# EXHIBIT F

COMMENTS OF

CIVIL LIBERTIES GROUPS

BOP Docket No. 1135-P
RIN 1120-AB35

71 Fed. Reg. 16520-16525 (Apr. 3, 2006)

# "Limited Communication for Terrorist Inmates"

## Comments of

**American Civil Liberties Union**
**Center for National Security Studies**
**Comite Pro Derechos Humanos de Puerto Rico**
**D.C. Prisoners' Legal Services Project**
**Florida Institutional Legal Services, Inc.**
**Interfaith Prisoners of Conscience Project**
**The Legal Aid Society**
**Office of the Public Defender of Maryland**
**The Multiracial Activist**
**National Boricua Human Rights Network**
**National Lawyers Guild**
**Northwest Constitutional Rights Center**
**Penal Reform International**
**People's Law Office**
**Prison Legal News**
**Prisoners' Legal Services of New York**
**Sylvia Rivera Law Project**
**Uptown People's Law Center**

## Introduction

On April 3, 2006, the Bureau of Prisons proposed a new regulation imposing severe restrictions on the ability of persons in Bureau custody to communicate with the outside world. Although the regulation is titled "Limited Communication for Terrorist Inmates," the regulation can be applied to persons who have not been convicted, or even charged, with any act of terrorism, or indeed with any crime at all.

The regulation provides that a Bureau of Prisons Warden may determine, without external review, that a person in Bureau custody has "an identifiable link to terrorist-related activity." 28 CFR 540.200(a). Once a person is so designated, his or her communications with the outside world are all but eliminated. More specifically, the prisoner may communicate only with immediate family members, and those communications are limited as follows:

-One six-page letter per week.
-One fifteen-minute telephone call per month.
-One one-hour visit per month.

28 CFR 540.202(a); 540.203(a); 540.204(a)(1). There is no provision for communication with friends, relatives other than immediate family, or members of the news media.[1] According to the Notice of Proposed Rulemaking, the regulation is necessary "[t]o minimize the risk of terrorist-related communication being sent to or from inmates in Bureau custody." 71 Fed. Reg. 16522.

The regulation's blanket ban on communications with the news media and with most family members is unprecedented and almost certainly unconstitutional. Moreover, this ban will be imposed by prison officials, with no outside review. Finally, the ban is completely unnecessary, as existing law allows the Bureau to monitor the mail, telephone calls, and visits of persons in its custody. Such monitoring fully accommodates legitimate security concerns without trenching so heavily on the First Amendment rights of prisoners and those in the outside world who wish to communicate with them.

For all of these reasons, the regulation should be withdrawn.

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

The regulation applies not only to convicted persons, but to "inmates (as defined in 28 CFR 500.1(c))." 28 CFR 540.200(a). Section 500.1(c) in turn defines "inmate" as "all persons in the custody of the Federal Bureau of Prisons or Bureau contract facilities," including "persons held as witnesses, detainees, or otherwise." The regulation may accordingly be applied to persons who have not been convicted of, or even charged with, a crime of terrorism, or indeed any crime at all. Thus, while these Comments use the term "prisoner" for ease of reference, the regulation's reach is in fact far broader,

[1] Separate provision is made for communication with counsel and with designated federal officials. 28 CFR 540.202(a)(2), (b); 540.203(b); 540.204(b).

extending even to witnesses and to pretrial detainees clothed with the presumption of innocence.

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

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

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

Procunier v. Martinez, 416 U.S. 396, 408-409 (1974), overruled in part on other grounds, Thornburgh v. Abbott, 490 U.S. 401 (1989).

**The regulation completely and unconstitutionally bars prisoners from communicating with the news media.**

"The constitutional guarantee of a free press assures the maintenance of our political system and an open society, and secures the paramount public interest in a free flow of information to the people concerning public officials." Pell v. Procunier, 417 U.S. 817, 832 (1974) (internal quotation marks, citations omitted). But now, for the first time in modern history, the government proposes to completely bar a class of persons from communicating with the news media in any form. Such a ban is unprecedented in American jurisprudence and, under existing case law, is unconstitutional.

