March 17, 2009

Rules Unit
Office of General Counsel
Bureau of Prisons
320 First Street, NW
Washington, DC 205354

Re: Docket ID BOP-2009-0008, "Religious Beliefs and Practices: Chapel Library Materials," 74 Fed. Reg. 2913 (Jan. 16, 2009)

To Whom It May Concern:

Pursuant to Section 553 of the Administrative Procedure Act ("APA"),[1] the ACLU Washington Legislative Office, ACLU National Prison Project, Aleph Institute, American Jewish Committee, American Jewish Congress, Baptist Joint Committee for Religious Liberty, Friends Committee on National Legislation, General Board of Church and Society of the United Methodist Church, General Conference of Seventh-day Adventists, International CURE, Jewish Council for Public Affairs, Muslim Advocates, and Religious Action Center of Reform Judaism submit these comments in response to the Notice of Proposed Rulemaking ("NPRM") entitled "Religious Beliefs and Practices: Chapel Library Materials."[2]

"Prison walls do not form a barrier separating prison inmates from the protections of the Constitution,"[3] for, as Justice Thurgood Marshall stated, "[w]hen the prison gates slam behind an inmate, he does not lose his human quality; his mind does not become closed to ideas . . . . nor is his quest for self-realization concluded . . . . It is the role of the First Amendment . . . to protect those precious personal rights by which we satisfy such basic yearnings of the human spirit."[4] The materials at stake in the proposed regulation – religious publications contained in prison chapel libraries – help many prisoners fulfill these "basic yearnings of the human spirit,"[5] both their "right to receive information and ideas,"[6] and their liberty to practice religion "as their own consciences dictate[ ]."[7] The rule proposed in the notice would dramatically – and needlessly – expand the power of the Bureau of Prisons ("BOP") to purge chapel libraries of vital religious works. The rule must be revised substantially to comply with the Constitution and federal statutes.

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[1] 5 U.S.C. § 553.

[2] 74 Fed. Reg. 2913 (Jan. 16, 2009).

[3] *Turner v. Safley*, 482 U.S. 78, 84 (1987).

[4] *Procunier v. Martinez*, 416 U.S. 396, 428 (1974) (Marshall, J., concurring), *overruled in part on other grounds*, *Thornburgh v. Abbott*, 490 U.S. 401 (1989).

[5] *Id.*

[6] *Stanley v. Georgia*, 394 U.S. 557, 564 (1969).

[7] *Everson v. Bd. of Educ.*, 330 U.S. 1, 10 (1947).

While managing a prison requires a careful balance between legitimate security needs and the rights to free speech and free exercise of religion, Congress itself struck a more appropriate balance just last year when it enacted the Second Chance Act. Section 214 of the Second Chance Act articulates a narrow standard for removing expressive works from chapel libraries and explicitly forbids any attempt by BOP to "otherwise restrict prisoners' access to reading materials, audiotapes, videotapes, or any other materials made available in a chapel library."[8] As detailed below, the proposed regulation differs from the statute in that it creates a less rigorous overarching standard for censoring materials in chapel libraries and because it inserts two additional bases for such censorship.[9] These departures from the plain language of the statute violate the Second Chance Act because they "otherwise restrict prisoners' access"[10] to materials in prison chapel libraries by purporting to expand BOP's censorial power. The expansion of such power also violates statutory protections for religious exercise and the constitutional right to free speech.[11]

In addition to these substantive problems, the proposed regulation suffers from troubling procedural deficiencies. The First Amendment and Due Process Clause require that prison officials provide notice to both prisoners and publishers when censorship occurs and that high-level officials make the sensitive decisions about which materials to censor.[12] The proposed rule creates the possibility of censorship by low-level staff and lacks any provision for notice to prisoners or publishers when a book is banned.[13] The failure to require notice becomes especially alarming because a prisoner's opportunity to file a grievance protesting censorship will almost always expire before the prisoner has any idea that a book has been removed.[14]

A. The Standard for Censorship in the Proposed Regulation Violates Statutory and Constitutional Requirements

1. The Proposed Standard for Censorship Violates the Second Chance Act

While the NPRM asserts that BOP proposed the new rule "in connection with passage of the Second Chance Act,"[15] the proposed rule violates the statute on its face. Section 214 of the Second Chance Act allows BOP to restrict *only*: "(1) any materials in a chapel library that seek to incite, promote, or otherwise suggest the commission of violence or criminal activity; and (2) any other materials prohibited by any other law or regulation."[16] The statute explicitly bans any

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[8] Second Chance Act of 2007, PL 110-199, § 214 (a), 122 Stat. 683 (2008).

