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**THE LEGAL STORY OF GUANTÁNAMO NORTH**

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## INTRODUCTION

More than a decade ago, the Bureau of Prisons (“the Bureau”) secretly created the first of two Communication Management Units (“CMUs”) in Terre Haute, Indiana, and transferred seventeen federal prisoners there—fifteen of whom were Muslim.<sup>1</sup> The units’ purpose is to limit inmates’ communications by prohibiting all physical contact with visitors and monitoring the content and duration of all phone calls and other forms of communication, including letters and in-person visits.<sup>2</sup> Since the units came into being, civil liberties advocates have criticized the procedural mechanisms used to create the CMUs, the process for designating prisoners to CMUs, and the conditions imposed on those prisoners.<sup>3</sup>

News outlets have given the units nicknames including “Guantánamo North”<sup>4</sup> and “Little Gitmo,”<sup>5</sup> because like Guantánamo<sup>6</sup> detainees CMU inmates are mostly Arab or Muslim men believed to be low-level terrorists or to have terrorist associations.<sup>7</sup> As of 2011, between 66 and 72% of CMU inmates were Muslim.<sup>8</sup>

The communications restrictions imposed on CMU inmates are dramatically different from those imposed on inmates in general population units. The Center for Constitutional Rights—which represents several CMU in-

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1 David M. Shapiro, *How Terror Transformed Federal Prison: Communication Management Units*, 44 COLUM. HUM. RTS. L. REV. 47, 50 (2012).

2 See *infra* Section I.

3 American Civil Liberties Union et al., Comment on Proposed Rule Limited Communication for Terrorist Inmates, 71 Fed. Reg. 16520 (June 2, 2006) [hereinafter ACLU Comments], <https://www.aclu.org/files/pdfs/prison/limitedcommunications20060605.pdf>.

4 Carrie Johnson & Margot Williams, ‘Guantanamo North’: Inside Secretive U.S. Prisons, NPR (Mar. 3, 2011, 1:09 PM), <http://www.npr.org/2011/03/03/134168714/guantanamo-north-inside-u-s-secretive-prisons> [hereinafter Johnson & Williams, *Inside Guantanamo North*].

5 Matt Sledge, *Judge Rules Against Prisoners in ‘Little Guantanamo’ Lawsuit*, HUFFINGTON POST (Mar. 16, 2015, 6:42 PM), [http://www.huffingtonpost.com/2015/03/16/prisoners-little-guantanamo\\_n\\_6881774.html](http://www.huffingtonpost.com/2015/03/16/prisoners-little-guantanamo_n_6881774.html); Christopher S. Stewart, ‘Little Gitmo’, N.Y. MAG. (July 10, 2011), <http://nymag.com/news/features/yassin-aref-2011-7/>.

6 Andrei Scheinkman et al., *The Guantánamo Docket*, N.Y. TIMES (last updated Feb. 22, 2017), <https://www.nytimes.com/interactive/projects/guantanamo>.

7 Alia Malek, *Gitmo in the Heartland*, THE NATION (Mar. 10, 2011), <https://www.thenation.com/article/gitmo-heartland/>.

8 Johnson & Williams, *Inside Guantanamo North*, *supra* note 4.

mates and remains in ongoing litigation over the units<sup>9</sup>—describes them as “the federal prison system’s experiment in social isolation.”<sup>10</sup> Indeed, CMUs radically restrict inmates’ ability to maintain contact with their families. Yet CMUs are not unique within the federal prison system in terms of imposing isolation.<sup>11</sup> Varying forms of restrictive housing exist within the federal prison system, including solitary confinement, where prisoners are held alone in single cells for up to 23 hours per day.<sup>12</sup> So, although CMU conditions are not the most isolative along the spectrum of restrictive settings, the communications restrictions they impose are among the most extreme. And most CMU inmates are classified as medium- and low-security offenders; many have no disciplinary infractions nor do they have violent histories.<sup>13</sup>

On January 22, 2015, the Bureau finalized regulations establishing and describing CMU operation.<sup>14</sup> The Final Rule was a near replication of its proposed precursors, permitting CMU staff to monitor “all communications between inmates . . . and persons in the community,” and explaining that “[t]he ability to monitor such communication is necessary to ensure the safety, security, and orderly operation of correctional facilities, and protection of the public.”<sup>15</sup> Officially, the eighty or so CMU inmates are classified as general population inmates, though the Government Accountability Office (“GAO”) reviewed CMUs alongside other segregated housing units because “CMU inmates are separated from general inmate population and have . . . 100 percent of their communications monitored and noncontact visits.”<sup>16</sup>

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9 See, e.g., *Aref v. Lynch (Aref IV)*, 833 F.3d 242 (D.C. Cir. 2016) (holding that prisoners had a Fifth Amendment liberty interest in avoiding placement in a CMU and remanding to determine whether process assigning inmates to CMUs was adequate).

10 *CMUs: The Federal Prison System’s Experiment in Social Isolation*, CTR. FOR CONST. RTS. (Mar. 31, 2010), <https://ccrjustice.org/home/get-involved/tools-resources/fact-sheets-and-faqs/cmus-federal-prison-system-s-experiment>.

11 *Aref IV*, 833 F.3d at 256-57 (“All parties agree CMUs are less extreme in terms of deprivation than administrative segregation. Inmates in administrative segregation must remain in their cells for twenty-three hours a day; they are unable to hold jobs or access most educational opportunities. . . . By contrast, CMU inmates are allowed in common spaces with other CMU inmates for sixteen hours a day. They have access to educational and professional opportunities . . .”).

12 *Id.*; see also U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-13-429, BUREAU OF PRISONS: IMPROVEMENTS NEEDED IN BUREAU OF PRISONS’ MONITORING AND EVALUATION OF IMPACT OF SEGREGATED HOUSING 2 (2013) [hereinafter GAO Report] (“As of February 2013, BOP confined approximately 12,460 federal inmates—or about 7 percent of inmates in BOP-operated facilities—in segregated housing units.”).

13 Shapiro, *supra* note 1, at 84; see also Sameer Ahmed, *Is History Repeating Itself? Sentencing Young American Muslims in the War on Terror*, 126 YALE L.J. 1520, 1566 (2017) (“Often, the application of these measures fails to distinguish between hardened terrorists and individuals . . . whose convictions are not tied to any act of violence or viable threat.”).

14 Communications Management Units, 80 Fed. Reg. 3168, 3168 (Jan. 22, 2015) (to be codified at 28 C.F.R. pt. 540).

15 *Id.*

16 GAO Report, *supra* note 12, at 45.

Despite political interest in prisons and criminal justice reform, and the fact that CMUs implicate substantive legal doctrine and ongoing court challenges, these units have garnered relatively little scholarly attention.<sup>17</sup>

This Article provides a factual background and context for the CMUs, details the Final Rule promulgated in January 2015, and analyzes legal and policy problems with the units' continued employ and existence through the lens of the most recent decision in the ongoing case, *Aref v. Lynch*.<sup>18</sup> Part I defines and describes the CMUs' creation and conditions and profiles some of the inmates who have challenged their designation to CMUs. Part II analyzes how courts exercise deference to prison officials in prisoners' rights cases, using the second district court decision in the *Aref* case as a primary example. Part III examines recent outcomes in due process challenges to CMUs. Part IV assesses potential equal protection claims under *Ashcroft v. Iqbal*<sup>19</sup> and addresses some of the differences between *Aref* and *Johnson v. California*.<sup>20</sup> Part V explores how courts can and should take a human rights oriented view of prison reform efforts. Throughout, *Aref v. Holder* serves as an exemplar,<sup>21</sup> demonstrating how different legal theories have been considered in the CMU context.

Ultimately, this Article is about why prisoners, and especially CMU inmates, should be afforded greater procedural safeguards. It argues that political actors should pursue prison reform and that courts should consider rights-based, substantive arguments in prisoners' rights cases. This shift is necessary in light of an evolving understanding of the impact of restrictive

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17 CMUs have been thoroughly examined—and criticized—in only two articles. Shapiro, *supra* note 1, at 52 (arguing that “BOP’s operation of CMUs is greatly flawed, both legally and from the perspective of sound policy” and discussing potential improvements); Luke A. Beata, Note, *Stateside Guantanamo: Breaking the Silence*, 62 SYRACUSE L. REV. 281 (2011) (providing an overview of the CMUs’ creation and operation and arguing that as they currently exist, CMUs violate both constitutional and statutory standards).

Outside of these in-depth analyses, CMUs are mentioned in a few other articles. Ahmed, *supra* note 13, at 1565–66; Sahar F. Aziz, *Caught in a Preventive Dragnet: Selective Counterterrorism in a Post-9/11 America*, 47 GONZ. L. REV. 429, 454–56 (2012) (describing conditions of CMU confinement and asserting that CMUs continue disparate treatment of Muslims in the criminal justice system post conviction); Cyra Akila Choudhury, *Shari’ah Law as National Security Threat?*, 46 AKRON L. REV. 49, 107 (2013) (suggesting that CMUs are “used to segregate and isolate those Muslims who are considered leaders . . . from the general population”); SpearIt, *Muslim Radicalization in Prison: Responding with Sound Penal Policy or the Sound of Alarm?*, 49 GONZ. L. REV. 37, 72 (2013) (asserting that CMUs may foster “solidarity and defiance” among inmates due to “heightening conflicts between guards and inmates”); Wadie E. Said, *The Message and Means of the Modern Terrorism Prosecution*, 21 TRANSNAT’L L. & CONTEMP. PROBS. 175, 194 (2012) (characterizing the CMUs as an extension of exceptionalism in terrorism prosecutions).

18 *Aref IV*, 833 F.3d 242 (D.C. Cir. 2016).

19 *Ashcroft v. Iqbal*, 556 U.S. 662 (2009).

20 *Johnson v. California*, 543 U.S. 499 (2005).

21 *Aref IV*, 833 F.3d 242 (D.C. Cir. 2016); *Aref v. Holder (Aref III)*, No. 10-0539 (BJR), 2015 WL 3749621 (D.D.C. Mar. 16, 2015); *Aref v. Holder (Aref II)*, 953 F. Supp. 2d 133 (D.D.C. 2013); *Aref v. Holder (Aref I)*, 774 F. Supp. 2d 147 (D.D.C. 2011).

conditions on prisoners, the Bureau's professed intention to both rehabilitate and punish inmates, and the important goal of deterring future crime.

### I. WHAT ARE COMMUNICATION MANAGEMENT UNITS AND HOW DID THEY COME TO EXIST?

The term Communication Management Unit officially refers to a federal prison unit that holds “inmates who . . . require increased monitoring of communications between the inmate and persons in the community to protect the safety, security, and orderly operation of the BOP and to protect the public.”<sup>22</sup> CMU inmates are often believed to have terrorist associations.<sup>23</sup>

#### A. Logistics: How Were the CMUs Created?

At present, the Bureau operates two CMUs, one at the U.S. Penitentiary in Marion, Illinois,<sup>24</sup> and one at the Federal Correctional Complex in Terre Haute, Indiana.<sup>25</sup> Both are characterized as medium-security facilities with minimum-security satellite camps.<sup>26</sup> Each CMU was initially created through the same opaque process.<sup>27</sup> In April 2006, the Bureau proposed a new regulation—in the form of a Notice of Proposed Rulemaking (“Proposed Rule”)—which intended to limit terrorist inmates’ communications.<sup>28</sup> Critics responded to the Proposed Rule by arguing that it was broader than professed, gave prison officials too much discretion without oversight, and would undermine both prisoners’ and the news media’s First

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22 FED. BUREAU OF PRISONS, U.S. DEP’T OF JUSTICE, LEGAL RESOURCE GUIDE TO THE FEDERAL BUREAU OF PRISONS 18 (2014) [hereinafter BOP LEGAL RESOURCE GUIDE], [http://www.bop.gov/resources/pdfs/legal\\_guide.pdf](http://www.bop.gov/resources/pdfs/legal_guide.pdf).

23 *Id.* (going on to explain that “[i]nmates designated to the CMU may have been convicted of, or associated with, terrorism or terrorist organization, repetitively attempted to contact their victims; and/or attempted illegal activities through approved communication methods and/or received extensive disciplinary action due to misuse of approved communicating methods”); *see also* Communications Management Units, 80 Fed. Reg. at 3177.

24 FED. BUREAU OF PRISONS, USP MARION, <http://www.bop.gov/locations/institutions/mar/> (last visited May 30, 2017).

25 NATHAN JAMES, CONG. RESEARCH SERV., R42486 THE BUREAU OF PRISONS (BOP): OPERATIONS AND BUDGET 8, 8 n.44 (2014) (noting that the Bureau of Prisons only operates CMUs at two facilities, which are located at FCC Terre Haute and USP Marion); FED. BUREAU OF PRISONS, FCI TERRE HAUTE, <http://www.bop.gov/locations/institutions/tha/> (last visited May 30, 2017).

26 FED. BUREAU OF PRISONS, FCI TERRE HAUTE, *supra* note 25; FED. BUREAU OF PRISONS, USP MARION, *supra* note 24.

27 *See* Malek, *supra* note 7 (calling the CMU at Terre Haute “a secret experimental unit for second-tier terrorism inmates”).

28 Limited Communication for Terrorist Inmates, 71 Fed. Reg. 16520 (proposed Apr. 3, 2006) (to be codified at 28 C.F.R. pt. 540).

Amendment rights.<sup>29</sup> The Bureau then appeared to abandon the rulemaking process.<sup>30</sup> Seven months later, however, the CMU at Terre Haute was established and seventeen inmates were transferred there. This was unusual: rather than engaging in the rulemaking process anew, the Bureau wrote a policy document called an “Institution Supplement” to set up and govern the units.<sup>31</sup> Unlike rulemakings, such a policy document does not require a notice-and-comment period prior to implementation.<sup>32</sup>

Professor William Luneberg<sup>33</sup> articulated the issue surrounding the 2006 Proposed Rule this way: “It is not a normal thing for agencies legally bound by the APA [Administrative Procedure Act] to propose some new program, to start through the public rule-making process and then basically not complete it, and then to decide to go ahead and do it on their own.”<sup>34</sup> This is because the Administrative Procedure Act differentiates between agency-promulgated rules based on whether or not they are “legislative rules.”<sup>35</sup> If an agency begins to engage in the notice-and-comment process, it implies that the rule in question is legislative.<sup>36</sup> To then quietly bypass this process, as the Bureau did, is rare.<sup>37</sup>

In February 2007, two months after prisoners were transferred to Terre Haute, news of the new unit entered the public sphere. First, a CMU inmate named Rafil Dhafir<sup>38</sup> wrote a letter about his transfer and the new

<sup>29</sup> ACLU Comments, *supra* note 3, at 2–3, 5–6. Besides the American Civil Liberties Union (“ACLU”), signatories included the Legal Aid Society, and the National Lawyers Guild, among others. *Id.* at 1.

