

DEPARTMENT OF JUSTICE

Bureau of Prisons

28 CFR Part 501

[BOP-1046-F; BOP-1059-F]

RIN 1120-AA47; RIN 1120-AA54

Scope of Rules: National Security; Prevention of Acts of Violence and Terrorism

AGENCY: Bureau of Prisons, Justice.

ACTION: Final rule.

SUMMARY: This document finalizes Bureau of Prisons interim rules on institutional management with respect to special administrative measures that may be necessary to prevent the disclosure of classified information that could endanger national security and to prevent acts of violence and terrorism, either of which may be caused by contacts with certain inmates. The affected inmate must be notified in writing as promptly as possible of the restrictions to be imposed. Restrictions may be imposed initially for up to 120 days, and may be extended in further increments of 120 days only upon additional written notification that the circumstances identified in the original certification continue to exist.

EFFECTIVE DATE: This rule shall take effect June 20, 1997.

ADDRESSES: Rules Unit, Office of General Counsel, Bureau of Prisons, HOLC Room 754, 320 First Street, NW., Washington, DC 20534.

FOR FURTHER INFORMATION CONTACT: Roy Nanovic, Office of General Counsel, Bureau of Prisons, phone (202) 514-6655.

SUPPLEMENTARY INFORMATION: The Bureau of Prisons ("Bureau") is finalizing its interim regulations on the correctional management of inmates whose contacts with other persons present the potential for disclosure of classified information that could endanger national security or for acts of violence and terrorism. An interim rule on preventing the disclosure of classified information was published in the **Federal Register** on October 13, 1995 (60 FR 53490). No public comment was received, and the interim rule is adopted, with only minor changes. In the second sentence of section 501.2(a), the word "ordinarily" is added, and the word "housing" is substituted for "placing". This sentence also adds the phrase, "interviews with representatives of the news media" as another example where privileges may be limited. The existing rule contained a listing that said, "* * * limiting certain privileges,

including, but not limited to, * * *" In section 501.2(b), the phrase, "as soon as practicable" is substituted for "as promptly as possible." None of these revisions change the intent of the rule.

An interim rule on preventing acts of violence and terrorism was published in the **Federal Register** on May 17, 1996 (61 FR 25120). Public comment was received on this rule and is responded to below.

Comments generally expressed concern that the regulation is violative of a person's First Amendment rights, with one commenter stating that the First Amendment "prohibits governmental interference with freedom of speech and freedom of press." The commenter states that any such restriction must be based on substantial and controlling state interest and that the restriction be the least drastic method of accomplishing the state goal. The commenter believes this restriction may not pass the above test.

In response, the Bureau of Prisons notes that the U.S. Supreme Court in *Pell v. Procunier*, 417 U.S. 817, 822, 823 (1974), held that "* * * a prison inmate retains those First Amendment rights that are not inconsistent with his status as a prisoner or with the legitimate penological objectives of the corrections system * * * An important function of the corrections system is the deterrence of crime * * * Finally, central to all other corrections goals is the institutional consideration of internal security within the corrections facilities themselves." We believe this regulation, with its concern of security and protection of the public, meets this test. Nor do we agree with the commenter's suggestion that the rule is unnecessary since it has not been needed in the past, and, the commenter believes, "no death or injury has resulted from a federal prisoner's communication with unincarcerated individuals." It is not necessary to experience such an incident before regulations can be implemented to address the need.

Other commenters acknowledge that the regulation was promulgated in order to protect the safety of government officials and the general public, and, as stated by one of the commenters, do "not dispute the legitimacy of the goals underlying the interim regulations." Notwithstanding this acknowledgment, these commenters also addressed the First Amendment issue. They viewed the regulation as overbroad, as more expansive than necessary, and as possibly indiscriminately barring expression of speech that does not pose any threat to Federal officials or those outside of prison. Other comments said that the regulation may prevent the

press from fully reporting on the very people who "may threaten society the most", and that the regulation forecloses other avenues of obtaining information; that the "complete ban suggested by the regulation * * * is legally impermissible"; and that the regulation is imposed "without sufficient checks and balances to challenge government action."

