

laundering, tax evasion and a variety of other nonviolent crimes. He had no terrorism convictions or charges.)

In his letter Dhafir reported that at the time there were sixteen men in the CMU, fourteen of whom were Muslims and all but one of those were Arab. They had been told by prison officials that the unit was an experiment. Written material they received informed them that they would be entitled to one fifteen-minute call a week, that their communications had to be in English only and that their visits would all be noncontact; it made no mention of "terrorism." According to Dhafir, the inmates were particularly devastated at the prospect of not being able to hug or kiss their families and of having so little time to talk with them. For those who didn't speak English, there was particular panic.

Legal advocates were shocked by the discovery—and by the BOP's impunity. According to William Luneburg, former chair of the American Bar Association's administrative law practice section and a professor of administrative law, the BOP action was "grossly irregular" and arguably illegal. "It is not a normal thing for agencies legally bound by the APA to

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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." Or as David Shapiro of the ACLU's Prison Project says, "Essentially these CMUs are being operated in the absence of any rules or policies that authorize them."

The media, however, paid scant attention to the CMUs, save for a few articles, the most notable by Dan Eggen in the *Washington Post*, which Jenny found during her frantic Internet search for information. All the articles noted that the CMUs were almost entirely filled with Muslim and Arab prisoners.

Then in March 2008, the BOP established by memo a second CMU, at Marion. Two months later, Daniel McGowan, who is neither Muslim nor Arab, was moved there. In June 2008, Andy Stepanian, another non-Arab, non-Muslim low-security inmate, was sent to Marion for the last six months of his three-year sentence for conspiring to violate the Animal Enterprise Protection Act of 1992. The only notice he received after his transfer said that he "has known connections to Stop Huntingdon Animal Cruelty (SHAC) and the Animal Liberation Front (ALF), groups considered to be domestic terrorist organizations." "Enhanced review and control of inmate communications," it claimed, "is required to assure the safe functioning of the correctional facility, surrounding community and American public."

According to Stepanian, prison staff referred to non-Arab and non-Muslim inmates as "balancers." One white guard comforted Stepanian, who had received biweekly visits from his fiancée at his previous prison, saying, "You're nothing like these Muslims. You're just here for balance. You're going to go home soon."

Based on these and similar reports, observers began to speculate that because of criticism, the BOP was trying to improve the CMUs' racial and ethnic demographics. The BOP, however, told *The Nation*, "Race, religion and ethnicity are not a basis for designation decisions." Nonetheless, as of this writing, the BOP reports that eighteen of thirty-three prisoners at Terre Haute (55 percent) and twenty-three of thirty-six at Marion (64 percent) are Muslim. Muslims make up just 6 percent of the federal prison population.

The BOP declined to disclose the CMU inmates' names or convictions. It did, however, provide a partial list of "examples" of activities that might land an inmate inside a CMU, including being convicted of or associated with international or domestic terrorism; repeated attempts to contact victims or witnesses; a history of soliciting minors for sexual activity; a court-ordered communication restriction; coordinating illegal activities from inside prison and a disciplinary history that includes continued abuse of communications methods. According to the BOP, twenty-four (73 percent) and twenty-three (64 percent) of the inmates at Terre Haute and Marion, respectively, were assigned to the CMUs because of terrorism-related reasons.

As the populations of the CMUs grew, civil rights groups like the Center for Constitutional Rights began to receive letters from inmates. Eventually, CCR attorneys Alexis Agathocleous and Rachel Meeropol communicated with a majority of the inmates. They quickly noticed that in many cases there was nothing in inmates' disciplinary records—many of which were clean—or security-level designations that would suggest they warranted such drastic isolation. Indeed, convicted terrorists like Times Square bomber Faisal Shahzad and shoe bomber Richard Reid are housed not in a CMU but in high and maximum security prisons in Colorado. Many of the CMU inmates will eventually be released; eleven already have been. Nine others have been transferred back to general population housing.

