



[4410-050-F]

**DEPARTMENT OF JUSTICE**

**Bureau of Prisons**

**28 CFR Part 541**

[Docket No. BOP-1172-F]

RIN 1120-AB72

**Inmate Discipline Program: New Prohibited Act Code for Pressuring Inmates for Legal Documents.**

**AGENCY:** Bureau of Prisons, Department of Justice.

**ACTION:** Final rule.

**SUMMARY:** In this document, the Bureau of Prisons (Bureau) adds a new code to the list of prohibited act codes in the inmate discipline regulations which will clarify that the Bureau may discipline inmates for pressuring or otherwise intimidating other inmates into producing copies of their own legal documents, such as pre-sentence reports (PSRs), or statement of reasons (SORs).

**DATES:** This rule is effective [**INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER**].

**FOR FURTHER INFORMATION CONTACT:** Sarah N. Qureshi, Rules Unit, Office of General Counsel, Bureau of Prisons, phone (202) 307-2105.

**SUPPLEMENTARY INFORMATION:**

In this document, the Bureau adds a new prohibited act

code, 231, to Table 1 - Prohibited Acts and Available Sanctions in the inmate discipline regulations at 28 CFR 541.3, which will clarify that inmates may be disciplined for pressuring or otherwise intimidating other inmates into producing copies of their own legal documents, such as pre-sentence reports (PSRs), statement of reasons (SORs), or other such documents.

The Bureau has found that inmates, or inmate groups, frequently pressure other inmates for copies of their PSRs, SORs, or other similar sentencing documents from criminal judgments, to learn if they are informants, gang members, have financial resources, to find others involved in offenses, to prove affiliations, etc. Some inmates who produced, or refused to produce, the documents were threatened, assaulted, and/or sought protective custody, all of which jeopardized the Bureau's ability to safely manage its institutions. The problem of threats and assaults on inmates arising from possession of an inmate's presentence investigative reports, statements of reasons, or other similar sentencing documents from criminal judgments has been acknowledged by the Administrative Office of U.S. Courts and in case law. See, e.g., United States v. Antonelli, 371 F.3d 360, 361 (7<sup>th</sup> Cir. 2004); Harrison v. Lappin, 510 F.Supp.2d 153 (D.C. Cir. 2007); Delgado v. Bureau of Prisons, 2007 WL 2471573 (E.D.Tex.); Martinez v. Bureau of Prisons, 444 F.3d 620, 370 U.S.App.D.C. 275 (D.C. Cir. 2006);

Sample v. Watts, 100 Fed.Appx. 317, 2004 WL 1255359 (C.A.5  
(Tex.).

The Bureau of Prisons (Bureau) published a proposed rule on this subject on November 19, 2019 (84 FR 63830). The comment period closed on January 21, 2020. We received fifteen comments during the comment period. While several were in support of the general premise of the proposed rule, commenters raised similar concerns and questions in their comments, which we address below.

**The rule limits inmates' right to meaningful access to courts.** Fourteen of the fifteen commenters raised a version of this issue: The prohibited act code, as proposed, appears to curtail the ability of inmates to assist other inmates with preparation of legal documents, as allowed by 28 CFR part 543, specifically §§ 543.10 and 543.11.

As we stated in the proposed rule, the Bureau has found that inmates, or inmate groups, pressure other inmates for copies of their PSRs, SORs, or other similar sentencing documents from criminal judgments, to learn if they are informants, gang members, have financial resources, or to learn of others involved in the offense, etc. Some inmates who produced, or refused to produce, the documents were threatened, assaulted, and/or sought protective custody, all of which jeopardized the Bureau's ability to effectively and safely

manage its institutions. The defense bar, federal sentencing courts, and the Bureau identified this issue as one of concern that required attention/action.

In Dept. of Justice v. Julian, 486 U.S. 1 (1988), the U.S. Supreme Court decided the government was obligated to provide inmates access to their own pre-sentence investigation reports under the Freedom of Information Act (FOIA). By continuing to provide inmates reasonable access to review their PSRs, SORs, or other similar sentencing documents from criminal judgments at the facilities at which they are located, the Bureau's obligation under the FOIA is satisfied. The Julian decision did not mandate that inmates be permitted to obtain and possess copies of these documents contrary to legitimate penological interests, i.e., the safety and security of Bureau institutions, inmates, staff, and the public.

The Bureau's regulation in volume 28 of the Code of Federal Regulations, section 543.10, indicates that the Bureau affords inmates "reasonable access to legal materials" in order to prepare legal documents. Section 543.11(d)(1) authorizes inmates to receive legal materials from outside the institution, including the inmate's "pleadings and documents (such as a pre-sentence report) that have been filed in court or with another judicial or administrative body, drafts of pleadings to be submitted by the inmate to a court or with other

judicial or administrative body which contain the inmate's name and/or case caption prominently displayed on the first page, documents pertaining to an inmate's administrative case."