<sup>30</sup> Shapiro, *supra* note 1, at 50.

<sup>31</sup> *Id.*

<sup>32</sup> *Id.* For more information on the unusual means employed by the Bureau to establish the two CMUs, see *id.* at 49–51; Beata, *supra* note 17, at 286.

<sup>33</sup> William V. Luneberg is a Professor Emeritus of Law at the University of Pittsburgh School of Law.

<sup>34</sup> Malek, *supra* note 7. See Administrative Procedure Act, 5 U.S.C. § 553 (2015) (outlining rulemaking procedures for all agencies).

<sup>35</sup> 5 U.S.C. § 553(b)(3)(A) (noting that the process for proposed rulemakings does not apply to “interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice”); Shapiro, *supra* note 1, at 69 (explaining the difference between legislative and non-legislative rules and describing the procedures required to issue legislative rules).

<sup>36</sup> An agency’s understanding—as illustrated by its actions or otherwise—is relevant because “[t]he distinction between legislative rules and interpretative rules or policy statements has been described at various times as ‘tenuous,’ ‘fuzzy,’ ‘blurred,’ and perhaps most picturesquely, ‘enshrouded in considerable smog.’” Shapiro, *supra* note 1, at 69 (quoting *Cnty. Nutrition Inst. v. Young*, 818 F.2d 943, 946 (D.C. Cir. 1987)).

<sup>37</sup> Malek, *supra* note 7 (calling the Bureau’s approach “‘grossly irregular’ and arguably illegal”).

<sup>38</sup> Dr. Rafil Dhafir was an oncologist in upstate New York until he was arrested in 2003 and charged with violating the International Emergency Economic Power Act, money laundering, mail and wire fraud, tax evasion, visa fraud, and Medicare fraud. Katherine Hughes, *Anatomy of a “Terrorism” Prosecution: Dr. Rafil Dhafir and the Help the Needy Muslim Charity Case*, 68 NAT’L LAW. GUILD REV. 234, 234, 239 (2011). Most of these charges were related to a charity Dhafir ran that sent food and medicine to Iraqi civilians. *Id.* at 234. Then-New York Governor George Pataki “described the case as a ‘money laundering case to help terrorist organizations . . . conduct

prison conditions, which was published on the blog of a court-watcher for the American Civil Liberties Union who had followed Dhafir’s trial from the beginning.<sup>39</sup> Soon after, the *Washington Post* published an article briefly describing the CMU at Terre Haute.<sup>40</sup> Both writings documented communications restrictions reminiscent of those described in the 2006 Proposed Rule. All CMU inmate communications were monitored, phone calls limited in number, and visits “restricted to a total of four hours per month.”<sup>41</sup> The 2006 Proposed Rule had recommended restricting “terrorist prisoners”<sup>42</sup> written communications to a single six-page letter per week in correspondence with a single recipient, telephone communications to a single fifteen-minute phone call per month, and in-person visiting to one hour per month,<sup>43</sup> and the actual restrictions imposed on prisoners in the newly established CMU were only slightly less stringent.<sup>44</sup>

In 2008, the CMU at Marion was established, also by way of an “Institution Supplement.”<sup>45</sup> Another Proposed Rule treating the CMUs was introduced and opened for public comment in April 2010,<sup>46</sup> then reopened for additional comment in March 2014.<sup>47</sup> Finally, on January 22, 2015, the Bureau promulgated the Final Rule formally establishing the CMUs.<sup>48</sup> This step was significant because it precluded further lawsuits challenging the Bureau’s failure to adhere to Administrative Procedure Act require-

horrible acts.” *Id.* at 235. However, none of the charges against Dhafir were terrorism-related. United States v. Dhafir, 577 F.3d 411, 412–13 (2d Cir. 2009).

39 Rafil Dhafir, *A Letter from Dr. Dhafir About His Transfer and New Prison Situation*, DHAFIR TRIAL (Feb. 7, 2007, 11:50 PM), <http://www.dhafirtrial.net/2007/02/07/a-letter-from-dr-dhafir-about-his-transfer-and-new-prison-situation/>.

40 Dan Eggen, *Facility Holding Terrorism Inmates Limits Communication*, WASH. POST (Feb. 25, 2007), [http://www.washingtonpost.com/wp-dyn/content/article/2007/02/24/AR2007022401231\\_pf.html](http://www.washingtonpost.com/wp-dyn/content/article/2007/02/24/AR2007022401231_pf.html).

41 *Id.*

42 Legal scholars and practitioners have pointed out that what constitutes “terrorist activities” or “an identifiable link to terrorist-related activities” in accordance with regulation 28 CFR 540.200(a) is ambiguous and subject to prison officials’ discretion. *See, e.g.*, ACLU Comments, *supra* note 3, at 2 (advocating for withdrawal of the Proposed Rule because it violates the Constitution and lacks proper oversight).

43 Limited Communication for Terrorist Inmates, *supra* note 28, at 16524.

44 Eggen, *supra* note 40 (noting that all prisoners must speak in English, all mail and telephone calls are monitored, inmate receive a limited number of phone calls, and prison visits are limited to four hours per month at the at the CMU facilities in Terre Haute).

45 Shapiro, *supra* note 1, at 50–51.

46 Communication Management Units, 75 Fed. Reg. 17324 (proposed Apr. 6, 2010) (to be codified at 28 C.F.R. pt. 540).

47 Communication Management Units, 79 Fed. Reg. 13263 (proposed Mar. 10, 2014) (to be codified at 28 C.F.R. pt. 540).

48 Communications Management Units, 80 Fed. Reg. 3168 (Jan 22, 2015) (to be codified at 28 C.F.R. pt. 540); Christie Thompson, *Another Kind of Isolation*, THE MARSHALL PROJECT (Jan. 28, 2015, 2:02 PM), <https://www.themarshallproject.org/2015/01/28/another-kind-of-isolation#.x6qufG19H> (explaining that the CMUs “operated largely in secret, without any formal policies or procedures in place—until last week.”).

ments.<sup>49</sup> Before promulgation of the Final Rule, that failure provided fodder for several lawsuits,<sup>50</sup> but these claims became moot because the Bureau ultimately completed the rulemaking process.<sup>51</sup> Nevertheless, other claims against CMUs remain.<sup>52</sup>

*B. Confinement Criteria: Who Is Designated to CMUs and How?*

The Final Rule provides explicit designation criteria and procedures for transferring inmates to CMUs.<sup>53</sup> These require the Bureau's Assistant Director of the Correctional Program Division to review "substantiated/credible evidence of a potential threat to" prison security or the public and conclude that the "inmate's designation to a CMU is necessary."<sup>54</sup> "Upon arrival at the designated CMU," the facility's warden will provide the inmate with written notice that details the communication restrictions and informs the inmate that the designation is not punitive.<sup>55</sup> The notice also explains why the inmate has been designated to the CMU, unless the Assistant Director feels that providing an explanation would be dangerous.<sup>56</sup> Finally, the notice informs inmates that designation will be "reviewed regularly by the inmate's Unit Team" and may be challenged through the Bureau's administrative remedy program.<sup>57</sup>

Criteria for designation to a CMU are broad,<sup>58</sup> but even before the Final Rule was promulgated, CMUs were known, albeit more informally, to

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<sup>49</sup> Administrative Procedure Act, 5. U.S.C. § 553 (2015).

<sup>50</sup> *See, e.g.,* Royer v. Fed. Bureau of Prisons, 934 F. Supp. 2d 92, 99 (D.D.C. 2013) (denying a motion to dismiss because the court could not "conclude that notice-and-comment rulemaking was not required"); Nosair v. Fed. Bureau of Prisons, No. 13-CV-1017-MJR, 2013 WL 5835733, at \*4 (S.D. Ill. Oct. 30, 2013) (finding that the plaintiff was entitled to further review with respect to the Bureau's violation of the APA in the creation of the CMUs).

<sup>51</sup> *Aref I*, 774 F. Supp. 2d 147, 171 (D.D.C. 2011) (dismissing the plaintiffs' APA claim as moot because defendants had re-engaged with the rulemaking process).

<sup>52</sup> *See, e.g., Aref III*, No. 10-0539 (BJR), 2015 WL 3749621, at \*2 (D.D.C. Mar. 16, 2015) (listing various claims plaintiffs brought in relation to their transfer to CMUs); *Miller v. Walton*, No. 3:15-cv-00533-NJR, 2015 WL 2330478, at \*1 (S.D. Ill. May 14, 2015) (noting that the plaintiff brought a number of claims in relation to his detention in a CMU); *Amawi v. Fed. Bureau of Prisons*, 13-cv-536-JPG-DGW, 2014 WL 1389278, at \*1 (S.D. Ill. Apr. 9, 2014) (dismissing Freedom of Information Act claim brought against CMU); *Nosair*, 2013 WL 5835733, at \*1 (listing various claims inmate brought in relation to his detention in a CMU).

<sup>53</sup> Communications Management Units, 80 Fed. Reg. at 3177–78.

<sup>54</sup> *Id.* at 3178.

<sup>55</sup> *Id.*

<sup>56</sup> *Id.*

<sup>57</sup> *Id.* *See also* Shapiro, *supra* note 1, at 61 (describing the Administrative Remedy Program as a written process inmates use to submit complaints and appeal rejections).

<sup>58</sup> Alexis Agathocleous, 'New' Rules for the BOP's Experiment in Social Isolation, HUFFINGTON POST (Jan. 29, 2015, 3:56 PM), [http://www.huffingtonpost.com/the-center-for-constitutional-rights/new-rules-for-the-bops-ex\\_b\\_6574136.html](http://www.huffingtonpost.com/the-center-for-constitutional-rights/new-rules-for-the-bops-ex_b_6574136.html) ("Documents unearthed by CCR [Center for Constitutional Rights] reveal that when prisoners are told why they have been sent to a CMU, these explanations are vague, incomplete, inaccurate, and sometimes even false.").

house terrorists.<sup>59</sup> Under the Final Rule, CMU designation is permitted if evidence exists that the “inmate’s current offense(s) of conviction, or offense conduct, included association, communication, or involvement, related to international or domestic terrorism.”<sup>60</sup> In some known cases, an association with terrorism has been cited where none was proven.<sup>61</sup> For example, Avon Twitty, a plaintiff in *Aref v. Holder* (“*Aref I*”),<sup>62</sup> was a Muslim convert in prison for a murder he committed in 1982.<sup>63</sup> He spent three years in the CMU at Terre Haute before being released to a halfway house in 2010.<sup>64</sup> When he appealed his transfer to the CMU, the Bureau responded that Twitty was “a ‘member of an international terrorist organization,’ though no organization was named and there appears to be no public evidence for the assertion.”<sup>65</sup> Twitty’s claims for relief have since been dismissed because he is no longer in the Bureau’s custody.<sup>66</sup> Other inmates’ alleged terrorist associations are similarly attenuated.<sup>67</sup>

In many cases, however, CMU inmates actually were convicted of terrorism-related charges.<sup>68</sup> Nevertheless, an investigation conducted by National Public Radio (“NPR”) in 2011 suggests that even these inmates are unlikely to be deemed dangerous.<sup>69</sup> Consider, for example, Sabri Benkahla, one of the first plaintiffs to challenge CMU operations. In 2004, Benkahla was charged with “supplying services to the Taliban and using a

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59 BOP LEGAL RESOURCE GUIDE, *supra* note 22, at 18; Thompson, *supra* note 48 (describing the “new restrictive units” as being “for terrorists or other inmates [the Bureau] feared might coordinate crimes from behind bars”).

60 Communications Management Units, 80 Fed. Reg. at 3177; *see also* Ahmed, *supra* note 13, at 1528–31 (discussing application of the Terrorism Enhancement to nonviolent defendants who committed crimes involving conduct less directly threatening to U.S. interests).

61 Scott Shane, *Beyond Guantanamo, a Web of Prisons for Terrorism Inmates*, N.Y. TIMES (Dec. 10, 2011), [http://www.nytimes.com/2011/12/11/us/beyond-guantanamo-bay-a-web-of-federal-prisons.html?\\_r=1&pagewanted=all&#](http://www.nytimes.com/2011/12/11/us/beyond-guantanamo-bay-a-web-of-federal-prisons.html?_r=1&pagewanted=all&#) (referencing Avon Twitty’s case); *see also* Shapiro, *supra* note 1, at 84 (mentioning a case in which the prisoner was sent to a CMU despite having no disciplinary record).

62 *Aref I*, 774 F. Supp. 2d 147, 153 (D.D.C. 2011).

63 Shane, *supra* note 61.

64 Johnson & Williams, *Inside Guantanamo North*, *supra* note 4.

65 Shane, *supra* note 61.

66 *Aref I*, 774 F. Supp. 2d at 161.

67 Carrie Johnson & Margot Williams, *Leaving ‘Guantanamo North’*, NPR (Mar. 4, 2011, 12:01 AM), <http://www.npr.org/2011/03/04/134176614/leaving-guantanamo-north> [hereinafter Johnson & Williams, *Leaving*] (describing Enaam Arnaout, “who pleaded guilty to racketeering for allegedly misleading donors to his charity about where their money was going”); Malek, *supra* note 7 (describing Rafil Dhafir, who has “had no terrorism convictions or charges”).

68 Margot Williams & Carrie Johnson, *Five More High-Profile Inmates Sent to ‘Guantanamo North’ Prison Units*, NPR (Sept. 29, 2011, 11:40 AM), <http://www.npr.org/sections/thetwo-way/2011/09/29/140919617/five-more-high-profile-inmates-sent-to-guantanamo-north-prison-units> [hereinafter Williams & Johnson, *Five More*] (describing CMUs as housing a “high percentage of inmates convicted of terrorism-related charges”).

