COMMUNICATION MANAGEMENT UNITS:

The Role of Duration and Selectivity in the *Sandin v. Conner* Liberty Interest Test

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In Sandin v. Conner*, the Supreme Court explained for the first time that prisoners have a "liberty interest," protected by the Due Process Clause, in avoiding segregation or otherwise restrictive conditions that "impose atypical and significant hardship . . . in relation to the ordinary incidents of prison life." But prison conditions vary significantly, making "the ordinary incidents of prison" difficult to define. As a result, the lower courts have struggled to identify the proper baseline, with some courts comparing challenged conditions to the most secure prisons within the jurisdiction, and others looking to the general prison population for comparison.*

This Article explores the federal Bureau of Prisons' "Communication Management Units" (CMUs) as a case study for applying Sandin*'s liberty interest test. In 2016, the D.C. Circuit held in* Aref v. Lynch *that prisoners have a liberty interest in avoiding CMU placement, since it entails lengthy segregation from the general prison population and restrictions on communication with the outside world. This decision illuminates the previously unexplored role of duration and selectivity in* Sandin*'s "atypical and significant" analysis.*

The Aref *decision builds on a nascent consensus comparing challenged prison conditions to a typical stay in administrative segregation. While many courts agree that an unusually prolonged stay in administrative segregation gives rise to a liberty interest, this analysis has been hampered by a lack of empirical evidence regarding the typical length of such segregation. This Article makes a first attempt to correct this deficiency by presenting evidence offered in* Aref *and collected from other sources,*

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which challenge the common assumption that segregation stays of twenty weeks or longer are "typical" and require no procedural protections.

Along with duration, the discrete role of "atypicality" in Sandin*'s "significant and atypical" standard has received little attention. This Article uses CMUs, which single out a tiny portion of federal prisoners for unusual communications restrictions, to explain why selectivity matters in assessing whether procedural protections are constitutionally required.*

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Introduction

The first "Communication Management Unit" (CMU) was opened at the federal prison in Terre Haute, Indiana, in December of 2006.[1] The unit, which isolates prisoners from the rest of the prison population and restricts their contact with the outside world, was opened without public acknowledgment by the Federal Bureau of Prisons (BOP).[2] Nothing was publicly known of it until February 7, 2007, when one of the first prisoners transported there, Dr. Rafil Dhafir, sent a letter to a supporter outside prison, who posted the letter online.[3] Dhafir described a secret prison unit, an "experiment," designed to segregate Muslim prisoners from the rest of the federal prison population.[4]

1. Carrie Johnson, *"Guantanamo North": Inside Secretive U.S. Prisons*, Nat'l Pub. Radio (Mar. 3, 2011, 1:09 PM), http://www.npr.org/2011/03/03/134168714/guantanamo-north-inside-u-s-secretive-prisons [https://perma.cc/R25A-PU2T].
2. *Id.*
3. *See* Katherine Hughes, *A Letter from Dr. Dhafir About His Transfer and New Prison Situation*, DhafirTrial (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 [https://perma.cc/95VZ-B7J8].
4. *Id*. In the decade since, the Terre Haute CMU, along with a second CMU opened later in Marion, Illinois, have been the subjects of multiple lawsuits. *See e.g.*, Aref v. Lynch, 833 F.3d 242 (D.C. Cir. 2016) (constitutional challenge to CMU conditions and procedures); Amended Complaint at 1, Benkahla v. Fed. Bureau of Prisons, No. 2:09-cv-00025-WTL-DML (S.D. Ind. July 27, 2008) (administrative

Central to the legality of the CMUs is the Supreme Court case, *Sandin v. Conner*,[5] which created a test to determine when prisoners facing placement in a restrictive setting are entitled to due process.[6] Under *Sandin*, due process protections are only necessary when segregation implicates the prisoner's "liberty interest" in avoiding restrictions that "impose atypical and significant hardship . . . in relation to the ordinary incidents of prison life."[7] Yet this test has proven "easier to articulate than to apply,"[8] largely because the "ordinary incidents" of prison life vary greatly by prison and by jurisdiction. The Supreme Court has not determined what constitutes "the ordinary incidents of prison life," or how courts should account for variation among prison systems, and the federal circuit courts are in stark disagreement.[9]

Most of the case law applying *Sandin* involves prisoner challenges to placement in "administrative segregation" or "disciplinary segregation," which are the most common forms of restrictive housing in US prisons. Thus, to evaluate CMUs under *Sandin*, it is essential to understand how these other statuses operate. Use of segregation varies significantly from state to state, but the BOP's practices provide an adequate introduction to the concepts. Most prisoners reside in "general population" units, where they may leave their cell during daytime hours to work, recreate, and eat among other prisoners. In the federal system, these general population prisoners receive 300 minutes of telephone access per month and frequent access to contact visitation with family and friends.[10] Prisoners may be transferred between general population units at a correctional system's discretion, and so long as no unusual restrictions are imposed, due process is not implicated.[11]

However, general population prisoners may be removed from these relatively unrestrictive conditions and placed in administrative or disciplinary segregation for a variety of reasons. Prisoners in the federal system may be placed in administrative segregation while their security classification is pending, while they are being investigated for a disciplinary violation, or upon transfer from one prison to another.[12] Prisoners in administrative segregation are put in a "special housing unit"

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procedures act challenge to CMU); Amawi v. Walton, No. 3:13-cv-00866, 2016 U.S. Dist. LEXIS 175095 (S.D. Ill. Nov. 17, 2016) (individual prisoner's challenge to CMU placement). The author represents plaintiffs in *Aref v. Lynch*.

5. 515 U.S. 472 (1995).
6. *Id.* at 484.
7 *Id.*
8. Hatch v. District of Columbia, 184 F.3d 846, 851 (D.C. Cir. 1999).
9. *See infra* Part II.A.
10. Joint Appendix at JA-842 ¶ 20, Aref v. Lynch, 833 F.3d 242 (D.C. Cir. 2016) (No. 15-5154).
11. Meachum v. Fano, 427 U.S. 215, 223–24 (1976).
12. 28 C.F.R. § 541.23 (2011); *see also* Wagner v. Hanks, 128 F.3d 1173, 1174 (7th Cir. 1997) (describing general bases for administrative segregation: "the prisoner is awaiting classification or transfer, or is an escape risk, or is incorrigible, or is a gang leader, or has a contagious disease. . .").

(SHU) where they are locked in their cells for twenty-three hours a day, are unable to work or attend educational programming, and are given only limited access to personal possessions.[13] They can make only one fifteen minute telephone call a month and are allowed only four hours of non-contact visitation per month.[14]

Disciplinary segregation in the federal system involves similar conditions, but is imposed as punishment after a prisoner has been found to have violated a prison rule.[15] Not all prison rule violations result in segregation; in the federal system, a "SHU-term" of up to three months, up to six months, and up to one year may be imposed for moderate, high, and greatest severity level prohibited acts, respectively.[16] The BOP does not allow for SHU placement as punishment for a low severity offense.[17]

When prisoners challenge their placement in administrative or disciplinary segregation, they rarely have counsel to represent them. Perhaps due in part to the prevalence of such *pro se* cases, procedural due process doctrine has developed in a somewhat haphazard and inconsistent manner. This Article will explore *Aref v. Lynch*,[18] a recent procedural due process challenge to the CMUs that has advanced *Sandin*'s liberty interest rule by 1) providing unprecedented empirical support regarding the typical time a federal prisoner spends in segregation, and 2) highlighting the little-explored role of "atypicality" in a challenge to prison restrictions.