Subparagraph (d)(2) further allows inmates to "possess those legal materials which are necessary for the inmate's own legal actions. Staff may also allow an inmate to possess the legal materials of another inmate subject to the limitations of paragraph (f)(2) of this section."

Notably, however, commenters do not mention the limitations of § 543.11(f)(2) in existence prior to the proposed rule, which provide that an assisting inmate may possess another inmate's legal materials, while assisting the other inmate, in the institution's main law library or in other locations designated by the Warden, but may not remove another inmate's legal materials, including copies, from the designated location. The new prohibited act does not alter or curtail the ability of an assisting inmate to view another inmate's legal materials for the purposes of assisting that inmate in an authorized location.

Additionally, under § 543.11(f)(2)(i), an assisting inmate is also permitted to make handwritten notes and drafts of pleadings, and even to remove those notes from the authorized location, as long as the notes do not contain a case caption, document title, or the name of any inmate.

Finally, § 543.11(f)(4) indicates that limitations on inmate assistance to other inmates may be imposed in the interest of institution security, good order, or discipline. This rulemaking is a practical limitation for reasons of security on the scope of inmate assistance to other inmates. While this rule does not prohibit such inmate assistance, inmates may find that firmer adherence to the letter of the regulations has become necessary due to greater attention to incidences of inmate harassment and intimidation.

However, because commenters found the language of the prohibited act code to be unclear and overbroad, the Bureau now alters code 231 as set forth in the rule to provide that the conduct to be prohibited is, in fact, *unauthorized* conduct, not the authorized inmate assistance rendered by one inmate to another inmate in a location authorized by the Warden and performed as required in 28 CFR part 542.

**Staff awareness and/or abuses of the prohibited act code sanctions.** Two commenters asked how staff would be made aware of prohibited act conduct and what action they would take upon being made aware of it. Another was concerned that staff would take "discipline as physical punishment" and warned that "it must be made very clear to any guard or authority figure in a prison what kind of discipline the inmate is to receive as well

as clear justification for it." Three more commenters expressed concerns regarding the potential for staff to impose immediate and direct discipline for perceived violations of this prohibited act code.

To respond to these concerns, we first suggest to these and any other inmates with grievances relating to staff abuse to locate appropriate staff members or medical professionals in their facilities and report such behavior, and also to make use of the Administrative Remedy Procedures process in 28 CFR part 542. Inmates may electronically send requests to different departments within the institution and use the Request to Staff service to report misconduct directly to the Office of Inspector General (OIG). These emails are anonymous and not retained or traceable in the inmate email system.

However, the Bureau is committed to ensuring the safety and security of all inmates in our population, our staff, and the public. Staff are trained and expected to conduct themselves professionally, including the humane and courteous treatment of those in our custody. Bureau staff are trained to stay mindful of the agency's core values of correctional excellence, respect and integrity. At the outset of their employment, staff are instructed that they must adhere to the principles of ethical conduct in the Basic Obligations of Public Service at 5 CFR § 2635.101; Standards of Ethical Conduct for Employees of the

Executive Branch at 5 CFR Part 2635; the Department of Justice's Supplemental Ethics Regulations at 5 CFR Part 3801; the criminal conflict of interest statutes at 18 U.S.C. §§ 201, 202, 203, 205, 207, 208, and 209; and the Bureau of Prisons Standards of Employee Conduct in Bureau of Prisons Program Statement 3420.11. The Bureau of Prisons provides ethics training to all new employees both when they begin employment and annually thereafter.

Secondly, before any sanctions may be imposed for violation of prohibited acts, current regulations in 28 CFR part 541 describe the required process which must be undertaken, including the following:

- Issuing an incident report to the inmate describing the prohibited act the inmate is charged with, ordinarily within 24 hours of becoming aware of the inmate's involvement in the prohibited act conduct;
- Investigating the incident reported;
- Informing the inmate of the charges against him/her and of his/her rights during the process;
- Taking an inmate statement of explanation of the incident, including requests for witnesses or other evidence; and
- Referring the incident report to the Disciplinary Hearing Officer (DHO) for a hearing.

When an incident report is referred to a DHO for a hearing, Bureau regulations explain that inmates again receive written notice of the charges against them at least 24 hours prior to the hearing unless they waive that requirement, and are entitled to a staff representative, to make a statement and present evidence on their own behalf, and to present witnesses with relevant information.

After the DHO hearing, inmates will receive a written copy of the DHO's decision which must document whether the inmate was advised of his/her rights during the DHO process, what evidence the DHO relied on to make the decision reached, what decision was reached, that sanction was imposed, and the reasons for the sanctions imposed. The inmate is also advised that he/she may appeal the DHO's action through the Administrative Remedy Program (28 CFR part 542, Subpart B).