69 Johnson & Williams, *Leaving*, *supra* note 67.

firearm in furtherance of a crime of violence” and was acquitted.<sup>70</sup> The government remained convinced, however, that Benkahla had attended a jihadist training camp and subpoenaed him to testify before two grand juries on this subject only a few weeks after his acquittal.<sup>71</sup> Based on this testimony and the answers he gave to FBI investigators, he was charged in 2006 with making false declarations to two grand juries and the FBI and with “obstructing justice on account of the false declarations.”<sup>72</sup> Following his conviction, “his sentencing judge . . . declared unequivocally that ‘Sabri Benkahla is not a terrorist,’ . . . and stated that the chances of Benkahla ever committing another crime were ‘infinitesimal.’”<sup>73</sup> He was transferred to a CMU in 2007.<sup>74</sup> His Notice of Transfer explained, “Your offense conduct included significant communication with and support to Lashkar-e-Taiba, an identified foreign terrorist organization, which is committed to engaging in violence and terrorist activity against the United States and its allies.”<sup>75</sup> Benkahla tried to challenge his designation, but when the Bureau transferred him out of the CMU, he voluntarily dismissed the case.<sup>76</sup> At bottom, it appears that Benkahla was “sent to a CMU despite a clean disciplinary record in prison and a judicial finding that he was not a terrorist,”<sup>77</sup> ultimately suggesting that—at least as to Benkahla—the Bureau wasted resources and imposed a needlessly restrictive environment, not to mention the potential infringement of his rights.

In addition to the first criterion permitting CMU designation for a terrorist association, inmates may be designated to a CMU if “any other substantiated/credible evidence” exists that the inmate’s communication with “persons in the community” might result in “a potential threat to the safe, secure, and orderly operation of prison facilities, or protection of the public.”<sup>78</sup> Some have characterized this as a “catchall provision,” evincing a “remarkably low bar.”<sup>79</sup> In response to criticism that overly broad designation criteria results in discrimination or retaliation against politically active minorities, the

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70 United States v. Benkahla, 530 F.3d 300, 303–04, 306 (4th Cir. 2008) (noting that Benkahla was believed to be a part of the quasi-military “Dar al-Arqam paintball group”).

71 *Id.* at 304.

72 *Id.* at 305.

73 Shapiro, *supra* note 1, at 84; ACLU, *Benkhala v. Federal Bureau of Prisons, et al.* (quoting *Benkahla*, 530 F.3d at 306), <https://www.aclu.org/cases/benkahla-v-federal-bureau-prisons-et-al> (last updated June 2, 2010).

74 Dean Kuipers, *ACLU Suit to Challenge Isolation Prisons*, L.A. TIMES (June 18, 2009), <http://articles.latimes.com/2009/jun/18/nation/na-terror18>.

75 Shapiro, *supra* note 1, at 83 (citing Exhibit C to Amended Complaint, *Benkahla v. Fed. Bureau of Prisons*, No. 2:09-CV-00025 (S.D. Ind. July 27, 2009)).

76 Shapiro, *supra* note 1, at 52.

77 *Id.* at 84 (quotation marks omitted).

78 Communications Management Units, 80 Fed. Reg. 3168, 3178 (Jan. 22, 2015) (to be codified at 28 CFR pt. 540).

79 Shapiro, *supra* note 1, 87 (noting that the “vagueness of the contemplated harm places no meaningful limit on prison officials’ discretion to deem an inmate a ‘threat.’”).

Bureau wrote that inmates are provided with “an explanation of the decision in sufficient detail, unless providing specific information would jeopardize the safety . . . or orderly operation of the facility.”<sup>80</sup> This response fails to engage with the substance of critics’ concerns about imprecise criteria and deficient oversight in the designation decision-making process.<sup>81</sup>

Understanding the CMUs is easier with a few examples. A number of CMU inmates have been described at length by the news media. *New York Magazine* profiled Yassin Aref, for whom the *Aref* cases are named, in a nearly 5,000-word article chronicling how the FBI targeted him in a controversial sting operation, as well as his ensuing arrest, conviction, and eventual designation to the CMU at Terre Haute.<sup>82</sup> Aref and his family came to the United States as refugees fleeing the Saddam Hussein regime.<sup>83</sup> When the FBI arrested him in Albany, New York, he had served as a local imam for almost four years.<sup>84</sup> Following a three-week trial, Aref was “sentenced to a fifteen-year term for money laundering, providing material support for terrorism, conspiracy, and making a false statement to the FBI.”<sup>85</sup> As the *New York Times* described his crime, “he agreed to serve as witness to a loan between an acquaintance and another man, actually an informant posing as a supporter of a Pakistani terrorist group, Jaish-e-Muhammad.”<sup>86</sup> Witnessing loans is a traditional part of Islamic culture.<sup>87</sup>

Prosecutors insisted that Aref knew the loan would be used to buy a “shoulder-firing missile launcher” to kill a Pakistani official, though after he was sentenced, the Assistant U.S. Attorney prosecuting the case commented, “Did [Aref] actually engage in terrorist acts? . . . Well, we didn’t have the evidence of that. But he had the ideology.”<sup>88</sup> Others have characterized his involvement as “peripheral.”<sup>89</sup> The judge recommended that he be incarcerated locally.<sup>90</sup> In spring 2007, after a series of transfers, Aref found himself in the Terre Haute CMU.<sup>91</sup> Aref had four young children at the time,

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80 Communications Management Units, 80 Fed. Reg. at 3169.

81 ACLU Comments, *supra* note 3, at 5–6.

82 Stewart, *supra* note 5.

83 Shapiro, *supra* note 1, at 84 n.178.

84 Stewart, *supra* note 5.

85 *Aref III*, No. 10-0539 (BJR), 2015 WL 3749621, at \*2 (D.D.C. Mar. 16, 2015).

86 Shane, *supra* note 61.

87 Stewart, *supra* note 5 (noting that “as the only imam in Albany, Aref had notarized many loans”).

88 *Id.*; see also Ahmed, *supra* note 13, at 1548–49 (“What is clear is that ‘ideology alone—even endorsement of terrorist activity—is such a poor predictor of actual terrorist activity that [it] is almost worthless.’”) (quoting Jesse J. Norris, *Entrapment and Terrorism on the Left: An Analysis of Post 9-11 Cases*, 19 NEW CRIM. L. REV. 236, 269 n.206 (2016)).

89 Shane, *supra* note 61.

90 Stewart, *supra* note 5.

91 *Id.*

including a daughter who was newborn when he was convicted.<sup>92</sup> Terre Haute is nearly 1,000 miles from the family's home in Albany and, during "the first two years of Aref's imprisonment, his family was only able to visit four times . . . [and] only allowed to have one four-hour visit per month."<sup>93</sup>

The other inmate plaintiff remaining in the *Aref* case is Kifah Jayyousi, who "was sentenced to a twelve-year and eight-month term for conspiracy to murder, kidnap, and maim in a foreign country, and conspiracy to provide material support to terrorism."<sup>94</sup> In June 2008, about nine months into Jayyousi's sentence, the Chief of the Bureau's Counter-Terrorism Unit recommended he be designated to a CMU, and Jayyousi was transferred to the Terre Haute CMU.<sup>95</sup> Later that year, in October 2008, Jayyousi was serving as a rotational Muslim prayer leader and gave a sermon<sup>96</sup> for which

92 Annie P. Waldman, *Inside the Kafkaesque World of the US's 'Little Guantánamos'*, VICE (Mar. 20, 2014, 5:00 AM), [https://www.vice.com/en\\_us/article/inside-the-kafkaesque-world-of-the-uss-little-guantanamos](https://www.vice.com/en_us/article/inside-the-kafkaesque-world-of-the-uss-little-guantanamos).

93 *Id.*

94 *Aref III*, No. 10-0539 (BJR), 2015 WL 3749621, at \*2 (D.D.C. Mar. 16, 2015).

95 *Aref II*, 953 F. Supp. 2d. 133, 139 (D.D.C. 2013) (including Jayyousi's Notice of Transfer, which read, "Your current offenses of conviction are for Conspiracy to Commit Murder [listing convictions] . . . You acted in a criminal conspiracy to raise money to support mujahideen operations and used religious training to recruit other individuals in furtherance of criminal acts in this country as well as many countries abroad. Your offense conduct included significant communication, association and assistance to al-Qaida, a group which has been designated as a foreign terrorist organization").

96 An excerpt of the sermon as included in the *Aref II* opinion:

"My brothers in this place, as you are aware this concentrated Muslim community, this Muslim community is a Prison and is not a prison. . . . This is a very unique prison and even BOP employees and some of the CO's and some of the Officers wonder where did this place come from. It's like a place that fell from some hell, some evil created this place because it does not belong to anything that BOP has done in the past 300 year history and you know what is happening here. . . . [E]ach one of you have been brought[,] whether your case was started with a fabrication or the reason that brought you here was the fabricator[,] you were brought here because you are Muslim and we have our response to that, has to be to stand firm, stand strong, to stand steadfast. . . . [T]hey turned a few[] good American citizens into [criminals]. . . . [Y]ou are not the target, I am not the target, it is not U.S. vs. Jayyousi, it is U.S. vs. [I]slam. . . . John McCain is a presidential candidate and in two months he could be our president where was he 20 years ago? He was being to[rtu]red in a Vietnamese prison for many years with no hope . . . [H]e stood fast he stayed firm he came through. [I]f the people of (Minion?) are doing this shouldn't we as beli[e]vers do the same. There is a famous story of . . . Nelson Mandel[]a . . . [S]omeone comes [with] an offer to you; oh you will get out but hey we would like to . . . ask you to help us get more people into the CMU[,] entrap more Muslims and get them in jail; tarnish the image of Islam in America. Mandel[]a refused them. . . . There was another story of Admiral Jim Scotsdale. . . . Admir[a]l Jim Scotsdale was the highest ranking U.S. officer to be Captain in Vietnam[] he was shot down. He was a three star General and they tortured him for eight years. . . . [H]e said that if you want to survive a very bad situ[ati]on like that and we are not being tortured here except psychologically but if you want to survive he said retain faith that you will prevail at the end. It is hard but it is the way which Allah created us. . . . [Y]ou are going to return to your lord to meet him with your hard work and the hardships that you have faced and done in this life; this is why we mart[y]r. . . . [Y]ou have to brave this life you have to face this life and remember that no matter what happens to us . . . [it] is what Allah has pre-ordained . . . ."

*Id.* at 139–40 (alterations in original).

he was charged with a disciplinary infraction that was later dismissed and expunged from his record.<sup>97</sup> In October 2010, Jayyousi was transferred to the Marion CMU and in February 2011, “the Marion CMU Unit Manager wrote a memorandum requesting that Jayyousi be transferred out of the CMU.”<sup>98</sup> The Counter-Terrorism Unit Chief opposed that recommendation on the basis of the sermon, which he characterized as “aimed at inciting and radicalizing the Muslim inmate population.”<sup>99</sup> As a result, Jayyousi “remained in the CMU until May 2013, when he was transferred to the general prison population.”<sup>100</sup> Jayyousi spent more than five and a half years in the CMUs. He has five children. His wife described their visits, explaining, “we need to hold the phone in our hands . . . You can’t hear him. [His daughters] can’t touch him.”<sup>101</sup>

### C. Conditions of Confinement: How Have Communications Been Limited?

Due to the promulgation of the Final Rule, some details of the restrictions are more certain and transparent than they were before. All visits must be non-contact, and prison wardens may limit various aspects of the visit.<sup>102</sup> According to their Institution Supplements, neither CMU is quite as restrictive in practice as the Final Rule would permit.<sup>103</sup> In practice, they permit only non-contact visits for a maximum of eight hours per month (although this could be reduced to four hours), with any single visit lasting up to a maximum of four hours.<sup>104</sup> Unless prior arrangements are made, all visits must be conducted in English and each inmate may have only four visitors in the visiting room at any time.<sup>105</sup> Visits must also be pre-approved and scheduled at least one week in advance, and must occur during visiting hours—Sunday through Friday, 8:30 AM to 2:30 PM.<sup>106</sup> Privileged com-

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97 *Id.* at 140.

98 *Id.*

99 *Id.*

100 *Id.* at 141.

101 Johnson & Williams, *Inside Guantanamo North*, *supra* note 4.

102 Communications Management Units, 80 Fed. Reg. 3168, 3178 (Jan. 22, 2015) (to be codified at 28 CFR pt. 540); *see also Aref IV*, 833 F.3d 242, 246–48 (D.C. Cir. 2016).

103 Compare USP MARION, FED. BUREAU OF PRISONS, INSTITUTION SUPPLEMENT MAR-5267.08, 10–11 (July 5, 2012), [https://www.bop.gov/locations/institutions/mar/MAR\\_visit\\_hours.pdf](https://www.bop.gov/locations/institutions/mar/MAR_visit_hours.pdf), and FED. BUREAU OF PRISONS, INSTITUTION SUPPLEMENT THX-5267.08E, 5–6 (Apr. 15, 2014), [http://www.bop.gov/locations/institutions/thp/THX\\_visit\\_hours.pdf](http://www.bop.gov/locations/institutions/thp/THX_visit_hours.pdf), with Communications Management Units, 80 Fed. Reg. at 3178. *See also Aref IV*, 833 F.3d at 247 (explaining that BOP permits longer visitation and phone calls than the minimum established in the final rule).

104 *Aref IV*, 833 F.3d at 247

105 *Id.*; FED. BUREAU OF PRISONS, INSTITUTION SUPPLEMENT THX-5267.08E, 2 (Apr. 15, 2014), [http://www.bop.gov/locations/institutions/thp/THX\\_visit\\_hours.pdf](http://www.bop.gov/locations/institutions/thp/THX_visit_hours.pdf); USP MARION, FED. BUREAU OF PRISONS, INSTITUTION SUPPLEMENT MAR-5267.08, 2 (July 5, 2012), [https://www.bop.gov/locations/institutions/mar/MAR\\_visit\\_hours.pdf](https://www.bop.gov/locations/institutions/mar/MAR_visit_hours.pdf).

106 *Id.*; UPS MARION, FED. BUREAU OF PRISONS, INSTITUTION SUPPLEMENT MAR-5267.08, 10–11 (July 5, 2012).

munications between inmates' and their attorneys are also subject to some restrictions, but are not monitored.<sup>107</sup> Besides these unmonitored attorney calls, "CMU inmates can telephone only immediate family members, and the calls are monitored, [and] . . . telephonic communication can be limited to no more than three fifteen-minute calls per month, but BOP currently allows inmates two fifteen-minute calls per week."<sup>108</sup> In other words, the Final Rule empowers wardens to increase CMU restrictions even further and without need for justification.<sup>109</sup>

As previously mentioned, CMU inmates tend to be classified at lower security levels; many have few, if any, disciplinary violations.<sup>110</sup> According to former CMU inmate Daniel McGowan<sup>111</sup> (who had no disciplinary violations),<sup>112</sup> before he was transferred to the CMU, he had up to fifty-six hours of contact visits available per month, as opposed to eight in the CMU, and 300 minutes per month to make phone calls, in contrast to sixty in the CMU.<sup>113</sup> He also noted that the limited phone schedule at the CMU formed a new challenge for his working spouse; before his transfer, he had nearly any-time access to phones and could call her often.<sup>114</sup>

In summarizing the Final Rule, the Bureau explained that the restrictions promulgated "represent a 'floor' beneath which communications

107 Communications Management Units, 80 Fed. Reg. at 3172 ("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.").

108 *Aref IV*, 833 F.3d at 247 (citations omitted); see also Thompson, *supra* note 48.

