion, or national origin. But given more likely explanations, they do not plausibly establish this purpose.'' *Id.* In particular, the Court found that the ''obvious alternative explanation'' for the arrests was that they were a response to legitimate security concerns following the 9/11 attacks. *Id.* As the Court concluded, in the face of this explanation, ''the purposeful, invidious discrimination respondent asks us to infer . . . is not a plausible conclusion.'' *Id.* at 1951–1952.

The Bureau, acting on a case-by-case basis, may designate an inmate to a CMU for heightened monitoring for any of the reasons articulated in § 540.201. This valid legitimate penological purpose negates a claim of a Bureau-wide conspiracy to discriminate against Muslims.

Assignment to a CMU With Notice Upon Arrival Does Not Violate the Due Process Clause

Several commenters, either inmates in CMUs or friends or relatives of inmates in CMUs, stated that the inmates were placed there without prior notice, and that such placement is in violation of the Due Process Clause of the Fifth Amendment of the United States Constitution.

Written notice. As indicated in the proposed rule, upon arrival at the designated CMU, inmates receive written notice from the Warden of the facility in which the CMU exists of the inmate's placement. The written notice explains that:

(1) Designation to a CMU allows greater Bureau staff management of communication with persons in the community through complete monitoring of telephone use, written correspondence, and visiting. The volume, frequency, and methods of CMU inmate contact with persons in the community may be limited as necessary to achieve the goal of total monitoring, consistent with this subpart;

(2) General conditions of confinement in the CMU may also be limited as necessary to provide greater management of communications;

(3) Designation to the CMU is not punitive and, by itself, has no effect on the length of the inmate's incarceration. Inmates in CMUs continue to earn sentence credit in accordance with the law and Bureau policy;

(4) Designation to the CMU follows the Assistant Director's decision that such placement is necessary for the safe, secure, and orderly operation of Bureau institutions, or protection of the public. The inmate will be provided an explanation of the decision in sufficient detail, unless the Assistant Director determines that providing specific information would jeopardize the safety, security, and orderly operation of correctional facilities, and/or protection of the public;

(5) Continued designation to the CMU will be reviewed regularly by the inmate's Unit Team under circumstances providing the inmate notice and an opportunity to be heard, in accordance with the Bureau's policy on Classification and Program Review of Inmates; and

(6) The inmate may challenge the CMU designation decision, and any aspect of confinement therein, through the Bureau's administrative remedy program.

Through the written notice, inmates are informed that designation to the CMU follows the Assistant Director's decision that such placement is necessary for the safe, secure, and orderly operation of Bureau institutions, or protection of the public. The inmate is 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.

Continued placement in CMUs may not be necessary and will be reviewed regularly by the inmate's Unit Team, as described above. Conditions may change and allow inmates to be transferred out of the CMUs. For instance, an inmate's behavior and conduct may change. Another example of an altered circumstance is that the heightened security risk or threat to the safety, security and good order of the institution or protection of the public may have changed in some way. For instance, if an inmate communicates about the possibility of a disruption at a particular public event, and the event timeframe passes, the security threat may be diminished.

The requirements of due process. The due process clause protects persons against deprivations of ''life, liberty or property without due process of law.'' U.S. Const. Amend. V. A constitutionally-protected liberty interest can arise under the Constitution itself or be created by the State.

If a court were to conclude that inmates had a constitutionally-protected liberty interest in avoiding transfer to a CMU, the process that would have to be afforded an inmate would depend on the particular situation's demands. *Morrissey* v. *Brewer,* 408 U.S. 471, 481 (1972) (stating that the requirements are ''flexible''). Determining what procedural due process demands in a given situation requires balancing of three factors. *Mathews* v. *Eldridge,* 424 U.S. 319 (1976). They are: (1) The private interest affected; (2) the risk of erroneous deprivation of a liberty

interest as a result of procedures used, and the probable value, if any, of any alternative safeguards; and (3) the government's interest. *Id.* at 335.

No private liberty interest is affected. An inmate's liberty interest in avoiding conditions of confinement can arise from the Constitution itself. *Vitek* v. *Jones,* 445 U.S. 480, 493–94 (1980) (finding liberty interest in avoiding psychiatric treatment against an inmate's will). However, the Constitution does not give rise to a liberty interest in avoiding a transfer to an institution that is ''much more disagreeable than another.'' *Meachum* v. *Fano,* 427 U.S. 215, 225 (1976); *see also Wilkinson* v. *Austin,* 545 U.S. 209, 221–22 (2005). This includes institutions with ''more severe rules'' as long as the inmate is still within the normal limits or range of custody authorized by the conviction. *Id.* ''Transfers between institutions. . . are made for a variety of reasons and often involve no more than informed predictions as to what would best serve institutional security or the safety and welfare of the inmate.'' *Meachum,* 427 U.S. at 225.

Since the Constitution does not give rise to a liberty interest when the issue is avoiding a transfer to an institution that is less favorable or more restrictive than another, inmates do not have a liberty interest that should be protected from transfer to a CMU.

In *Wilkinson* v. *Austin,* the Supreme Court held that a liberty interest arises when an inmate is transferred to a maximum security prison where, among other restrictions, ''almost all human contact is prohibited, even to the point that conversation is not permitted from cell to cell.'' *545 U.S. 209,* 223–24 (2005); *id.* at 224 (noting that the inmates were placed in the facility for indefinite duration and were disqualified for parole consideration during their placement). Because the conditions imposed ''an atypical and significant hardship,'' the Court found a state-created liberty interest in that case. *Id.* at 223.

However, unlike the situation in *Wilkinson,* there is no state-created liberty interest based upon the facts of confinement in a CMU. Inmates are subjected to an ''atypical and significant hardship'' if the hardships are more egregious than the ''ordinary incidents of prison life.'' *Sandin* v. *Conner,* 515 U.S. 472, 484 (1995). The restrictions imposed on inmates in CMUs are not atypical of the ordinary incidents of prison life. Restrictions on communication are common and are within the discretion of the prison authorities to regulate. *See Overton* v. *Bazzetta,* 539 U.S. 126, 132 (2003). Current regulations that apply to general population inmates allow the warden of a particular facility to impose heightened restrictions on inmates' communications with the public. (28 CFR 540.15; § 540.43; § 540.100.)

The conditions at a CMU are not like those at issue in *Wilkinson;* indeed, they are not significantly different from the ordinary incidents of prison life. Inmates in the CMU operate as a general population unit, where they participate in all educational, recreational, religious, unit management and work programming within their unit.