[9] *See infra* pp. 2-5.

[10] Second Chance Act, § 214 (a).

[11] *See infra* pp. 6 n.36 & 7-8.

[12] *See infra* pp. 8-12.

[13] *See infra* pp. 8-12.

[14] *See infra* p. 9.

[15] 74 Fed. Reg. at 2913.

[16] Second Chance Act, § 214(a).

further attempt "*by whatever designation* that seeks to ... restrict prisoners' access to reading materials."[17]

The legislative history of the Second Chance Act confirms that Congress intended to sharply limit BOP's censorial power by creating a strict standard. Congress enacted Section 214 in the face of public outrage against BOP's Standardized Chapel Library Project ("SCLP"), which aimed to create a standardized and exclusive list of "acceptable" publications that chapel libraries could maintain.[18] The SCLP unleashed a firestorm of criticism from a broad spectrum of individuals and groups, with the *New York Times* reporting that "Republican lawmakers, liberal Christians and evangelical talk shows all criticized the government for creating a list of acceptable religious books."[19] The extensive list of critics included, among many others, a group of over 100 Republican U.S. Representatives, a former Bush Administration official, the American Library Association, evangelical groups, and Jewish Rabbis.[20] The SCLP also provoked a class action lawsuit (with a Christian and an Orthodox Jew as the named plaintiffs) alleging that BOP had undertaken an "indiscriminate dismantling of religious libraries," purging

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[17] *Id.*, § 214(a) (emphasis added).

[18] *Id.*

[19] *See* Neela Banerjee, *Prisons to Restore Purged Religious Books*, N.Y. TIMES (Sept. 26, 2007), *available at* www.nytimes.com/2007/09/26/us/27cnd-prisons.html?_r=1.

[20] *See, e.g.*, Letter from U.S. Representatives Jeb Hensarling, Joe Pitts, and Don Manzullo to Director Harley Lappin (Sept. 17, 2007), *available at* rsc.tomprice.house.gov/News/DocumentSingle.aspx?DocumentID=101500 (Republican Study Committee, a group of over 100 Republican U.S. Representatives, criticizes the SCLP and states: "No matter how well intentioned, a government project to limit books and other material deemed religious raises serious issues with respect to the religious liberties of Americans."); Bob Moore, *Throwing the Baby Out with the Bath Water*, 12 NATIONAL LIBERATOR 24-27 (2007) (noting that under the SCLP, "[b]ooks about the Talmud, Kabbalah, and Jewish Law and Tradition vanished from the shelves" and describing the Aleph Institute's role in opposing the SCLP, including meeting with the Deputy Attorney General); Michael Gerson, "Prison Library Purge," WASH. POST (Sept. 14, 2007), *available at* www.washingtonpost.com/wp-dyn/content/article/2007/09/13/AR-2007091301414.html (stating that "the immediate effect of the [SCLP] has been to decimate prison libraries collected over decades"); *id.* (citing criticism of SCLP by ACLU attorney); American Library Association, "American Library Association President Loriene Roy Releases Statement on Removal of Religious Texts from Prison Libraries" (Sept. 24, 2007), *available at* ala.org/ala/newspresscenter/news/pressrel-eases2007/september2007/pll07.cfm (stating "[w]e are outraged to learn that the Bureau of Prisons is removing religious texts from prison chapel libraries based solely on whether or not the books are on a short list of 'approved' religious books."); Letter from Rabbi David Saperstein to Director Harley Lappin (Sept. 11, 2007), *available at* http://rac.org/Articles/index.cfm?id=2521 (stating, on behalf of Union for Reform Judaism, an organization consisting of over 900 congregations and 1800 rabbis, "[a]lthough we certainly recognize the need to maintain order within our nation's prisons, it appears from the press reports that in pursuit of that legitimate goal the Bureau has greatly, and unnecessarily, reduced prisoner's access to religious texts."); Prison Fellowship, "Religious Books Purged from Prison Libraries" (Sept. 19, 2007), *available at* www.justicefellowship.org/contentindex.asp?ID=7060 (condemning the SCLP as "terribly overbroad").