This process provides multiple checks and balances to deter or prevent staff abuse by allowing inmates several opportunities to speak on their own behalf or present evidence and witnesses. Staff must also carefully document their observation of prohibited acts and cannot immediately or directly impose sanctions upon inmates, but must instead refer incident reports to DHOs for hearings, in the case of 200-level prohibited acts, before sanctions may be imposed.

**Sanctions.** Eight commenters asked for more detail regarding the possible sanctions that might be imposed for violation of the prohibited act code. The sanctions can be found in current regulations at 28 CFR part 541. However, we summarize them below.

The rule adds a new prohibited act code 231, which is in the High Severity Level Offenses category. If an inmate is found to have committed a prohibited act after a properly conducted DHO hearing the DHO may impose a sanction as listed in 28 CFR § 541.3(b), Table 1, Prohibited Acts and Available Sanctions. Therefore, for violation of new prohibited act code 231, a code in the High Severity Level category, a DHO may:

- Recommend parole date rescission or retardation;
- Forfeit and/or withhold earned statutory good time or non-vested good conduct time up to 50% or up to 60 days, whichever is less, and/or terminate or disallow extra good time (an extra good time or good conduct time sanction may not be suspended);
- Disallow ordinarily between 25% and 50% (14-27 days) of good conduct time credit available for year (a good conduct time sanction may not be suspended);
- Impose disciplinary segregation (up to 6 months);
- Require monetary restitution;

- Impose a monetary fine;
- Revoke privileges (e.g., visiting, telephone, commissary, movies, recreation);
- Require a change in housing (quarters);
- Remove an inmate from a program, job and/or group activity; impound an inmate's personal property,
- Confiscate contraband,
- Restrict an inmate to quarters; or
- Impose extra duty.

**This prohibited act code should be moved to a greater severity level.** Commenters suggested that the prohibited conduct described by this rule was sufficiently egregious to warrant upgrading its severity level and therefore upgrading the severity of potential sanctions that may be imposed for violation. Several current or former inmates commented regarding "organized gangs and other predatory groups who formally assign members to vet individuals" and "use information for financial extortion for protection," indicating that the proposed severity level would "have little impact and minimal deterrence" on this conduct.

While the Bureau appreciates the position of these commenters, the severity level determination was chosen based on

the nature of the offense conduct. In this case, the new prohibited act code includes "requesting, demanding, pressuring, or otherwise intentionally creating a situation" causing an inmate to produce documents for any unauthorized purpose to another inmate. The Greatest Severity Level category includes prohibited acts such as escape, killing, arson, etc., which are generally considered more threatening to institution safety, security and good order than actions including "requesting, demanding, pressuring" or "creating a situation" causing production of documents for unauthorized purposes. While the activity contemplated is clearly enough of an issue to warrant the creation of a High Severity Prohibited Act, in the correctional expertise of the Bureau of Prisons, it does not rise to the level necessary for inclusion in the Greatest Severity Level Category.

The intent of the severity scale at its inception was to "ensure a greater consistency of use of discipline throughout the Federal Prison System" and alleviate prior "concern that the disciplinary system allowed for a variety of interpretation on the degree of severity of the prohibited act and on sanctions that could be imposed." (See 44 FR 23174, April 18, 1979.) In a later final rule in 1982, the Bureau reflected that the inmate disciplinary procedures are "not intended to be either a judicial process or to have the wide gradations of offenses and

punishments available to the judiciary” but instead that the “purpose of the disciplinary process is to help inmates live in a safe and orderly environment.” (See 47 FR 35920, August 17, 1982.) Therefore, the guiding factor when determining the severity levels of prohibited act codes has been “the impact on institution security and good order.”

In determining the severity level of the new prohibited act code 231, the Bureau compared the impact of the prohibited conduct upon the safety, security and good order of the facility with that which might be generated from violation of codes in each Severity Level category, and determined that it would fit best in the High Severity Level offenses category in terms of seriousness of the offense and threat generated.

**Prohibited documents should include institutional disciplinary history, and prohibited conduct should include accessing law library resources or community resources to find information regarding other inmates.** For similar reasons, these commenters also suggested that the code conduct be expanded from possession of inmate court documents to inmate conduct violation (institution disciplinary) history as well, and suggested that if inmates have need to see their paperwork for legal representation purposes that the paperwork be sent directly from court systems to Wardens, who should permit inmate viewing, but

not possession. Inmate commenters also strongly recommended either disallowing or disciplining inmate access to court documents of fellow inmates via the inmate law library or community channels, and which they noted has been a way for some inmates to discover conviction information about fellow inmates.