The communications restrictions possible in the CMU do not rise to the level that implicates violation of a liberty interest. To effectively and efficiently allow monitoring and review of the general correspondence communications of inmates in CMUs, those communications may be limited in frequency and volume as follows:

- Written correspondence may be limited to six (expanded from the proposed rule limitation to three) pieces of paper, double-sided, once per week to and from a single recipient (in addition, electronic messaging may be limited to two messages, expanded from the proposed rule limitation of one, per calendar week, to and from a single recipient at the discretion of the Warden);
- Telephone communication may be limited to three completed calls (expanded from the proposed rule limitation to one call) per calendar month for up to 15 minutes; and
- Visiting may be limited to four one-hour visits (expanded from the proposed rule limitation of one one-hour visit) each calendar month.

Unless the quantity to be processed becomes unreasonable or the inmate abuses or violates these regulations, there is no frequency or volume limitation on written correspondence with the following entities: U.S. courts, Federal judges, U.S. Attorney's Offices, Members of U.S. Congress, the Bureau of Prisons, other federal law enforcement entities, or, as stated earlier, the inmate's attorney (privileged, unmonitored communications only). Correspondence with these entities is not limited under these regulations in furtherance of inmates' access to courts and their ability to defend in litigation.

Even assuming that inmates have a liberty interest in this context, inmates have been afforded sufficient process and will continue to be afforded due process by these regulations, under the *Mathews* standard. Inmates are afforded post-placement due process in the form of written notice under § 540.202(c) upon arrival, which includes information on how to appeal the designation decision.

There is little risk of erroneous deprivation of a liberty interest. The second factor addresses the possibility that an inmate could be erroneously assigned to the wrong unit. Inmates placed in the CMU are given notice of their transfers under the regulations (§ 540.202(c)) and their opportunity to appeal. The notice delineates the specific reasons for their designation within this program unless the Assistant Director determines that providing the information would jeopardize the safety, security, and orderly operation of correctional facilities, and/or protection of the public. If information in the notice is inaccurate, inmates may appeal regarding the inaccuracy of the information contained in the notice, the CMU designation decision, and any other aspect of confinement therein, through the Bureau's administrative remedy program. *See* 28 CFR 542.10–542.19 and § 540.202(c)(6). The procedures thus offer an inmate notice and an opportunity to appeal the decision. See *Wilkinson,* 545 U.S. at 226 (''Our procedural due process cases have consistently observed that [notice of the factual basis leading to consideration for placement and a fair opportunity for rebuttal] are among the most important procedural mechanisms for purposes of avoiding erroneous deprivations.'') This procedure allows for the review of an inmate's claim that he has been erroneously placed in the CMU.

Further, continued designation to the CMU is regularly reviewed by the inmate's Unit Team under circumstances providing the inmate notice and an opportunity to be heard, in accordance with the Bureau's policy on Classification and Program Review of Inmates. *See id.* at 227 (review 30 days after assignment to facility ''further reduces the risk of erroneous placement''). These procedures, therefore, afford sufficient protection from the risk of erroneous deprivation of any liberty interest.

The government's interest is significant. The final *Mathews* factor is the governmental interest in placing inmates in a CMU; this interest is a ''dominant consideration.'' *Wilkinson* at 227. The interest of protecting the security of the facility is a legitimate penological interest that has been consistently acknowledged by the Supreme Court. *Sandin* v. *Conner,* 515 U.S. 472, 484 (1995); *Block* v. *Rutherford,* 468 U.S. 576, 586 (1984). Particularly, with regard to the CMUs, the government's interest in protecting

the security of the facility and the public is furthered by allowing the government to concentrate monitoring resources, thereby increasing the probability of detecting and deterring dangerous communications and reducing potential security issues.

By limiting the frequency and volume of the communication to and from inmates identified under this regulation, the Bureau reduces the amount of communication requiring monitoring and review. Reducing the volume of communications helps ensure the Bureau's ability to provide heightened scrutiny in reviewing communications, thereby increasing both internal security within correctional facilities, and the security of members of the public.

As we explained in the proposed rule, the Bureau has determined that in the context of inmates in CMUs, the restrictions authorized by the CMUs regulations are the most appropriate means of accomplishing the Bureau's legitimate goal and compelling interest to ensure the safety, security, and orderly operation of Bureau facilities, and protection of the public. We stated the following in the preamble to the proposed rule:

''The CMU concept allows the Bureau to monitor inmates for whom such monitoring and communication limits are necessary, whether due to a terrorist link or otherwise, such as inmates who have previously committed an infraction related to mail tampering from within an institution, or inmates who may be attempting to communicate with past or potential victims. The ability to monitor such communication is necessary to ensure the safety, security, and orderly operation of correctional facilities, and protect the public. The volume, frequency, and methods of CMU inmate contact with persons in the community may be limited as necessary to achieve the goal of total monitoring, consistent with this subpart.''

Restricting Inmates' Telephone and Visiting Privileges Does Not Violate the Due Process Clause

Several commenters stated that CMU restrictions on visiting and telephone calls violate the Due Process Clause and the rights of inmates in CMUs.

Substantive Due Process. In analyzing whether the communication restrictions violate substantive due process, the proper inquiry is whether the prison regulation or policy ''is reasonably related to legitimate penological interests.'' *Turner* v. *Safley,* 482 U.S. 78, 89 (1987); *Overton* v. *Bazzetta,* 539 U.S. 126, 132 (2003). Several factors are relevant to the reasonableness inquiry; *Turner* identified four factors, the first of which has been described as the most important: There must be a ''valid, rational connection'' between the regulation and the objective set forth to justify it. *Turner,* 482 U.S. at 89; *Beard v Banks,* 548 U.S. 521, 532 (2006) (describing the particular importance of this factor, explaining that in a given case, the second, third, and fourth Turner factors may ''add little, one way or another, to the first factor's basic logical rationale.'').

Here, analysis of this factor demonstrates that the regulation is reasonably related to legitimate interests. The regulation is designed to ensure the safety, security, and good order of Bureau institutions and protection of the public. Security of the facility has been cited as a valid primary interest in not permitting contact visitation for pretrial detainees. *Sandin* v. *Conner,* 515 U.S. 472, 484 (1995); *Block* v. *Rutherford,* 468 U.S. 576, 586 (1984). The regulation furthers this legitimate penological interest by effectively monitoring the communications of high-risk inmates. The regulation and the penological interest are, therefore, rationally related.

Procedural Due Process. The limitations on telephone use and visitation do not violate the procedural due process rights of inmates in CMUs because they do not implicate a protected liberty interest. These restrictions are ordinary incidents of prison life. Such restrictions do not rise to the level which the Supreme Court has determined is outside the normal boundaries of confinement needed to trigger a liberty interest under the Due Process Clause. *See Vitek* v. *Jones,* 445 U.S. 480, 493–94 (1980) (transfer to mental hospital); *Washington* v. *Harper,* 494 U.S. 210, 221–22 (1990) (involuntary administration of psychotropic drugs); *Wilkinson* v. *Austin,* 545 U.S. 209 at 224 (2005) (indefinite transfer to solitary confinement). Courts have recognized that similar limitations do not threaten a protected liberty interest. *See Searcy* v. *United States,* 668 F.Supp.2d 113, 122 (D.D.C. 2009) (internal quotation marks omitted) (''An inmate has no right to unlimited telephone use.'''); *Perez* v. *Federal Bureau of Prisons,* 229 Fed. Appx. 55, 58 (3d Cir. 2007) (''[L]imits on telephone usage are ordinary incidents of prison confinement,'' and their restriction ''do[es] not implicate a liberty interest protected by the Due Process Clause.'').