As noted by one commenter, the U.S. Supreme Court has held that the press has no constitutional right of access to prisons or their inmates beyond that afforded the general public. See *Pell v. Procunier*, 417 U.S. 817 (1974) and *Saxbe v. Washington Post Co.*, 417 U.S. 843 (1974). In this context, the Bureau of Prisons disagrees with the broad scope of comment that the public is the ultimate decider of what it wants to hear from the inmates. Where the issue is prevention of acts of violence and terrorism, it is appropriate for government officials, at the highest level and acting on the basis of their intelligence information, to impose restrictions on an inmate's public dissemination of information that may cause such acts. The rule, however, in no way is intended to prevent inmates, as suggested by commenters, from communicating about the prison system. In one sense, the government officials, as are the press, are operating on behalf of the public. As noted below, there are means by which disagreements can be addressed.

Further, as noted at the time of the interim rule's publication, the application of these measures is likely to affect only a minute portion of the inmate population; those inmates for whom there is an identified concern by a government official of the highest level that the inmate's communications with other persons could serve as an instrumentality for acts of violence and terrorism. These measures will be subject to strict controls, as their implementation may occur only upon written notification by the Attorney General, or at his or her direction, by the head of a federal law enforcement agency or the head of a member agency of the United States intelligence community, that there is a substantial risk that a prisoner's communications or contacts with persons could result in death or serious bodily injury to persons, or substantial damage to property that would entail the risk of death or serious bodily injury to persons. The Bureau of Prisons finds this standard consistent with the commenter who suggests, "At a minimum, the standards for restrictive inmate privileges such as those described in the regulation should be

that there is clear and convincing evidence of a substantial risk to death or serious bodily injury.”

The regulation also addresses commenters' concern that the regulation is overbroad, and that it may indiscriminately bar expression of speech. It is not the intention of the Bureau of Prisons that the restrictions imposed in these special cases routinely include complete curtailment of privileges, including all means of access, but rather the regulation is directed to allowing the imposition of appropriate limitations, as needed to prevent acts of violence and terrorism. For example, it is possible, in response to one comment, that an inmate subject to the provisions of this regulation, would be allowed to be interviewed by the media, but with the necessary conditions imposed to meet what one commenter refers to as “the legitimacy of the goals underlying the interim regulations.”

In addition, an inmate upon whom these special restrictions are imposed is entitled to notification in writing of the imposed restrictions and the basis for the restrictions. This ensures the inmate is aware of the rule's implementation. The affected inmate may appeal imposition of restrictions ordered under this section through the Bureau's Administrative Remedy Program, 28 CFR part 542.

A commenter correctly points out that the rule does not provide a formal administrative measure by which a non-inmate may challenge the restrictions on the inmate's privileges. Such an administrative mechanism is not considered necessary as the inmate is notified of the reasons and of the means to appeal the decision. Certainly, a non-inmate may contact the Bureau of Prisons, with the extent of information provided governed by the security concerns involved and the privacy rights of the inmate. Further, this regulation poses no restriction on an individual's right to initiate judicial action.

Contrary to one comment, the regulation as promulgated fully conforms to First Amendment requirements and provides an inmate with due process. The inmate is notified of any restrictions imposed and is given the opportunity to appeal those restrictions. It appears the commenter may believe the regulation allows an inmate to be placed in disciplinary segregation status (commenter refers to “placing a prisoner in segregation without a due process hearing.”) That is not the case, as a disciplinary segregation placement would occur not on the basis of this regulation, but only

as a result of an inmate being found, after a limited due process hearing, to have committed an infraction of an institution's prohibited act.