109 Communications Management Units, 80 Fed. Reg. at 3178 (noting, for example, that written correspondence is subject to staff inspection and may be limited to a single letter consisting of six pieces of paper, once per week, to and from a single recipient and that all visits may be monitored and recorded); Thompson, *supra* note 48 (reporting that the new policy is "more limiting than what inmates currently receive").

110 Beata, *supra* note 17, at 297 ("many CMU detainees are not high-risk prisoners while others have never been disciplined for behavioral violations")

111 Daniel McGowan is an environmental activist associated with the Earth Liberation Front who has written extensively about his time in CMUs. See Daniel McGowan, *Court Documents Prove I Was Sent to Communications Management Units (CMU) for My Political Speech*, HUFFINGTON POST (Apr. 1, 2013, 8:36 AM), [http://www.huffingtonpost.com/daniel-mcgowan/communication-management-units\\_b\\_2944580.html](http://www.huffingtonpost.com/daniel-mcgowan/communication-management-units_b_2944580.html); Daniel McGowan, *Tales from Inside the U.S. Gitmo*, HUFFINGTON POST (Aug. 9, 2009, 5:12 AM), [http://www.huffingtonpost.com/daniel-mcgowan/tales-from-inside-the-us\\_b\\_212632.html](http://www.huffingtonpost.com/daniel-mcgowan/tales-from-inside-the-us_b_212632.html). McGowan pled guilty to "conspiracy and two counts of arson" and was sentenced to seven years in prison in November 2006. *Aref II*, 953 F. Supp. 2d 133, 141 (D.D.C. 2013). The court dismissed McGowan from the *Aref* case in 2013 because he was "released altogether from BOP custody." *Id.* at 141, 144.

112 Anna Merian, *Daniel McGowan: The FBI's Least Wanted*, THE VILLAGE VOICE (Sept. 25, 2013, 4:00 AM), <http://www.villagevoice.com/news/daniel-mcgowan-the-fbis-least-wanted-6439605>.

113 Daniel McGowan, *Tales from Inside the U.S. Gitmo*, *supra* note 111.

114 *Id.*

cannot be further restricted.”<sup>115</sup> Though the Bureau officially refers to the CMUs as general population units, it also emphasizes that CMU inmates must be wholly segregated from general population inmates.<sup>116</sup> Like general population inmates, CMU inmates are permitted access to customary inmate activities, such as recreation, religious services, and education programming,<sup>117</sup> but the extremely restrictive communications limitations and complete monitoring are unique.<sup>118</sup> Moreover, a physical barrier separates inmates from visitors, preventing inmates from touching their partners and children and permitting conversation only by phone through thick glass.<sup>119</sup>

*D. Conditions of Confinement: How Do CMUs Compare to Other Federal Prison Units?*

There are versions of incarceration within the federal prison system that are more broadly restrictive than CMUs. In a review of the Bureau’s monitoring and evaluation of segregated housing, the GAO described “three main types of segregated housing units” including Special Management Units, Secure Housing Units (commonly referred to as “the SHU”), and the Administrative Maximum facility; it included CMUs in its assessment because CMU inmates are segregated from other prisoners and subject to more restrictions than inmates in general population units.<sup>120</sup> Nonetheless, as both the district court and D.C. Circuit noted, conditions in the CMUs do not “approach the restrictions imposed on inmates in administrative detention.”<sup>121</sup>

Generally speaking, in the Bureau’s segregated housing units, inmates may be sequestered in their cells for up to 23 hours per day.<sup>122</sup> In almost all

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<sup>115</sup> Communications Management Units, 80 Fed. Reg. 3168, 3168 (Jan. 22, 2015) (to be codified at 28 CFR pt. 540)

<sup>116</sup> UPS MARION, FED. BUREAU OF PRISONS, INSTITUTION SUPPLEMENT MAR-5267.08, 11 (July 5, 2012), [http://www.bop.gov/locations/institutions/mar/MAR\\_visit\\_hours.pdf](http://www.bop.gov/locations/institutions/mar/MAR_visit_hours.pdf) (“However, every precaution shall be made to maintain separation of CMU inmates and general population inmates. At no time shall a CMU inmate and general population inmate use the restroom facilities or be in the search room at the same time.” (emphasis omitted)).

<sup>117</sup> *Id.*

<sup>118</sup> GAO Report, *supra* note 12, at 40.

<sup>119</sup> Communications Management Units, 80 Fed. Reg. at 3173.

<sup>120</sup> GAO Report, *supra* note 12, at 5 (noting that according to Bureau policy, “all three types of segregated housing units have the same purpose, which is to separate inmates from the general inmates population to protect the safety, security, and orderly operation of BOP facilities, and to protect the public”).

<sup>121</sup> *Aref III*, No. 10-0539 (BJR), 2015 WL 3749621 at \*21 (D.D.C. Mar. 16, 2015); *see also Aref IV*, 833 F.3d 242, 256 (D.C. Cir. 2016).

<sup>122</sup> The terminology used to describe segregated or restrictive housing units varies across jurisdictions and can be confusing even within the federal system. Different terms sometimes do refer to slightly different conditions and settings. Nonetheless, all of these units fit the definition of solitary confinement provided by the United Nations: “the physical and social isolation of individuals . . . confined to cells for 22 to 24 hours a day.” Solitary confinement goes by many other names, though, including “‘segregation’, ‘isolation’, ‘separation’, ‘cellular’, ‘lockdown’, ‘Super-

cases, inmates designated to one of these units must be afforded a hearing where they are permitted to present documentary evidence, call witnesses, and receive assistance from a staff representative.<sup>123</sup> There is an important exception to the hearing requirement, however. Placement in a SHU can either be disciplinary, for “inmates who violate rules,” or administrative, for “[i]nmates who are pending security classification,” in which case placement is “intended to be temporary and nonpunitive.”<sup>124</sup> In the latter circumstance, where placement is administrative, inmates are not provided a hearing.<sup>125</sup>

The GAO mentions a fourth condition, called the Special Administrative Measures or SAMs, only briefly.<sup>126</sup> The Department of Justice explains that “the Attorney General may direct the [Bureau] to initiate [SAMs] with respect to a particular inmate . . . when there is a substantial risk that a prisoner’s communications or contacts with persons could result in death or serious bodily injury to persons.”<sup>127</sup> Under SAMs, inmates are held “in isolated confinement” and even attorney-client communications may be monitored, where there is “reasonable suspicion . . . to believe that a particular inmate may use communications with attorneys or their agents to further or facilitate acts of terrorism.”<sup>128</sup> As of 2013, only thirty inmates were subject to SAMs out of a federal prison population of about 217,000 inmates.<sup>129</sup> The Bureau differentiates CMU designation from SAMs by explaining there are circumstances where “information indicates a similar need to impose communication restrictions,” but evidence does not indicate 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.”<sup>130</sup> As such, CMUs may “create an alternative to SAMs, enabling . . . substantial communication restrictions in cases where the evidence does not warrant the imposition of a SAM.”<sup>131</sup>

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max’, ‘the hole’ or ‘Secure Housing Unit.’” Juan E. Méndez (Special Rapporteur of the Human Rights Council on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment), *Interim Rep. on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, U.N. Doc. A/66/268, 8–10 (Aug. 5, 2011).

123 GAO Report, *supra* note 12, at 7, 9.

124 *Id.* at 7.

125 *Id.*

126 *Id.* at 9–10.

127 Press Release, Dep’t of Justice, Fact Sheet: Prosecuting and Detaining Terror Suspects in the U.S. Criminal Justice System (June 9, 2009), <http://www.justice.gov/opa/pr/fact-sheet-prosecuting-and-detaining-terror-suspects-us-criminal-justice-system>.

128 Shapiro, *supra* note 1, at 57 (quoting 28 C.F.R. § 501.3(d)).

129 GAO Report, *supra* note 12, at 1, 9. As of Aug. 20, 2015, the Bureau reports that there are about 206,860 federal inmates. *Population Statistics*, FED. BUREAU OF PRISONS (Aug. 20, 2015), [http://www.bop.gov/about/statistics/population\\_statistics.jsp](http://www.bop.gov/about/statistics/population_statistics.jsp).

130 Communications Management Units, 80 Fed. Reg. 3168, 3176 (Jan. 22, 2015) (to be codified at 28 CFR pt. 540).

131 Shapiro, *supra* note 1, at 57.

Yet the level of evidence required seems insufficient to subject CMU inmates to indefinite restrictive confinement far from their families and communities. In contrast to other segregated inmates, they receive only “written notice of their reason for placement, conditions of confinement, and their procedural protection rights.”<sup>132</sup> This constitutes a bare minimum of procedural protection.

Ultimately, placement in any of these settings is unenviable. The guarantee of a hearing cannot guarantee actual protection against wrongful isolation; procedural protection does not ensure substantive protection. But inmates designated to CMUs are subject to a highly restrictive environment without concomitant procedural protection.

## II. UNDERSTANDING JUDICIAL DEFERENCE IN PRISONERS’ RIGHTS LITIGATION

The Supreme Court first held in 1964 that state prisoners could sue in federal court for violation of their constitutional rights under section 1983.<sup>133</sup> Even at that time, however, the Court “took pains to emphasize the need for restraint” in the prison context and developed a strong doctrine of deference to prison officials.<sup>134</sup> Sharon Dolovich<sup>135</sup> has suggested that in prisoners’ rights cases, meaningful constitutional enforcement has taken a back seat to judicial deference to prison administrators.<sup>136</sup>

Dolovich identifies “at least three main functions” that judicial deference has evolved to serve in prison litigation.<sup>137</sup> First, it “informs the construction of substantive constitutional doctrine,”<sup>138</sup> meaning that “deference to prison officials is written right into the substantive constitutional standards, yielding rules of decision that tip the scales in favor of defendants.”<sup>139</sup> Second, deference is used to justify “altering . . . procedural rules”<sup>140</sup> to transform “familiar aspects of the legal process” into more “defendant-friendly procedural mechanisms.”<sup>141</sup> Third, deference also frames “the interpretation and assessment of relevant facts,”<sup>142</sup> which may result in “the

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132 GAO Report, *supra* note 12, at 53.

133 42 U.S.C. § 1983 (2012); *Cooper v. Pate*, 378 U.S. 546 (1964).

134 Sharon Dolovich, *Prison Litigation Reform Act: Forms of Deference in Prison Law*, 24 FED. SENT’G R. 245, 245 (2012).

135 Sharon Dolovich is a Professor of Law at the University of California, Los Angeles, School of Law.

136 Dolovich, *supra* note 134, at 245.

137 *Id.*

138 *Id.*

139 *Id.* at 246.

140 *Id.* at 245.

141 *Id.* at 246.

142 *Id.* at 245.

recasting of a procedural or factual history,”<sup>143</sup> in ways that “deny or disregard the lived experiences of prisoners, thereby undermining the force of the constitutional claim at issue.”<sup>144</sup>

All three of these deferential functions are visible in the ongoing *Aref* case. In *Aref I*, for example, the plaintiffs’ substantive due process claim was dismissed because “the weight of the relevant case law supports the conclusion that the types of communications restrictions imposed by the CMUs are rationally related to the legitimate penological interest of promoting the safety of correctional institutions and the public.”<sup>145</sup> This accords with *Turner v. Safley*,<sup>146</sup> which unequivocally stated, “when a prison regulation impinges on inmates’ constitutional rights, *the regulation is valid* if it is reasonably related to legitimate penological interests.”<sup>147</sup> In other words, courts limit their substantive interpretation of constitutional rights when prison officials can show that a practice or rule “facilitates the running of the prison.”<sup>148</sup> As the Supreme Court has explained, to subject “the day-to-day judgments of prison officials to an inflexible strict scrutiny analysis would seriously hamper their ability to anticipate security problems and to adopt innovative solutions to the intractable problems of prison administration.”<sup>149</sup>

Understanding *Turner v. Safley* is essential to understanding the outcome of most prisoners’ rights litigation. The holding is “itself deferential,” but the Court’s description of *Turner*’s four factors reveals just how deferential the standard actually is.<sup>150</sup> First, “there must be ‘a valid, rational connection’ between the prison regulation and the government interest put forward to justify it.”<sup>151</sup> Put another way, a challenged regulation and its asserted goals must not be “so remote as to render the policy arbitrary or irrational.”<sup>152</sup> Second, courts should consider whether prison inmates are still able to exercise the asserted right through alternative means, and where “other avenues remain available . . . courts should be particularly conscious of the measure of judicial deference owed to corrections officials . . . in

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143 *Id.* at 246.

144 *Id.* at 248.

145 *Aref I*, 774 F. Supp. 2d 147, 163 (D.D.C. 2011) (citing *Block v. Rutherford*, 468 U.S. 576, 586 (1984); *Williams v. Mierzejewski*, 401 F. App’x 142, 145 (7th Cir. 2010); *Maze v. Tafolla*, 369 F. App’x 532, 535 (5th Cir. 2010); *Stojanovic v. Humphreys*, 309 F. App’x 48, 51 (7th Cir. 2009); *Perez v. Fed. Bureau of Prisons*, 229 F. App’x 55, 57 (3rd Cir. 2007); *Pope v. Hightower*, 101 F.3d 1382, 1385 (11th Cir. 1996); *Searcy v. United States*, 668 F. Supp. 2d 113, 122 (D.D.C. 2009); *Arney v. Simmons*, 26 F. Supp. 2d 1288, 1293 (D. Kan. 1998)).

146 482 U.S. 78 (1987).

147 *Id.* at 89 (emphasis added).

148 Dolovich, *supra* note 134, at 246.

149 *Turner*, 482 U.S. at 89.

150 Dolovich, *supra* note 134, at 246.

151 *Turner*, 482 U.S. at 89 (citing *Block*, 468 U.S. at 586).

152 *Id.* at 89–90.

gauging the validity of the regulation.”<sup>153</sup> The third factor assesses the “impact accommodation of the asserted constitutional right will have on guards and other inmates, and on the allocation of prison resources generally.”<sup>154</sup> In particular, the Court explains that if an accommodation “will have a significant ‘ripple effect’ on fellow inmates or on prison staff, courts should be particularly deferential to the informed discretion of corrections officials.”<sup>155</sup> Fourth, “the absence of ready alternatives is evidence of the reasonableness of a prison regulation.”<sup>156</sup> And finally, the Court cautions, this “is not a ‘least restrictive alternative’ test: prison officials do not have to set up and then shoot down every conceivable alternative method of accommodating the claimant’s constitutional complaint.”<sup>157</sup> Predictably, the resulting doctrine is profoundly deferential to the judgment of prison officials—the defendants—in prisoners’ rights cases.<sup>158</sup> It is hardly surprising that the *Aref* plaintiffs’ substantive due process claim was dismissed outright.