There is also no liberty interest protected by the Due Process Clause that is implicated by the rules governing the scheduling of visits or phone calls in the CMU. In fact, not only are the CMU restrictions well below the level necessary to trigger a liberty interest, but they also are within the scope of restrictions authorized by the Bureau's current regulations. 28 CFR 540.100 and 540.101(d) indicate that inmate telephone use may be limited as necessary to protect institutional security and the safety of the public. Further, 28 CFR 540.51(h)(2) indicates that restrictions on contact visiting, for example, are permitted if necessary for security reasons. Also, the restrictions imposed upon attorney visiting are within the current visiting parameters: As stated in § 540.205(b), ''Regulations and policies previously established under 28 CFR part 543 are applicable.''

However, in response to public comment, the final regulations provide new limitations which would be more consistent with the Bureau's resources for monitoring communications. Again, the limitations in the regulation serve as the minimum requirement. Further access may be granted as resources allow, in the discretion of Bureau staff, on a case-by-case basis. The CMUs regulations serve to detail the specific restrictions which may be imposed in the CMU in a way that current regulations authorize but do not detail.

Restrictions on Unmonitored Communication With Members of the Media Are Not Unconstitutional

The regulations allow communication with news media (via telephone or writing) ''only at the discretion of the warden.'' Several commenters argued that this language authorized a ''complete ban on communication with news media, a result that is unconstitutional under existing case law.''

First, we note that the regulations in § 540.203 do not restrict with whom a CMU inmate may correspond. The only restriction in the regulation related to correspondence is as follows: The regulations state that ''[s]pecial mail, as defined in Part 540, is limited to privileged communication with the inmate's attorney.'' § 540.203(b). This means that any correspondence with representatives of the news media will be subject to the level of inspection given to other general mail correspondence. There will be no unmonitored communication with news media representatives.

Second, it is true that inmates in CMUs may not have unmonitored telephone communication with news media representatives. The regulation states that ''[u]nmonitored telephone communication is limited to privileged communication with the inmate's

attorney. Unmonitored privileged telephone communication with the inmate's attorney is permitted as necessary in furtherance of litigation, after establishing that communication with the verified attorney by confidential correspondence or visiting, or monitored telephone use, is not adequate due to an urgent or impending deadline.'' § 540.204(b).

Contrary to the commenters' assertions, prison officials are not required to permit and accommodate confidential, unmonitored communication between inmates and news media representatives. Previous case law has not afforded news media any greater right of access to inmates than that of the general public. *See, e.g., Houchins* v. *KQED,* 438 U.S. 1, 16 (1978) (''Neither the First Amendment nor the Fourteenth Amendment mandates a right of access to government information or sources of information within the government's control. . . . [T]he media have no special right of access to the Alameda County Jail different from or greater than that accorded the public generally.''); *Saxbe* v. *Washington Post Co.,* 417 U.S. 843 (1974) (upholding regulation prohibiting face-to-face interviews with certain inmates); *Pell* v. *Procunier,* 417 U.S. 817 (1974) (regulation imposing conditions for press interviews of inmates did not unconstitutionally interfere with rights of inmates or the media) ; *Johnson* v. *Stephan,* 6 F.3d 691 (10th Cir. 1993). Rather, as made clear in these cases, news media representatives are entitled to no greater prisoner access than the general public. Inmate communications with news media representatives are governed by regulations in 28 CFR part 540, subpart E.

The Regulation Contains No ''Absolute Ban'' on Communication With Clergy, Consular Officials, or Non-Immediate Family Members

Some commenters stated that the proposed regulation's limitations on communication with clergy and other religious communications violate the Religious Freedom Restoration Act, 42 U.S.C. 2000bb (2006) (hereinafter ''RFRA''); others suggested that restrictions on visitation violated inmates' due process rights. These and other commenters also stated that the regulations impose an ''absolute ban'' on communications with clergy and non-immediate family members. One commenter also stated that these regulations violate Article 36 of the Vienna Convention on Consular Relations (1969), which gave ''consular officers'' 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 . . .'' The same commenter likewise stated that the regulations impose a ''total ban'' on communication with ''most family members,'' citing 28 CFR 540.44(a), which defines immediate family members as being ''mother, father, step-parents, foster parents, brothers and sisters, spouse, and children.''

There is no such ''absolute ban''. inmates in CMUs are not prohibited outright by these regulations from communicating with clergy, consular officials, or non-immediate family members. These regulations represent a ''floor'' beneath which communications cannot be further restricted. Communication restrictions are tailored to the security needs presented by each CMU inmate, on a case-by-case basis. The regulations contain no ban on written correspondence with these groups, nor any outright ban on telephone calls or visits with these groups, only stating that ''monitored telephone communication *may* be limited to immediate family members only'' (§ 540.204(a)), and that ''regular visiting *may* be limited to immediate family members'' (§ 540.205(a)) (emphasis added), not that it will, in fact, be so limited in every case.

Any such restrictions imposed on an inmate's access to clergy do not violate RFRA. 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.'' 42 U.S.C. 2000bb–1 (2006). The interest of protecting the security of the facility is a legitimate penological interest that has been consistently upheld by the Supreme Court. *Sandin* v. *Conner,* 515 U.S. 472, 484 (1995); *Block* v. *Rutherford,* 468 U.S. 576, 586 (1984). The Senate Report on RFRA also recognized security of the institution as an interest of the ''highest order.'' S. Rep. 103–111, S. Rep. No. 111, 103rd Cong., 1st Sess. 1993, 1993 U.S.C.C.A.N. 1892, 1899, 1993 WL 286695, 10 (Leg. Hist.) The Bureau has a compelling interest to ensure the safety, security, and orderly operation of Bureau facilities, and protection of the public.

Also, inmates in CMUs are provided the services of Bureau chaplains upon request, per 28 CFR 548.12, for religious care and counseling, thus providing inmates in CMUs an opportunity to engage in communications with clergy. As discussed below, inmates in CMUs are permitted to engage in religious practices and services. Any limitation on the access to clergy is, therefore, not unduly restrictive and satisfies RFRA.

In comments on the restrictions on visiting, some commenters suggested that the restrictions violated the inmates' due process rights, citing *Overton* v. *Bazzetta,* 539 U.S. 126 (2003). In that case, the Supreme Court concluded that there was no violation even though the inmates in that case were denied visiting in certain circumstances because the restrictions were related to penological interests and alternatives were available. *Id.* at 135–36 (noting that telephone and letter communication were available alternatives). Although telephone and visiting contact *may* be limited to immediate family members in these regulations, written correspondence is not limited in this way. Therefore, even if an inmate were to have such restrictions on telephone and visiting contact with the above-mentioned groups, that inmate may correspond in writing with them, within the limits of current regulations, as an alternative method of communication.