The Bureau must balance the inmate's ability to prepare, review, and analyze his/her own case and access courts against the security concerns sought to be managed by this regulation. In conducting this balance, the Bureau finds it necessary to permit inmates to retain the ability to access the inmate law library to satisfy the inmate's need to prepare his/her case and access courts. With regard to prohibiting inmate access to documents received through community channels, the Bureau's regulations regarding incoming publications (28 CFR part 540, Subpart F), correspondence (Subpart B), visiting (Subpart D), and telephone (Subpart I), address these issues and the Bureau continues to adhere to these regulations.

The Bureau holds inmates accountable for threatening and coercive behavior under existing provisions of the disciplinary code. New prohibited act code 231, however, will clarify that this specific behavior may result in sanctions. The defense bar, federal sentencing courts and the Bureau identified this issue as one of concern that requires heightened disciplinary

attention. We therefore add the aforementioned code provision, with the aforementioned changes to the proposed rule published on November 19, 2019 (84 FR 63830), to underscore the severity of the conduct described.

## **REGULATORY ANALYSES**

### **Executive Orders 12866, 13563, and 13771.**

This rule falls within a category of actions that the Office of Management and Budget (OMB) has determined do not constitute "significant regulatory actions" under section 3(f) of Executive Order 12866 and, accordingly, it was not reviewed by OMB. The economic effects of this regulation are limited to the Bureau's appropriated funds. It takes an average of 7.5 hours of staff time to process an incident report. One of the expected outcomes of this clarifying regulation is that inmates may be deterred from engaging in the prohibited behavior because violations are better defined. This expected outcome would save staff resources required to process incident reports. At this time, however, the Bureau cannot estimate precisely how many incidents will be avoided or the monetary value of the resulting cost/resource savings. Further, the Bureau would expect any anticipated savings generated by this rule to have minimal effect on the economy.

### **Executive Order 13132.**

This regulation will not have substantial direct effect on the States, on the relationship between the national government and the States, or on distribution of power and responsibilities among the various levels of government. Under Executive Order 13132, we determine that this regulation does not have sufficient federalism implications to warrant the preparation of a Federalism Assessment.

**Regulatory Flexibility Act.**

The Director of the Bureau of Prisons, under the Regulatory Flexibility Act (5 U.S.C. 605(b)), reviewed this regulation and certifies that it will not have a significant economic impact upon a substantial number of small entities. This regulation pertains to the correctional management of offenders committed to the custody of the Attorney General or the Director of the Bureau of Prisons, and its economic impact is limited to the Bureau's appropriated funds.

**Unfunded Mandates Reform Act of 1995.**

This regulation will not result in the expenditure by State, local and tribal governments, in the aggregate, or by the private sector, of \$100,000,000 or more in any one year, and it will not significantly or uniquely affect small governments. Therefore, no actions are necessary under the provisions of the Unfunded Mandates Reform Act of 1995.

**Congressional Review Act.**

This regulation is not a major rule as defined by the Congressional Review Act, 5 U.S.C. 804. This regulation will not result in an annual effect on the economy of \$100,000,000 or more; a major increase in costs or prices; or significant adverse effects on competition, employment, investment, productivity, innovation, or on the ability of United States-based companies to compete with foreign-based companies in domestic and export markets.

**List of Subjects in 28 CFR Part 541**

Prisoners.

Michael Carvajal  
Director, Federal Bureau of Prisons

Under rulemaking authority vested in the Attorney General in 5 U.S.C. 301; 28 U.S.C. 509, 510 and delegated to the Director, Bureau of Prisons, we amend 28 CFR part 541 as follows.

**SUBCHAPTER C — INSTITUTIONAL MANAGEMENT**

**PART 541 – INMATE DISCIPLINE AND SPECIAL HOUSING UNITS**

1. The authority citation for part 541 continues to read as follows:

Authority: 5 U.S.C. 301; 18 U.S.C. 3621, 3622, 3624, 4001, 4042, 4081, 4082 (Repealed in part as to offenses committed on or after November 1, 1987), 4161-4166 (Repealed as to offenses committed on or after November 1, 1987), 5006-5024 (Repealed October 12, 1984 as to offenses committed after that date), 5039; 28 U.S.C. 509, 510.

**SUBPART A – GENERAL**

2. Amend § 541.3 by adding an entry 231 under “High Severity Level Prohibited Acts” in Table 1 – Prohibited Acts and Available Sanctions in numeric order to read as follows:

**§ 541.3 Prohibited acts and available sanctions**

\* \* \* \* \*

**Table 1 – Prohibited Acts and Available Sanctions**

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<b>High Severity Level Prohibited Acts</b>	
* * * * *	
231	Requesting, demanding, pressuring, or otherwise intentionally creating a situation, which causes an

	inmate to produce or display his/her own court documents for any unauthorized purpose to another inmate.
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