Because the opinions in *Aref* have relied almost exclusively on precedent and no novel procedural shifts have been made, the second form of deference is present but less obvious. This is because *Turner*’s precedential force has already shifted some of the procedural ground. For example, a summary judgment motion generally requires the moving party show that no triable issue of material fact exists even when “taking the evidence in the light most favorable to the non-moving party.”<sup>159</sup> But in *Turner* cases, the Court has found it possible to give “‘too little deference’ to the judgment of prison officials.”<sup>160</sup> Even while drawing “all justifiable inferences in [the plaintiff’s] favor,” a plurality of the Court explained that courts still “must distinguish between evidence of disputed facts and disputed matters of professional judgment,” and that with “respect to the latter, our inferences must accord deference to the views of prison authorities.”<sup>161</sup> In each of the-

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153 *Id.* at 90 (internal quotation marks omitted) (citing *Jones v. N.C. Prisoners’ Labor Union, Inc.*, 433 U.S. 119, 131 (1977) and *Pell v. Procunier*, 417 U.S. 817, 827 (1974)).

154 *Id.* at 90.

155 *Id.*

156 *Id.* (citing *Block*, 468 U.S. at 587).

157 *Turner*, 482 U.S. at 90–91.

158 Dolovich summarizes the *Turner* test this way:

“In short, having plainly instructed lower courts that they must be deferential in assessing alternatives (factor 2) and that any change to a prison regime will necessarily have ramifications for the institution (factor 3), the *Turner* Court made clear that, unless the challenged policy is found to be an ‘arbitrary or irrational’ method for the state to achieve its stated goals (factor 1) and claimants can identify an alternative means to ‘fully accommodate’ their rights without any appreciable cost to the prison (factor 4), the challenged regulation is to be upheld. And sure enough, it is a rare case decided under *Turner* in which the plaintiff ultimately prevails.”

Dolovich, *supra* note 134, at 246.

159 *Id.* at 248.

160 *Id.* at 248 (citing *Beard v. Banks*, 548 U.S. 521, 535 (2006) (plurality opinion)).

161 *Beard*, 548 U.S. at 529–30 (internal quotation marks omitted) (citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986) and *Overton v. Bazzetta*, 539 U.S. 126 (2003)).

se decisions, the Court held for the defendants, relying on their view of the facts, despite significant evidence supporting the plaintiffs' view of the facts.

The third form of deference works to whitewash prisoners' experiences by essentially yielding to factual accounts provided by prison officials over those experienced by prisoners.<sup>162</sup> Dolovich cites a series of examples to illustrate this, including challenges to "the practice of double-celling (that is, housing two men in sixty-three-square-foot cells originally intended for one person),"<sup>163</sup> use of force by a correctional officer,<sup>164</sup> a "two-year ban on visitors for Michigan inmates who had two or more substance abuse infractions,"<sup>165</sup> and "inadequate legal research facilities."<sup>166</sup> In each of these decisions, the Court held for the defendants despite significant evidence supporting the plaintiffs' view of the facts.<sup>167</sup>

In *Aref*, the plaintiffs<sup>168</sup> originally alleged violations of their procedural and substantive due process rights and First Amendment rights to "family integrity," as well as violations of the Eighth Amendment's ban on cruel and unusual punishment and the First and Fifth Amendment's prohibition on discrimination on the basis of religion.<sup>169</sup> Several plaintiffs also alleged that they "were transferred into the CMU in retaliation for their litigation against [the Bureau]."<sup>170</sup> By the time of *Aref III*, only two issues remained before the court on cross-motions for summary judgment—*Aref* and Jayyousi's procedural due process claims and Jayyousi's retaliation claim.<sup>171</sup>

162 Dolovich, *supra* note 134, at 249 ("[I]n its quest to reach the desired result, the Court simply pretends that the facts as it frames them require the stipulated outcome, reasoning in ways that not only favor defendants but also seem willfully to deny the lived experience of prisoners—even when the nature of that experience is the gravamen of the legal complaint.").

163 *Id.* at 248 (citing *Rhodes v. Chapman*, 452 U.S. 337, 346, 348 (1981) (rejecting the challenge because double-celling did not "create other conditions intolerable for prison confinement").

164 *Id.* (citing *Whitley v. Albers*, 475 U.S. 312, 317–18 (1986) (comparing the views of the majority and dissent regarding how to assess facts in the context of a directed verdict)).

165 *Id.* (citing *Overton*, 539 U.S. at 135 (holding that there need only be sufficient alternative means of communication)).

166 *Id.* at 248–49 (citing *Lewis v. Casey*, 518 U.S. 343, 343 (1996)).

167 Dolovich, *supra* note 134, at 248 (noting that "the great weight of the evidence indicated that 'a long-term inmate must have to himself' a minimum of fifty square feet of floor space 'in order to avoid serious mental, emotional, and physical deterioration'" (citing *Rhodes*, 452 U.S. at 371 (Marshall, J., dissenting))).

168 In the beginning of the suit, there were seven plaintiffs: Yassin Muhiddin Aref, Avon Twitty, also known as Abdul Ali, Daniel McGowan, Jenny Synan, Royal Jones, Kifah Jayyousi, Hedaya Jayyousi. *Aref I*, 774 F. Supp. 2d 147, 154–56 (D.D.C. 2011). Jenny Synan and Hedaya Jayyousi are married to Daniel McGowan and Kifah Jayyousi, respectively.

169 *Id.* at 156–57.

170 *Aref III*, No. 10-0539 (BJR), 2015 WL 3749621, at \*2 (D.D.C. Mar. 16, 2015). All but two of these claims—those alleging procedural due process violations and retaliation—were dismissed in *Aref I*. 774 F. Supp. 2d. at 161–71.

171 *Aref III*, 2015 WL 3749621, at \*11 ("Having considered the parties' arguments, the relevant case law, and the entire record, the Court finds that Plaintiffs have failed to establish that designation to the CMU is an 'atypical and significant hardship . . . in relation to the ordinary incidents of prison life.' . . . As such, their Procedural Due Process claim fails. Further, the Court finds that

As a result, the same court discusses these two claims once on a motion to dismiss and again on a motion for summary judgment. In *Aref IV*, the D.C. Circuit reversed the district court's dismissal of the procedural due process claims and affirmed dismissal of the retaliation claim.<sup>172</sup> The varying discussions of these claims are illustrative.

Consider first Jayyousi's retaliation claim. In *Aref II*, the court discussed the facts and concluded, "As transcribed, Jayyousi's speech does not obviously 'confront institutional authority'."<sup>173</sup> The court then briefly excerpted portions of the defendant's description of the speech,<sup>174</sup> concluding that one "interpretation of a large portion of the sermon as transcribed is that it is dedicated to an inspirational comparison with U.S. government officials John McCain and Jim Scotsdale, as well as Nelson Mandela."<sup>175</sup> At bottom, however, the court notes that "[d]efendants may well have actually been motivated by legitimate penological goals" and that the plaintiff in a retaliation case bears the "burden of proving the pertinent motive."<sup>176</sup>

By contrast at the summary judgment stage, the court wrote,

Plaintiffs invite the Court to substitute its judgment for that of prison administrators in determining what constitutes a security risk warranting continued CMU monitoring. This the Court will not do. Smith wrote a lengthy memorandum detailing the portions of Jayyousi's speech that he found to be 'aimed at inciting and radicalizing the Muslim inmate population' in the CMU at Terra Haute. . . . Smith expressed concern about Jayyousi's statement that Muslim inmates had been placed in the CMU not because of any action they had taken but simply because they were Muslim. . . . Smith also was concerned about Jayyousi's statements regarding 'why we martyr.' . . . Smith also discussed the offense for which Jayyousi had been convicted, namely, conspiracy

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Plaintiff Jayyousi has failed to establish that his conduct was protected by the First Amendment and, as such, his retaliation claim fails."). Daniel McGowan was documented as a plaintiff in *Aref III*, but the court explains that his claims were dismissed as moot on July 12, 2013 "because of his release from BOP custody." *Id.* at \*3.

<sup>172</sup> *Aref IV*, 833 F.3d 242, 268–69 (D.C. Cir. 2016).

<sup>173</sup> *Aref II*, 953 F. Supp. 2d 133, 146 (D.D.C. 2013) (citation omitted) (internal quotation marks omitted) (citing *Freeman v. Tex. Dept. of Crim. Just.*, 369 F.2d 854, 864 (5th Cir. 2004)).

<sup>174</sup> *Id.* at 146 ("Defendant Smith stated that the sermon 'made statements which were aimed at inciting and radicalizing the Muslim inmate population,' 'elicit[ing] violence, terrorism or intimidation' and 'disrespect[ing] or condemn[ing] other religious, ethnic, racial, or regional groups.' . . . While the sermon was arguably inflammatory, it does not, on its face, advocate 'violence, terrorism or intimidation' or 'disrespect or condemn other religious, ethnic, racial, or regional groups.'" (alterations in original)).

<sup>175</sup> *Id.*

<sup>176</sup> *Id.* at 147 (internal quotation marks omitted) (citing *Crawford-El v. Britton*, 523 U.S. 574, 588, 600 (1998)). To establish a retaliation claim, a prisoner must show "(1) he engaged in conduct protected under the First Amendment; (2) the defendant took some retaliatory action sufficient to deter a person of ordinary firmness from speaking again; and (3) a causal link exists between the exercise of a constitutional right and the adverse action taken against him." *Aref III*, 2015 WL 3749621, at \*9.

to murder, kidnap, and maim in a foreign country, and conspiracy to provide material support to terrorism.<sup>177</sup>

This reproduction of the defendant prison officials' justification for maintaining Jayyousi's incarceration in the CMU is equivalent to the unquestioning acceptance of the defendants' set of facts. As discussed above, when Jayyousi was cited with a disciplinary infraction, it was eventually dismissed and expunged from his record,<sup>178</sup> indicating that the Bureau's own internal procedures had failed to produce a record indicating Jayyousi posed any actual threat.<sup>179</sup> The court, however, did not engage in any inquiry at the summary judgment stage, citing instead the need to "accord [p]rison administrators . . . wide-ranging deference."<sup>180</sup> On appeal, the D.C. Circuit agreed with this analysis, noting that although "the interplay between *Turner* and the summary judgment standard is admittedly murky," the Supreme Court has held that "inferences must accord deference to the views of prison authorities."<sup>181</sup> After reciting the *Turner* factors, the court concluded, "appellants are challenging a 'disputed matter of professional judgment' rather than disputed matters of fact" and affirmed the district court's grant of summary judgment on Jayyousi's retaliation claim.<sup>182</sup>

The problem with invoking deference at this stage, particularly given the relatively robust factual record, is that it suggests no limit to what prison officials may deem appropriate without substantive basis in fact. As Justice Stevens has explained in dissent, while it may be the case that any "deprivation of something a prisoner desires gives him added incentive to improve his behavior," it is a justification without a limiting principle; "if sufficient, it would provide a 'rational basis' for any regulation that deprives a prisoner of a constitutional right so long as there is at least a theoretical possibility that the prisoner can regain the right at some future time by modifying his behavior."<sup>183</sup> While *Aref* is not a case that necessarily depends upon the "deprivation theory of rehabilitation,"<sup>184</sup> CMU designation arguably rests on a theory of behavioral modification. But this presents a problem because inmates often do not know which specific behavior they should modi-

177 *Aref III*, 2015 WL 3749621, at \*10 (citations omitted).

178 *Aref II*, 953 F. Supp. 2d. at 139–40.

179 *Contra* Defs.' Mot. for Summ. J. and Opp'n to Pls.' Cross-Mot. for Summ. J., *Aref III*, Civ. Act. No. 10-0539 (BJR), 2015 U.S. Dist. LEXIS 79636, 2014 U.S. Dist. Ct. Motions LEXIS 3422, at \*69–70 (explaining that the Discipline Hearing Officer who concluded that a "charge of encouraging a group demonstration was not supported," was simply "not asked to address, and thus did not assess, Mr. Smith's separate concern that the speech was evidence of Jayyousi's possible efforts to recruit and radicalize other inmates").

180 *Aref III*, 2015 WL 3749621, at \*10 (alteration in original) (internal quotations omitted) (quoting *Hatim v. Obama*, 760 F.3d 54, 59 (D.C. Cir. 2014)).

181 *Aref IV*, 833 F.3d 242, 259 (D.C. Cir. 2016) (quoting *Beard v. Banks*, 548 U.S. 521, 530 (2006)).

182 *Id.* at 261.

183 *Beard*, 548 U.S. at 546 (Stevens, J., dissenting).

184 *Id.*

fy, beyond their offense conduct for which they have already been sentenced, imprisoned, and, for the most part, classified by the Bureau as low- or medium-security inmates.

It is irrational to subject inmates to increased restrictions and expect a change in behavior without any semblance of documented cause and effect. Prison officials had already determined that Jayyousi's sermon was not a threat and did not constitute a disciplinary infraction—to then punish him on the basis of that sermon is senseless. Nevertheless, to the extent that prison officials are able to justify their decisions on the grounds that they preserve safety and are necessary to prison administration, courts will defer to prison officials' version of the facts and disregard underlying irrationality.

One recent case suggests the Supreme Court may occasionally push back against prison officials' version of the facts in especially extreme or egregious circumstances.<sup>185</sup> In *Brown v. Plata*,<sup>186</sup> the Court upheld an order by a panel of the Ninth Circuit requiring California “to reduce its prison population to 137.5 percent of the rated capacity of its facilities”<sup>187</sup> because of the “degree of overcrowding in California’s prisons.”<sup>188</sup> In its 184-page opinion, the panel described grievous conditions, leading the Court to comment: “A prison that deprives prisoners of basic sustenance, including adequate medical care, is incompatible with the concept of human dignity and has no place in civilized society.”<sup>189</sup> Yet given the exceptional nature of the circumstances, and sheer number of inmates affected—all those incarcerated in California—*Brown* likely does not signal a shift in the Court's prison deference jurisprudence. The plaintiffs in *Aref* face hardships that are disproportionate to their crimes and in-prison behavior, but none has been held in “a cage for nearly 24 hours, standing in a pool of his own urine, unresponsive and nearly catatonic.”<sup>190</sup>

Given the low likelihood that the political branches will legislate reasonable bounds of acceptable prison conditions unambiguously, courts should move toward finding value in a clearer and less deferential prison law jurisprudence.<sup>191</sup>

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185 Dolovich, *supra* note 134, at 250 (describing the Court as having shown itself “able to acknowledge strategic behavior on the part of prison officials and to credit the lived experience of people in prison”). *Johnson v. California*, 543 U.S. 499 (2005), discussed *infra* Part IV, provides another example of a plaintiff prisoner succeeding on his facts.

