The Federal Bureau of Prisons: Willfully Ignorant or Maliciously Unlawful?

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THE FEDERAL BUREAU OF PRISONS: WILLFULLY IGNORANT OR MALICIOUSLY UNLAWFUL?

Deborah Golden*

INTRODUCTION

The Federal Bureau of Prisons ("BOP") and the larger U.S. government either purposely ignore the plight of men with serious mental illness in the federal prison system or maliciously act in violation of the law. I have no way of knowing which it is. In a complex system comprising many individual actors, motivations are most likely complex and contradictory. Either way, uncontroversially, the BOP and the U.S. government, against overwhelming evidence to the contrary, continuously assert that there are no men with serious mental illnesses housed in the federal supermax prison, the Administrative Maximum facility in Florence, Colorado, also known as ADX.

There is no simple definition of a "supermax" prison. The Department of Justice's National Institute of Correction provided one clear description:

[A supermax prison is] a highly restrictive, high-custody housing unit within a secure facility, or an entire secure facility, that

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isolates inmates from the general prison population and from each other due to grievous crimes, repetitive assaultive or violent institutional behavior, the threat of escape or actual escape from high-custody facility(s), or inciting or threatening to incite disturbances in a correctional institution. . . . It is assumed that such a facility would be operated with the majority of services and programs provided at cell front, that movement from the cell would be in restraints with multiple officer escort, and that overall security would be the highest level available in an institution or the corrections system.¹

Men and women with serious mental illnesses may not be constitutionally assigned to supermax confinement.² Even BOP's own policies forbid the placement of anyone with a serious mental illness in the ADX.³ The government claims no one with a serious mental illness is in the ADX.⁴ Nonetheless, the place is full of men who by any definition have serious mental illnesses.

Any thorough review of the 433 men⁵ at the ADX would demonstrate that about one-third of the men suffer a severe mental illness. The prison is filled with men who have been previously found unfit to stand trial,⁶ men who have long-standing histories of intensive psychiatric treatment,⁷ men who take antipsychotic medication,⁸ men who decorate their


⁷. See, e.g., id. at 47–50, 36–37.

⁸. See Justin Moyer, D.C. inmates in federal prison file suit alleging lack of mental health care, WASH. POST, June 24, 2012 (describing Rodney Jones who was prohibited from taking prescribed Seroquel at ADX); see also Cunningham Complaint, supra note 6, at 62 (listing Jeremy Pinson's medication: Olanzapine, Quetiapine, Risperidone, Fluphenazine, Haldol and Perphenazine, antidepressants Amitriptyline, Bupropion, Mirtazapine and Sertraline, antimanic Depakote, and the anti-anxiety medication Busiprone).
cells with their own feces, and men who mutilate their own bodies. After an investigation, the Washington Lawyers’ Committee for Civil Rights and Urban Affairs and the law firm Arnold & Porter, LLP filed suit on behalf of several individuals and a putative class. The U.S. Department of Justice defends the status quo at the ADX and has moved to dismiss the entire lawsuit for failure to state a claim under the Eighth Amendment. As of this writing, it shows no intention of addressing the systemic failures that have led to so many men with serious mental illnesses being placed at the ADX.

The remainder of this Article includes: (1) a description of the conditions in the ADX; (2) a discussion of serious mental illness and the case law that prevents those who suffer with one from being housed in a supermax prison; (3) a review of the BOP’s own policies prohibiting the housing of inmates with severe mental illnesses in the ADX; (4) an explanation of the lawsuit challenging the fact that the ADX houses many inmates with severe mental illnesses and descriptions of some of the men behind the case; and (5) an analysis of why the BOP insistence that it is not in violation of the law.

I. ADX: THE FEDERAL SUPERMAX PRISON

ADX is one prison in a federal complex of four facilities in Florence, Colorado. It was built in 1994. Proudly designed by the DLR Group architecture firm, it was the first prison in America built specifically as a supermax. It is the only federal supermax.

The BOP states that “[t]he Administrative Maximum (ADX) facility in Florence, Colorado, houses offenders requiring the tightest controls.”

9. Cunningham Complaint, supra note 6, at 24, 27.
10. See id. at 69 (regarding John Jay Powers).
11. Arnold & Porter has put enormous work into this case. Without the firm’s support, little of the information in this Article would have been uncovered, and none would have been presented so effectively in court. More than fifty lawyers, paralegals, and other staff members have devoted meaningful time and effort to the case. Deserving special thanks publicly are Keri Arnold, Ed Aro, Jessica Caterina, Pat Conti, Jerry Falk, Linda Fields, Tanya Kalivas, Dan Horne, Maury Leiter, Alicia Macklin, Will Miller, Scott Morrow, Nancy Perkins, Sonia Siewert, Valerie Swanson, Bob Taylor, Linda Teater, Kelly Welchans, and Emily Wood. Also deserving of public thanks are the companies that have donated support to this effort: Atomic6Design, FTI Consulting, Hampton Inn Canon City, and Litigation Solution, Inc.
12. See Cunningham Complaint, supra note 6, at 4.
Its mission is "containment of extremely dangerous, violent, or escape-prone inmates." The men housed there are described as so dangerous that "video footage of the exterior of the institution would negatively affect the security and orderly operation of the facility."