titles ranging from Maimonides' *Code of Jewish Law* to *The Purpose-Driven Life* by Reverend Rick Warren, who recently delivered the invocation at the Inauguration of President Obama.[21]

In response to widespread condemnation of the SCLP, Section 214 of the Second Chance Act ordered BOP to abandon the SCLP, requiring that "[n]ot later than 30 days after the enactment of this Act, the Director of the Bureau of Prisons shall discontinue the Standardized Chapel Library project."[22] But Congress was not content to eliminate this program alone or to allow BOP to define the standard for removing books from chapel libraries. Congress specifically forbade all other attempts by BOP to restrict publications in chapel libraries by prohibiting "*any other project by whatever designation* that seeks to ... restrict prisoners' access to reading materials, audiotapes, videotapes, or any other materials made available in a chapel library."[23] Congress crafted only a narrow exception to this sweeping and categorical command, stating that restrictions are impermissible "except that the Bureau of Prisons may restrict access to – (1) any materials in a chapel library that seek to incite, promote, or otherwise suggest the commission of violence or criminal activity; and (2) any other materials prohibited by any other law or regulation."[24]

Despite the clear language and legislative history of the Second Chance Act, three elements of the proposed rule "restrict prisoners' access to reading materials"[25] in chapel libraries more severely than the statute:

- *The "Could Incite" Provision*: Congress allowed BOP to restrict access only to materials that "*seek to* incite, promote, or otherwise suggest the commission of violence or criminal activity."[26] By contrast, the watered-down standard in the proposed rule allows any book to be banned based on a mere determination that it "*could incite*," or even "*could ... suggest*" violence or criminal activity, regardless of whether there is any intent to cause violence or

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[21] Complaint, *Milstein v. Federal Bureau of Prisons*, No. 07-7434 (S.D.N.Y. filed Aug. 21, 2007), at 2-3.

[22] Second Chance Act, § 214(a).

[23] *Id.*, § 214 (emphasis added).

[24] *Id.* While Section 214 allows BOP to restrict "any other materials prohibited by any other law or regulation," *id.*, no such law or regulation applies. The only provisions cited in the NPRM are (1) 18 U.S.C. § 4042(a), which does not prohibit or even refer to expressive materials, and (2) 28 C.F.R. § 548.15, which states "[n]o one may disparage the religious beliefs of an inmate, nor coerce or harass an inmate to change religious affiliation," obviously referring to statements by live people rather than religious works. Nor could BOP rely on language in Section 214 of the Second Chance Act that states, "[n]othing in this section shall be construed to impact policies of the Bureau of Prisons related to access by *specific prisoners* to materials for security, safety, sanitation, or disciplinary reasons." Second Chance Act, § 214(b) (emphasis added). Removing books from a chapel library affects all prisoners in a facility, and therefore does not qualify as a restriction aimed at "specific prisoners." *Id.*

[25] Second Chance Act, § 214(a)

[26] *Id.* (emphasis added).

even a reasonable possibility that violence will result.[27] Under this standard, any number of vital religious works that do not *seek to* incite or promote violence or criminal activity might be banned because, *theoretically*, they *could* suggest it to a reader. *E.g.*, *Deuteronomy* 17:5 (Revised Standard Version) (Moses commands Israelites that if a person has worshipped untrue gods, "then you shall bring forth to your gates that man or woman who has done this evil thing, and you shall stone that man or woman to death with stones."); *Hosea* 13:16 (Revised Standard Version) ("Sama'ria shall bear her guilt, because she has rebelled against her God; they shall fall by the sword, their little ones shall be dashed in pieces, and their pregnant women ripped open."); Qur'an 005.033 ("The punishment of those who wage war against Allah and His Messenger, and strive with might and main for mischief through the land is: execution, or crucifixion, or the cutting off of hands and feet from opposite sides, or exile from the land..."); Reverend Martin Luther King, Jr., "Letter from Birmingham Jail" (Apr. 16, 1963) ("You express a great deal of anxiety over our willingness to break laws ... I would agree with St. Augustine that 'an unjust law is no law at all.'").

- *The Intolerant Speech Ban*: The proposed rule empowers BOP to censor books seen as "[a]dvocating or fostering violence, vengeance, or hatred toward particular religious, racial, or ethnic groups."[28] The statute contains no such language.

- *The Subversive Advocacy Ban*: The proposed rule would allow BOP to censor expressive works viewed as "[u]rging the overthrow or destruction of the United States."[29] Again, the statute creates no such authority.