186 131 S. Ct. 1910 (2011)

187 Dolovich, *supra* note 134, at 250.

188 *Brown*, 131 S. Ct. at 1923–24 (cataloging severe overcrowding, a lack of minimal adequate care for the seriously mentally ill, a “shortage of treatment beds [resulting in] suicidal inmates [being] held for prolonged periods in telephone-booth sized cages without toilets,” specific deaths resulting from delays in medical evaluation, and so on).

189 *Id.* at 1928.

190 *Id.* at 1924.

191 Dolovich, *supra* note 134, at 245 (calling for “a theory of deference for the prison law context, i.e., for the development of principles to guide judicial deference in prison law cases and to set appropriate limits on its use”).

### III. ASSESSING PROCEDURAL DUE PROCESS VIOLATIONS IN CMUS UNDER *MATHEWS V. ELDRIDGE*

“[I]t’s an administrative black hole.”

—Andy Stepanian, former CMU inmate<sup>192</sup>

Prisoners face long odds when asserting their rights in court. Still, CMU inmate-plaintiffs can and should allege procedural due process violations when they are not provided a hearing. As the D.C. Circuit held in *Aref IV*, prisoners have a liberty interest in avoiding transfer to a CMU, which may occur erroneously.<sup>193</sup> The potential impact of additional procedural safeguards is significant and the administrative burden of implementation is relatively low.

Procedural due process claims are assessed under the *Mathews v. Eldridge* balancing test,<sup>194</sup> wherein courts consider:

First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government’s interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.<sup>195</sup>

In the prison litigation context, however, constitutional claims are more limited. The Supreme Court has acknowledged that “prisoners do not shed all constitutional rights at the prison gate,”<sup>196</sup> but also admonished that “[l]awful incarceration brings about the necessary withdrawal or limitation of many privileges and rights, a retraction justified by the considerations underlying our penal system.”<sup>197</sup> As a result, prisoners’ liberty interests are inherently circumscribed; “the Due Process Clause does not protect every change in the conditions of confinement having a substantial adverse impact on the prisoner.”<sup>198</sup>

With these premises in mind, the Court held in *Sandin v. Conner*<sup>199</sup> that inmates only have a liberty interest in “freedom from restraint which . . . imposes atypical and significant hardship on the inmate in rela-

192 Christopher S. Stewart, *The Balancer: Animal-Rights Activist Andrew Stepanian Talks About His Time Inside ‘Little Gitmo’*, N.Y. MAG (July 15, 2011, 3:15 PM), [http://nymag.com/daily/intelligencer/2011/07/little\\_gitmo\\_author\\_speaks\\_to.html](http://nymag.com/daily/intelligencer/2011/07/little_gitmo_author_speaks_to.html).

193 833 F.3d 242, 257–58 (D.C. Cir. 2016).

194 424 U.S. 320, 334.

195 *Id.* at 335.

196 *Sandin v. Conner*, 515 U.S. 472, 485 (1995) (citing *Wolff v. McDonnell*, 418 U.S. 539, 555 (1974)).

197 *Id.* (citing *Jones v. N.C. Prisoners’ Labor Union, Inc.*, 433 U.S. 119, 125 (1977)).

198 *Id.* at 478 (citing *Meachum v. Fano*, 427 U.S. 215, 224 (1976)).

199 515 U.S. 472.

tion to the ordinary incidents of prison life.”<sup>200</sup> If such a liberty interest exists, then “a ‘fundamental requirement’ of due process is that an individual receive ‘the opportunity to be heard at a meaningful time and in a meaningful manner.’”<sup>201</sup> Indeed, in the D.C. Circuit, “the proper methodology for evaluating deprivation claims under *Sandín* is to consider (i) the conditions of confinement relative to administrative segregation, (ii) the duration of that confinement generally, and (iii) the duration relative to length of administrative segregation routinely imposed on prisoners serving similar sentences.”<sup>202</sup> Administrative segregation is “a form of solitary confinement commonly used to separate disruptive prisoners.”<sup>203</sup> The D.C. Circuit also emphasizes “that a liberty interest can potentially arise under less-severe conditions when the deprivation is prolonged or indefinite.”<sup>204</sup>

For CMU inmates, their potential liberty interest lies “in avoiding an erroneous designation to a CMU.”<sup>205</sup> In the *Aref* cases, plaintiffs survived an initial motion to dismiss their procedural due process claim,<sup>206</sup> lost at the summary judgment stage in the district court,<sup>207</sup> and then won reversal on appeal albeit with some skepticism.<sup>208</sup> The court in *Aref I* explained, “it is plausible that the conditions of confinement in the CMUs constitute an atypical and significant hardship on the plaintiffs”<sup>209</sup> because there may be “a significant disparity in the treatment of CMU inmates and those housed in the general population.”<sup>210</sup> The Bureau argued “restrictions in the CMU are no harsher than those found in solitary confinement,” but the court pointed out that the Bureau failed to address “whether prisoners with similar sentences are routinely placed in solitary confinement.”<sup>211</sup> In *Aref III*, on dueling motions for summary judgment, it became clear that some federal prisoners at the Marion and Terre Haute facilities are subject to administrative segregation, which is far more restrictive than CMU confinement.<sup>212</sup>

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200 *Id.* at 484.

201 *Aref I*, 774 F. Supp. 2d 147, 164 (D.D.C. 2011) (citing *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976)).

202 *Aref IV*, 833 F.3d 242, 255 (D.C. Cir. 2016); *see also* *Hatch v. Dist. of Columbia*, 184 F.3d 846, 847 (D.C. Cir. 1999).

203 *Hatch*, 184 F.3d at 848.

204 *Aref IV*, 833 F.3d at 255.

205 *Beata*, *supra* note 17, at 294.

206 *Aref I*, 774 F. Supp. 2d at 163–64.

207 *Aref III*, No. 10-0539 (BJR), 2015 WL 3749621, at \*11 (D.D.C. Mar. 16, 2015).

208 *Aref IV*, 833 F.3d at 258 (remanding to the district court to determine “whether the assignment process used by the government is adequate,” but noting that “[b]ecause the cardinal principle in due process analysis is flexibility—i.e., attention to relevant context and consideration of competing interests—only minimal process is likely due”).

209 *Aref I*, 774 F. Supp. 2d at 165–66.

210 *Id.* at 165.

211 *Id.*

212 *Aref III*, 2015 WL 3749621, at \*5–6. Plaintiffs also argued that the average inmates’ duration of confinement in the CMUs was much longer than the average inmates’ stay in administrative segrega-

Accordingly, the district court concluded that plaintiffs had no protected liberty interest in avoiding CMU designation.<sup>213</sup> On appeal, the D.C. Circuit found three factors were significant when it reversed the district court.<sup>214</sup> CMU designation, the panel explained, “is exercised selectively; the duration is indefinite and could be permanent; the deprivations—while not extreme—necessarily increase in severity over time . . . as children grow older and relationships with the outside become more difficult to maintain.”<sup>215</sup> But the D.C. Circuit also predicted that, “only minimal process is likely due.”<sup>216</sup> Given current jurisprudence, this prediction is unsurprising.

*Sandin* did not produce “consistent conclusions for identifying the baseline from which to measure what is atypical and significant in any particular prison system.”<sup>217</sup> Particularly in light of *Wilkinson v. Austin*,<sup>218</sup> judges may be unimpressed by the stark implications of imposing needless restrictions on inmates and may feel that the judiciary should not involve itself in protecting substantive rights except in the most extreme cases. But this is a failure to recognize the role of the judiciary in serving as a last line of defense for the rights of a group society finds all too easy to despise.

The second *Mathews* factor requires assessing available procedure;<sup>219</sup> in this case, inmates transferred to CMUs are notified of the reason for their

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tion such that even though CMUs are comparatively less restrictive than administrative segregation, CMU restrictions become increasingly onerous over time, eventually constituting the required atypical and significant hardship. The court did not find this argument persuasive. *Id.* at \*7–8.

213 *Id.* at \*8.

214 *Aref IV*, 833 F.3d 242, 257 (D.C. Cir. 2016).

215 *Id.*

216 *Id.* at 258.

217 *Wilkinson v. Austin*, 545 U.S. 209, 223 (2005) (citing *Hatch v. Dist. of Columbia*, 184 F.3d 846, 847 (D.C. Cir. 1999), among others) (noting further, “We need not resolve the issue here, however, for we are satisfied that assignment to OSP [Ohio State Penitentiary] imposes an atypical and significant hardship under any plausible baseline.”).

218 In *Wilkinson*, the Supreme Court upheld a district court finding that inmates had a liberty interest in avoiding designation to the Ohio State Penitentiary, which it described as prohibiting “almost all human contact . . . even to the point that conversation is not permitted from cell to cell; the light, though it may be dimmed, is on 24 hours; exercise is for 1 hour per day, but only in a small indoor room.” *Wilkinson*, 545 U.S. at 223–24. Justice Kennedy then explained that “these conditions likely would apply to most solitary confinement facilities,” suggesting that perhaps with those attributes alone the facility would not impose a sufficiently atypical and significant hardship to create a liberty interest. *Id.* at 224. But because placement was also indefinite and, “after an initial 30-day review . . . [was] reviewed just annually,” and because the placement “disqualifies an otherwise eligible inmate for parole consideration,” the setting did impose “an atypical and significant hardship within the correctional context.” *Id.* In fact, as recently as April 2015, prisoners in Ohio’s supermax, another name for the Ohio State Penitentiary in Youngstown, went on a month-long hunger strike “to protest new restrictions placed on already severely limited recreation and programming for those in solitary confinement.” Vaidya Gullapalli, *At Ohio’s Supermax Prison, a Hunger Strike Ends But Extreme Isolation Remains*, SOLITARY WATCH (Apr. 21, 2015), <http://solitarywatch.com/2015/04/21/at-ohios-supermax-prison-a-hunger-strike-ends-but-extreme-isolation-remains/>.

219 Communications Management Units, 80 Fed. Reg. 3168, 3178 (Jan. 22, 2015) (to be codified at 28 CFR pt. 540). The Final Rule’s description of this procedure does not differ notably from

transfer in a short paragraph delivered to them on a one-page form *after* arriving in the CMU.<sup>220</sup> To challenge the CMU designation, inmates can only file “an administrative appeal through [the Bureau’s] Administrative Remedy Program,” which provides “a purely written process.”<sup>221</sup>

Manifold problems are contained in this procedure. First, notice is provided post-transfer, preventing inmates from being able to timely notify lawyers and only permitting a correction after the transfer has already occurred.<sup>222</sup> This is especially troubling because it provides an administrative and financial incentive not to correct errors,<sup>223</sup> particularly those that may only be brought to light by the inmate himself. Moreover, the explanation provided to justify transfers is often vague, giving prison officials nearly complete discretion.<sup>224</sup> Some former CMU inmates have suggested that discretion is used to punish inmates who express unpopular political ideas while in prison.<sup>225</sup> In *Aref I*, plaintiff Royal Jones<sup>226</sup> survived a motion to dismiss on the allegation that he was transferred in retaliation for making frequent use of procedures to complain internally and for pursuing formal litigation against the Bureau.<sup>227</sup> The district court explained that given his “relatively clean disciplinary history, his history of complaints and the threat allegedly directed at him by staff at [another Bureau prison], Jones [had] plausibly alleged that he was transferred to the CMU in retaliation for his continued litigation against [the Bureau].”<sup>228</sup> It is difficult to know

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those described by media and scholarly accounts of CMU designation. Beata, *supra* note 17, at 296; Malek, *supra* note 7; Shapiro, *supra* note 1, at 60–61.

220 Shapiro, *supra* note 1, at 60–61 (“A fairly typical Notice of Transfer states: ‘Your current offenses of conviction include Providing Material Support & Resources to a Foreign Terrorist Organization, & Conspiracy to Use a Weapon of Mass Destruction. Your offense conduct included significant communication, association and assistance to Jaish-e-Mohammed (JeM), a group which has been designated as a foreign terrorist organization.’”).

221 *Id.* at 61 (describing the Administrative Remedy Program as generally being used by inmates to submit complaints and appeal rejections “through the chain of command”).

222 See Beata, *supra* note 17, at 296 (describing a CMU designation as “fait accompli”).

223 *Id.*

224 *Id.*

225 Amy Goodman, *EXCLUSIVE: Animal Rights Activist Jailed at Secretive Prison Gives First Account of Life Inside a “CMU”*, DEMOCRACY NOW! (June 25, 2009), [https://www.democracynow.org/2009/6/25/exclusive\\_animal\\_rights\\_activist\\_jailed\\_at](https://www.democracynow.org/2009/6/25/exclusive_animal_rights_activist_jailed_at); McGowan, *Court Documents Prove I Was Sent to Communications Management Units (CMU) for My Political Speech*, *supra* note 111. Others have theorized similar motives behind their transfers. Malek, *supra* note 7; Stewart, *supra* note 5.

226 Royal Jones was a plaintiff in *Aref I* who was “convicted of solicitation of bank robbery, which also constituted a probation violation for an earlier gun possession conviction. . . . He was sentenced in 2007 to ninety-four months of incarceration.” *Aref I*, 774 F. Supp. 2d 147, 155 (D.D.C. 2011). He had “‘no serious disciplinary infractions’ and only ‘one minor communications [-]related infraction’ during this period of incarceration.” *Id.* (alteration in original). Jones was originally party to the amended complaint in *Aref II*, but the court “dismissed him from the case on May 1, 2013 for failing to comply with the Court’s Order or otherwise prosecute his case.” *Aref II*, 953 F. Supp. 2d 133, 138 n.1 (D.D.C. 2013).

227 *Aref I*, 774 F. Supp. 2d at 169.

228 *Id.*

whether this type of retaliation is common given the breadth of prison officials' discretion and the dearth of visible administrative process when inmates are designated to CMUs.<sup>229</sup>

The Bureau argues that the current administrative system of appeals provides sufficient due process,<sup>230</sup> but prisoners have “no right to a live hearing, no right to call witnesses, and no right to representation by a staff member.”<sup>231</sup> These are procedures generally provided when inmates are placed in restrictive settings for disciplinary or punitive reasons.<sup>232</sup> Given that the total inmate population in restrictive segregated housing was about 12,460 in 2013,<sup>233</sup> the burden on the Bureau to provide these basic procedures to about eighty additional inmates would be negligible. Although the D.C. Circuit pointed out that the *Aref* plaintiffs “are challenging fundamentally predictive judgments in an area where administrators are given broad discretion and the government’s legitimate interests in maintaining CMUs must be accorded substantial weight,”<sup>234</sup> the district court should not be cowed into permitting Bureau officials to carry on without any semblance of oversight. Prevention of erroneous designation is important for individual inmates, but it also gives a greater appearance of fairness more broadly, and the shoring up of public faith in just institutions is itself a worthwhile goal.