At any given time, between 400 and 500 prisoners are housed at ADX in nine different maximum-security housing units:

- the Control Unit;
- four so-called "General Population" Units;
- the Special Security Unit (also called the "SAMs" Unit);
- two units that in recent years have been used as transitional housing units for prisoners who have entered the so-called "Step-Down Program" in which they can earn their way out of ADX; the disciplinary Special Housing Unit (also called the "SHU" or the "Hole"); and
- "Range 13," an ultra-secure and isolated four-cell wing of the SHU where the BOP houses prisoners it thinks require confinement with virtually no human contact.

Depending on which unit they are in, prisoners spend at least twenty, and as much as twenty-four, hours per day locked alone in their cells. The cells measure approximately twelve feet by seven feet, and they have solid walls that prevent prisoners from viewing the interiors of other cells or having direct contact with prisoners in adjacent cells. All ADX cells have solid doors with a small closable slot for food delivery. Cells in all units other than Step-Down units also have an interior barred wall with a sliding door, which together with the exterior door forms a sally port in each cell. Each cell is furnished with a concrete bed, desk, and stool, and a stainless steel combination sink and toilet. The beds are usually dressed with a thin mattress and blankets over the concrete. Each cell contains a single window, approximately forty-two inches tall and four inches wide; this allows entry of some natural light depending on the window's directional orientation and the time of the day and year. Meals are delivered three times a day.

With few exceptions, prisoners in most ADX units are allowed out of their cells only for limited visits, some forms of medical treatment, visits to the "law library" (a cell with a specialized computer terminal that provides access to a limited range of federal legal materials), and a few hours a

19. See Cunningham Complaint, supra note 6, at 9.
20. Id. at 9–10.
The Federal Bureau of Prisons

week in indoor or outdoor “recreation cages.” Otherwise they remain locked in their cells.21

The Control Unit is the most secure and isolated unit currently in use at ADX. Prisoners in the Control Unit are isolated from the other prisoners at all times, even during recreation, for extended terms often lasting six years or more.22 Their only meaningful contact with other humans is with ADX staff members.23 The compliance of Control Unit prisoners with institutional rules is assessed monthly; a prisoner is given “credit” for serving a month of his Control Unit time only if he maintains clear conduct for the entire month.24 The BOP provides no mental health care or psychotropic medication to Control Unit prisoners.25

Prisoners confined to the SHU live in similar isolation.26 They are continuously segregated from other prisoners, even during recreation.27 Unlike other ADX prisoners, those in the SHU are generally denied access to televisions and radios, and are sometimes confined with nothing in their cells but a mattress and minimal clothing (for example, a t-shirt and boxer shorts).28

ADX prisoners are housed in the SHU in several circumstances. Most ADX prisoners spend at least a few days in the SHU upon their arrival at the institution.29 Others are moved to the SHU pending investigation of incidents such as fights that occur from time to time elsewhere in the institution.30 Prisoners who receive disciplinary incident reports, and, as a result are sentenced to a term of punitive segregation, serve that time in the SHU.31

In the four General Population units, prisoners also are isolated from one another, spending at least twenty-two hours per day alone in their cells.32 A few days a week, they may be able to see and speak with a limited number of other prisoners during shared recreation periods lasting two hours, but only while all are confined in separate outdoor cages.33 A few days a week, prisoners in most ADX units also have a few hours of access,
one at a time, to either individual inside recreation rooms or outdoor recreation cages.\textsuperscript{34}

These conditions are the most restrictive in the BOP.\textsuperscript{35} They are, by any realistic measure, supermax segregation.\textsuperscript{36} Because of the extreme conditions, the housing of people with “Serious Mental Illness” in such places has been carefully scrutinized.