Of the CMU inmates who are there because of a link to terrorism, Meeropol says, "The vast majority of these folks are there due to entrapment or material support convictions. In other words, terrorism-related convictions that do not involve any violence or injury."

Bound by confidentiality, Meeropol declined to name these inmates, but *The Nation* was able to identify several. They include the officers of the Holy Land Foundation—a now-defunct US-based Islamic charity that sent funds to social programs administered by Hamas, a US-designated terrorist organization—and the Lackawanna Six, who admitted to traveling to an Al Qaeda training camp before the 9/11 attacks. Some of the notable entrapment cases include those of Shahawar Matin Siraj, convicted for taking part in a plot planned by a paid FBI informant to bomb Herald Square, and Yassin Aref, whose underlying act was simply witnessing a loan in another plot planned by an FBI informant.

CCR attorneys also noticed the presence of CMU inmates who had neither links to terrorism nor communications infractions. They fell into three general groups, with occasional overlaps. The first had made complaints against the BOP either

through internal procedures or formal litigation, and their placement appeared retaliatory. The second held unpopular political views, both left- and right-leaning, from animal rights and environmental activists to neo-Nazis and extreme antiabortion activists. The third seemed to be Muslims, including African-American Muslims, whose convictions had nothing to do with terrorism and ranged from robbery to credit card fraud.

The brief reasons given for transferring these prisoners into CMUs varied, but in several cases their designation was based on conduct that had already been successfully managed at other institutions without restricting communications or family visits. The reasons were often vague: for example, that inmates had engaged in conduct while incarcerated to "recruit and radicalize" other inmates. When pressed for specific evidence about such allegations in interviews and FOIA requests, the BOP declined to provide additional information.

On March 30, 2010, CCR filed a lawsuit against the government on behalf of several CMU inmates and their families, including Jenny and Daniel. In *Aref v. Holder*, CCR charges that the government not only violated the APA in establishing the CMUs but also violated the First, Fifth and Eighth Amendments. CCR alleges that designation to the CMUs was discriminatory, retaliatory and/or punitive in nature and not rationally related to any legitimate penological purpose or based on substantiated information. Rather, CCR contends that the inmates' designation was based on their religion and/or perceived political beliefs. Moreover, since there had been no real notice, hearing and appeal, CCR alleges due process violations as well. The extreme nature of the restrictions also raises the issue of cruel and unusual punishment. CCR also argues that the communications restrictions impeded the free speech and association rights of the family members.

Eight days after CCR filed suit, the BOP suddenly gave notice of a proposed rule titled "Communication Management Units." In it the Obama administration kept the Bush-era communication restrictions while broadening their scope. While the 2006 proposed rule was limited to people with "an identifiable link to terrorist-related activity," the Obama-era rule can be applied to "any inmate," including "persons held as witnesses, detainees or otherwise."

The ACLU's Shapiro says, "When Obama came into office, we hoped that the use of CMUs would be revisited, and we recommended that BOP withdraw the first rule-making." But it is unclear if any such review took place. The BOP declined to say if the Obama administration had conducted a review before deciding to maintain the CMUs, or even if it had reviewed the assignment of current inmates.

Starting his presidency with two CMUs established by the Bush administration outside the APA process, Obama, says Luneburg, essentially had two choices. "He could totally abandon it or try to make lawful what was perhaps arguably an unlawful situation." Taking the latter approach, the BOP accepted comments about the new rule until June 7, 2010. It recently announced it would publish the finalized rule in October—sixteen months after the close of the comment period. According to Luneburg, that delay is surprising, given that the rule consists

largely of legal issues, as opposed to complex scientific claims that underlie rules published by agencies like the EPA.