The last *Mathews* factor considers the government interest, which in this case centers on maintaining safety and order in the prison context. Courts have called this a “dominant consideration.”<sup>235</sup> Given the prison system’s “attendant curtailment of liberties,” the extent to which prisoners may demand procedural protections by right is inherently reduced.<sup>236</sup> Even where prisoners are able to successfully allege a liberty interest, this factor raises up a second significant hurdle in the quest for robust procedural due process.<sup>237</sup> According to the Court, this is because prison administrators’ “first

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229 Both Daniel McGowan, discussed *supra* note 111, and Kifah Jayyousi, discussed *supra* Part I.B., alleged that they were transferred to the CMUs in retaliation for their protected political and religious speech.

230 Communications Management Units, 80 Fed. Reg. 3168, 3170 (Jan. 22, 2015) (to be codified at 28 CFR pt. 540) (“Even assuming that inmates have a liberty interest in this context, inmates have been afforded sufficient process and will continue to be afforded . . . post-placement due process in the form of written notice under § 540.202(c) upon arrival.”).

231 Beata, *supra* note 17, at 296 (citing Letter from David Shapiro, Counsel, Brennan Ctr. for Justice, to Sarah Qureshi, Office of Gen. Counsel, Bureau of Prisons (June 2, 2010), [http://www.brennancenter.org/content/resource/CMU\\_letter/](http://www.brennancenter.org/content/resource/CMU_letter/)).

232 See GAO Report, *supra* note 12, at 7, 9 (comparing segregated housing unit policies).

233 *Id.* at 14.

234 *Aref IV*, 833 F.3d 242, 258 (D.C. Cir. 2016).

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

236 *Id.* at 211.

237 See *Dolovich*, *supra* note 134, at 246 (describing the holding in *Turner* as doubly deferential; both the holding in the case, which permits prison officials to “violate constitutional rights if they can show that doing so facilitates the running of the prison,” and the four-factor rule arising from it,

obligation must be to ensure the safety of guards and prison personnel, the public, and the prisoners themselves.”<sup>238</sup> To illustrate the danger, the Court invokes “the brutal reality of prison gangs . . . committed to fear and violence as a means of disciplining their own members and their rivals,” and emphasizes the risk of testifying against gang activities.<sup>239</sup> Moreover, prison officials face the “problem of scarce resources,” and given that more restrictive confinement costs more, it is possible to assume that any “penal system, faced with costs like these will find it difficult to fund more effective education and vocational assistance programs.”<sup>240</sup> Accordingly, “courts must give substantial deference to prison management decisions before mandating additional expenditures for elaborate procedural safeguards when correctional officials conclude that a prisoner has engaged in disruptive behavior.”<sup>241</sup> The result is that although the Court recognizes the plaintiffs’ liberty interest, it finds that the state’s new policy “is adequate to safeguard” that interest.<sup>242</sup>

The chief complaint about CMUs is the lack of procedural due process in designation because it means a lack of protection from error and prejudice.<sup>243</sup> Before being transferred to the Bureau’s Administrative Maximum facility, inmates receive advance notice and “a pre-transfer hearing during which they can present evidence and call witnesses on their behalf.”<sup>244</sup> As the lead counsel in the ongoing *Aref* suit has put it, CMU designation criteria are drawn broadly and without “robust processes for prisoners to protest,” creating “a situation that’s ripe for abuse.”<sup>245</sup>

The promulgation of the Final Rule with few substantive changes is troubling because the Proposed Rules were so roundly criticized over the course of roughly nine years.<sup>246</sup> Moreover, alternative procedural safe-

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which requires only a rational connection between the prison regulation and the government interest, ensure a defendant-friendly slant).

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

239 *Id.*

240 *Id.* at 228.

241 *Id.*

242 *Id.*

243 *See Shapiro*, *supra* note 1, at 89 (describing the lack of meaningful procedural protections associated with CMU designation). *See also Beata*, *supra* note 17, at 291–98 (noting that the “lack of notice implicates the potential for arbitrary decision-making and precludes the inmate from preparing an adequate basis for objection”).

244 *Thompson*, *supra* note 48.

245 *See id.* (“When you draw your designation criteria so broadly and you don’t have robust processes for prisoners to protest, you create a situation that’s ripe for abuse.”).

246 *Agathocleous*, *supra* note 58 (writing that the Bureau was “flooded with criticism during a public comment period about the units” and asserting that the new rule “does nothing to change, correct, or enhance the process by which prisoners are singled out for CMU designation”).

guards are feasible.<sup>247</sup> Given the small CMU population—fewer than 100 at any given time<sup>248</sup>—providing advance notice would have a minimal impact on resources nationally. The Bureau professes to believe that even the strictest forms of restricted communication are discretionary and unreviewable.<sup>249</sup> That perspective does not comply with the Bureau’s own policy of encouraging the maintenance of family connections<sup>250</sup> and fails to comprehend the dramatic nature of the restrictions imposed on CMU inmates.<sup>251</sup> Furthermore, the Bureau itself classifies many CMU inmates as low-security prisoners and most have few or no behavioral or disciplinary violations.<sup>252</sup> For these reasons, a brief delay to accommodate procedural safeguards is unlikely to incur much if any risk.<sup>253</sup>

#### IV. ASSESSING EQUAL PROTECTION VIOLATIONS IN CMUS UNDER *ASHCROFT V. IQBAL*

Muslim inmates make up somewhere between sixty-six and seventy-two percent of the CMU population, and just six percent of the federal prison population.<sup>254</sup> The plaintiffs in *Aref I* argued that there was “a pattern and practice throughout the [Bureau] of designating individuals . . . to the CMU in retaliation for their protected political and religious speech and

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247 See Beata, *supra* note 17, at 297 (“[G]iven the small size of CMUs, the costs associated with implementing additional safeguards, such as providing inmates with advance notice, would be minimal.”).

248 See *id.* (noting that the “Terra Haute CMU’s total capacity is just eighty-five prisoners,” and that the two units only held seventy-one men as of that writing in 2012); Williams & Johnson, *Five More*, *supra* note 68 (noting that the units can hold “a total of 100 inmates”).

249 See Communications Management Units, 80 Fed. Reg. 3168, 3170 (Jan. 22, 2015) (to be codified at 28 CFR pt. 540) (“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.”).

250 See *Stay in Touch*, FED. BUREAU OF PRISONS, <http://www.bop.gov/inmates/communications.jsp> (last visited Jan. 30, 2015) (“Studies show that when inmates maintain relationships with friends and family, it greatly reduces the risk they will recidivate.”). See also Shapiro, *supra* note 1, at 85 n.180 (“With remarkable consistency, studies have shown that family contact during incarceration is associated with lower recidivism rates.”) (citing Nancy G. La Vinge et al., *Examining the Effect of Incarceration and In-Prison Family Contact on Prisoner’s Family Relationships*, 21 J. OF CONTEMP. CRIM. JUST. 314, 316 (2005)).

251 *Aref II*, 953 F. Supp. 2d. 133, 141 (D.D.C. 2013) (noting that the plaintiff alleged that “restrictions placed on his visitation and telephone access were ‘extremely painful and onerous,’ requiring him to ‘struggle[] to maintain a close relationship with his wife and children’”).

252 See Stewart, *supra* note 5 (underscoring that Aref’s lawyers describe his conduct in prison as spotless).

253 See McGowan, *Tales from Inside the U.S. Gitmo*, *supra* note 111 (describing the lack of due process afforded CMU prisoners); Shapiro, *supra* note 1, at 84 (describing the low threat posed by some CMU prisoners). In addition, the Bureau’s own internal procedure classified these inmates as low security, implying that it might be reasonable to require greater justification to transfer them far from their families and communities and to subject them to dramatic communications restrictions.

254 Johnson & Williams, *Inside Guantanamo North*, *supra* note 4.

beliefs, or based on their religion, national origin, and perceived political and/or ideological beliefs.”<sup>255</sup> Specifically, they alleged that “Aref, Jayyousi and Jones [were transferred] into CMUs because they are Muslim and therefore [were] unlawfully discriminated against . . . in violation of the First and Fifth Amendment.”<sup>256</sup> The retaliation claims were not initially dismissed, but the allegations of discrimination were because, as the court explained, the “statistics . . . without more, are not minimally sufficient to survive a motion to dismiss.”<sup>257</sup>

To successfully allege wrongdoing, *Ashcroft v. Iqbal*<sup>258</sup> requires that plaintiffs plead facts that make their entitlement to relief plausible, not simply possible.<sup>259</sup> In the context of equal protection, this entails both a plausible showing of unconstitutional discrimination, and a plausible showing that the classification policy was “purposefully adopted . . . because of [the plaintiffs’] race, religion, or national origin.”<sup>260</sup> In *Iqbal*, the Court held that it might be possible for “a legitimate policy directing law enforcement to arrest and detain individuals because of their suspected link to the [September 11] attacks would produce a disparate, incidental impact on Arab Muslims, even though the purpose of the policy was to target neither Arabs nor Muslims.”<sup>261</sup> The relationship between *Iqbal* and potential challenges by prisoners being placed in CMUs is transparent: if the Court accepts as a preliminary matter that the Bureau only selected prisoners whose communications threaten prison stability, then moving past the pleading stage will prove nearly impossible, no matter the racial or religious makeup of those prisoners.<sup>262</sup> Finding discriminatory purpose requires that a decision maker selected a “course of action ‘because of, not merely in spite of, [the action’s] adverse effects upon an identifiable group.’”<sup>263</sup> If more terrorist inmates in the United States are Arab or Muslim, it follows that a greater proportion of CMU inmates will be Arab or

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255 *Aref I*, 774 F. Supp. 2d 147, 156 (D.D.C. 2011).

256 *Id.* at 170.

257 *Id.*

258 556 U.S. 662 (2009).

259 *See id.* at 678 (“Where a complaint pleads facts that are ‘merely consistent with’ a defendant’s liability, it ‘stops short of the line between possibility and plausibility of ‘entitlement to relief.’”) (citing *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007)).

260 *Id.* at 682 (“But even if the complaint’s well-pleaded facts give rise to a plausible inference that respondent’s arrest was the result of unconstitutional discrimination, that inference alone would not entitle respondent to relief.”).

261 *Id.*

262 *See id.* at 683 (noting that the plaintiff must “allege more by way of factual content to ‘nudge’ his claim of purposeful discrimination ‘across the line from conceivable to plausible.’”) (citing *Twombly*, 550 U.S. at 570). *See also Aref I*, 774 F. Supp. 2d at 170–71 (granting the defendant’s motion to dismiss claims of discrimination) (citing *Iqbal*, 556 U.S. at 676).

263 *Aref I*, 774 F. Supp. 2d at 170 (alteration in original) (citing *Personnel Adm’r of Mass. v. Feeney*, 442 U.S. 256, 279 (1979)).

Muslim.<sup>264</sup> As a result, discovering proof of purposeful discrimination may border on the impossible, even in circumstances where disparities between populations appear to implicate egregious discrimination.<sup>265</sup>

So, challenging CMU designation on an equal protection basis requires more than statistical evidence.<sup>266</sup> And some evidence does exist that Muslims are being designated to the CMUs because of their religion and potentially their national origin or political beliefs.<sup>267</sup> The experience of Andy Stepanian, a non-Muslim, non-Arab, animal rights activist who was transferred to the CMU at Marion in June 2008, provides this evidence.<sup>268</sup> According to Stepanian, one prison guard said to him, “You’re nothing like these Muslims. You’re just here for balance. You’re going to go home soon.”<sup>269</sup> He also reported that guards sometimes referred to non-Muslim inmates generally as “balancers.”<sup>270</sup> These details would, on their face, suggest the type of purposeful official discrimination that *Iqbal* requires,<sup>271</sup> and they were not introduced in the *Aref* case.<sup>272</sup> But there are few, if any, additional documented examples of intent.<sup>273</sup> The Bureau claims to have articulated a “valid legiti-

264 See Communication Management Units, 80 Fed. Reg. 3168, 3168 (Jan. 22, 2015) (to be codified at 28 CFR pt. 540) (describing one of the significant reasons for CMU designation as involvement in terrorist-related activities and communications); Shane, *supra* note 61 (citing that as of October 2011, the Bureau “reported that it was holding 362 people convicted in terrorism-related cases”).

265 Cf. *United States v. Armstrong*, 517 U.S. 456, 482 n.6 (Stevens, J., dissenting) (noting that the district court should have been entitled to take judicial notice of the fact that of the 3,500 defendants the government had charged with narcotics violations over three years, the government could only offer eleven nonblack defendants, all of whom “were members of other racial or ethnic minorities”).

266 *Aref I*, 774 F. Supp. 2d at 170 (citing *Segar v. Smith*, 738 F.2d 1249, 1273–74 (D.C. Cir. 1984) (“explaining that ‘to be legally sufficient’ the proffered statistics must demonstrate not just a disparity of treatment, but they must ‘eliminate the most common nondiscriminatory explanations of the disparity, and thus permit the inference that, absent other explanation, the disparity more likely than not resulted from illegal discrimination’”).

267 McGowan, *Court Documents Prove I Was Sent to Communications Management Units (CMU) for My Political Speech*, *supra* note 111; Goodman, *supra* note 225.

268 Malek, *supra* note 7.

269 *Id.*

270 *Id.*; Andy Stepanian, *Isolated in Federal Communication Management Units, Silenced Voices Need Ours*, HUFFINGTON POST (May 25, 2011), [http://www.huffingtonpost.com/andy-stepanian/isolated-in-federal-commu\\_b\\_570920.html](http://www.huffingtonpost.com/andy-stepanian/isolated-in-federal-commu_b_570920.html).

271 *Contra Club Retro, L.L.C. v. Hilton*, 568 F.3d 181, 213 (5th Cir. 2009) (holding that the combination of statistical evidence suggesting the raid was ineffective and that the targeted Club’s patrons were mixed-race even in combination with the use of racial epithets by police officers was not enough to show “unequal treatment or discriminatory intent on the part of” the defendants).

272 *Aref I*, 774 F. Supp. 2d 147, 170 (D.D.C. 2011).