No-Contact Visitation in the CMU Is Constitutional Under the First Amendment

Several commenters stated that the CMU's no-contact visitation policy has significantly impacted the ability of inmates in CMUs to maintain close and personal relationships with family members, which results in emotional hardships and psychological issues for both the inmate and the visitor(s). These commenters believe that the no-contact visitation policy violates the inmates' right to free association contained in the First Amendment.

First Amendment rights. Generally, claims of violation of First Amendment rights must be analyzed in light of the policies and goals of the prison. *Pell* v. *Procunier,* 417 U.S. 817, 822 (1974) (''[C]hallenges to prison restrictions that are asserted to inhibit First Amendment interests must be analyzed in terms of the legitimate policies and goals of the corrections system, to whose custody and care the prisoner has been committed in accordance with due process of law.''). A prison regulation or policy that ''impinges on an inmates' constitutional rights. . . . is valid if it is reasonably related to a legitimate penological interests.'' *Turner* v. *Safley,* 482 U.S. 78, 89 (1987); *Overton* v. *Bazzetta,* 539 U.S. 126, 132 (2003).

As described above, several factors are relevant to the reasonableness inquiry:

First, there must be a ''valid, rational connection'' between the regulation and the objective set forth to justify it. *Turner,* 482 U.S. at 89. A second factor to consider is whether the inmate has an alternative means of exercising the restricted right. *Id.* at 90. A third factor to consider is the impact of accommodating the asserted right on prison staff, other inmates, and prison resources. *Id.* Last, courts should consider whether the restriction is an ''exaggerated response'' that ignores alternatives that accommodate the inmate's constitutional rights at a de minimis cost to legitimate penological interests. *Id.* at 90–91. The Supreme Court has recognized the particular importance of the first of these factors, explaining that in a given case, the second, third, and fourth *Turner* factors may ''add little, one way or another, to the first factor's basic logical rationale.'' *Beard* v. *Banks,* 548 U.S. 521, 532 (2006).

There Is a Rational Connection Between the Regulation and Its Objective

The purpose of the limitation on contact visits is to effectively monitor the communications of high-risk inmates in order to ensure the safety, security, and good order of Bureau institutions and protection of the public. Security of a facility has been recognized as a valid interest in not permitting contact visitation for pretrial detainees. *Block* v. *Rutherford,* 468 U.S. 576, 586 (1984) (''[T]here is no dispute that internal security of detention facilities is a legitimate governmental interest . . . That there is a valid, rational connection between a ban on contact visits and internal security of a detention facility is too obvious to warrant extended discussion.''). Deference is given to the judgment of prison authorities in devising the policies and practices that further legitimate penological interests. *Id.* at 589.

In *Block* v. *Rutherford,* the Supreme Court addressed a due process challenge to a ban on contact visits between pretrial detainees and their family members and friends. 468 U.S. 576, 578 (1984). Because the case arose in the context of a challenge brought by pretrial detainees, who may not be ''punished prior to an adjudication of guilt in accordance with due process of law,'' the Court asked whether the restriction on contact visits was punitive. *Id.* at 583–84 (internal quotation marks omitted). In making this determination, the Court considered whether the restriction was ''reasonably related to a legitimate governmental objective,'' because if so, ''it does not, without more, amount to punishment.'' *Id.* (internal quotation marks omitted).

The Court found the ban on contact visits helped to prevent the introduction of contraband and reduced the possibility of violent confrontations during visits, and, as a result, promoted the legitimate governmental objective of maintaining the internal security of the prison. *Id.* at 586. Once the Court decided that the restriction on contact visits did not qualify as punishment, its analysis ended, as there was no suggestion that the Constitution might independently provide a right to contact visits. Rather, the Court held ''the Constitution does not require that detainees be allowed contact visits when responsible, experienced administrators have determined, in their sound discretion, that such visits will jeopardize the security of the facility.'' *Id.* at 589.

In *Overton* v. *Bazzetta,* 539 U.S. 126 (2003), the Supreme Court rejected a claim that restrictions on visitation violated the right to association of prisoners and their families under the Due Process Clause and First Amendment. The inmates who challenged the restrictions were all subject to no-contact visitation. *Id.* at 130. The prisoners were required to ''communicate with their visitors through a glass panel,'' and had no opportunity for any physical contact. *Id.* The Third Circuit has explained that ''nothing in *Overton* suggests that non-contact visitation is, by itself, constitutionally suspect; to the contrary, the Court upheld additional restrictions affecting those subject to non-contact visitation.'' *Henry* v. *Dep't of Corrections,* 131 Fed. Appx. 847, 850 (3rd Cir. 2005). The *Overton* decision is also consistent with the Supreme Court's previous holding in *Block* v. *Rutherford* that upheld a blanket ban on contact visits for pretrial detainees. 468 U.S. 576, 578, 586 (1984).

By limiting the contact visits of inmates housed in the CMU, the Bureau seeks to balance First Amendment rights with its correctional mission and the special mission of the CMU. The Bureau has made a judgment that communications between the inmates housed in the CMUs and their visitors must be strictly monitored because the inmates meet one or more of the designation criteria listed in § 540.201. The reasoning for the restrictions is rationally related to the legitimate governmental interest in preserving security, as communications could be easily passed without strict monitoring through a no-contact visit.

There Are Alternative Means of Exercising the Restricted Right

Addressing the second *Turner* factor, we note that the alternatives to contact visitation are other forms of First Amendment expression. The *Turner* Court looked at whether the inmates were deprived of ''all means of expression.'' *Turner,* at 92. Inmates in the CMU, however, are granted no-contact visitation privileges for at least 4 one-hour visits each month (expanded from the proposed rule limitation of one one-hour visit). Further, inmates are permitted to maintain relationships through mediums other than visiting, such as through monitored correspondence, including carefully monitored email (which we have increased from one per calendar week in the proposed rule to two per calendar week), and telephone calls (which we have increased from one per month to three per month). These alternatives are sufficient forms of communication that meet the *Turner* test.

There Is a High-Risk Impact of Accommodating the Asserted Right on Prison Staff, Other Inmates, and Prison Resources

The third *Turner* factor directs us to examine the impact of permitting the exercise of the asserted right and analyzing its impact. Permitting contact visiting would create a security threat to the staff and the public as a whole. The inmates housed in CMUs are segregated from the rest of the general population and are housed there for a specific reason. The CMUs are general population units designed to closely monitor inmates for whom such monitoring and communication limits have been determined necessary. Such inmates include those for whom communication limits are necessary due to a terrorist link, and also for those who are engaged in activities that threaten the security of the institution or endanger the public. Contact visiting would provide inmates who are at risk for communication threats with opportunities for passing along unauthorized communications.