During the comments phase, submissions poured in from civil rights groups, current and former CMU inmates, inmates' families and mental health professionals. One theme was common to many: the communications restrictions (including the inability to touch) were devastating to family integrity. The writers argued that strong connections to family were essential for a variety of reasons, such as mental health, rehabilitation, prison order and safety, staying recidivism and societal reintegration—truths long recognized by psychologists, corrections professionals and the BOP alike.

As University of Delaware professor of sociology and criminal justice Christy Visser explains, "The lack of connection to family makes it harder to think of a plan for post-release, and if they have no hope for life after release, then they're less likely to be making behavior change." Visser, who has looked at the question of how best to reintegrate released convicts for the National Institute of Justice, says, "Contact visits where you can hold a child on your lap or touch your wife are very important."

This past November, before driving the 650 miles from Dallas to see her husband, Ghassan Elashi, at the Marion CMU, Majida Salem cut and colored her hair. "Why bother?" one of her daughters asked, alluding to the fact that since Majida's visit would not be private, her head would be covered by her hijab.

"Because I'm going to be sitting with Baba," she answered, referring to the man she had married twenty-six years before in Jordan, choosing him after turning away many others. She had felt that his devotion to God mirrored her own.

To the government, however, Ghassan—co-founder of the Holy Land Foundation, once the largest US Muslim charity—was a material supporter of terrorism. Ghassan has never been accused of engaging in violence, but because the HLF sponsored schools and social welfare programs in the Occupied Territories alleged by Washington to be controlled by Hamas, he was charged with materially supporting terrorism. He was convicted in November 2008, following a 2007 mistrial in which the government failed to convince jurors of its case.

Majida hadn't seen Ghassan since the previous Thanksgiving, when he was still at the low-security prison in Seagoville, Texas, not far from their home. He was moved to Marion in April 2010. The distance ended their weekly visits and essentially left Majida to raise a family of six children, the youngest of whom had Down syndrome, by herself.

They tried to maintain contact nonetheless. Majida shared her weekly fifteen-minute call with her children and in-laws, co-parenting with Ghassan in these morsels and through e-mails, which arrived days after they were written and only after a detour through Washington. Other CMU families had given up on visits or stopped bringing the children, who were often traumatized by the inability to touch their fathers or speak to them in a native language. But the Elashis were determined to make it work, so on Thanksgiving morning, with three of her children and her mother-in-law, Majida set out for Marion.

Once inside the prison, they were led toward the CMU,

passing through a series of sliding barred doors. In the periphery, they could see the general population visitation room, spying a few families, UNO cards and a play area for kids. They were ushered into a 5-by-7 room with a Plexiglas wall at its center. Behind the Plexiglas, in a room that mirrored theirs, Ghassan waited to greet them.

The five of them crowded around three receivers, which would record their conversation and transmit it to BOP officials in Washington. When they gushed at how healthy Ghassan looked, he lifted his sleeve and flexed his bicep. "Pilates," he told them. When he told them he now had a six-pack, his teenage sons begged him to show them, but he demurred. Soon they realized they could hear through the glass, so they hung up the receivers and spoke naturally. Quickly a guard reprimanded them: all communication had to be through the receivers.

Majida and Ghassan spoke about the boys, how they were doing in school and how the second-to-youngest was acting up. Ghassan turned to him, doing his best to advise him from behind the barrier. His son burst out, "I need you! I need you!"

Toward the end of the visit, to keep things light, Ghassan began demonstrating Pilates exercises. Having put the receiver down, he flashed with his fingers the amount of seconds he held each pose. Guards rushed in on both sides, demanding to know what Ghassan was doing. "Teaching them Pilates," he answered.

They stayed until they were kicked out, the kids signing off with pantomimed high-fives and Majida blowing him a kiss while touching the glass. She wanted to be alone with him, without the barrier, and there was so much more she wanted to express. But that would have felt like stealing from the children.