The Supreme Court has consistently assumed that communications between prisoners and members of the news media enjoy constitutional protection. See, e.g., Houchins v. KQED, Inc., 438 U.S. 1, 15 (1978) ("Respondents have a First Amendment right to receive letters from inmates criticizing jail officials and reporting on conditions") (plurality opinion). When the Court has sustained limitations on certain forms of media access to correctional facilities, it has always emphasized that alternative means of communication between prisoners and the press remained open. See, e.g., Saxbe v. Washington Post Co., 417 U.S. 843, 847 (1974) (upholding restrictions on media interviews with prisoners) ("In addition, newsmen and inmates are permitted virtually unlimited written correspondence with each other. Outgoing correspondence from inmates to press representatives is neither censored nor inspected. Incoming mail from press representatives is inspected only for contraband or statements inciting illegal action"); Pell, 417 U.S. at 824 (same) ("Thus, it is clear that the medium of written correspondence affords inmates an open and substantially unimpeded channel for communication with persons outside the prison, including representatives of the news media"). On those few occasions when prison officials attempted to restrict prisoners' written communications with the news media, the restrictions were held to be unconstitutional. See Owen v. Lash, 682 F.2d 648, 650-53 (7th Cir. 1982) (ban on correspondence with newspaper reporter was unconstitutional); Mujahid v. Sumner, 807 F. Supp. 1505, 1509-11 (D. Hawaii 1992) (ban on correspondence with members of the press unless they had been friends before the prisoner's incarceration was unconstitutional), aff'd, 996 F.2d 1226 (9th Cir. 1993); cf. Abu-Jamal v. Price, 154 F.3d 128, 136 (3d Cir. 1998) (enjoining application of rule against "engaging in a business or profession" to prisoner's writing for publication). Accordingly, the regulation – which bars prisoners from communicating with the news media by mail, by telephone, or via personal visits – is unconstitutional.

**The regulation imposes a total ban on communication with most family members.**

The Supreme Court has long recognized a right to intimate family association. Meyer v. Nebraska, 262 U.S. 390 (1923); see also M.L.B. v. S.L.J., 519 U.S. 102, 116 (1996) (noting the importance of associational rights including choices about marriage, family life and the upbringing of children); Moore v. City of East Cleveland, 431 U.S. 494, 499 (1977) (plurality opinion) (collecting cases regarding the constitutional protection afforded choices in matters of marriage and family life). Moreover, the Court has declined invitations to hold that this right is extinguished by incarceration. See Overton v. Bazzetta, 539 U.S. 126, 131-132 (2003) ("We do not hold, and we do not imply, that any right to intimate association is altogether terminated by incarceration or is always irrelevant to claims made by prisoners").

The regulation provides that the affected prisoners will be cut off from *all* communication with family members, except for spouses, parents, siblings, and children. See 28 CFR 540.201(d). Even with these immediate family members, communication is limited to one 15-minute telephone call per month; one one-hour visit per month; and one six-page letter per week. 28 CFR 540.202(a)(1), 540.203(a), 540.204(a)(1). Nor is the prisoner guaranteed even this extremely limited contact with immediate family

members; the regulation specifies that "additional limitations on ... communications" may be imposed as a result of "abusing or violating" the communication limits, a term that is not defined. 28 CFR 540.205(f).

Once again, this blanket ban on all contact with grandparents, grandchildren, aunts, uncles, cousins, and other relatives is unprecedented. In Bazzetta, the Supreme Court upheld various restrictions on prison visiting, including a two-year ban on all visits for prisoners who engaged in certain misconduct. The Court noted that, even for those prisoners denied all visiting, alternatives were available; "they and other inmates may communicate with persons outside the prison by letter and telephone." Bazzetta, 539 U.S. at 135. No such alternatives are available here.