Should the proposed rule become final, it would fail judicial review because it purports to expand BOP's power beyond the limits plainly stated in the Second Chance Act and confirmed by the legislative history. Section 706 of the Administrative Procedure Act commands invalidation of illegal regulations,[30] and courts "must reject administrative constructions which are contrary to clear congressional intent" or the plain language of a statute.[31]

The fact that Congress legislated in an area that implicates the free speech and free exercise guarantees of the First Amendment renders fidelity to the statute all the more important. Although prisoners do not have the same free speech rights as non-prisoners under the *Turner* standard,[32] the right to criticize the government is a paramount constitutional right, and one that

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[27] Proposed § 548.21(b) (emphasis added).

[28] Proposed § 548.21(c)(1).

[29] Proposed § 548.21(c)(1).

[30] 5 U.S.C. § 706 (requiring reviewing court to "hold unlawful and set aside agency action" that is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law" or "in excess of statutory jurisdiction, authority, or limitations").

[31] *Chevron v. NRDC*, 467 U.S. 837, 843 n.9 (1984).

[32] *See Turner v. Safley*, 482 U.S. 78 (1987).

religious groups have exercised.[33] Because there is a fine line between speech that merely criticizes the government and speech that incites illegal activity, the Supreme Court has "consistently recognized" a constitutional "distinction between advocacy of abstract doctrine and advocacy directed at promoting unlawful action."[34] Overly restrictive laws against incitement would paralyze the marketplace of ideas because, on some level, "[e]very idea is an incitement."[35] In diluting the standard mandated by the Second Chance Act, the proposed regulation rejects Congress's attempt to balance two critical interests – prison security and this nation's commitment to free speech, particularly in the realm of religious faith.[36]

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[33] *New York Times v. Sullivan*, 376 U.S. 254, 276 (1964) (stating that "restraint ... imposed upon criticism of government and public officials" is "inconsistent with the First Amendment").

[34] *Yates v. United States*, 354 U.S. 298, 318 (1957), *overruled on other grounds*, *Burks v. United States*, 437 U.S. 1 (1978); *see also Brandenburg v. Ohio*, 395 U.S. 444, 444-45, 449 (1969) (striking down Ohio statute prohibiting "advocat[ing] ... the duty, necessity, or propriety of crime, sabotage, violence, or unlawful methods of terrorism as a means of accomplishing industrial or political reform" because the statute "purports to punish mere advocacy").

[35] *Gitlow v. New York*, 268 U.S. 652, 673 (1925) (Holmes, J., dissenting); *see also Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting). The views expressed by Justice Holmes in these dissents were later adopted by the Court in *Brandenburg*. *See United States v. Williams*, 128 S.Ct. 1830, 1855 (2008) (Souter, J., dissenting) ("[O]ne of the milestones of American political liberty is [*Brandenburg*], which is seen as the culmination of a half century's development that began with Justice Holmes's dissent in *Abrams v. United States*.").

[36] Moreover, the blanket Intolerant Speech Ban directly violates the First Amendment. The rule would prohibit "[a]dvocating or fostering violence, vengeance, *or* hatr ed" toward religious, racial, or ethnic groups, Proposed § 548.21(c)(1) (emphasis added), and the disjunctive phrasing suggests that BOP may remove a book that discusses hatred or intolerance even if it does *not* advocate violence. While prisons may restrict materials that advocate racial violence or are likely to incite it, *see Murphy v. Missouri Dept. of Corrections*, 814 F.2d 1252, 1257 (8th Cir. 1987), "prison authorities have no legitimate penological interest in excluding religious books from the prison [chapel] library merely because they contain racist views. Courts have repeatedly held that prisons may not ban all religious literature that reflects racism." *McCabe v. Arave*, 827 F.2d 634, 638 (9th Cir. 1987); *see also Williams v. Brimeyer*, 116 F.3d 351, 354 (8th Cir. 1997) (holding that prison violated prisoner's First Amendment rights by banning Church of Jesus Christ Christian publications that advocated racial separatism, affirming award of punitive damages, and stating, "[t]he incoming publications did not counsel violence, and there is no evidence that they have ever caused a disruption. Certainly the views expressed in the publications are racist and separatist, but religious literature may not be banned on that ground alone"); *Aikens v. Jenkins*, 534 F.2d 751, 756 (7th Cir. 1976) (holding prison regulation overbroad because "[t]he phrase 'material that seriously degrades race or religion' is not narrow enough to reach only that material which encourages violence") (citation omitted); *Nichols v. Nix*, 810 F. Supp. 1448, 1452-53 (S.D. Iowa 1993) (holding that prison violated prisoners' First Amendment rights by banning publications that did not advocate violence but did make a series of offensive and racist assertions), *aff'd*, No. 93-1490, 1994 WL 20653 (8th Cir. Jan. 28, 1994). The First Amendment protects the expression even of hateful ideas, particularly ones grounded in religious belief, for "[i]n the realm of religious faith ... sharp differences arise ... To persuade