Alternatives Were Considered

Finally, the fourth *Turner* factor requires consideration of whether alternatives have been considered. Some commenters suggested alternatives to no-contact visiting. The suggested alternatives do not adequately serve the legitimate penological purpose of ensuring the safety of the institution and the public. Some commenters suggested contact visitation in the attorney-client room so that the visit could be live

monitored and recorded at a small cost to the prison. This is not an adequate alternative to the no-contact visitation. No-contact visitation is crucial to carefully monitor the transfer of information between the inmates and their visitors. The visitor and the inmate communicate through a telephone apparatus which is connected to the Bureau-wide inmate telephone system. This system, which records the communications and maintains the recordings, is used in all Bureau facilities and maintains records of all inmate telephone calls. This system is a reliable and powerful tool in the detection and prevention of criminal activities and disciplinary infractions. Monitoring via this system also permits correctional officials to immediately terminate communication taking place on the phone, whereas it is harder to immediately stop a prohibited communication during a contact visit.

Also, the inmate telephone system consists of digital recordings which accurately store the conversations. These digital recordings are also easily maintained, retrieved, and used for law enforcement purposes and the detection of disciplinary infractions. Attorney-client visits, however, are *not* audio-monitored and attorneys and their clients do not communicate through the use of a telephone. An alternative means to record the communications between inmates and their visitors would not be as reliable as the inmate telephone system already in place. In addition, no-contact visitation eliminates the danger of introduction of contraband, including drugs and weapons, into the institution.

The CMU restrictions satisfy the *Turner* test. The CMU regulation is rationally related to the governmental interest of preserving the orderly running of the institution and protection of the public by allowing the Bureau to monitor inmate communications with members of the public, while providing inmates with the means to maintain their ties to the community.

A Prohibition on Contact Visitation Does Not Violate the Eighth Amendment

Some commenters stated that no-contact visiting constitutes ''cruel and unusual punishment'' in violation of the Eighth Amendment of the U.S. Constitution. U.S. Const. amend. VIII.

A punishment violates the Eighth Amendment when it is incompatible with ''the evolving standards of decency that mark the progress of a maturing society.'' *Trop* v. *Dulles,* 356 U.S. 86, 101 (1958). For instance, the Eighth Amendment is violated if there is ''deliberate indifference to serious medical needs of prisoners,'' *Estelle* v. *Gamble,* 429 U.S. 97, 104 (1976); when the conditions are ''grossly disproportionate to the severity of the crime warranting imprisonment,'' *Rhodes* v. *Chapman,* 452 U.S. 337, 347 (1981); or when inmates are deprived of basic human needs. *Hutto* v. *Finney,* 437 U.S. 678 (1978). As the Supreme Court has explained,

> Conditions other than those in *Gamble* and *Hutto,* alone or in combination, may deprive inmates of the minimal civilized measure of life's necessities. Such conditions could be cruel and unusual under the contemporary standard of decency . . . But conditions that cannot be said to be cruel and unusual under contemporary standards are not unconstitutional. To the extent that such conditions are restrictive and even harsh, they are part of the penalty that criminal offenders pay for their offenses against society.

Rhodes, at 347.

The conditions of confinement present in the CMUs are not grossly disproportionate to the crimes committed by the inmates assigned to it. In fact, the inmates were placed in the CMU specifically because their offense of conviction, offense conduct, disciplinary record or other verified information raised serious concerns about their communications with members of the public and close monitoring of those communications was needed in order to preserve the security of the Bureau institutions and protect the public. As we stated in the proposed rule, under the regulation, inmates may be designated to a CMU if:

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

Ultimately, the inmates are not being deprived of basic human needs by not permitting them to have physical contact with family or community members. The inmates are permitted to have visitors, although it is through no-contact visits, write letters, and make telephone calls to their family members, albeit under closer monitoring. Inmates are not completely deprived of all contact with family or community members.

The no-contact visitation policy is a reasonable communication restriction that is within the discretion of prison authorities to implement. It does not approach the level of a cruel and unusual condition of confinement proscribed by the Eighth Amendment.

Conditions of CMU Confinement Are Not ''Atypical and Significant''

Several commenters stated that conditions of confinement in the CMU were ''atypical and significant,'' thereby creating a liberty interest protected by the Due Process Clause.

As discussed above, even where the Due Process Clause does not itself create a liberty interest, the government may create one where a prison restriction imposes an ''atypical and significant hardship on the inmate in relation to the ordinary incidents of prison life.'' *Sandin,* 515 U.S. at 484. In *Sandin,* the Court found that the disciplinary transfer of an inmate for 30 days to solitary confinement ''did not present the type of atypical, significant deprivation in which a State might conceivably create a liberty interest.'' 515 U.S. at 486–87; *id.* at 494 (Breyer, J., dissenting) (describing conditions of confinement.) This is because the punishment ''mirrored those conditions imposed upon inmates in administrative segregation and protective custody.'' *Id.* at 486.

Based on *Sandin,* the D.C. Circuit has sought to define the ''ordinary incidents of prison life'' for purposes of creating a baseline that can be used to determine whether a particular restriction is atypical and significant. In *Hatch* v. *District of Columbia,* the D.C. Circuit rejected treating the conditions of prison life in the general population as the appropriate baseline. 184 F.3d 846, 856–58 (D.C. Cir. 1999). Instead, *Hatch* explains that the conditions that are imposed in administrative segregation should be used in determining what constitutes the ''ordinary incidents of prison life.'' *Id.* at 855–85.

Accordingly, the determination of what is atypical and significant should be made in comparison with the ''most restrictive confinement conditions that prison officials, exercising their

administrative authority to ensure institutional safety and good order, routinely impose on inmates serving similar sentences.'' *Id.* at 856. In making this determination, the nature of the restriction and its duration should both be considered. *Id.* at 858.

Under *Sandin* and *Hatch,* the loss of contact visits and reduced time for visits and telephone calls do not constitute an ''atypical and significant'' deprivation. While the Bureau's visiting regulations only require four hours of visitation per month (28 CFR 540.43), inmates in CMUs have been allowed as much as eight hours of visits per month—above the CMU proposed rule's one-hour ''floor'' (which the final rule changes to conform to the current visiting regulation limit of four one-hour visits per month). And consistent with the Warden's authority to ''restrict inmate visiting when necessary to ensure the security and good order of the institution,'' 28 CFR 540.40, Bureau regulations expressly contemplate the possibility that inmates will lose contact visitation privileges based on security concerns. *Id.* § 540.51(h)(2) (noting that ''[s]taff shall permit limited physical contact . . . unless there is clear and convincing evidence that such contact would jeopardize the safety or security of the institution). As described above, the Bureau has made a determination that threats to the security of its facilities and/or the public justify the imposition of no-contact visits.