The Article begins by describing conditions and procedures used in the CMU. Next, in Part II, I explore disagreement among the circuits in identifying a proper baseline for the "atypical and significant" comparison. While there is a developing consensus that prisoners have a liberty interest in avoiding segregation that is unusually long, application of this doctrine has been hampered by a lack of data on duration of segregation stays in various jurisdictions. In the absence of such data, results have skewed against prisoners, as courts have declined to recognize a liberty interest in avoiding segregation that, in reality, was much longer than is typical. This Article takes a first step toward correcting that evidentiary failing by presenting statistical information developed in *Aref* regarding the typical duration of administrative segregation in the federal system and suggesting future avenues for research.

13. Aref v. Lynch, 833 F.3d 242, 256–57 (D.C. Cir. 2016).
14. *Id.*
15. 28 C.F.R. § 541.24 (2011).
16. *Id.* § 541.3. "Moderate severity" prohibited acts vary greatly, and include things like indecent exposure, possession of contraband, and refusal of a work assignment. *Id.* "High severity" prohibited acts are more serious, and include assault that does not result in significant injury, possession of stolen property, threats and fights. *Id.* "Greatest severity" prohibited acts generally involve violence or a risk of harm, including murder, assault that results in serious injury, and possession of a weapon. *Id.*
17. *Id.* Examples of "low severity" prohibited acts include using obscene language and unauthorized physical contact (like kissing or embracing). *Id.*
18. 833 F.3d 242 (D.C. Cir. 2016).

In Part III, I explore a largely ignored component of the *Sandin* liberty interest test—the role of atypicality when determining whether placement in a restrictive unit gives rise to a liberty interest. As stated above, most procedural due process challenges involve administrative or disciplinary segregation. Administrative or disciplinary segregation may be atypical when it lasts longer than normal, or when it involves particularly restrictive conditions, but the placements themselves are commonplace. All prisoners are subject to prison discipline if they violate prison rules, and all prisoners face the possibility of administrative segregation for investigation, transfer, or other perceived correctional needs. The case law leaves open how *Sandin*'s liberty interest analysis will apply when a prisoner is *singled out* for an unusual restriction, whether through placement in a CMU, or for some other atypical experience. The *Aref* decision provides a helpful starting point to analyze such atypical segregation.

I. Conditions and Procedures in the CMUs

Other commentators have detailed conditions in the two CMUs,[19] so I will provide only a short summary here. As the name suggests, the CMUs severely restrict prisoners' communication with the outside world. CMU prisoners are currently allowed two fifteen-minute calls per week,[20] but this is subject to change; before 2010, CMU prisoners were only given one call a week, and the BOP has discretion to reduce calls even further, to three fifteen-minute calls per month.[21] All social telephone calls are monitored live, subject to recording, and must be conducted in English only, unless previously scheduled for and conducted through simultaneous translation.[22] Thus, CMU prisoners can expect to receive between 45 and 120 telephone minutes a month, compared to a prisoner in a BOP general population unit, who would receive 300 minutes of telephone time a month.[23]

19. *See generally* Luke A. Beata, *Stateside Guantanamo: Breaking the Silence*, 62 Syracuse L. Rev. 281 (2012); David M. Shapiro, *How Terror Transformed Federal Prison: Communication Management Units*, 44 Colum. Hum. Rts. L. Rev. 47 (2012).
20. U.S. Dep't of Justice, Fed. Bureau of Prisons, Communication Management Units Program Statement 5214.02, at 10 (2015) [hereinafter CMU Program Statement].
21. *Id.*; Joint Appendix, *supra* note 10, at JA-304 ¶ 27. The BOP has never explained why it changed CMU practice to allow an additional weekly call in 2010; but it is my belief that pending and threatened litigation played a role in the decision.
22. Joint Appendix, *supra* note 10, at JA-303 ¶¶ 25–26. While prison social telephone calls are all *subject* to monitoring or recording, the BOP does not have the resources to monitor them all, and a 2006 Office of Inspector General report revealed that most institutions fail to monitor even ten to 15% of inmate telephone calls. *See* U.S. Dept. of Justice, Office of the Inspector Gen., Evaluation and Inspections Division, The Federal Bureau of Prisons' Monitoring of Mail for High-Risk Inmates 53 (2006).
23. Joint Appendix, *supra* note 10, at JA-842 ¶¶ 18, 20.

Visitation is also severely restricted. All social visits are non-contact, meaning that a glass wall separates a prisoner from his visitor, and the two must communicate via a microphone.[24] CMU prisoners are currently allowed two four-hour visits per month, but this too is subject to reduction—to four one-hour visits per month.[25] Visitation was limited in this manner from 2006 to 2010, and during that period visits (as well as telephone calls) were only allowed during school and work hours, that is, weekdays between 8:30am and 2:00pm.[26]

CMU prisoners may currently write as many letters as they wish, but the BOP claims discretion to limit correspondence to one six-page letter per week.[27] Social mail, like social telephone calls and visits, is monitored and analyzed.[28]

A variety of factors render these communications restrictions more impactful in practice than they appear on paper. There are currently two CMUs in the federal system, one in Terre Haute, Indiana, and the other in Marion, Illinois.[29] The BOP generally attempts to place all prisoners relatively close to their home, but CMU prisoners are unlikely to have family in Illinois or Indiana, making visitation time consuming and expensive. And while all social communication by BOP prisoners is *subject* to monitoring, the BOP generally monitors only a random sample of most prisoners' communication.[30] Even CMU prisoner's most mundane communication, in contrast, is not only monitored but closely analyzed by officials in the BOP's Counterterrorism Unit (CTU).

Little has been published about the procedures by which prisoners are singled out for placement in a CMU and ultimately reviewed for release. Thus, these procedures are explored in some detail below. The procedures have evolved significantly from the time the units were opened in 2006 to the present, so I discuss the procedures at issue in terms of three separate time periods: First, from 2006 to 2009, when the CMUs were first opened and procedures were still being formalized; second, from 2009 to 2014, when procedures were somewhat developed but still not codified; and third, from 2015 to the present, when procedures became the subject of formal BOP policy.

A. *2006–2009*

In December of 2006, seventeen prisoners were transferred to the newly formed CMU in Terre Haute, Indiana.[31] Sixteen of these seven-

24. Aref v. Lynch, 833 F.3d 242, 247 (D.C. Cir. 2016).
25. CMU Program Statement, *supra* note 20, at 11. The program statement is silent as to whether visits can be reduced based solely on the warden's discretion, or whether any finding need be made.
26. Joint Appendix, *supra* note 10, at JA-303 ¶ 23.
27. CMU Program Statement, *supra* note 20, at 8.
28. *Id*.
29. *Aref*, 833 F.3d at 246.
30. Joint Appendix, *supra* note 10, at JA-842 ¶ 17.
31. Beata, *supra* note 19, at 281.