II. PEOPLE WITH SERIOUS MENTAL ILLNESS CANNOT BE HOUSED IN SUPERMAX CONDITIONS

“Serious Mental Illness” is a term of art. The term does not encompass everything that is classified as a mental illness in the \textit{Diagnostic and Statistical Manual of Mental Disorders}.\textsuperscript{37} Rather, Serious Mental Illness (“SMI”) refers to those disorders that are what most people would think of as serious issues: the kind of disorders that significantly impact someone’s daily life.\textsuperscript{38}

The federal government’s Substance Abuse and Mental Health Services Administration defines SMI as “[a] mental, behavioral, or emotional disorder . . . diagnosable currently or within the past year [that has been] of sufficient duration to meet diagnostic criteria specified within the [DSM-IV] and result[s] in serious functional impairment, which substantially interferes with or limits one or more major life activities.”\textsuperscript{39}

34. \textit{Id.}
35. See generally Greene, supra note 18.
37. The DSM is the \textit{Diagnostic and Statistical Manual of Mental Disorders} published by the American Psychiatric Association. It is, essentially, the official compendium of mental illness. A new version, the DSM-V, is anticipated in May 2013. See \textit{DSM-5: The Future of Psychiatric Diagnosis}, AM. PSYCHIATRIC ASS’N, http://www.dsm5.org/Pages/Default.aspx (last visited Feb. 23, 2013). Changes are expected, of course, but nothing is expected that should change the legal approach to housing people with SMIs in the prison system.
38. See, e.g., Ind. Prot. & Advocacy Servs. Comm’n v. Comm’r, Ind. Dep’t of Corr., No. 1:08-CV-01317-TWP, 2012 WL 6738517, at *8 (S.D. Ind. Dec. 31, 2012) (“A mental illness is properly characterized as ‘serious’ based on two features of the diagnosis—one being the duration that the person has the illness and the second being the degree of disability or functional impairment that it causes.”). See generally Fathi, supra note 2, at 682-85.
39. Prevalence of Serious Mental Illness Among U.S. Adults by Age, Sex, and Race, NAT’L INST. MENTAL HEALTH, http://www.nimh.nih.gov/statistics/SMI_AASR.shtml (last visited Jan. 27, 2013). Contrary to claims that this definition is unworkable in practice, it echoes the familiar definition of disability in disability civil rights legislation. See Americans with Disabilities Act of 1990, 42 U.S.C. § 12102(2) (2006); 29 C.F.R. § 1630.2(g)(1) (2011). This standard has proved workable for decades. See, e.g., The Rehabilitation Act of 1973, 29 U.S.C. § 701 (2006). The Cunningham Complaint, supra note 6, at 97-98, proposes a specified definition of SMIs comprising the following conditions: Schizophrenia (all sub-types); Delusional Disorder; Schizopreniform Disorder; Schizoaffective Disorder; Brief Psychotic Disorder; Substance-Induced Psychotic Disorder (excluding intoxication and withdrawal); Psychotic Disorder Not Otherwise Specified; Major Depressive Disorder (all types); Bipolar Disorder I and II; Post-
Noting the effects of supermax conditions on people who have SMIs, the courts have been uniform that the Eighth Amendment to the Constitution forbids housing them in such a manner. For instance, Judge Thelton E. Henderson of the Northern District of California, evaluating conditions in Pelican Bay’s SHU, wrote the following in his opinion:

We cannot, however, say the [current conditions in the SHU are not per se violative of the Eighth Amendment] for certain categories of inmates: those who the record demonstrates are at a particularly high risk for suffering very serious or severe injury to their mental health, including overt paranoia, psychotic breaks with reality, or massive exacerbations of existing mental illness as a result of the conditions in the SHU. Such inmates consist of the already mentally ill, as well as persons with borderline personality disorders, brain damage or mental retardation, impulse-ridden personalities, or a history of prior psychiatric problems or chronic depression. For these inmates, placing them in the SHU is the mental equivalent of putting an asthmatic in a place with little air to breathe. The risk is high enough, and the consequences serious enough, that we have no hesitancy in finding that the risk is plainly “unreasonable.” Such inmates are not required to endure the horrific suffering of a serious mental illness or major exacerbation of an existing mental illness before obtaining relief.

We are acutely aware that defendants are entitled to substantial deference with respect to their management of the SHU. However, subjecting individuals to conditions that are “very likely” to render them psychotic or otherwise inflict a serious mental illness or seriously exacerbate an existing mental illness can not be squared with evolving standards of humanity or decency, especially when certain aspects of those conditions appear to bear little relation to security concerns. A risk this grave—this shocking and indecent—simply has no place in civilized society. It is surely not one “today’s society [would]
choose[ ] to tolerate.” Indeed, it is inconceivable that any representative portion of our society would put its imprimatur on a plan to subject the mentally ill and other inmates described above to the SHU, knowing that severe psychological consequences will most probably befall those inmates. Thus, with respect to this limited population of the inmate class, plaintiffs have established that continued confinement in the SHU, as it is currently constituted, deprives inmates of a minimal civilized level of one of life’s necessities.41

