

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

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Yassin Muhiddin AREF, et al.,)	
)	
Plaintiffs,)	
)	Case No. 1:10-cv-00539-BJR
v.)	
)	
Eric HOLDER, et al.,)	
)	
Defendants.)	
)	

**PLAINTIFFS’ SURREPLY IN FURTHER OPPOSITION TO DEFENDANTS’
CONSOLIDATED MOTION TO DISMISS**

While Plaintiffs have already adequately addressed the legal arguments raised by Defendants’ Reply in Support of their Consolidated Motion to Dismiss (“Reply”) (Docket No. 105), two factual matters, which became relevant subsequent to Plaintiffs’ opposition, require a brief response.

I. Mr. McGowan’s Official Capacity Claims Are Not Moot.

First, due to the treatment of Mr. McGowan since Plaintiffs filed their opposition, Plaintiffs now oppose Defendants’ request to dismiss Mr. McGowan’s official capacity claims as moot.¹ As this Court is already aware, Defendants argued in their motion that Mr. McGowan’s transfer to a halfway house on December 11, 2012 mooted his claims because he would not be returned to prison unless he violated a halfway house rule. *See* Defendants Consolidated Motion to Dismiss (“MTD”) (Docket No. 99) at 9-12. As that was Plaintiffs’ understanding as well,

¹ When the parties met and conferred prior to briefing, Plaintiffs initially indicated to opposing counsel that we would not oppose Defendants’ mootness argument. We have met and conferred with opposing counsel again, to explain our change in position in light of recent events.

Plaintiffs did not oppose this request. The events of the last week, however, have demonstrated that this representation is incorrect.

On April 1, 2013, Mr. McGowan published a blog on the Huffington Post entitled, *Court Documents Prove I Was Sent to Communication Management Units (CMU) for My Political Speech*.² See Declaration of Daniel McGowan (“McGowan Decl.”), attached hereto as Exhibit 1, at ¶ 6.

Only two days later, on April 3, 2013, the BOP refused to issue Mr. McGowan a daily work pass to his current job as a receptionist at the Law Firm of Rankin and Taylor. *Id.* at ¶ 7. When he inquired why, he was told by his halfway house case manager that the instruction not to issue the work pass came from the Bureau of Prisons (BOP). *Id.* The following morning Mr. McGowan was detained by U.S. Marshals and taken into custody at the Metropolitan Detention Center (MDC) in Brooklyn, NY. *Id.* at ¶ 8. He was placed in the MDC Special Housing Unit, even though two other prisoners brought to MDC for violating halfway house rules were placed in general population. *Id.* at ¶ 9.

Mr. McGowan was issued an Incident Report stating that his Huffington Post blog violated a BOP rule forbidding prisoners from publishing under a byline. *Id.* at ¶ 8. However, the rule prohibiting a prisoner from publishing under a byline was declared unconstitutional by a federal court six years ago. See *Jordan v. Pugh*, 504 F. Supp. 2d 1109, 1126 (D. Colo. 2007) (“the Byline Regulation violates the First Amendment rights of Mr. Jordan, other inmates in federal institutions, and the press”). Instead of appealing, the BOP abandoned the byline regulation by interim rule on April 23, 2010 and final rule on April 3, 2012. See *Inmate*

² Available at http://www.huffingtonpost.com/daniel-mcgowan/communication-management-units_b_2944580.html.

Communication With News Media: Removal of Byline Regulations, available at <http://www.gpo.gov/fdsys/pkg/FR-2012-04-03/html/2012-7971.htm>.

There is no halfway house rule or current regulation that prohibits Mr. McGowan's right to publish information on the Huffington Post. *See* McGowan Decl. at ¶ 3. Rather, Mr. McGowan was returned to federal custody in retaliation for his publication of an article describing how Defendants retaliated against his prior speech by sending him to the CMUs, all under the guise of an unconstitutional rule that the BOP has explicitly abandoned.