teen men were Muslim.[32] The men were designated for CMU placement without any formal process. Rather, Leslie Smith, the head of the BOP's newly created CTU, was tasked with creating a list of BOP prisoners with ties to international terrorism who might be appropriate for CMU placement.[33] Smith and his staff identified forty potential transferees on their own, without any guidance from the BOP as to any criteria to consider among the hundreds of men convicted of international terrorism held by the BOP.[34] From that list of forty, John Vanyur, then Assistant Director of the Correctional Programs division of the BOP, selected the initial group.[35] Over the next three years, the BOP continued to designate prisoners to the CMU without written criteria or procedures, but rather based on unofficial practices that changed over time.[36] Some individuals were nominated for CMU placement by the CTU, but referrals were welcome from other sources as well.[37] As more prisoners were approved for CMU segregation, CTU officials developed criteria for CMU placement based on the types of referrals ultimately approved. For example, the CTU received several referrals of sex offenders who tried to contact their victims from inside prison, and several such men were eventually sent to the CMU, so the CTU decided to add as one criteria for CMU placement that the prisoner has attempted, or indicates a propensity, to contact victims of the inmate's current offense(s) of conviction.[38]

CMU placement criteria were not documented in full until October of 2009, when D. Scott Dodrill, Assistant Director of Correctional Programs after Vanyur, issued a memorandum regarding review of CMU prisoners for *release* to the general population (discussed below). The memorandum listed, for the first time, five criteria for CMU placement:

> (a) the inmate's current offense(s) of conviction, or offense conduct, included association, communication, or involvement, related to international or domestic terrorism;
> (b) The inmate's current offense(s) of conviction, offense conduct, or activity while incarcerated, indicates a propensity to encourage, coordinate, facilitate, or otherwise act in furtherance of, illegal activity through communications with persons in the community;
> (c) The inmate has attempted, or indicates a propensity, to contact victims of the inmate's current offense(s) of conviction;
> (d) The inmate committed prohibited activity related to misuse/abuse of approved communication methods while incarcerated; or

32. Exhibit 71 to Plaintiffs' Motion for Summary Judgment at 1–3, *Aref v. Holder*, No. 10-cv-00539, 2015 WL 3749621 (D.D.C. Mar. 16, 2015), *aff'd in part, rev'd in part sub nom.* Aref v. Lynch, 833 F.3d 242 (D.C. Cir. 2016) [hereinafter Exhibit 71].
33. Joint Appendix, *supra* note 10, at JA-559–61 (Smith Dep. 36:6–37:25, 45:4–45:25).
34. *Id.*
35. *Id.* at JA-642 (Schiavone Dep. 39:2–11).
36. *Id.*; Aref v. Lynch, 833 F.3d 242, 247 n.1 (D.C. Cir. 2016).
37. Joint Appendix, *supra* note 10, at JA-648 (Schiavone Dep. 53:11–16).
38. *Id.* at JA-564–65 (Smith Dep. 81:2–82:15).

> (e) There is any other evidence of a potential threat to the safe, secure, and orderly operation of prison facilities, or protection of the public, as a result of the inmate's unmonitored communication with persons in the community.[39]

Between 2006 and 2009, when the CTU received a prisoner's name for potential CMU placement, or determined on their own that a given prisoner was a potential candidate for the CMU, the CTU was then responsible for gathering together a packet of relevant information and drafting a referral memorandum to the Regional Director of the BOP that recommended for or against such placement.[40] The Regional Director routed the referral packet and memorandum through several administrators on his staff, who each opined as to whether CMU placement was warranted; the Regional Director then made a final decision as to whether to designate the prisoner for transfer to a CMU.[41]

Prisoners are not notified of their designation to the CMU prior to transfer. Rather, they are provided with a one-page "Notice to Inmate of Transfer to a Communication Management Unit" after arrival at the CMU, which is designed to provide prisoners with a summary of the factual basis for their CMU placement.[42] The notice also informs prisoners that they can appeal their CMU placement through the BOP's administrative remedy process.[43]

Between 2006 and 2009, there was no process in place to review CMU prisoners for eventual release to a general population unit.[44] During this period some CMU prisoners were told they would remain in the CMU for their entire sentence. Others were told that they would be considered for a transfer to general population if they maintained a clean disciplinary record for eighteen months.[45] Even the Deputy Attorney

39. *Id.* at JA-688–89 (Dodrill Memo at 1–2, Oct. 14, 2009). The memo identifies these five criteria in the context of instructing CMU personnel to review current CMU prisoners for potential release to general population by considering "whether the original reasons for CMU placement still exist." *Id.* at JA-688.
40. *Id.* at JA-853–54 ¶¶ 100–04 (Defendants' Statement of Undisputed Material Facts).
41. *Id.* at JA-462 (Schiavone Dep. 81:4–6); *Aref*, 833 F.3d at 247 n.2.
42. Joint Appendix, *supra* note 10, at JA-858 ¶ 126, JA-723. In reality, the notice fails to provide prisoners with meaningful notice of the reason for their CMU placement in several ways. First, the notice does not reflect the decision-maker's reason for deciding to place a prisoner in the CMU. The Regional Director had final say over CMU placements during this period, but it was not his practice to document the reasons for his decision. Joint Appendix at JA-533, 544 (Schiavone Dep. 264:10–23, 285:3–17). Rather, the explanation in the Notice of Transfer is drafted by the CTU, who recommends but does not decide on CMU placement, and the CTU regularly includes only one of several reasons for its recommendation. *Id.* at JA-520–22.
43. *Id.* at JA-858 ¶ 127. Significantly, not a single prisoner has ever had their CMU placement reversed pursuant to such an appeal. *Id.* at JA-323 § 152.
44. *Id.* at JA-480–84 (Schiavone Dep. 142:3-147:23142:3–147:23).
45. *Id.* at JA-714 (Aref Administrative Remedy Response, Jan. 4, 2008); JA-340 ¶ 281, JA-757 ¶¶ 9–10; Exhibit 27 to Plaintiffs' Motion for Summary Judgment

General, who emailed the BOP to ask about the CMUs, was told that transfers would be considered after eighteen months.[46] But this was untrue: there was no process in place to review prisoners for potential release, and thus, no prisoner was considered for transfer or transferred from the CMU to a general population unit until 2010.[47]

B. *2009–2014*

In October of 2009, the Dodrill memo created a process to review CMU prisoners for release to the general population.[48] According to the memo, the "unit team" at the CMU would consider prisoners for potential transfer out of the CMU in conjunction with "regularly scheduled program reviews" which occur as a matter of general BOP policy every six months.[49] At the reviews, the unit team was tasked with considering whether the original reasons for CMU placement still exist, "whether the original rationale for CMU designation has been mitigated, whether the inmate no longer presents a risk, and [whether] the inmate does not require the degree of monitoring and controls afforded at a CMU."[50] If the unit team finds that the prisoner is eligible for transfer based on these criteria, it recommends as much to the warden, who must concur with the recommendation for transfer to go forward.[51] If the warden concurs, the recommendation is forwarded to the CTU for consideration.[52] The warden's and CTU's recommendation are then forwarded to the Regional Director for a decision.[53] The Dodrill memo specifies that prisoners who are denied release from the CMU shall receive notification of the reasons for their continued CMU designation, but as matter of practice, no actual explanation is provided.[54]

After the Dodrill memo, transfers from the CMU became commonplace: Between 2010 and August of 2013, forty-one prisoners were transferred out of the CMU to a general population unit.[55] Average

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at 75, *Aref v. Holder*, No. 10-cv-00539, 2015 WL 3749621 (D.D.C. Mar. 16, 2015), *aff'd in part, rev'd in part sub nom.* Aref v. Lynch, 833 F.3d 242 (D.C. Cir. 2016).