As previously noted, commenters' concerns appear to relate more to a misapplication of the rule rather than to the purpose of the rule. For example, one commenter stated there was no dispute of the legitimacy of the goals underlying the interim regulations, but saw the regulation as overbroad. Other comments expressed concern over the potential for a lack of accountability and/or abuse, including abuse by government officials who wish to deny the media access for illegitimate reasons, such as “content-based suppression of speech.” The Bureau of Prisons regulation is promulgated to alleviate such concerns. The rule provisions for implementation only at the direction of the Attorney General, or at her designation, the head of a federal law enforcement agency or head of a member agency of the United States intelligence community, coupled with the provision limiting its provisions to 120 days (unless specifically renewed) help ensure against such abuse. The Department's Standards of Professional Conduct also serve as a constraint. These provisions, in conjunction with other aspects discussed above, such as the inmate's opportunity to file an administrative appeal and the rule's intent to ordinarily not curtail all access, serve as “checks and balances” on the addressing of this very serious issue of preventing violence and acts of terrorism.

It is unclear as to what is being requested by a comment that the rule be revised to “prohibit the unilateral involvement of federal law enforcement and intelligence agencies in access decisions.” The scope of this rule is to prevent acts of violence and terrorism. The federal law enforcement and intelligence agencies are charged with this responsibility. The rule, as drafted, recognizes this aspect but carries constraints, such as approval by the Attorney General, re-approval every 120 days and the inmate's right to appeal, to help ensure that the rule is applied appropriately. The Bureau of Prisons is not aware of any further revision that may be made to more effectively achieve the intent of the rule without increasing the potential for acts of violence and terrorism.

A commenter suggested that the interim rule be amended to create guidelines specifying the referral of suspicious mails and communications to the appropriate investigatory agency. This comment is outside the scope of the current rule. However, it is an issue

that the Bureau of Prisons is examining with respect to its internal procedures.

A commenter believes that the Bureau's rule sets a “dangerous example for the state prison systems, which may be less appreciative of the constitutional restrictions on banning speech, and therefore may be less exacting.” In response, the Bureau notes that its rule is limited to Federal prisons, and does not directly affect the state prison systems. The Bureau fully expects any state that would feel it appropriate to initiate such a procedure would do so with a full awareness of the applicable restrictions.

The one change made to this interim rule is in the first sentence of section 501.3(a), where the word “measures” is substituted for the word “procedures.” The intent of the section is unchanged.

Members of the public may submit comments concerning this rule by writing to the previously cited address. These comments will be considered but will receive no further response in the **Federal Register**.

The Bureau of Prisons has determined that this rule is not a significant regulatory action for the purpose of E.O. 12866, and accordingly this rule was not reviewed by the Office of Management and Budget. After review of the law and regulations, the Director, Bureau of Prisons, has certified that this rule, for the purpose of the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*), does not have a significant economic impact on a substantial number of small entities within the meaning of the Act. Because this rule pertains to the management of offenders committed to the custody of the Attorney General or the Director of the Bureau of Prisons, its economic impact is limited to the Bureau's appropriated funds. This rule will not have substantial direct effects on the states, on the relationship between the national government and the states, or the distribution of power and responsibilities among the various levels of government. Therefore, in accordance with section 6 of E.O. 12612, it is determined that this rule does not have sufficient federalism implications to warrant the preparation of a Federalism Assessment.

List of Subjects in 28 CFR Part 501

Prisoners.

Kathleen M. Hawk,

Director, Bureau of Prisons.

Accordingly, pursuant to the rulemaking authority vested in the Attorney General in 5 U.S.C. 552(a) and delegated to the Director, Bureau of Prisons, in 28 CFR 0.96(p), part 501 in

subchapter A of 28 CFR, chapter V is amended as set forth below:

SUBCHAPTER A—GENERAL MANAGEMENT AND ADMINISTRATION

PART 501—SCOPE OF RULES

1. The authority citation for 28 CFR part 501 continues to read as follows:

Authority: 5 U.S.C. 301; 18 U.S.C. 3621, 3622, 3624, 4001, 4042, 4081, 4082 (Repealed in part as to offenses committed on or after November 1, 1987), 4161–4166 (Repealed 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; 28 CFR 0.95–0.99.