Upon learning that Mr. McGowan had been taken into custody undersigned counsel contacted counsel for Defendants and requested that they immediately investigate the matter. The next day, Mr. McGowan was released from MDC and allowed to return to his halfway house. *Id.* at ¶ 10. The Incident Report was expunged. *Id.*

When Mr. McGowan arrived at the halfway house, however, he was required to sign a "case notes" form prohibiting him from any contact with the media, including publishing articles, without prior BOP permission. *Id.* These restrictions do not comport with BOP or halfway house rules or policies. After again bringing our concern to the attention of opposing counsel, the case notes document was removed from Mr. McGowan's file.

Plaintiffs will seek appropriate discovery in this case in order to determine who made the decision to detain Mr. McGowan, purportedly on the basis of an unconstitutional and obsolete rule, in response to his exercise of his First Amendment right to free speech, and to ascertain why his speech rights were again restricted. In the meantime, in the light of these continued acts of First Amendment retaliation, and the possibility that Mr. McGowan could again be sent to the CMU for protected speech, Mr. McGowan's claims are not moot. *See Friends of the Earth, Inc. v. Laidlaw Envtl. Servs.*, 528 U.S. 167, 189 (2000) (mootness requires a Defendant to show

that subsequent events make it absolutely clear that the allegedly wrongful behavior cannot reasonably be expected to recur); *Barnett v. Rodgers*, 410 F.2d 995, 997 n.1 (D.C. Cir. 1969) (prisoner-plaintiffs' transfer from a D.C. jail to a Virginia prison did not moot their challenge to the jail's failure to provide them with a pork-free diet as prisoner-plaintiffs might be returned to the jail). Defendants are correct that a prisoners' (or probationers') claim may be mooted where the only possibility of recurrence rests on speculation that he will again violate a rule or law, and thus be returned to prison. *See* MTD at 11. But the same cannot be said when the BOP evidences a continuing disregard for their own rules and the First Amendment. Given this unique situation, and the possibility that Defendants will once again retaliate against Mr. McGowan, Plaintiffs respectfully request that the Court retain jurisdiction of Mr. McGowan's official capacity claims until his release from BOP custody and the completion of his term of probation, currently scheduled to end on June 6, 2016. *See* McGowan Decl. at ¶ 2.

II. Mr. Jayyousi Did Not Instruct CMU Prisoners to "Martyr" Themselves.

Second, Defendants' Reply repeatedly attempts to justify the decision to retain Mr. Jayyousi in the CMU by claiming that he urged or instructed his fellow CMU prisoners "to martyr themselves." *See* Reply at 9, 10, 13, 17. This is an inaccurate characterization of Mr. Jayyousi's sermon. *See* Exhibit 2, attached hereto.³ As the transcript makes clear, Mr. Jayyousi most certainly *did not* instruct CMU prisoners to martyr themselves. *Id.* at 2. His use of the word martyr was in no way adversarial or violent, but rather, referenced famous prisoners of the past, like John McCain and Nelson Mandela, and the importance of keeping faith despite the pain prisoners, and all people, experience throughout their lives. *Id.*

³ The excerpts of this sermon attached to Plaintiffs' opposition did not provide the full context in which the word "martyr" was used. We have attached a more complete transcription, previously subject to the protective order, with permission from opposing counsel.

For these reasons, and for the reasons explained in Plaintiffs' Opposition to Defendants' Consolidated Motion to Dismiss, Defendants' motion should be denied.

Dated: April 11, 2013

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CERTIFICATE OF SERVICE

I, Alexis Agathocleous, counsel of record for the Plaintiffs, hereby certify that on April 11, 2013, I placed a copy of the foregoing in the mail in a prepaid Federal Express envelope to the following person and address: “Royal Jones, Fed. Reg. No. 04935-046, Community Education Center – Casper, 10007 Landmark Lane, mills, WY 82644.”