46. Joint Appendix, *supra* note 10, at JA-343, ¶ 299; Exhibit 38 to Plaintiffs' Motion for Summary Judgment at 2, *Aref v. Holder*, No. 10-cv-00539, 2015 WL 3749621 (D.D.C. Mar. 16, 2015), *aff'd in part, rev'd in part sub nom.* Aref v. Lynch, 833 F.3d 242 (D.C. Cir. 2016).
47. Exhibit 27 to Plaintiffs' Motion for Summary Judgment at 73, *Aref v. Holder*, No. 10-cv-00539, 2015 WL 3749621 (D.D.C. Mar. 16, 2015), *aff'd in part, rev'd in part sub nom.* Aref v. Lynch, 833 F.3d 242 (D.C. Cir. 2016).
48. Joint Appendix, *supra* note 10, at JA-853 ¶ 96, JA-688–89.
49. Exhibit 95 to Plaintiffs' Motion for Summary Judgment at 4–5, *Aref v. Holder*, No. 10-cv-00539, 2015 WL 3749621 (D.D.C. Mar. 16, 2015), *aff'd in part, rev'd in part sub nom.* Aref v. Lynch, 833 F.3d 242 (D.C. Cir. 2016).
50 Joint Appendix, *supra* note 10, at JA-688–89 (Dodrill Memorandum, Oct. 14, 2009).
51. *Id.* at JA-689.
52. *Id.*
53. *Id.*
54. *Id.* at JA-689, JA-770 (Memorandum from CMU Unit Manager, Dec. 30, 2013).
55. Exhibit 2 to Plaintiffs' Memorandum in Opposition to Defendants' Motion for

CMU stays remained lengthy, however. Between January 1, 2007, and June 30, 2011, the median length of a prisoner's CMU placement was 138.71 weeks.[56]

C. *2015–Present*

On January 22, 2015, the BOP finally published a federal regulation codifying CMU policy.[57] CMU conditions and procedures are now codified at 28 CFR §§ 540.200–.205. Under the regulation, decision-making authority for placing a prisoner in the CMU now belongs to the BOP's Assistant Director of Correctional Programs, instead of the Regional Director.[58] The procedures appear to otherwise remain the same.

The constitutionality of the procedures used by the BOP to designate prisoners to a CMU, and to review them for potential release, are the topic of ongoing litigation in the D.C. District and are beyond the scope of this Article.[59] Instead, in Part II, I discuss CMU conditions and procedures in the context of identifying when a liberty interest exists, focusing on the proper role of duration and selectivity in *Sandin*'s "atypical and significant" standard.

Summary Judgement, *Aref v. Holder*, No. 10-cv-00539, 2015 WL 3749621 (D.D.C. Mar. 16, 2015), *aff'd in part, rev'd in part sub nom.* Aref v. Lynch, 833 F.3d 242 (D.C. Cir. 2016). During that same time period, 175 prisoners total were housed in one of the two CMUs. *Id.*

56. Joint Appendix, *supra* note 10, at JA-607 (Beveridge Expert Report, Feb. 24, 2014). The numbers are based on data produced by the Bureau of Prisons relevant to low and medium security prisoners only, as those are the classifications that were relevant to the *Aref* litigation. Some "high" security prisoners are also housed at CMUs.

57. *See* Communications Management Units, 80 Fed. Reg. 3168 (Jan. 22, 2015) (now codified at 28 C.F.R. pt. 540). As detailed in Shapiro, *supra* note 19, the CMUs were opened without notice and comment rulemaking. A proposed CMU Rule was pending between June 2010 and January 22, 2015, when a final rule was issued.

58. 28 C.F.R. § 540.202 (2017).

59. *See Aref*, 833 F.3d at 258 (remanding to the District Court to determine whether the procedures used by the government are adequate). The *Aref* plaintiffs argue that the Bureau of Prisons fails to meet the minimum requirements of due process, set forth in *Hewitt v. Helms*, 459 U.S. 460, 476, 477 n.9 (1983) and *Wilkinson v. Austin*, 545 U.S. 209, 225–26 (2005), as it fails to provide prisoners with adequate notice of the reason for placement, a meaningful opportunity to rebut the basis for placement, and meaningful periodic review. *See generally* Memorandum of Law in Support of Plaintiffs' Motion for Summary Judgment at 18–45, *Aref v. Holder*, No. 10-cv-00539, 2015 WL 3749621 (D.D.C. Mar. 16, 2015), *aff'd in part, rev'd in part sub nom.* Aref v. Lynch, 833 F.3d 242 (D.C. Cir. 2016); Plaintiffs' Memorandum of Law in Opposition to Defendants' Motion for Summary Judgment and in Further Support of Plaintiffs' Motion for Summary Judgment at 20–33, *Aref v. Holder*, No. 10-cv-00539, 2015 WL 3749621 (D.D.C. Mar. 16, 2015), *aff'd in part, rev'd in part sub nom.* Aref v. Lynch, 833 F.3d 242 (D.C. Cir. 2016); Reply Brief for Plaintiffs-Appellants at 16–22, Aref v. Lynch, 833 F.3d 242 (D.C. Cir. 2016) (No. 15-5154).

II. The Existence of a Liberty Interest under Sandin v. Conner

Outside the prison context, government action which is alleged to have deprived an individual of life, liberty, or property without due process of law is evaluated under the *Matthew v. Eldridge*[60] balancing test, which considers the individual interest at stake, the risk of erroneous deprivation of that interest under existing procedures, and the government's interest in avoiding the burden of additional process.[61] Inside prison, however, a procedural due process challenge involves an additional preliminary step. Before considering the adequacy of procedural protections, a court must determine whether the prisoner's segregation even implicates a liberty interest protected by the Due Process Clause.[62] Not every prison restriction does so.

In *Sandin v. Conner*,[63] the Supreme Court rejected a prisoner's challenge to a thirty-day placement in disciplinary segregation, explaining that prisoners only have a liberty interest in avoiding that which "imposes atypical and significant hardship . . . in relation to the ordinary incidents of prison life."[64] The Court reasoned that Conner's confinement "mirrored those conditions imposed upon inmates in administrative segregation and protective custody" and that prisons in the jurisdiction imposed significant lockdown time even in general population.[65] "Based on a comparison between inmates inside and outside disciplinary segregation," thirty days in disciplinary segregation "did not work a major disruption in [Conner's] environment."[66] Thus, Conner had no liberty interest, and no procedural protections were required.[67]

A. *The Proper Sandin Baseline*

As the Supreme Court acknowledged in *Wilkinson v. Austin*,[68] a subsequent prison procedural due process case, the circuits have diverged in determining what constitutes the "ordinary incidents of prison life" or the "baseline" to compare a challenged restriction against.[69] Due process protections are only required when a prisoner is treated in an unusual way; but given the immense difference in prison conditions and security levels within jurisdictions and across the country, how do the courts

60. 424 U.S. 319 (1976).
61. *Id.* at 335.
62. Sandin v. Conner, 515 U.S. 472, 484 (1995).
63. 515 U.S. 472.
64. *Id.*
65. *Id.* at 486.
66. *Id.* at 486–87.
67. *Id.*
68. 545 U.S. 209 (2005).
69. *Id.* at 223. *Wilkinson* involved a challenge to prolonged placement in an Ohio Super-maximum security prison, where conditions were so extreme as to give rise to a liberty interest under "any plausible baseline." *Id.* at 223–24 (conditions included indefinite solitary confinement, with a prohibition on almost all human contact, 24 hour lights in cells, exercise for one hour a day in a small indoor room, and ineligibility for parole consideration).