2. The Proposed Standard for Censorship Violates Statutory Protections for the Free Exercise of Religion

Any attempt to dilute the standard mandated by the Second Chance Act and to expand censorship of religious works also violates the Religious Freedom Restoration Act ("RFRA"),[37] which protects prisoners' right to practice their religions. Not only did Congress enact RFRA, but after the Supreme Court struck down RFRA as applied to state governments,[38] Congress responded by providing special protections for state prisoners' religious exercise through the Religious Land Use and Institutionalized Persons Act ("RLUIPA").[39]

In enacting RLUIPA, Congress found that 'frivolous or arbitrary' barriers impeded institutionalized persons' religious exercise," and heard testimony that religious texts such as "the Bible, the Koran, the Talmud ... were frequently treated with contempt and were confiscated, damaged or discarded' by prison officials."[40] In response, Congress mandated that the government cannot impose a substantial burden on a prisoner's religious exercise unless the burden is the least restrictive means of furthering a compelling governmental interest.[41] The same standard applies to federal prisoners under RFRA.[42]

Censoring religious books in chapel libraries constitutes a substantial burden and strikes at the core of religious exercise because, for many a prisoner, "his books and his religion are one

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others to his own point of view, the pleader, as we know, at times, resorts to exaggeration, to vilification of men . . . and even to false statement." *Cantwell v. Connecticut*, 310 U.S. 296, 310 (1942). The Supreme Court held in *Beard v. Banks*, 548 U.S. 521, 531 (2006), that prison officials may, in some cases, curtail access to reading materials by "particularly difficult prisoners" to create incentives for improved behavior, but *Beard* does not apply here because the proposed regulation affects all prisoners and therefore provides no motivation for better discipline.

[37] 42 U.S.C. § 2000bb *et seq.*

[38] *See City of Boerne v. Flores*, 521 U.S. 507 (1997).

[39] 42 U.S.C. § 2000cc-1 *et seq.*

[40] *Cutter v. Wilkinson*, 544 U.S. 709, 716 & n.5 (2005) (quoting 146 Cong. Rec. 16698, 16699 (2000) (joint statement of Sen. Hatch and Sen. Kennedy on RLUIPA) & Hearing on Protecting Religious Freedom After *Boerne v. Flores* before the Subcommittee on the Constitution of the House Committee on the Judiciary, 105th Cong., 2d Sess., pt. 2, at 58-59 (1998) (prepared statement of Donald W. Brooks, Reverend, Diocese of Tulsa, Oklahoma)).

[41] RFRA applies to BOP prisoners because although the Supreme Court struck down RFRA as applied against *state* governments in *City of Boerne v. Flores*, RFRA continues to apply against the federal government, and hence federal prisoners. *See Cutter*, 544 U.S. at 715 & n.2.

[42] Both RFRA and RLUIPA create the same standard – a substantial burden on religious exercise is impermissible unless it is both "in furtherance of a compelling governmental interest" and "the least restrictive means of furthering that compelling governmental interest." 42 U.S.C. § 2000bb-1 (RFRA provision); 42 U.S.C. § 2000cc-1 (RLUIPA provision); *see also Cutter*, 544 U.S. at 716-17.

and the same; his religion is destroyed in the absence of his religious books."[43] Indeed, "distribution of religious tracts is an age-old form of missionary evangelism – as old as the history of printing presses,"[44] and "[t]his form of religious activity occupies the same high estate under the First Amendment as do worship in the churches and preaching from the pulpits."[45]

The substantial burden that would result from censorship under the proposed regulation is not the least restrictive burden that would further any compelling government interest – indeed *Congress itself has already mandated* the less-restrictive standard contained in Section 214 of the Second Chance Act. In litigation challenging the regulation, BOP would not be heard to argue that even though Congress strictly limited BOP's censorial power through the Second Chance Act, and even though BOP then assumed greater authority through regulation, the more expansive power claimed by regulation is still the least restrictive alternative under RFRA.[46]