Ghassan's incarceration at Marion demonstrates one of the biggest problems with the CMUs and with the terrorist designation generally—how broadly and capriciously they are applied. "It is one thing to use restrictive isolationist tactics against the leader of a gang or terror group who, if he could communicate freely with the outside world, would wreak violence on innocent people—that's not an illusory concern," says David Cole, of Georgetown University Law School and *The Nation's* legal affairs correspondent. "But when you define 'terrorist activity' to include material support that can involve no violent activity and no intentional support of violent activity, then you are relegating nonviolent offenders to these very extreme conditions that are entirely unwarranted."

The BOP declined to say whether it differentiates between nonviolent—even humanitarian—activities and violent activity in determining CMU assignment for a "terrorist-related link." The profiles of inmates like Ghassan would suggest it doesn't, and that, in fact, the link to terrorism can be quite tenuous.

Consider, for example, the case of Sabri Benkahla, whose CMU incarceration the ACLU challenged in 2009. In 2003 the government accused Benkahla of materially supporting a terrorist-related group. When prosecutors failed to secure a conviction at trial, he was charged and convicted of grand jury perjury. At his sentencing, the US District Judge declared unequivocally that "Benkahla is not a terrorist" and noted having received more letters on Benkahla's behalf than any other defendant in twenty-five years, including one from

Congressman James Moran, who described Benkahla as "an upstanding and productive member of society." Although Benkahla lacks a terrorism-related conviction, he was nonetheless transferred to a CMU because of a terrorist-related link, asserted by the government. Before the court could reach a decision in the ACLU case, which challenged the legality of the CMUs on APA grounds, the BOP moved Benkahla back to the general population, and the case was dismissed.

David Shapiro, who was also on Benkahla's team, sees a lack of clear criteria for CMU placement as the crux of the problem. "People are overclassified," he says, "and the level of restriction they are placed under bears no rational relationship to the security threat that they actually pose."

Visher concurs. "We are not making good decisions about who is dangerous," she says. To remedy the problem and to balance family and penological interests, Visher proposes risk profiles and careful examination by an independent party. Factors that should be considered, she says, are a person's pattern of communication with terrorist groups, his history of violence, good behavior and strong connections to the community.

On July 21, 2010, the government answered CCR's lawsuit with a motion to dismiss. In its written arguments, it pleaded that it deserves deference in determining what restrictions are reasonably related to legitimate penological interests. It also argued that several of the claims, including those of Jenny and Daniel, are moot, as on October 19, after more than two years, Daniel was moved out of the CMU and back to the general population.

Last Thanksgiving, Jenny was finally able to wait for Daniel in Marion's general visitation room, which she used to walk wistfully past when she visited the CMU. That was behind her now, she thought, as were the once-a-week fifteen-minute calls. When she saw Daniel, she embraced him and gave him a big kiss. They spent the hours talking and playing UNO. When they didn't feel like saying anything, they sat in the silence they felt they could finally afford, letting a simple touch speak for itself.

A few hours into their visit, Jenny saw the Elashi family as they were led down the hall to the CMU. She felt her eyes tear up. She found it especially hard to watch a whole family going to visit their father, their husband, their son under such conditions. They looked so solemn; Jenny felt guilty that they wouldn't be able to embrace as she and Daniel could. Later that night she posted on Facebook: "Thankful for hugs and brief kisses."

But time for hugs and brief kisses would remain short-lived. On February 24, Daniel was suddenly transferred back to the CMU, this time to Terre Haute. The government gave the court notice that in light of Daniel's reassignment, it was withdrawing its defense that Daniel's claims were moot; CCR has since asked the court to expedite its consideration of the motions to dismiss.

The notice was almost identical to the one Daniel had been given the last time, but it included a new sentence. The BOP asserted that Daniel's "incarceration conduct has included attempts to circumvent communication monitoring policies, specifically those governing attorney-client privileged correspondence." In keeping with BOP practice, Daniel's notification does not state what evidence or acts serve as the basis for these claims. Neither he nor Jenny knows why he is there. They know only that their next visit will be brief and behind glass. ■