measure what is usual? At the far end of the spectrum, the Tenth Circuit has held that even an atypically long stay in administrative segregation does not give rise to a liberty interest where it is "reasonably related to legitimate penological interests."[70] And the Seventh Circuit has reasoned that the requirement of due process for prison discipline is all but illusory, finding that *Sandin* compels the conclusion that the proper baseline for comparison is conditions in the state's most secure prison.[71]

At the other end of the spectrum, in the Fourth Circuit conditions in a prison's general population are normally used as the baseline for comparison, with the caveat that conditions "dictated by a prisoner's conviction and sentence" are "the conditions constituting the 'ordinary incidents of prison life' *for that prisoner.*"[72] And in the Third Circuit, "the baseline for determining what is 'atypical and significant' . . . is ascertained by what a sentenced inmate may reasonably expect to encounter as a result of his or her conviction. . . ."[73]

Other circuits have not yet determined the proper baseline. In the Ninth Circuit, for example, an early case suggested that general population might serve as the proper baseline,[74] but more recent cases have noted that issue is open.[75]

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70. Jordan v. Federal Bureau of Prisons, 191 F. App'x. 639, 652 (10th Cir. 2006); *see also* Rezaq v. Nalley, 677 F.3d 1001 (10th Cir. 2012) (holding many years in extraordinarily harsh solitary confinement does not give rise to a liberty interest because it was justified by legitimate penological concerns). The Tenth Circuit's approach improperly collapses the right to due process with the outcome of that process, and is wholly irreconcilable with the Supreme Court's admonition in *Wilkinson v. Austin* that "harsh conditions may well be necessary and appropriate in light of the danger that high-risk inmates pose both to prison officials and to other prisoners. . . . That necessity, however, does not diminish our conclusion that the conditions give rise to a liberty interest in their avoidance." 545 U.S. at 224.
71. Wagner v. Hanks, 128 F.3d 1173, 1175 (7th Cir. 1997). The court reasoned that it would be "arbitrary" to distinguish between different parts of the same prison, on one hand, and different prisons in the same system, on the other, as the Constitution is not implicated by a prison system's decision to create high-security units at every prison, versus concentrating high-security prisoners at a few prisons. *Id.* Given this conclusion, the *Wagner* court characterized "the right to litigate disciplinary confinement" as "vanishingly small," but invited clarification of this "harsh result" which "perhaps the Court did not actually intend." *Id.* at 1175–76.
72. *See* Beverati v. Smith, 120 F.3d 500, 503 (4th Cir. 1997) (comparing conditions in administrative segregation to conditions in general prison population); Preito v. Clark, 780 F.3d 245, 254 (4th Cir. 2015) (conditions on death row are appropriate baseline for a prisoner sentenced to death); Icumaa v. Sterling, 791 F.3d 517, 528–29 (4th Cir. 2015) (harmonizing *Beverati* and *Preito*, and explaining that while general population will not be the appropriate baseline in all cases, it is appropriate for a prisoner sentenced to confinement in general population, and then transferred to a more secure prison).
73. Griffin v. Vaughn, 112 F.3d 703, 708 (3d Cir. 1997) (fifteen months in administrative segregation was not atypical).
74. Keenan v. Hall, 83 F.3d 1083, 1089 (9th Cir. 1996).
75. *See* Brown v. Or. Dep't of Corrs., 751 F.3d 983, 988 (9th Cir. 2014) (contrasting

B. *The Role of Duration in the Sandin Baseline*

Despite these variations in approach, one can identify a nascent consensus in recent cases arising in the Fifth, Sixth, Second, and D.C. Circuits, which all compare the challenged segregation to a "typical" administrative or disciplinary segregation stay. For example, while earlier Fifth Circuit cases suggested that prisoners would only have a liberty interest in avoiding conditions that lengthen their sentence,[76] a more recent decision suggests this will not always be the case. In *Wilkerson v. Goodwin*,[77] the Fifth Circuit considered due process claims by Albert Woodfox, who had been held in solitary confinement for thirty-nine years. The court rejected defendants' arguments that administrative segregation can never implicate a liberty interest, explaining that "administrative segregation 'without more' or 'absent extraordinary circumstances' is administrative segregation that is merely incident to ordinary prison life, and is not an 'atypical and significant hardship' under *Sandin*."[78] Woodfox's prolonged administrative segregation, however, did give rise to a liberty interest.[79] Similarly, the Sixth Circuit initially looked only to whether challenged segregation would extend a prisoner's sentence, but in *Harris v. Caruso*,[80] it reversed course, and found a liberty interest based on an eight year stay in administrative segregation.[81]

Interestingly, even in cases where duration is outcome determinative, statements about what is or is not "typical" are often made without any empirical support. In *Harris*, for example, the court held that eight

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Keenan, 83 F.3d at 1089 and *Ramirez v. Galaza*, 334 F.3d 850, 861 (9th Cir. 2003), which compared challenged conditions to administrative segregation and protective custody). The question is similarly unresolved in the First, Eighth, and Eleventh Circuits. *Compare* William v. Norris, 277 F. App'x. 647 (8th Cir. 2008) (holding nine years in administrative segregation is atypical and significant, without identifying the proper baseline for comparison), *with* Ballinger v. Cedar County, 810 F.3d 557, 562–63 (8th Cir. 2016) (holding one year in solitary confinement not atypical and significant, without identifying the proper baseline for comparison); *see* Mathews v. Moss, 506 F. App'x. 981, 984 (11th Cir. 2013) (implying, without explicitly holding, that courts should compare challenged conditions to those in "administrative confinement or close management I status generally"); Clark v. Clarke, No. 11-11490-RWZ, 2013 U.S. Dist. LEXIS 36974, at *16–17 n.5 (D. Mass. Mar. 18. 2013) (acknowledging that the First Circuit has not yet decided the proper baseline under *Sandin*).

76. *See e.g.*, Carson v. Johnson, 112 F.3d 818, 821 (5th Cir. 1997); Orellana v. Kyle, 65 F.3d 29, 31–32 (5th Cir. 1995).
77. 774 F.3d 845 (5th Cir. 2014).
78. *Id.* at 853.
79. *Id.* at 856.
80. 465 F. App'x. 481 (6th Cir. 2012).
81. *Id.* at 484 ("Although this court has found at least one defendant did not have a liberty interest following a 30-month segregation, *Jones v. Baker*, 155 F.3d 810, 812 (6th Cir. 1998), Harris's confinement more than tripled that mark. . . . No matter how much Harris deserved this isolation, the atypical duration created a liberty interest that triggered his right to due process.").

years in administrative segregation is atypical,[82] and common sense suggests it is, but no evidence was cited. Perhaps the court was relying on its experience with prison cases, which presumably informed the assumption, but the court did not indicate as much. Similarly, in concurrence in *Jones v. Baker*,[83] Judge Gilmin noted that confinement in administrative segregation "for a period of over two and a half years *is clearly a rare occurrence*."[84] But there does not appear to be any evidence in the record to support this assumption.