Inmate telephone use ''is subject to those limitations which the Warden determines are necessary to ensure the security or good order, including discipline, of the institution or to protect the public,'' and requires only that an inmate who is not on discipline receive one three minute telephone call each month. *Id.* § 540.100(a)–(b); § 540.101(d); *id.* § 540.100(a) (stating that ''[t]elephone privileges are a supplemental means'' of communicating with persons in the community). In contrast, some inmates in CMUs have received more telephone minutes than is required under the agency's regulations. Also, the final rule expands the telephone limitations from one call per month to three calls per month.

In short, the CMU's communication restrictions do not constitute the kind of ''extraordinary treatment'' required to find a government-created liberty interest. *Smith* v. *U.S.,* 277 F.Supp.2d at 113 (no ''atypical and significant'' deprivation due to prison transfer because prisoner was not subject to any extraordinary treatment, but instead transfer was an issue within the ''day-to-day management of prisons.'') (quoting *Franklin* v. *District of Columbia,* 163 F.3d 625, 634–35 (D.C. Cir. 1998)).

Religious Activities for Inmates in CMUs Are Permitted in the Same Manner as Religious Activities for Inmates Who Are Not in CMUs

Some commenters stated that inmates in CMUs are prohibited from certain religious activities, such as congregational prayers, designated chapel space, limited recognition of voluntary religious fasting, and religious studies.

Inmates in CMUs are permitted to pursue religious activities, including prayers, fasting, and studies, to the extent that it does not threaten the safety, security, or good order of the facility or protection of the public. Policies regarding religious practices are the same in the CMUs as for all other Bureau facilities, as outlined in 28 CFR 548.10–20 and the Bureau's policy on religious beliefs and practices.

Inmates in CMUs are permitted to hold several types of prayer in a similar manner as general population inmates. Congregate prayers are allowed in the CMU. Group prayers led by inmates are subject to constant staff supervision. Those who engage in additional prayers, such as individual prayers for Muslims (the five daily prayers) are permitted to do so in their own cells or in a previously designated area while at work or education or may pray independently at their work station. These inmates are provided an area out of the way, so as to not interfere with other operations or be disturbed themselves.

Also, policy recognizes certain fasts as part of the religious practice and others as personal choice. There is a distinction to be made between fasts which are part of religious practice and those that are personal choice. Fasts which are part of religious practice are recognized as a routine practice in the religion; whereas fasts undertaken by personal choice, or to meet personal religious goals, are sporadic or non-routine fasts that are not recognized as routine practice as part of the religion. Inmates are permitted to fast as they see fit to meet their personal religious goals.

A concern among the commenters was that inmates were not allowed to retain food in their cells from scheduled meals in order to eat the food later after their personal fasts. Bureau national policy on food service prohibits inmates, whether in CMUs or in general population, from removing food from the dining hall, except maybe one piece of whole fruit, due to health concerns and to avoid the spoiling of food items. Inmates have been informed if they choose to engage in a personal fast, then they choose to skip the scheduled meal(s) and cannot retain food in their cells from the dining hall. However, inmates in the CMU who raise this issue have been informed that they may purchase food items at the institution commissary for retention and later consumption in their cells.

The Authority of the Assistant Director, Correctional Programs Division, To Approve CMU Designations May Not Be Delegated

Some commenters were concerned that the authority to approve CMU placement might be delegated below the level of Assistant Director.

The Bureau's Assistant Director, Correctional Programs Division, has authority to approve CMU designations. The Assistant Director's decision must be based on a review of the evidence, and a conclusion that the inmate's designation to a CMU is necessary to ensure the safety, security, and orderly operation of correctional facilities, or protection of the public. There is no provision in the regulation that allows for delegation of the Assistant Director's authority.

Additional Issues Raised During the 2014 Comment Period

The following additional miscellaneous issues were raised during the 2014 comment period.

One commenter requested that we ''[e]dit the language of 540.200(b) to include 'Vocational Technical Training, Unicor (FPI),' after 'unit management,' and before 'and work programming,' in order to incorporate these programs with programs already offered to CMU inmates.'' Section 540.200(b) of the proposed rule states that a CMU ''is a general population housing unit where inmates ordinarily reside, eat, and participate in all educational, recreational, religious, visiting, unit management, and work programming, within the confines of the CMU.'' Vocational technical training is included in this phrase, as part of ''all'' educational and work programming activities. Because it is already included in the general list, we will not include this specific reference.

The same commenter requested that we ''[r]eplace the language of 540.203(a) with 'General Correspondence. General written correspondence as defined by part 540, may be limited to three pieces of handwritten correspondence (8.5 X 11 inches or smaller), double-sided, once per calendar week to and from any party on the inmate's approved contact list and an unlimited amount of typed or computer generated correspondence

mailed to or from any party on the inmate's approved contact list.' The Bureau of Prisons has the ability to scan all written correspondence.'' Our proposed rule stated that general written correspondence ''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 at the discretion of the Warden, except as stated in (c) below. This correspondence is subject to staff inspection for contraband and for content.'' In response to comments received requesting expansion of the three-page limitation, we double the limitation in the final rule to six pieces of paper.

Subsection (c) of this regulation refers to the absence of a volume limitation on mail to and from certain listed correspondents. The commenter would substantively alter this provision to remove ''at the discretion of the Warden'' in favor of ''any party on the inmate's approved contact list.'' We do not make this change because the Warden may choose to temporarily suspend communications with someone that may be on the inmate's approved contact list for a certain period of time due to a time-sensitive threat, so it is more accurate to say that it is in the Warden's discretion. The commenter would also alter this provision to add inmate electronic correspondence. While we currently allow inmates in CMUs access to electronic correspondence in the same manner permitted for general population inmates, electronic correspondence is not specifically mentioned by regulation because it is currently included under the authority of ''general mail'' correspondence. We therefore do not make this edit to the regulations.

One inmate stated that ''the designation criteria described in section 540.201, sections (a) and (b) permit the BOP to confine and [sic] inmate to a CMU merely on the basis of his offense of conviction. This is unwise policy because, as in my case, an inmate's offense alone provides a very limited glimpse of that individual and what level of security measures he may require.'' The inmate also stated that the criteria listed in the proposed rule are unlawful ''because 18 U.S.C. Sec. 3621(b) requires the BOP to consider five factors when designating a prisoner's place of confinement; these include the offense of conviction, but also, *inter alia,* the history and characteristics of the prisoner and the sentencing court's recommendation.'' We do not designate an inmate to the CMU solely on the basis of the criteria described in § 540.201. Rather, if a factor listed in § 540.201 is found to be present, the Bureau's Assistant Director, Correctional Programs Division, is required to conduct a review of the evidence, and make a conclusion that the inmate's designation to a CMU is necessary to ensure the safety, security, and orderly operation of correctional facilities, or protection of the public. This procedure is described in § 540.202(b). The use of the criteria listed in § 540.201 does not preclude consideration of the five factors in 18 U.S.C. Sec. 3621(b), rather, it supplements or details that consideration process. The Assistant Director must consider the inmate's circumstances as a whole, not rely solely on the presence of one criteria listed in § 540.201.