Exhibit 1

**UNITED STATES DISTRICT COURT
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)	
Plaintiffs,)	
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v.)	Case No.:1:10-cv-00539-RMU
)	
Eric HOLDER, et al.,)	
)	
Defendants.)	
_____)	

Declaration of Daniel McGowan

I, Daniel McGowan, make the following declaration under penalty of perjury:

1. I was transferred to a halfway house in Brooklyn, New York, on December 11, 2012.
2. I am scheduled to be released from Bureau of Prisons (BOP) custody on June 5, 2013. Upon information and belief, I will be on probation until June 5, 2016.
3. Upon my arrival at the halfway house, I was given a list of rules. I have followed those rules. I have incurred no disciplinary infractions while at the halfway house of which I am aware. The halfway house rules do not forbid publishing blogs, or contacting the news media. I am not aware of any BOP rules that would prohibit me from doing so.
4. I have been working at the Law Office of Rankin and Taylor since December 2012. I have been issued a work pass every day without incident, and have worked there full time.
5. I have also been allowed home visits with my wife, Jenny Synan, every weekend.

6. On April 1, 2013, I published a blog piece on the Huffington Post, titled “Court Documents Prove I Was Sent to Communication Management Units (CMUs) For My Political Speech,” in which I explained that I believe that I was sent to the CMUs in retaliation for my First Amendment-protected speech.

7. Two days later, on April 3, 2013, I was not issued a work pass for the first time. When I inquired why, I was told by my case manager at the halfway house, Ms. Suriel, that the instruction not to issue the work pass came from the BOP. Ms. Suriel said that she could give me no further information.

8. On the morning of April 4, 2013, the United States Marshals escorted me from the halfway house to the Metropolitan Detention Center (MDC) in Brooklyn, New York. I was given an incident report indicating that my Huffington Post blog violated BOP program statement #1480.05 page 5, section (d), stipulating that an inmate currently confined in an institution may not publish under a byline.

9. At MDC I was placed in the Special Housing Unit, although two prisoners who I traveled with, and who were also sent to the MDC for violating a halfway house rule, were placed in general population.

10. I received no warning that I had committed any infraction of any BOP or halfway house rule, and I do not believe that I violated any BOP or halfway house rule. On April 5, 2013 I was furloughed from the BOP, and returned to the halfway house. I was told that the incident report was expunged, but I was provided with a written warning prohibiting me from having “any contact with the media without approval from the BOP....” I was advised that, among other activities, “writing articles” without prior BOP approval is strictly prohibited.

Executed on this 10 day of April 2013.

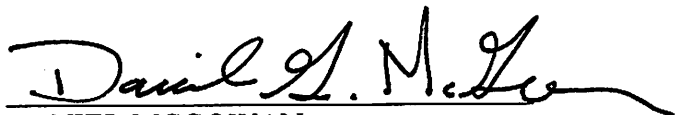

DANIEL MCGOWAN
New York, New York

Exhibit 2

PROTECTED - JAYYOUSI - NOT TO BE RETAINED BY PLAINTIFF



U.S. Department of Justice
Federal Bureau of Prisons

Correctional Programs Division

Counter Terrorism Unit

[REDACTED]
[REDACTED]
[REDACTED]

April 12, 2011

MEMORANDUM FOR ALL CONCERNED

FROM: John Bair, Intelligence Analyst
SUBJECT: Jumma Prayer
RE: Inmate JAYYOUSI, Kifah, Reg. No. 39551-039
RE: Nice Vision Recording

Juma prayer recorded Friday, August 15, 2008, 12:55 p.m. - CMU. The first 20 minutes are singing, prayer in english and arabic. He discuss the role of being a Muslim and cites passages in the Koran to illustrate his point.

Time 1:15:35 pm.

My brothers in this place, as you are aware this concentrated Muslim community, this Muslim community is a Prison and is not a prison. Somebody told me words that was um somebody who is not a muslim, who has spent 25 years in prison. He said he has never seen any place like this. This is a very unique prison and even BOP employees and some of the CO's and some of the Officers wonder where did this place come from. It's like a place that fell from some hell, some evil created this place because it does not belong to anything that BOP has done in the past 300 year history and you know what is happening here. We are being observed, you are being studied, you are being watched. Other prisons are being watched but in this place each one of you have been brought whether your case was started with a fabrication or the reason that brought you here was the fabricator. You were brought here because you are Muslim and we have our response to that, has to be to stand firm, stand strong, to stand steadfast. Yes, it is a hard place. Yes (Arabic) but you have to remember and you are being tested and you are being tested by Allah and you have to remember you are here because you are Muslim. Not because you are a criminal.