Courts make the same type of unsupported assumptions when denying procedural due process claims. In *Griffin v. Vaughn*,[85] the Third Circuit found it

> apparent that it is not atypical for inmates to be exposed to [administrative segregation] conditions . . . for a substantial period of time. Given the considerations that lead to transfers to administrative custody of inmates at risk from others, inmates at risk from themselves, and inmates deemed to be security risks, etc., one can conclude with confidence that stays of many months are not uncommon.[86]

However, the Court cited no evidence in support of this conclusion.[87]

Both the relevance of evidence regarding the duration of a typical stay in administrative segregation and the absence of such evidence has been made explicit in the Second and D.C. Circuits. In the Second Circuit, the facts specific to several individual challenges have resulted in a framework under which segregation of 305 days or longer is considered atypical and significant, segregation of less than 101 days is generally not atypical and significant, and segregation between 101 and 305 days requires development of a detailed factual record to determine atypicality.[88] But these parameters do not appear to be based on any empirical analysis. Rather, in *Colon v. Howard*,[89] the Second Circuit noted the absence "of any data showing that New York frequently removes prisoners from general population for as long as the 305 days that Colon served," and explained that "New York could have shown that Colon's confinement

82. *Id.*
83. 155 F.3d 810 (6th Cir. 1998).
84. *Id.* at 815 (Gilman, J, concurring) (emphasis added); *see also id.* at 812 (noting, without evidentiary support, that "few cases of segregation extend to the length of plaintiff's stay"). A rare exception can be found in *Shoats v. Horn*, in which the Court relied on testimony from a prison Superintendent that "to the best of his recollection, approximately 1% of the inmate population" had been confined in restrictive housing for eight years or more. 213 F.3d 140, 144 (3d Cir. 2000).
85. 112 F.3d 703 (3d Cir. 1997).
86. *Id.* at 708.
87. *Id.*; *see also* McMann v. Gundy, 39 F. App'x. 208, 210 (6th Cir. 2002) (stating that five months in administrative segregation without a hearing is not "excessive or unusual" without empirical support).
88. Fludd v. Fischer, 568 F. App'x. 70, 72 (2d Cir. 2014) (even "normal" solitary confinement lasting 305 days is atypical and significant); Palmer v. Richards, 364 F.3d 60, 64–65 (2d Cir. 2004).
89. 215 F.3d 227 (2d Cir. 2000).

did not compare unfavorably with 'periods of comparable deprivation typically endured by other prisoners in the ordinary course of prison administration.'"[90] Despite this clear invitation, it does not appear that later litigants provided evidence as to typical segregation terms in New York.

Similarly, in *Hatch v. District of Columbia*,[91] the D.C. Circuit surveyed national precedent regarding the proper baseline for determining atypicality and significance and then created its own standard, holding that a challenged restriction must be compared against the "most restrictive confinement conditions that prison officials, exercising their administrative authority to ensure institutional safety and good order, routinely impose on inmates serving similar sentences."[92] The court compared Mr. Hatch's confinement to a typical stay in administrative segregation, as that is the type of restriction "that prison officials routinely impose . . . for non-punitive reasons related to effective prison management."[93] The *Hatch* court explained that, because the "'incidents of prison life' encompass more or less restrictive forms of confinement depending on prison management imperatives," the term "'ordinary' limits the comparative baseline to confinement conditions that prison officials routinely impose."[94] Thus, in *Hatch*, the Court was careful to clarify that any comparison must take into account not just segregation conditions, but also the duration of segregation and its typicality given the sentence the individual prisoner is serving.[95] As there was no evidence in *Hatch* as to the typical duration of a stay in administrative segregation, the Circuit remanded to allow the district court to determine if twenty-nine weeks in administrative segregation was atypical.[96]

Aref was the first case in which prisoner plaintiffs actually presented empirical evidence of typical stays in administrative segregation. The *Aref* plaintiffs received in discovery information about administrative segregation placements at every low and medium security prison in the federal system, and submitted an expert report analyzing the material.[97] Based on the data the BOP provided, the median aggregate time[98] low and medium security federal prisoners spend in administrative segregation during an eighteen month period is 3.42 weeks.[99] The median is only

90. *Id.* at 231.
91. 184 F.3d 846 (D.C. Cir. 1999).
92. *Id.* at 856.
93. *Id.* at 851.
94. *Id.* at 856.
95. *Id.*
96. *Id.* at 858.
97. The *Aref* plaintiffs are all low and medium security prisoners. *Id.* at 248–49.
98. "Aggregate" times mean that if prisoner X spent five days in administrative segregation at the beginning of the eighteen-month period, and then a week in segregation toward the end of that period, prisoner X's stay is calculated as 12 days over the eighteen-month period. Joint Appendix, *supra* note 10, at JA-606.
99. *Id.* at JA-606. Dr. Beveridge, a statistician, arrived at this median by reviewing data regarding all prisoners in a large set of Bureau of Prisons facilities who spent any time in administrative segregation during the period of February 1,

slightly higher for all prisoners (as opposed to merely low and medium security prisoners): 3.98 weeks in administrative segregation over the eighteen month period.[100] There is some variation by facility: Medota FCI had the highest (by far) median aggregated stay in administrative segregation (9.82 weeks in the eighteen month period); and Chicago MCC had the lowest (0.88 weeks in the eighteen month period).[101]

Of course, the median represents the most common experience; not every stay longer than the median is so unusual as to be atypical. According to the *Aref* data, 53.2% of medium and low security prisoners spent less than four weeks in administrative segregation over the eighteen-month period. 23.58% spent at least four but less than ten weeks over the eighteen-month period (meaning that a cumulative total of 76.78% of medium and low security prisoners spent less than ten weeks in administrative segregation during the eighteen-month period). And 15.38% of medium and low security prisoners spent at least ten but less than twenty weeks in administrative segregation (meaning that a cumulative total of 92.16% of prisoners spent less than twenty weeks in administrative segregation during the eighteen-month period).[102] Since only 7.84% of prisoners spent *more* than twenty weeks in administrative segregation over the period, such a stay could reasonably be considered "atypical and significant."

These numbers tell the story of how administrative segregation is typically used in the federal system, but there may very well be significant differences in the states. The Liman Program at Yale Law School recently surveyed the directors of all the state prison systems in the country in an attempt to document the use of administrative segregation nationally.[103] Twenty-four jurisdictions provided data on the length of administrative segregation stays system-wide; in eleven of these twenty-four jurisdictions the majority of prisoners in administrative segregation were there for fewer than ninety days, and in fifteen of the twenty-four jurisdictions the majority of prisoners in administrative segregation were there for fewer than 180 days.[104] Interestingly, in several of the jurisdictions where a majority of prisoners in administrative segregation spent more than ninety days in administrative segregation, the administrative segregation population was relatively low. For example, in New York 100% of

2012 through August 2, 2013. The data included security level, the date and time of placement in administrative segregation and the date and time segregation ended. *Id.* at JA-604.

100. *Id.* at JA-606.

101. *Id.* at JA-633.

102. Exhibit 13 to Plaintiffs' Memorandum in Opposition to Defendants' Motion for Summary Judgment and Reply in Support of Plaintiffs' Motion for Summary Judgment at tbl. 2, *Aref v. Holder*, No. 10-cv-00539, 2015 WL 3749621 (D.D.C. Mar. 16, 2015), *aff'd in part, rev'd in part sub nom.* Aref v. Lynch, 833 F.3d 242 (D.C. Cir. 2016).

103. The Liman Program, Yale Law School, Time in Cell: The ASCA-Liman 2014 National Survey of Administrative Segregation in Prison, at i (2014).