The regulation's ban on all contact with relatives other than members of the nuclear family is almost certainly unconstitutional. "Ours is by no means a tradition limited to respect for the bonds uniting the members of the nuclear family. The tradition of uncles, aunts, cousins, and especially grandparents sharing a household along with parents and children has roots equally venerable and equally deserving of constitutional recognition." Moore, 431 U.S. at 504 (holding that constitution was implicated by ordinance that prevented a grandmother from living with her grandchild). Moreover, this ban is likely to fall with disproportionate weight upon members of racial and ethnic minorities. See Bryson and Casper, Coresident Grandparents and Grandchildren (U.S. Dep't of Commerce, Economics and Statistics Administration, May 1999), at 5 (Black children are more likely than others to be raised by grandparents).[2]

**The regulation is vague, contains no meaningful standards, and provides no review of the Bureau of Prisons' decision to bar a prisoner from communicating with family members and the news media.**

As already noted, the regulation may be applied to persons who have not been convicted of, or even charged with, a crime of terrorism, or indeed any crime at all. The only requirement is that the person "have an identifiable link to terrorist-related activity." 28 U.S.C. § 540.200(a), (b)(2).

The term "identifiable link" is not defined, and the definitions that are provided in the regulation are singularly unhelpful. "Engaging in terrorist-related activity" is defined, *inter alia*, as "[t]o solicit any individual ... [f]or membership in a terrorist-related organization." 28 U.S.C. § 540.201(b)(5)(ii). "Terrorist-related organization" is in turn defined as, *inter alia*, "a group of two or more individuals, whether organized or not, which engages in terrorist-related activities." 28 C.F.R. § 540.201(c)(3). Such circularity in defining the regulation's central terms inspires little confidence that the regulation will be applied in an intelligible and evenhanded manner. Rather, such vague, standardless language invites arbitrary, inconsistent, and discriminatory application of the regulation.

Moreover, the restrictions are to be imposed by the Warden of an individual correctional facility, with the approval of other Bureau officials. 28 CFR 540.205(c). There is no

[2] Available at http://www.census.gov/prod/99pubs/p23-198.pdf (visited May 30, 2006).

provision for review of this decision outside the Bureau. The Supreme Court has acknowledged the unfortunate propensity of some prison officials to suppress criticism and complaints by prisoners:

> The regulations invalidated by [the district] court authorized, inter alia, censorship of statements that 'unduly complain' or 'magnify grievances,' expression of 'inflammatory political, racial, religious or other views,' and matter deemed 'defamatory' or 'otherwise inappropriate.' These regulations fairly invited prison officials and employees to apply their own personal prejudices and opinions as standards for prisoner mail censorship. Not surprisingly, some prison officials used the extraordinary latitude for discretion authorized by the regulations to suppress unwelcome criticism. For example, at one institution under the Department's jurisdiction, the checklist used by the mailroom staff authorized rejection of letters 'criticizing policy, rules or officials,' and the mailroom sergeant stated in a deposition that he would reject as 'defamatory' letters 'belitting staff or our judicial system or anything connected with Department of Corrections.' Correspondence was also censored for 'disrespectful comments,' 'derogatory remarks,' and the like.

Martinez, 416 U.S. at 415. In light of this reality, it is unwise to allow the extremely severe restrictions contemplated by the regulation to be imposed by prison officials without any outside review.

Placing the decision solely in the hands of Bureau officials also raises serious questions of institutional competence. The regulation calls on the Warden to impose the restrictions upon a "determination that limiting the inmate's communication is necessary to ensure," *inter alia*, "national security." 28 CFR 540.205(b). Wardens are experts in maintaining prison order and security and preventing escape; they are not, by and large, experts in assessing threats to national security. Courts have acknowledged that the deference customarily due to prison officials does not apply when they act outside their core function of ensuring prison security. See, e.g., Walker v. Sumner, 917 F.2d 382, 387 (9th Cir. 1990) ("general protestations of concern for the welfare of the citizens of Nevada" were insufficient to justify involuntary testing of prisoners for HIV).

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

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

have the authority to open and read all non-privileged prisoner mail. 28 CFR 540.12, 540.14.