BOP CMU 004901

PROTECTED - JAYYOUSI - NOT TO BE RETAINED BY PLAINTIFF

Always remember don't have a prison mentality you are not here because you are a criminal, you are here because you are Muslim. (Arabic)the only reason they are upset because we are believers we believe in Allah somebody who is raised with his parents with his family brothers and sisters going to work and good citizens all of a sudden is fucked out of his family and a huge case is fabricated and they turned a few good American citizens into a criminal. Because remember you are not the target, brother Smalls, brother Salah, brother Mandhai, brother Awan, you are not the target, I am not the target, it is not US vs Jayyousi, it is US vs Islam. You have to keep that in mind and the reason I say that is we need to never give up our faith. Never compromise our faith, and hey, if anyone of us compromise you wouldn't be here right, right? Some people compromise and still they send them to prison anyway. But we have to remember to not to betray our faith. And uh at the end of the day this is why and you have to take it as it is we are all grown men you have to take what you are take in life and if I could look at John McCain, John McCain is a presidential candidate and in two months he could be our president where was he 20 years ago? He was being tortured in a Vietnamese prison for many years with no hope probably of survival and he is handicapped he is disabled from that torture. But what happened he stood firm he stayed firm he came through if the people of (Minion?) are doing this shouldn't we as believers do the same. There is a famous story of a of course Nelson Mandela who can forget Nelson Mandela? He for 27 years he was offered to get out of jail twice but he refused he was offered in 76 and 85 he went in 62 and got out in 90. Offered twice if someone comes an offer to you; oh you will get out but hey we would like to uh uh recruit you our ask you to help us get more people into the CMU entrap more Muslims and get them in jail; tarnish the image of Islam in America. Mandela refused them. Mandela refused to get out of jail twice he was firm and was strong in his beliefs. These are the people of the Minion(SP?) he got out and was president of that country. Before he got out of Jail the system collapsed in south africa the system of (arabic) everybody knows what that system is. There was another story of Admiral Jim Scotsdale. Admiral Jim Scotsdale was the highest ranking US officer to be Captain in Vietnam he was shot down. He was a three star General and they tortured him for eight years if you can imagine he lost basically his foot. He couldn't walk on his foot anymore but Jim Admirial Scotsdale was very strong gave his beliefs and he was very firm in protecting his country all of the other prisoners were some of them were weak, but he had these couple of a points that were very famous with the prisoners, a that, that he was with he said that if you want to survive a very bad situation like that and we are not being tortured here except psychologically but if you want to survive he said retain faith that you will prevail at the end regardless , regardless of the circumstances but retain faith keep faith in your heart that you are going to overcome this you are gonna get out of this place you will reach that gate no matter what the difficulties are cause you don't control that Allah does controls that and his is a man of union(sp?) and then deal and face you current situation. You have to stop wining stop crying stop feeling sorry for yourself because that is not going to get you anywhere just (Arabic) ok stop worrying about your family because Allah is taking care of them. It is hard but it is the way which Allah created us (Arabic) you are, you are going to return to your lord to meet him with your hard work and the hardships that you have faced and done in this life; this is why we marter but (Arabic) we created the human in hardship why full of hardship from the minute you are born do you feel pain from the minute you are born you grow teeth you feel pain. Some Dr. said the growth of a baby a tooth is more painful than someone hitting you with an knife you feel pain every step of the way all the way to death (Arabic) and then he saying to us (Arabic) you have to brave this life you have to face this life and remember that no matter what happens to us (Arabic) what ever happens to us is

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what Allah has pre-ordained to us to us not against us (Arabic) but this hardship is good for us but we have to be patient we have to be patient and finally (Arabic) is it better for the man to be established with wealth and power or better for him to be blessed by Allah he said he would never reach power and wealth until he ??? (Arabic He is Crying while reciting the prayer) The rest of the service is in Arabic and ends at 1:37.