104. *Id.* at 29.

prisoners in administrative segregation spent over six months there, but only twenty-three prisoners total were in administrative segregation.[105] In Arkansas, Missouri, and Pennsylvania (three of the four states which reported over 1000 prisoners in administrative segregation), 71%, 82%, and 75% of prisoners, respectively, spent less than 180 days in administrative segregation.[106] Thus, while the matter requires more analysis, the Liman study results, along with the *Aref* data, provide significant empirical support for those courts which have found that administrative segregation stays of two and a half or eight years are atypical,[107] and call into question many courts' assumptions that one to two year stays are *not* atypical.[108]

Of course, in *Aref* the D.C. Circuit was confronted with prolonged CMU segregation, not prolonged administrative segregation. This adds a layer of complication, and the *Aref* court acknowledged uncertainty as to how duration should interact with the other benchmarks of significance and atypicality. The court compared the typical duration of a stay in administrative segregation to the duration of a CMU stay, noting that the latter "is indefinite—lasting years in appellants' case . . ." as opposed to the deprivations of administrative segregation, which "will generally only last for a few weeks."[109] However, the court held that conditions in administrative segregation are harsher than conditions in the CMU, as prisoners in administrative segregation must remain in their cells twenty-three hours a day while CMU prisoners need not.[110] Even communication restrictions in administrative segregation are harsher than communication restrictions in the CMUs, since prisoners in administrative segregation can make only one fifteen minute call per month, while CMU prisoners can currently make two fifteen minute calls per week.[111]

105. *Id.* At first glance, this might call into question the Second Circuit's approach, described above, but that does not follow. Rather, the prolonged stays in administrative segregation are themselves atypical, as New York simply does not typically use administrative segregation. *See supra* Part II.B.

106. *Id.* The significant outlier in the data was Texas, which reported 6,491 prisoners in administrative segregation, 77% of whom spent *more than 1 year there*.

107. *See e.g.*, Harris v. Caruso, 465 F. App'x, 481, 484 (6th Cir. 2012); Jones v. Baker, 155 F.3d 810, 815 (6th Cir. 1998) (Gilman, J., concurring).

108. *See, e.g*, Ballinger v. Cedar County, 810 F.3d 557, 562–63 (8th Cir. 2016) (holding one year in solitary confinement not atypical and significant, without identifying the proper baseline for comparison).

109. Aref v. Lynch, 833 F.3d 242, 257 (D.C. Cir. 2016). The *Aref* plaintiffs spent between three to five years in the CMU. Joint Appendix, *supra* note 10, at JA-309 ¶ 64, JA-310 ¶ 65, JA-310 ¶ 66. These lengthy stays are no aberration. During the 78-week period studied, low- and medium-security prisoners spent a median time of 66.78 weeks in the CMU. *Id.* at JA-606. This is 19.5 times as long as a typical stay in administrative segregation. And, as plaintiffs' experiences show, the *actual* duration of CMU confinement is generally much longer. Between January 1, 2007, and June 30, 2011, for example, low- and medium-security prisoners spent a median of 138.71 weeks (over two and a half years) in a CMU. *Id.* at JA-607.

110. *Aref*, 833 F.3d at 256–57.

111. *Id.* at 257.

However, prisoners "housed in CMUs . . . may spend years denied contact with their loved ones, and with diminished ability to communicate with them. The harms of these deprivations are heightened over time, as children grow older and relationships with the outside become more difficult to maintain."[112] For this reason, the court found that the prolonged and indefinite nature of CMU confinement weighed strongly in favor of a liberty interest. "The main tension, then, is how atypicality, indefiniteness and the harshness of the deprivations should be weighed."[113] To answer this question, the court considered the selectivity of CMU placement, and it is this issue to which I now turn.

C. *The Role of Selectivity in the Sandin Baseline*

Sandin directs courts to consider whether challenged conditions are "atypical and significant," but in implementing this directive, the lower courts have largely focused on significance and paid little attention to atypicality, beyond the issue of duration described above. This makes sense to a certain degree. Most of the procedural due process prison cases that make their way through the federal courts involve challenges to placement in administrative segregation or disciplinary segregation, and such processes are commonplace. Every prison system has a disciplinary process, and prisoners who violate prison rules risk punishment. Challenges may arise as to whether prison procedures are fair and just, and whether punishment is too extreme, but the system as a whole is rarely attacked. Certainly prison discipline can be enforced in a discriminatory or unfair way. A prisoner may be singled out for stricter enforcement of prison rules because he or she challenges the prison administration, and such enforcement may amount to unconstitutional retaliation if it is motivated by protected speech.[114] But as a general matter, prisoners can expect to be exposed to prison discipline if they violate prison rules, and such discipline in itself is not atypical. Similarly, administrative segregation is routinely used, and its routine use is precisely why so many circuits have identified it as the proper comparative baseline.

In *Hatch*, the D.C. Circuit explained this at length. The court surveyed national precedent, taking care to describe "the ordinary incidents of prison life," and determined that the conditions of Mr. Hatch's confinement should be compared to a typical stay in administrative segregation, since that is the type of restriction "that prison officials routinely impose . . . for non-punitive reasons related to effective prison management."[115] In coming to this conclusion, the Court looked to the way such segregation had previously been described by the Supreme Court:

112. *Id.* (citing Wilkerson v. Stalder, 639 F. Supp. 2d 654, 684 (M.D. La. 2007) ("With each passing day its effects are exponentially increased, just as surely as a single drop of water repeated endlessly will eventually bore through the hardest of stones.")).
113. *Id.*
114. *See, e.g.*, Banks v. York, 515 F. Supp. 2d 89, 111 (D.D.C. 2007).
115. Hatch v. Columbia, 184 F.3d 846, 855 (D.C. Cir. 1999).

> It is plain that the transfer of an inmate to less amenable and more restrictive quarters for nonpunitive reasons is well within the terms of confinement ordinarily contemplated by a prison sentence. The phrase "administrative segregation," as used by the state authorities here, appears to be something of a catchall: it may be used to protect the prisoner's safety, to protect other inmates from a particular prisoner, to break up potentially disruptive groups of inmates, or simply to await later classification or transfer. See 37 Pa. Code §§ 95.104 and 95.106. . . . Accordingly, administrative segregation is the sort of confinement that inmates should reasonably anticipate receiving at some point in their incarceration.[116]

The *Aref* plaintiffs argued that CMU confinement was atypical and significant, as compared to a typical stay in administrative segregation, not just because it is so prolonged, but because CMU confinement is so rarely imposed. In 2012, there were 218,687 federal prisoners.[117] Yet between 2006 and 2014, there were only 178 *total* CMU designations.[118] Thus, only a tiny minority of federal prisoners will be sent to the units. This atypicality persists even when considering only prisoners eligible for CMU placement. In 2012, there were 4,351 prisoners eligible for CMU placement by virtue of a terrorism-related conviction or repeated communication violations.[119] Presumably hundreds more are eligible under the other CMU criteria provided in Part I. However, less than 4% will actually be sent to a CMU.[120] Indeed, only 205 prisoners have ever even been *considered* for CMU placement (of that small group, 175 were so designated, and thirty were rejected for CMU placement).[121]

The *Aref* court found that this "selectivity," along with the typical duration of CMU placement, "pushes CMU designation over the *Sandin* threshold," rendering it "atypical."[122] The Court did not explain why this would be the case, but it makes sense as a logical matter. When relatively few prisoners are singled out to be treated differently than everyone else, it raises the question "why?" Out of the thousands of prisoners eligible for CMU placement, what distinguishes the 205 who were considered? Being one of so few is an atypical experience by definition, and while not all atypical experiences will be significant (for example, it is hard to imagine that a prisoner would have a liberty interest in avoiding placement