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

Indeed, there already exist specific provisions for limiting the communications of prisoners who are suspected of terrorist activity: the Special Administrative Measures (SAMs) set forth in 28 CFR part 501. The SAMs suffer from many of the same constitutional infirmities as the proposed regulation, but they do provide additional safeguards not present here. As explained in the Notice of Proposed Rulemaking:

> Under 28 CFR part 501, SAMs are imposed after approval by the Attorney General and are generally based on information from the FBI and the U.S. Attorney's Office (USAO), but are typically not based solely on information from internal Bureau of Prisons sources. Unlike 28 CFR part 501, the proposed regulations allow the Bureau to impose communication limits upon request from FBI or other Federal law enforcement agency, or if Bureau of Prisons information indicates a similar need to impose communication restrictions, *evidence which does not rise to the same degree of potential risk to national security or risk of acts of violence or terrorism which would warrant the Attorney General's intervention by issuance of a SAM.*

71 Fed. Reg. 16521 (emphasis added). This admission that the proposed regulation will dilute the standard for imposing these extraordinary restrictions on communication is troubling, particularly in the absence of any claim that the SAMs have proven inadequate to serve legitimate security needs.

**Conclusion**

The proposed regulation is poorly conceived, almost certainly unconstitutional, and entirely unnecessary. It should be withdrawn.

Respectfully submitted this 2nd day of June, 2006

David C. Fathi
Senior Staff Counsel
ACLU National Prison Project
915 15th St. N.W., 7th Floor
Washington, DC 20005
(202) 548-6609

Caroline Fredrickson
Director, ACLU Washington Legislative Office
915 15th Street NW
Washington, DC 20005

Kate Martin, Director
Center for National Security Studies
1120 19th Street, NW, Suite 800
Washington, DC 20036

Eduardo Villanueva, Esq.
Comite Pro Derechos Humanos de Puerto Rico
Apartado 9088
San Juan, Puerto Rico 00908-9088

Deborah M. Golden
D.C. Prisoners' Legal Services Project
2639 Connecticut Ave, NW, Suite 225
Washington, DC 20008

Christopher M. Jones
Executive Director
Florida Institutional Legal Services, Inc.
1010 B NW 8th Avenue
Gainesville, FL 32601

Rev. C. Nozomi Ikuta and Rev. Sala Nolan Gonzales, Co-Chairs
Interfaith Prisoners of Conscience Project
P.O. Box 770608
Lakewood, OH 44107

Steven R. Banks
John Boston
The Legal Aid Society
199 Water Street
New York, NY 10038

Lorenzo Bellamy
Counsel, Legislative Affairs
Office of the Public Defender of Maryland
6 St. Paul Street 14th Floor
Baltimore, MD 21202

James A. Landrith, Jr.
The Multiracial Activist
PO Box 8208
Alexandria, VA 22306-8208

Alejandro Luis Molina
National Boricua Human Rights Network
2038 W. Chicago Ave.
Chicago, IL 60622

Michael Avery, President
National Lawyers Guild
Professor, Suffolk Law School
120 Tremont Street
Boston, MA 02108

Alejandro Queral
Executive Director
Northwest Constitutional Rights Center
1020 S.W. Taylor St., Suite 449
Portland, OR 97205

Jenni Gainsborough
Director, Washington Office
Penal Reform International
1025 Vermont Ave., N.W., 3rd Floor
Washington, DC 20005

Jan Susler
People's Law Office
1180 N. Milwaukee
Chicago, IL 60622

Paul Wright, Editor
Prison Legal News
972 Putney Rd. PMB 251
Brattleboro, VT 05301

Susan Johnson
Executive Director
Prisoners' Legal Services of New York
114 Prospect Street
Ithaca, NY 14850

Pooja Gehi
Staff Attorney
Sylvia Rivera Law Project
322 8th Ave. 3rd Floor
New York , NY 10001

Alan Mills
Uptown People's Law Center
4413 North Sheridan
Chicago, IL 60640