The same commenter stated that ''[t]he responsibility for designation of inmates for SAMs or SAMs-like restrictions should remain with the Attorney General or FBI and not with the BOP.'' As we stated in the 2010 proposed rule, this regulation will be applied differently from regulations in 28 CFR part 501, which authorize the Attorney General to impose special administrative measures (SAMs). Under the CMUs regulations, the Bureau would impose communication limits based on evidence from the FBI or another federal law enforcement agency, or if Bureau information indicates a similar need to impose communication restrictions but does not constitute evidence which rises to the same degree of potential risk to national security or acts of violence or terrorism which would warrant the Attorney General's intervention through a SAM. Further, while SAMs potentially restrict communication entirely, CMUs regulations delineate a floor of limited communication beneath which the Bureau cannot restrict unless precipitated by the inmate's violation of imposed limitations, and then only as a disciplinary sanction following due process procedures in 28 CFR part 541.

Several commenters requested that we exempt inmates with ties to animal rights causes from CMU consideration. We will not favor a group of inmates based upon political affiliation or membership in a group, just as we do not discriminate based upon such factors. We will not make these edits.

One commenter stated that the CMU restrictions violate Article 3 of the Geneva Convention. This article applies ''in the case of armed conflict not of an international character'', which is not applicable in the situation of inmates in CMUs, and refers to ''violence to life and person, in particular, murder of all kinds, cruel treatment and torture'', which, also, is inapplicable in this situation. If the commenter's concern is that CMU restrictions are cruel treatment or torture, our analysis of the Eighth Amendment of the U.S. Constitution earlier in this document applies.

One commenter suggested that ''a review panel of 9 to 13 members whose majority are U.S. citizens not affiliated with the prison or any federal, state, or county agency (including law enforcement agencies) should be put in place to approve or disapprove of the initial assignment of a prisoner to a CMU and of the continuation of a prisoner's assignment to a CMU after each 28 days spent in a CMU.'' This suggestion is impracticable because the Bureau does not use, nor is it statutorily authorized to use, citizen groups for federal inmate designation. Two commenters suggested that ''CMUs should be required to keep a secure log of all CMU-assignment and CMU-release decisions and the rationale for each decision regarding prisoner assignment or release from a CMU.'' The Bureau currently maintains such assignment, release and rationale information securely, although not in in the ''log'' form that the commenter suggests. The commenters also suggest that such information about inmates in CMUs ''should be made available upon request to family members of the prisoner or to attorneys working on behalf of the prisoner.'' The commenters would also request that, ''[e]ach month a statistical summary of the number of prisoners in CMUs or the number of prisoners moved to or released from a CMU should be made available publicly on an Internet site.'' Information regarding inmates is protected by the Freedom of Information Act and Privacy Act, and is accessible through procedures authorized by those statutes under 28 CFR part 513, regarding access to records.

Finally, a large number of commenters mistakenly believed that the proposed rule would permit ''experimentation'' on inmates in CMUs. This is simply untrue. As stated in § 540.200(c), ''[t]he purpose of CMUs is to provide an inmate housing unit environment that enables staff to more effectively monitor communication between inmates in CMUs and persons in the community.'' Neither the proposed rule nor the preamble to the proposed rule mention experimentation on inmates, nor does the Bureau intend to conduct experiments on inmates in CMUs.

For the aforementioned reasons, the Bureau finalizes the regulations

proposed on April 6, 2010 (75 FR 17324), with minor changes.

Executive Order 13563 and Executive Order 12866

This regulation falls within a category of actions that the Office of Management and Budget (OMB) has determined to constitute ''significant regulatory actions'' under section 3(f) of Executive Order 12866 and, accordingly, it was reviewed by OMB.

The Bureau of Prisons has assessed the costs and benefits of this regulation as required by Executive Order 12866 Section 1(b)(6) and has made a reasoned determination that the benefits of this regulation justify its costs. There will be no new costs associated with this regulation. CMUs are set up in currently existing facilities, utilizing currently existing staff and resources, and no new staff and resources are required to implement these regulations. In fact, placing inmates who require communication restrictions together in a CMU decreases costs related to translation, technology use, and use of other such monitoring resources that had previously been spread throughout the Bureau in order to enable communication restrictions on inmates in general population facilities. CMUs enable the Bureau to pool such resources and concentrate them in the CMU locations. This regulation benefits public safety by minimizing the risk of dangerous communication to or from inmates in Bureau custody. This regulation clarifies the Bureau's current authority to limit and monitor the communication of inmates in CMUs, but maintains the ability of these inmates to maintain family ties and access to courts and other government officials. This permits inmates to raise issues related to their incarceration or their conditions of confinement, while minimizing potential internal or external threats.

Executive Order 13132

This regulation will not have substantial direct effects on the States, on the relationship between the national government and the States, or on distribution of power and responsibilities among the various levels of government. Therefore, under Executive Order 13132, we determine that this regulation does not have sufficient Federalism implications to warrant the preparation of a Federalism Assessment.

Regulatory Flexibility Act

The Director of the Bureau of Prisons, under the Regulatory Flexibility Act (5 U.S.C. 605(b)), reviewed this regulation and by approving it certifies that it will not have a significant economic impact upon a substantial number of small entities for the following reasons: This regulation pertains to the correctional management of offenders and detainees committed to the custody of the Attorney General or the Director of the Bureau of Prisons, and its economic impact is limited to the Bureau's appropriated funds.

Unfunded Mandates Reform Act of 1995

This regulation will not result in the expenditure by State, local and tribal governments, in the aggregate, or by the private sector, of $100,000,000 or more in any one year, and it will not significantly or uniquely affect small governments. Therefore, no actions were deemed necessary under the provisions of the Unfunded Mandates Reform Act of 1995.

Small Business Regulatory Enforcement Fairness Act of 1996

This regulation is not a major rule as defined by § 804 of the Small Business Regulatory Enforcement Fairness Act of 1996. This regulation will not result in an annual effect on the economy of $100,000,000 or more; a major increase in costs or prices; or significant adverse effects on competition, employment, investment, productivity, innovation, or on the ability of United States-based companies to compete with foreign-based companies in domestic and export markets.

List of Subjects in 28 CFR Part 540

Prisoners.

Charles E. Samuels, Jr.,

Director, Bureau of Prisons.

Under rulemaking authority vested in the Attorney General in 5 U.S.C. 301; 28 U.S.C. 509, 510 and delegated to the Director, Bureau of Prisons in 28 CFR 0.96, we amend 28 CFR part 540 as follows.