273 Dhafir, *supra* note 39 (“I was put in isolation for 2 days before the move in what I know now was a nationwide operation to put Muslims/Arabs in one place so that we can be closely monitored regarding our communications”). See Press Release, Ctr. for Const. Rts., CCR, Former Corrections Officials, Large Coalition Flood BOP with Public Comments Critical of Experimental Prison Units (June 2, 2010), <https://ccrjustice.org/newsroom/press-releases/ccr%2C-former-corrections-officials%2C-large-coalition-flood-bop-public-comments> (“Between 65 and 72 per-

mate penological purpose” for designating inmates to CMUs “on a case-by-case basis.”<sup>274</sup> This may not “negate[] a claim of a Bureau-wide conspiracy to discriminate against Muslims,”<sup>275</sup> but without more, CMU inmates are unlikely to successfully allege an equal protection violation.

Even so, there is one example of a successful equal protection challenge in the prisons context. In *Johnson v. California*,<sup>276</sup> the California Department of Corrections and Rehabilitation had a practice, albeit an unwritten one, of placing new and transferred inmates in double cells with inmates of the same race for the first sixty days of their placement.<sup>277</sup> As a result, prison officials explicitly relied on race to make double-cell assignments and they urged the Court to “apply the deferential standard of review articulated in *Turner*” to evaluate the practice.<sup>278</sup> But the Court ruled that *Turner* has never been applied to racial classifications.<sup>279</sup> Moreover, “*Turner*’s reasonable-relationship test [is applied] *only* to rights that are ‘inconsistent with proper incarceration,’” which is not the case for freedom from racial discrimination.<sup>280</sup> Rather: “The right not to be discriminated against based on one’s race is not susceptible to the logic of *Turner*.”<sup>281</sup>

Of course, *Johnson* differs from *Aref*, especially due to the involvement of racial rather than religious bias,<sup>282</sup> and the unwritten but express policy of discrimination. Yet the analysis in *Johnson* provides a parallel to CMU inmates’ situation. The Court explains that even as “prison officials cite racial violence as the reason for their policy,” they may aggravate the problem they intend to solve.<sup>283</sup> Indeed, “by insisting that inmates be housed only with other inmates of the same race, it is possible that prison officials will breed further hostility among prisoners and reinforce racial and ethnic

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cent of CMU prisoners are Muslim men, a fact that attorneys say demonstrates that the CMUs were created to allow for the segregation and restrictive treatment of Muslims based on the discriminatory belief that such prisoners are more likely than others to pose a threat to prison security.”).

274 Communications Management Units, 80 Fed. Reg. 3168, 3169 (Jan. 22, 2015) (to be codified at 28 CFR pt. 540).

275 *Id.*

276 543 U.S. 499 (2005).

277 *Id.* at 502.

278 *Id.* at 509.

279 *Id.* at 510.

280 *Id.* (citing *Overton v. Bazzetta*, 539 U.S. 126, 131 (2003)).

281 *Id.* at 510.

282 *Id.* at 530–531 n.4 (Thomas, J., dissenting) (citing *O’Lone v. Estate of Shabazz*, 482 U.S. 342, 349–50 (1987)) (asserting that *Turner* has been applied to “the right of free exercise of religion under the First Amendment”). See also Steven G. Calabresi & Abe Salander, *Religion and the Equal Protection Clause 2* (Nw. U. Sch. of Law Scholarly Commons, Paper No. 213, 2012), <http://scholarlycommons.law.northwestern.edu/cgi/viewcontent.cgi?article=1212&context=facultyworkingpapers> (explaining that “the modern Supreme Court has not recognized that the anti-discrimination command of the Fourteenth Amendment protects religion in the same way that [it] protects against discrimination on the basis of race”).

283 *Johnson*, 543 U.S. at 507.

divisions.”<sup>284</sup> Segregating inmates on the basis of religion might have a similar effect, particularly when radicalization is a concern.<sup>285</sup> But the Court views its Fourteenth Amendment jurisprudence narrowly and likely would not make this leap in the CMU context.<sup>286</sup> Thus, even if CMU inmates were able to withstand a motion to dismiss under *Iqbal*, their allegations are likelier assessed under the deferential *Turner* standard than under strict scrutiny and success is unlikely.<sup>287</sup> And *Iqbal*’s heightened pleading standards foreclose gathering persuasive information on discovery-level issues such as the inner workings of the designation process.<sup>288</sup> But this assumes no change in precedent or statute.

## V. REFORM IN THE POLITICAL MOMENT

In the years prior to President Trump’s election, the political climate suggested an opportunity for actors in all three branches of government to enact systemic reforms within prisons.<sup>289</sup> And there may still be political interest in prison reform. CMUs represent one egregious convergence of the problems within criminal justice and especially within the prison system. Reform that begins with CMUs would have implications across the Bureau, and—with any luck—across state prison systems as well.

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<sup>284</sup> *Id.*

<sup>285</sup> *Aref III*, No. 10-0539 (BJR), 2015 WL 3749621, at \*10 (D.D.C. Mar. 16, 2015) (finding that Smith’s “lengthy memorandum detailing the portions of Jayyousi’s speech that he found to be ‘aimed at inciting and radicalizing the Muslim inmate population’” along with the Bureau’s other asserted evidence was enough to constitute “a valid, rational connection between their recommendation that Jayyousi remain in CMU and a legitimate government or penological interest”).

<sup>286</sup> See Calabresi & Salander, *supra* note 282, at 2–3.

<sup>287</sup> *O’Lone*, 482 U.S. at 348–49.

<sup>288</sup> *Ashcroft v. Iqbal*, 556 U.S. 662, 678–79 (2009) (citing *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 556 (2007)).

<sup>289</sup> See, e.g., Russell Berman, *A Poll-Tested Message for Criminal Justice Reform*, THE ATLANTIC (Feb. 18, 2016, 6:03 AM), <http://www.theatlantic.com/politics/archive/2016/02/the-complicated-politics-of-criminal-justice-reform/463284/> (“Strong majorities in four purple states and Republican-leaning Kentucky and Missouri seem to agree with the premise of reform that both parties have been promoting: Federal prisons house too many non-violent criminals, the government spends too much money incarcerating them, the main goal of prison should be rehabilitation, and Washington shouldn’t make it so hard for inmates to find jobs after they’re released.”). See also MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* (2010); Neil Barsky, *A Letter from Our Founder*, THE MARSHALL PROJECT (Nov. 15, 2014), <https://www.themarshallproject.org/about#wMWsDITi>, (“What struck me was not only how expensive, ineffective, and racially biased [the criminal justice system] is, and how difficult it is to find anyone, liberal or conservative, who defends the status quo. But also how our condition has become taken for granted. Other American crises—soaring health-care costs, the failure of public education—typically lead to public debate and legislative action. But the spike in mass incarceration appears to have had the opposite effect: The general public has become inured to the overuse of solitary confinement, the widespread incidence of prison rape and the mixing of teens and adults in hardcore prisons. . . . The Marshall Project represents our attempt to elevate the criminal justice issue to one of national urgency, and to help spark a national conversation about reform.”).

In the 1820s, Quaker reformists theorized that solitude would lead “to reflection and ultimately penitence.”<sup>290</sup> Putting this theory into practice, American penitentiaries placed convicts “in total isolation . . . [permitting them] to speak with only a limited number of prison guards and a few pre-selected visitors.”<sup>291</sup> In 1890, the Supreme Court described the system’s effects this way: “A considerable number of the prisoners fell, after even a short confinement, into a semi-fatuous condition . . . while those who stood the ordeal . . . in most cases did not recover sufficient mental activity to be of any subsequent service to the community.”<sup>292</sup>

President Obama worked to curb the most extreme uses of solitary confinement within the federal system.<sup>293</sup> And Justice Kennedy recently suggested that the time has come for the judiciary “to determine whether workable alternative systems for long-term confinement exist, and, if so, whether a correctional system should be required to adopt them.”<sup>294</sup>

Though courts are expected to exercise deferential judicial restraint in the context of prison policy, the judiciary is in a unique position to engage critically and thoughtfully with the policies set forth by the executive branch through both the Bureau and the Department of Justice. The judicial role is twofold. First, prison officials must be held to account to internal standards they set for themselves. For example, the Bureau professes to believe that maintaining family connections while in prison is important because it decreases the likelihood of recidivism.<sup>295</sup> When the Bureau elects to disregard its own guidance, courts should require a substantive explanation. If that explanation is rational and legitimate, then it will survive scrutiny. However, courts must act as facilitators of critical dialogue, rather than deferential lackeys to prison administrators. No other actor can ensure com-

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290 Laurel Dalrymple, *At an Abandoned Philadelphia Prison, All Hell Breaks Loose*, NPR (Oct. 24 2013, 2:27 PM), <http://www.npr.org/2013/10/24/232208198/at-an-abandoned-philadelphia-prison-all-hell-breaks-loose>.

291 Sally Mann Romano, *If the SHU Fits: Cruel and Unusual Punishment at California’s Pelican Bay State Prison*, 45 EMORY L.J. 1089, 1094 (1996).

292 *In re Medley*, 134 U.S. 160, 168 (1890).

293 Dep’t of Justice, *Report and Recommendations Concerning the Use of Restrictive Housing* 94, 105–106 (Jan. 2016); Barack Obama, *Barack Obama: Why We Must Rethink Solitary Confinement*, THE WASHINGTON POST (Jan. 25, 2016), [https://www.washingtonpost.com/opinions/barack-obama-why-we-must-rethink-solitary-confinement/2016/01/25/29a361f2-c384-11e5-8965-0607e0e265ce\\_story.html](https://www.washingtonpost.com/opinions/barack-obama-why-we-must-rethink-solitary-confinement/2016/01/25/29a361f2-c384-11e5-8965-0607e0e265ce_story.html) (explaining the adoption of Justice Department recommendations to ban “solitary confinement for juveniles and as a response to low-level infractions, expanding treatment for the mentally ill and increasing the amount of time inmates in solitary can spend outside of their cells”).

294 *Davis v. Ayala*, 135 S. Ct. 2187, 2210 (2015) (Kennedy, J., concurring).

295 *Stay in Touch*, FED. BUREAU OF PRISONS (last visited Jan. 30, 2015), <http://www.bop.gov/inmates/communications.jsp> (“Studies show that when inmates maintain relationships with friends and family, it greatly reduces the risk they will recidivate.”).

pliance with both avowed policy and human rights tenets.<sup>296</sup> Second, the political branches are often unable or unwilling to engage in nuanced assessments of prison conditions and corresponding prisoners' rights.<sup>297</sup> Liberalizing prison policy is especially high stakes because failures may be perceived as endangering the public, causing political actors to fear repercussions of any dramatic change.<sup>298</sup> The result is a one-way political ratchet. This truth should not serve as an excuse for inaction on the part of those actors, but should provoke the Court into playing its role in protecting the constitutional rights of prisoners.

Prison officials are in a difficult position, but cannot be exempted from the strictures of the Constitution. Somewhat like climate change denial, the continued use of highly restrictive settings either to rehabilitate or to increase safety is (usually) politically attractive<sup>299</sup> and scientifically disproven as an effective method of rehabilitation or preserving safety.<sup>300</sup> Prison administrators do face an intractable problem of prison administration, but courts should not abandon them to navigate this problem without the benefit of oversight.

#### CONCLUSION

Although CMU conditions are less severe than many forms of restrictive housing, reforming the most restrictive forms of confinement routinely available in the prison system should shift the analysis of CMU conditions under *Sandin v. Conner*. One problem, though, is that *Sandin* itself fails to comprehend the nature of prison administration that is created when pris-

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<sup>296</sup> A president could choose to facilitate greater, faster change in the Bureau through an executive order requiring specified protections and procedures for prisoners transferred to more restrictive conditions.

<sup>297</sup> See Rachel Lyon, *Media, Race, Crime, and Punishment: Re-Framing Stereotypes in Crime and Human Rights Issues*, 58 DEPAUL L. REV. 741, 742 (2009) (noting that "media function[s] as mediators of meanings, powerfully shaping the ways in which people understand our world by organizing information [such that viewers form] perceptions about good and bad over time"). *But see* Obama, *supra* note 293 (demonstrating President Obama's direct criticism of solitary confinement).

<sup>298</sup> *Senators Criticize Bush Administration's Failure to Monitor Communications of Deadly Terrorists in U.S. Custody*, U.S. SENATE DEMOCRATS (Oct. 4, 2006, 8:00 AM), <http://democrats.senate.gov/2006/10/04/senators-criticize-bush-administrations-failure-to-monitor-communications-of-deadly-terrorists-in-u-s-custody/#.VNfTc1PF-4J>; *contra* Berman, *supra* note 289 (noting that the "chief goal" of the pollsters is "to persuade Senate Majority Leader Mitch McConnell that bringing up a bipartisan bill [to pass criminal-justice reform] will not jeopardize the GOP majority this fall"); Burke Butler et al., *A Solitary Failure: The Waste, Cost and Harm of Solitary Confinement in Texas*, AM. C.L. UNION OF TEX. 8 (Feb. 5, 2015); .

<sup>299</sup> Brian Mann, *How Solitary Confinement Became Hardwired in U.S. Prisons*, NPR (Aug. 23, 2015, 7:58 AM) ("In all, a dozen states are looking to reform the way they use solitary confinement. But here's a sign of how hard it might be to shift away from long-term isolation in American prisons: As President Obama condemned the use [of] solitary confinement last month, his administration is finishing construction of a new \$200 million Supermax correctional facility in Illinois. Its hundreds of isolation cells are expected to begin holding inmates next year.").

<sup>300</sup> Butler, *supra* note 298, at 10.

oners cannot challenge unduly harsh conditions imposed without explanation. It is irrational, and as criminal defense attorneys have long argued, people society considers dangerous “are the last ones in whom to reinforce values that disregard the worth of other human beings.”<sup>301</sup> Prisoners subject to the extreme forms of deprivation at issue in *Brown v. Plata* and *Wilkinson v. Austin* absolutely require protection. All prisoners do. Prison officials are not the only actors capable of determining proportionate punishment and, in fact, some check on their exercise of discretion is both beneficial and essential to a more appropriately punitive, deterrent, and rehabilitative prison system.

CMU inmates—like most prisoners—are not the most appealing plaintiffs. Many have actually been convicted of having terrorist associations. But none of them, including Yassin Aref and Kifah Jayyousi, should have been transferred thousands of miles from their families without notice or justification. If the political branches do not have the will to remedy this injustice, the judiciary should.

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<sup>301</sup> John B. Mitchell, *The Ethics of the Criminal Defense Attorney—New Answers to Old Questions*, 32 STAN. L. REV. 293, 334 (1980).