2. Sections 501.2 and 501.3 are revised to read as follows:

§ 501.2 National security cases.

(a) Upon direction of the Attorney General, the Director, Bureau of Prisons, may authorize the Warden to implement special administrative measures that are reasonably necessary to prevent disclosure of classified information upon written certification to the Attorney General by the head of a member agency of the United States intelligence community that the unauthorized disclosure of such information would pose a threat to the national security and that there is a danger that the inmate will disclose such information. These special administrative measures ordinarily may include housing the inmate in administrative detention and/or limiting certain privileges, including, but not limited to, correspondence, visiting, interviews with representatives of the news media, and use of the telephone, as is reasonably necessary to prevent the disclosure of classified information. The authority of the Director under this paragraph may not be delegated below the level of Acting Director.

(b) Designated staff shall provide to the affected inmate, as soon as practicable, written notification of the restrictions imposed and the basis for these restrictions. The notice's

statement as to the basis may be limited in the interest of prison security or safety or national security. The inmate shall sign for and receive a copy of the notification.

(c) Initial placement of an inmate in administrative detention and/or any limitation of the inmate's privileges in accordance with paragraph (a) of this section may be imposed for up to 120 days. Special restrictions imposed in accordance with paragraph (a) of this section may be extended thereafter by the Director, Bureau of Prisons, in 120-day increments only upon receipt by the Attorney General of additional written certification from the head of a member agency of the United States intelligence community, that the circumstances identified in the original certification continue to exist. The authority of the Director under this paragraph may not be delegated below the level of Acting Director.

(d) The affected inmate may seek review of any special restrictions imposed in accordance with paragraph (a) of this section through the Administrative Remedy Program, 28 CFR part 542.

§ 501.3 Prevention of acts of violence and terrorism.

(a) Upon direction of the Attorney General, the Director, Bureau of Prisons, may authorize the Warden to implement special administrative measures that are reasonably necessary to protect persons against the risk of death or serious bodily injury. These procedures may be implemented upon written notification to the Director, Bureau of Prisons, by the Attorney General or, at the Attorney General's direction, by the head of a federal law enforcement agency, or the head of a member agency of the United States intelligence community, that there is a substantial risk that a prisoner's communications or contacts with persons could result in death or serious bodily injury to persons, or substantial damage to property that would entail the risk of death or serious bodily injury to persons. These special administrative measures ordinarily may

include housing the inmate in administrative detention and/or limiting certain privileges, including, but not limited to, correspondence, visiting, interviews with representatives of the news media, and use of the telephone, as is reasonably necessary to protect persons against the risk of acts of violence or terrorism. The authority of the Director under this paragraph may not be delegated below the level of Acting Director.

(b) Designated staff shall provide to the affected inmate, as soon as practicable, written notification of the restrictions imposed and the basis for these restrictions. The notice's statement as to the basis may be limited in the interest of prison security or safety or to protect against acts of violence or terrorism. The inmate shall sign for and receive a copy of the notification.

(c) Initial placement of an inmate in administrative detention and/or any limitation of the inmate's privileges in accordance with paragraph (a) of this section may be imposed for up to 120 days. Special restrictions imposed in accordance with paragraph (a) of this section may be extended thereafter by the Director, Bureau of Prisons, in 120-day increments upon receipt by the Director of additional written notification from the Attorney General, or, at the Attorney General's direction, from the head of a federal law enforcement agency, or the head of a member agency of the United States intelligence community, that the circumstances identified in the original notification continue to exist. The authority of the Director under this paragraph may not be delegated below the level of Acting Director.

(d) The affected inmate may seek review of any special restrictions imposed in accordance with paragraph (a) of this section through the Administrative Remedy Program, 28 CFR part 542.

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