PART 540—CONTACT WITH PERSONS IN THE COMMUNITY

■ 1. The authority citation for 28 CFR part 540 continues to read as follows:

Authority: 5 U.S.C. 301; 551, 552a; 18 U.S.C. 1791, 3621, 3622, 3624, 4001, 4042, 4081, 4082 (Repealed in part as to offenses committed on or after November 1, 1987), 5006–5024 (Repealed October 12, 1984 as to offenses committed after that date), 5039; 28 U.S.C. 509, 510.

■ 2. Add a new subpart J, to read as follows:

Subpart J—Communications Management Housing Units

Sec.

Subpart J—Communications Management Housing Units

§ 540.200 Purpose and scope.

(a) *Purpose of this subpart.* This subpart defines the Federal Bureau of Prisons' (Bureau) authority to operate, and designate inmates to, Communications Management Housing Units (CMUs) within Bureau facilities.

(b) *CMU.* A CMU is a general population housing unit where inmates ordinarily reside, eat, and participate in all educational, recreational, religious, visiting, unit management, and work programming, within the confines of the CMU. Additionally, CMUs may contain a range of cells dedicated to segregated housing of inmates in administrative detention or disciplinary segregation status.

(c) *Purpose of CMUs.* The purpose of CMUs is to provide an inmate housing unit environment that enables staff to more effectively monitor communication between inmates in CMUs and persons in the community. The ability to monitor such communication is necessary to ensure the safety, security, and orderly operation of correctional facilities, and protection of the public. The volume, frequency, and methods, of CMU inmate contact with persons in the community may be limited as necessary to achieve the goal of total monitoring, consistent with this subpart.

(d) *Application.* Any inmate (as defined in 28 CFR 500.1(c)) meeting criteria prescribed by this subpart may be designated to a CMU.

(e) *Relationship to other regulations.* The regulations in this subpart supersede and control to the extent they conflict with, are inconsistent with, or impose greater limitations than the regulations in this part, or any other regulations in this chapter, except 28 CFR part 501.

§ 540.201 Designation criteria.

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 substantial likelihood that the inmate will 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 substantial likelihood that the inmate will contact victims of the inmate's current offense(s) of conviction;

(d) The inmate committed prohibited activity related to misuse or abuse of approved communication methods while incarcerated; or

(e) There is any other substantiated/credible 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.

§ 540.202 Designation procedures.

Inmates may be designated to CMUs only according to the following procedures:

(a) *Initial consideration.* Initial consideration of inmates for CMU designation begins when the Bureau becomes aware of information relevant to the criteria described in § 540.201.

(b) *Assistant Director authority.* The Bureau's Assistant Director, Correctional Programs Division, has authority to approve CMU designations. The Assistant Director's decision must be based on a review of the evidence, and a conclusion that the inmate's designation to a CMU is necessary to ensure the safety, security, and orderly operation of correctional facilities, or protection of the public.

(c) *Written notice.* Upon arrival at the designated CMU, inmates will receive written notice from the facility's Warden explaining that:

(1) Designation to a CMU allows greater Bureau staff management of communication with persons in the community through complete monitoring of telephone use, written correspondence, and visiting. The volume, frequency, and methods of CMU inmate contact with persons in the community may be limited as necessary to achieve the goal of total monitoring, consistent with this subpart;

(2) General conditions of confinement in the CMU may also be limited as necessary to provide greater management of communications;

(3) Designation to the CMU is not punitive and, by itself, has no effect on the length of the inmate's incarceration. Inmates in CMUs continue to earn sentence credit in accordance with the law and Bureau policy;

(4) Designation to the CMU follows the Assistant Director's decision that such placement is necessary for the safe, secure, and orderly operation of Bureau institutions, or protection of the public. The inmate will be provided an explanation of the decision in sufficient detail, unless the Assistant Director determines that providing specific information would jeopardize the safety, security, and orderly operation of correctional facilities, or protection of the public;

(5) Continued designation to the CMU will be reviewed regularly by the inmate's Unit Team under circumstances providing the inmate notice and an opportunity to be heard, in accordance with the Bureau's policy on Classification and Program Review of Inmates;

(6) The inmate may challenge the CMU designation decision, and any aspect of confinement therein, through the Bureau's administrative remedy program.

§ 540.203 Written correspondence limitations.

(a) *General correspondence.* General written correspondence as defined by this part, may be limited to six 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 at the discretion of the Warden, except as stated in (c) below. This correspondence is subject to staff inspection for contraband and for content.

(b) *Special mail.* (1) Special mail, as defined in this part, is limited to privileged communication with the inmate's attorney.

(2) All such correspondence is subject to staff inspection in the inmate's presence for contraband and to ensure its qualification as privileged communication with the inmate's attorney. Inmates may not seal such outgoing mail before giving it to staff for processing. After inspection for contraband, the inmate must then seal the approved outgoing mail material in the presence of staff and immediately give the sealed material to the observing staff for further processing.

(c) *Frequency and volume limitations.* Unless the quantity to be processed becomes unreasonable or the inmate abuses or violates these regulations, there is no frequency or volume limitation on written correspondence with the following entities:

(1) U.S. courts;

(2) Federal judges;

(3) U.S. Attorney's Offices;

(4) Members of U.S. Congress;

(5) The Bureau of Prisons;

(6) Other federal law enforcement entities; or

(7) The inmate's attorney (privileged communications only).

(d) Electronic messaging may be limited to two messages, per calendar week, to and from a single recipient at the discretion of the Warden.

§ 540.204 Telephone communication limitations.

(a) *Monitored telephone communication* may be limited to immediate family members only. The frequency and duration of telephone communication may also be limited to three connected calls per calendar month, lasting no longer than 15 minutes. The Warden may require such communication to be in English, or translated by an approved interpreter.

(b) *Unmonitored telephone communication* is limited to privileged communication with the inmate's attorney. Unmonitored privileged telephone communication with the inmate's attorney is permitted as necessary in furtherance of active litigation, after establishing that communication with the verified attorney by confidential correspondence or visiting, or monitored telephone use, is not adequate due to an urgent or impending deadline.

§ 540.205 Visiting limitations.

(a) *Regular visiting* may be limited to immediate family members. The frequency and duration of regular visiting may also be limited to four one-hour visits each calendar month. The number of visitors permitted during any visit is within the Warden's discretion. Such visits must occur through no-contact visiting facilities.

(1) Regular visits may be simultaneously monitored and recorded, both visually and auditorily, either in person or electronically.

(2) The Warden may require such visits to be conducted in English, or simultaneously translated by an approved interpreter.

(b) *Attorney visiting* is limited to attorney-client privileged communication as provided in this part. These visits may be visually, but not auditorily, monitored. Regulations and policies previously established under 28 CFR part 543 are applicable.

(c) For convicted inmates (as defined in 28 CFR part 551), regulations and policies previously established under 28 CFR part 543 are applicable.

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