116. Hewitt v. Helms, 459 U.S. 460, 468 (1983).
117. *Population Statistics*, Fed. Bureau of Prisons (Mar. 23, 2017), https://www.bop.gov/about/statistics/population_statistics.jsp#old_pops [https://perma.cc/T5EW-E68D].
118. Joint Appendix, *supra* note 10, at JA-339 ¶ 272.
119. *Id.* at JA-319–20 ¶ 130.
120. *Id.* at JA-319–20 ¶ 130, JA-339 ¶ 272.
121. *Id.* at JA-1572. That so few prisoners are considered for CMU placement is likely a function of the arbitrary and ever-changing nature of the CMU procedures, described in Part I. If the BOP had criteria and systems in place to screen all eligible prisoners for potential CMU placement, selectivity would likely not be a major problem.
122. Aref v. Lynch, 833 F.3d 242, 246, 257 (D.C. Cir. 2016).

in a green cell, simply because all other prisoners' cells at that prison are painted beige), restrictions which might not be harsh enough to give rise to a liberty interest if routinely imposed must be given a second look if they are imposed only upon a few.

Indeed, this logic is suggested by the identification of administrative segregation as the appropriate baseline. So long as it is not prolonged or otherwise unusual, placement in administrative segregation is the baseline *because* it is so commonplace. Conversely, uncommon treatment raises different concerns.

Where treatment is uncommon, procedural protections are more likely to be necessary to avoid not only arbitrary restrictions, but also discriminatory ones. Here too, the CMU is a perfect case study. As mentioned above, sixteen of the first seventeen prisoners sent to the CMU were Muslim.[123] This overrepresentation of Muslim prisoners continued through the CMUs' history, though not in such stark terms. Of 178 total CMU designations, 101 have been of Muslim prisoners.[124] Compared to a Muslim population within the BOP of approximately 6%,[125] this marks a *vast* overrepresentation that cannot be explained away by virtue of the CMUs' focus on terrorism. Of the first fifty-five prisoners designated to the CMU, forty-five were sent there because of their connection to terrorism, but the other ten were designated due to involvement in prohibited activities related to communication; and of that ten, eight self-reported as Muslim.[126] There is no sign that the overrepresentation of Muslims in the CMU will not continue. Based on a declaration submitted in a *pro se* CMU challenge, as of March 26, 2014, there were ninety-five inmates in total assigned to the two CMUs in Marion and Terre Haute, forty-five of whom were identified as Muslim.[127]

Evidence about uneven application of the CMU procedures described above also support this selectivity analysis. As explained above, each CMU prisoner is given a one-page "Notice to Inmate of Transfer to [a CMU]," shortly after his arrival at a CMU.[128] Each notice includes general information about the CMU along with several prisoner-specific sentences purporting to notify the prisoner of the reason for their placement on the unit.[129] However, the notice is drafted by the CTU, and the

123. Exhibit 71, *supra* note 32, at 1–3.
124. Joint Appendix, *supra* note 10, at JA-339 § 272.
125. *Id.* at JA-340 ¶ 274.
126. *Id.* at JA-339 ¶ 273. The *Aref* plaintiffs had argued that this overrepresentation of Muslims, especially in the context of a unit designed to hold terrorists, rendered CMU placement stigmatizing in way that was cognizable under *Sandin*'s atypical and significant test. The Court rejected the argument, as CMU designation does not involve a formal (and potentially stigmatizing) "terrorist" designation. *Aref*, 833 F.3d at 257–58.
127. Amawi v. Walton, No. 3:13-cv-00866-JPG-RJD, 2016 WL 7364768, at *3 (S.D. Ill. Nov. 17, 2016) (citing Doc. 176-2, p. 2).
128. Joint Appendix, *supra* note 10, at JA-322.
129. *Id.*

CTU does not have a policy or practice of including *all* of the reasons for their CMU recommendation.[130]

A review of all CMU prisoner notices, compared to their designation packets, uncovered that the notices frequently omit mention of the role a prisoner's political and religious beliefs and statements play in CMU designation. Daniel McGowan, for example, was transferred to the CMU after serving a year in a normal, low-security prison.[131] His notice of transfer describes his conviction and offense conduct as bases for his CMU designation, but fails to disclose that the CTU also relied on his social communications about environmental issues while at FCI Sandstone (his prison prior to the CMU) to justify his CMU placement.[132]

This does not seem to be an isolated incident. Prisoner B[133] was recommended for CMU placement based on communications violations and a conversation about Hamas, yet his notice of transfer does not mention the Hamas conversation.[134] Similarly, prisoner C was recommended for CMU placement based on his offense conduct, his communication of anti-government views while incarcerated, and one communication violation; but his notice of transfer did not mention the relevance of his anti-government communications.[135]

Viewed in the context of selectivity, the disproportionate number of Muslims assigned to CMUs and the possibility that prisoners are being singled out for such placement based on political beliefs or statements are both meaningful. Restrictions imposed only on a few, *especially* when many of those few belong to a minority religion (or political perspective), necessitates procedural protection, to ferret out discrimination or retaliation.

Conclusion

The Supreme Court's silence as to the proper baseline for *Sandin*'s "significant and atypical" test has led to significant divergence in the circuits, such that some jurisdictions have all but foreclosed the possibility that any length or form of segregation might require procedural protections. However, there is a nascent consensus comparing challenged placements in restrictive conditions to typical stays in administrative or

130. *Id.* at JA-322 ¶ 145. Leslie Smith, Chief of the CTU, testified that he sometimes omits one of the CTU's reasons for its recommendation. *Id.* When asked why, he responded that there is not enough space on the form. *Id.*

131. *Id.* at JA-328 ¶ 186, JA-310 § 66.

132. *Id.* at JA-329 ¶¶ 192–93, 195; JA-328 ¶¶ 186, 188.

133. Non-plaintiff prisoner names were kept confidential in the *Aref* litigation, to protect their privacy.

134. Exhibit 78 to Plaintiffs' Motion for Summary Judgment at BOP CMU 67422–23, 60913, 76144, *Aref v. Holder*, No. 10-cv-00539, 2015 WL 3749621 (D.D.C. Mar. 16, 2015), *aff'd in part, rev'd in part sub nom.* Aref v. Lynch, 833 F.3d 242 (D.C. Cir. 2016).

135. Exhibit 79 to Plaintiffs' Motion for Summary Judgment at 1–3, *Aref v. Holder*, No. 10-cv-00539, 2015 WL 3749621 (D.D.C. Mar. 16, 2015), *aff'd in part, rev'd in part sub nom.* Aref v. Lynch, 833 F.3d 242 (D.C. Cir. 2016).

disciplinary segregation. This approach requires the development of data as to how the different jurisdictions typically use segregation. Until such research is completed, the data developed in *Aref* and described in the Liman study may prove useful to prisoners across the country who seek to prove that segregation of longer than twenty weeks is atypical and significant, and thus requires procedural protections.

At the same time, prisoners who seek procedural due process protections for uncommon treatment or restrictions may be well-advised to emphasize the unique role of atypicality in *Sandin*'s significant and atypical test. Persistent irregularities in CMU placement and review procedures demonstrate that when a prisoner is singled out for different treatment, procedural protections are essential to ensure that discrimination or retaliation are not at issue.