> **Recommendation:** The path out of the constitutional and statutory thicket described above is clear: BOP should follow the language of the Second Chance Act. This requires removing the Could Incite Provision and stating that BOP may "restrict access to" (1) "reading materials, audiotapes, videotapes, or any other materials made available in a chapel library" if such materials "seek to incite, promote, or otherwise suggest the commission of violence or criminal activity," and (2) "any other materials prohibited by any other law or regulation."[47] BOP must also remove the surplussage introduced by the Subversive Advocacy Ban and the Intolerant Speech Ban.

B. The Lack of Notice Requirements Violates Prisoners' Right to Due Process

Prison officials who block access to a particular expressive work – including a letter or a magazine – must notify the prisoner when the censorship occurs. The Supreme Court has held that "the decision to censor or withhold delivery of a particular letter [to a prisoner] must be

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[43] *Washington v. Klem*, 497 F.3d 272, 282 (3d Cir. 2007) (finding a substantial burden under RLUIPA where prison did not allow prisoner to read twenty-eight "Afro-centric" books per week, as his religion required).

[44] *Watchtower Bible and Tract Soc'y of New York, Inc. v. Village of Stratton*, 536 U.S. 150, 161 (2002) (quotation omitted).

[45] *Id.*

[46] The proposed rule may also violate the Free Exercise Clause by discriminating against religious exercise. Rather than articulating an overarching standard for censorship of non-religious libraries, BOP policy requires the Supervisor of Education at each institution to "develop written guidelines to define principles, purposes, and criteria used for selection and maintenance of library materials." Program Statement 1542.06, at 3. If such standards for non-religious libraries permit less censorship than the proposed standard for chapel libraries, the proposed rule violates the non-discrimination requirement of the Free Exercise Clause. "At a minimum, the protections of the Free Exercise Clause pertain if the law at issue discriminates against some or all religious beliefs...." *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 532 (1993).

[47] Second Chance Act, § 214.

accompanied by minimum procedural safeguards," including notice to the prisoner and author,[48] and numerous federal appellate courts have held that prison officials must provide notice to prisoners and publishers when a prisoner is denied access to a publication.[49] There is no reason that these due process requirements would not attach to expressive works removed from a chapel library. Such procedural due process protections "'insure that the government treads with sensitivity in areas freighted with First Amendment concerns.'"[50] The proposed rule violates procedural due process because it lacks any requirement that BOP notify prisoners when it removes religious works from chapel libraries.

The due process violations that would result from lack of notice become all the more alarming when read in conjunction with the BOP grievance rules already in effect. A prison grievance system should not "create procedural requirements for the purpose of tripping up all but the most skillful prisoners."[51] However, BOP Prisoners have only "20 calendar days following the date on which the basis for the Request occurred" to submit a formal grievance.[52] An extension in filing time *"may* be allowed" if "the inmate demonstrates a valid reason for delay,"[53] but nothing in the applicable regulations or Program Statement guarantee that if BOP fails to provide notice regarding censorship, a prisoner will be deemed to have a "valid reason" for filing a grievance outside the twenty-day window. In short, lack of notice could result in prisoners' losing their opportunity to obtain administrative review of BOP censorship.

Amending the proposed rule to require notice when books are removed from chapel libraries would be consistent with current BOP policy on incoming publications, which ensures notice to the prisoner and the publisher, an opportunity for both the prisoner and the publisher to appeal if delivery is denied, and preservation of the disputed material during the review

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[48] *Procunier*, 416 U.S. at 417.

[49] *E.g.*, *Bonner v. Outlaw*, 552 F.3d 673, 677 (8th Cir. 2009) ("It is the inmate's interest in 'uncensored communication' that is the liberty interest protected by the due process clause, regardless of whether that communication occurs in the form of a letter, package, newspaper, magazine, etc. Thus, whenever prison officials restrict that right by rejecting the communication, they must provide minimum procedural safeguards...."); *Jacklovich v. Simmons*, 392 F.3d 420, 433 (10th Cir. 2004) ("[B]oth inmates and publishers have a right to procedural due process when publications are rejected."); *Montcalm Publ'g Corp. v. Beck*, 80 F.3d 105, 109 (4th Cir. 1996) (both prisoner and publisher must receive notice where prison officials deny prisoners' access to a publication); *Hopkins v. Collins*, 548 F.2d 503, 504 (4th Cir. 1977) (prisoner entitled to "appropriate notice" when prison censors Black Panther newsletter); *Krug v. Lutz*, 329 F.3d 692, 697 n.4 (9th Cir. 2003) (procedural protections required "even in cases where the publications at issue could be construed as allegedly obscene"); *Prison Legal News v. Cook*, 238 F.3d 1145, 1152 (9th Cir. 2001) (censorship of subscription publications entitles both prisoners and publishers to "notice and administrative review").

[50] *Krug*, 329 F.3d at 697 n.4 (quoting *Chicago Teachers Union v. Hudson,* 475 U.S. 292, 303 n.12 (1986)).

[51] *Woodford v. Ngo*, 548 U.S. 81, 102 (2006).

[52] 28 C.F.R. § 542.14(a); BOP Program Statement P1330.16, at 5.

[53] 28 C.F.R. § 542.14(b); BOP Program Statement P1330.16, at 5-6.

process.[54] Denying such notice when BOP removes materials from chapel libraries would hardly reflect the spirit of open government and "[t]he presumption of disclosure" that President Obama announced on his first day in office.[55]

The lack of notice provisions also threatens to lull BOP officials into the mistaken belief that notice is not constitutionally required, potentially provoking a wave of meritorious litigation against BOP. Because the Prison Litigation Reform Act ("PLRA") requires prisoners to exhaust only "such administrative remedies as are available,"[56] and because the lack of notice contemplated by the proposed rule combined with the twenty-day grievance period already in effect threatens to run out the clock before prisoners even know a violation has occurred, prisoners would have every right under the PLRA to disregard the administrative process and proceed directly to court on claims that BOP improperly removed religious works.[57]

> **Recommendation:** To comply with due process requirements, BOP should amend the regulation to ensure proper notice to prisoners when a publication is removed from a chapel library. Assuming that it would not be feasible to provide individual notice to each prisoner every time a publication is removed from the facility's chapel library, each chapel library should maintain and prominently display an up-to-date list of titles that have been removed, including the date on which each title first appeared on the list.
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> Furthermore, because prisoners often will not visit the chapel library and view the list frequently enough to comply with the twenty-calendar-day deadline (*i.e.*, to learn that a book has been removed, to pursue informal resolution required by BOP rules, *and* to file a formal grievance[58]), the regulation should either (1) specify that, for purposes of grievances regarding censored materials, the twenty-day period begins to run when a prisoner receives *actual* notice of the censorship, or (2) substantially extend the twenty-day deadline for grievances regarding such censorship.

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[54] 28 C.F.R. 540.71 (d) & (e); Program Statement 5266.10, at 5-6.

[55] Presidential Memorandum on Freedom of Information Act (Jan. 21, 2009) ("The presumption of disclosure … means that agencies should take affirmative steps to make information public.").

[56] 42 U.S.C. § 1997e(a); *Woodford*, 548 U.S. at 88.

[57] *E.g.*, *Timberlake v. Buss*, 2007 WL 1280659, No. 1:06-cv-1859, at *3 (S.D. Ind. May 1, 2007) (holding that prisoner need not exhaust administrative challenges to execution protocols of which he had no notice because "[p]rison and jail officials may not take unfair advantage of the exhaustion requirement. The evidence in this case does not show that the defense has been satisfied because there is no evidence that Woods was aware, or even that he should have been aware, of the execution protocols.").

[58] 28 C.F.R. § 542.13(a) & 542.14(a) (stating that "an inmate shall first present an issue of concern informally to staff" before filing a formal grievance, and the twenty-day deadline for filing the formal grievance starts on "the date on which the basis for the Request occurred," not on the date when attempts at informal resolution are concluded).

BOP facilities must also retain the disputed materials for a sufficient period of time to ensure that they are not destroyed before a prisoner has an opportunity to learn of and challenge the censorship.

Finally, in cases where a prisoner requests that the prison obtain a specific expressive work for a chapel library and the request is denied, the rule should clarify that the prisoner must be notified and informed of his or her right to grieve.

C. The Lack of Notice Requirements Violates Publishers' Right to Due Process

Separate from and in addition to prisoners' right to receive notice when officials censor an expressive work, courts have uniformly held that publishers also have a right to such notice.[59] Publishers' due process right to notice arises from their independent First Amendment interest in communicating with prisoners, for "[t]here is no question that publishers who wish to communicate with those who ... willingly seek their point of view have a legitimate First Amendment interest in access to prisoners."[60]

Notice to publishers is also a practical necessity because prisoners' lack of access to banned materials limits their ability to effectively contest the censorship. "An inmate who cannot even see the publication can hardly mount an effective challenge to the decision to withhold that publication, and while the inmate is free to notify the publisher and ask for help in challenging the prison authorities' decision, the publisher's First Amendment right must not depend on that."[61]

Recommendation: BOP should amend the proposed regulation to state that whenever a chapel library removes a publication, BOP shall provide written notice to the publisher. Such notice must be in addition to notice provided to prisoners.

D. The Proposed Rule Fails to Specify a Decision-Maker and Raises the Specter of Censorship by Low-Level Officials

The Proposed Rule states that "[m]aterial may be excluded from the chapel library *if it is determined* that such material could incite, promote, or otherwise suggest the commission of violence or criminal activity,"[62] but the proposed regulation does not specify who makes the determination. The final regulation should clarify that the decision to remove a publication must be made by senior officials in BOP's Central Office.

While the realities of prison security may in some cases require official censorship, the sensitivity of the task requires the expertise of high-level officials. Indeed, in the very report cited in the NPRM as a basis for the proposed rule,[63] the Office of the Inspector General ("OIG")

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[59] *See, e.g.*, *Jacklovich v. Simmons*, 392 F.3d at 433; *Montcalm Publ'g Corp. v. Beck*, 80 F.3d at 109; *Prison Legal News*, 238 F.3d at 1152.

[60] *Thornburgh*, 490 U.S. at 408.

[61] *Montcalm Publ'g Corp.*, 80 F.3d at 109; *see also Jacklovich*, 392 F.3d at 433 (procedures for notifying the publisher are required because otherwise, "the publisher may never know (or know well after the fact) that the publication has been rejected by the facility.").

[62] Proposed § 548.21(b) (emphasis added).

[63] 74 Fed. Reg. at 2914.

found that "many correctional officers are not familiar with Islam, ... that this lack of knowledge may limit their ability to recognize radical Islamist messages that are inappropriate in BOP facilities," and that BOP staff needed "basic training" to "understand Islamic terminology and recognize messages that violate BOP security policy."[64]

The Supreme Court in *Thornburgh v. Abbott* upheld a regulation that limited prisoners' First Amendment right to access communications in part because the Supreme Court was "comforted" by the fact that high-level officials made case-by-case decisions about which publications to censor.[65] Like the regulations in *Thornburgh*, the proposed rule would require an official to balance First Amendment rights against the risk that expressive works will promote "criminal activity,"[66] a sensitive task that demands the experience and sound judgment of senior officials.

Before deciding to remove a book from a chapel library, the Central Office should also consult with BOP chaplains, who are more likely to have an understanding of religious doctrines and practices. Drawing on the expertise of BOP chaplains before removing books would be consistent with the review that occurs under current BOP policy when a book is first donated to a chapel library – chaplains provide advice on "the suitability of accepting donations of religious audio or video tapes, books, newspapers, periodicals, and magazines offered for donation by religious organizations."[67]

> **Recommendation:** The regulation should clarify that high-level officials in BOP's central office have the non-delegable authority to order the removal of publications from chapel libraries. To promote informed decisionmaking in the sensitive area of religious belief and expression, the regulation should further specify that a decision to remove a publication from a chapel library must be made in consultation with BOP chaplains. Of course, centralized decisionmaking should not require BOP to find that a publication unsuitable for one prison is unsuitable for all prisons – that approach would merely replicate the flaws of the Standardized Chapel Library Project.

E. Conclusion

The proposed rule needlessly deprives prisoners of access to vital religious works. BOP should promulgate a final rule with revisions sufficient to address the concerns discussed above.

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[64] Office of the Inspector General, U.S. Dep't of Justice, *A Review of the Federal Bureau of Prisons' Selection of Muslim Religious Services Providers* (April 2004), at 54.

[65] 490 U.S. at 416 (1989).

[66] Proposed 28 C.F.R. § 548.21(b); *Thornburgh*, 490 U.S. at 416.

[67] BOP Program Statement 1350.02, at 4-5.

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