His observations have been echoed by every court to have considered the effects of supermax on people with SMIs.42 For example, Judge William Justice wrote, “Texas’ administrative segregation units are virtual incubators of psychoses—seeding illness in otherwise healthy inmates and exacerbating illness in those already suffering from mental infirmities.”43 Judge Barbara Crabb of the Western District of Wisconsin similarly noted the destabilizing effects isolation can have even on some individuals who enter prison without serious mental illness:

Confinement in a supermaximum security prison such as Supermax is known to cause severe psychiatric morbidity, disability, suffering and mortality. Prisoners in segregated housing units who have no history of serious mental illness and who are not prone to psychiatric decompensation (breakdown) often develop a constellation of symptoms known as “[Segregated Housing Unit] Syndrome.” Although SHU Syndrome is not an officially recognized diagnostic category, it is made up of official diagnoses such as paranoid delusional disorder, dissociative disorder, schizophrenia and panic disorder. The extremely isolating conditions in supermaximum confinement cause SHU Syndrome in relatively healthy prisoners who have histories of serious mental illness, as well as prisoners who have never suffered a breakdown in the past but are prone to break down when the stress and trauma become exceptionally severe. Many prisoners are not capable of maintaining their sanity in such an extreme and stressful environment; a high number attempt suicide.44

The BOP and the Department of Justice are well aware of the legal history. However, their policies only pay lip service to fidelity to the Constitution.

43. Ruiz, 37 F. Supp. 2d at 907.
III. THE BOP ADMITS THAT PEOPLE WITH SERIOUS MENTAL ILLNESS SHOULD NOT BE HELD IN SUPERMAX CONDITIONS

On paper, the federal government agrees that the ADX is not a place for men with SMI. The BOP’s written procedures for transferring prisoners to ADX state that prisoners “currently diagnosed as suffering from serious psychiatric illnesses should not be referred for placement at . . . ADX.” Additionally, federal regulations prohibit the placement of any person with an SMI in a Control Unit, including in the ADX Control Unit. No inmate should be housed in a control unit “[i]f the inmate shows evidence of significant mental disorder or major physical disabilities as documented in a mental health evaluation or a physical examination.” “Prisoners requiring prescribed psychotropic medication are not ordinarily housed in a control unit.”

The government claims that the law and regulations are followed. In sworn statements and in international proceedings, the U.S. government has affirmed its position that there are no men with serious mental illness housed at the ADX. This past summer, Congress held hearings on solitary confinement. Charles Samuels, the Director of the BOP, testified under oath. Senator Durbin and Samuels had the following colloquy:

Senator Durbin: So, Mr. Samuels, let me ask you a couple of questions. First, it’s my understanding that those who are seriously mentally ill are not supposed to be assigned to supermax facilities, like Florence, Colorado. Is that true?

Samuels: You are correct. Our policy prohibits any inmate who suffers from a serious psychiatric illness to be placed in that confinement.

Later, they returned to the same topic:

Senator Durbin: Well, let me get down to some of the more graphic—and I won’t go into more detail here in the hearing, but it’s there on the record. I’ve read stories about federal inmates and inmates at safe facilities in isolation who have clearly reached a point where they are self-destructive. They are maiming themselves, mutilating themselves, doing horrible things to themselves. They are creating an environment within that cell which is awful by any human standard. What happens next in the Federal Bureau of Prisons when someone has reached that extreme in their personal conduct?

46. 28 C.F.R. § 541.41(d)(1) (2012).
47. 28 C.F.R. § 541.46(i) (2012).
SAMUELS: If an individual is exhibiting that type of behavior due to suffering from serious psychiatric illness, those individuals are not, within our policy, individuals that we would keep at the ADX or in a restrictive housing. These individuals are referred to our psychiatric medical centers for care. And we believe that that’s important. And we would never under any situation believe that those individuals should be continued to be housed in that type of setting.49

This statement was not accidental. Considered diplomatic missives take the same position. Last fall, the United States was compelled to respond to an investigation by the United Nations Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment of Punishment. By letter dated September 16, 2011, Special Rapporteur Juan Méndez asked about the housing of men with mental illnesses at the ADX.50 In a November 30, 2011, response, signed by Ambassador Eileen Chamberlain Donahoe,51 the United States asserts in a paragraph entitled “Individuals with mental disabilities”:

Your letter notes an allegation that “many individuals with mental disabilities are held in solitary confinement in various prisons in the United States.” Individuals with mental illness housed in Bureau [of Prisons] facilities, including the ADX, have access to mental health practitioners and are afforded such care when necessary/appropriate. Furthermore, as a matter of practice, the Bureau does not house inmates with serious mental illness at the ADX.52

Recently, in an extradition proceeding in The European Court of Human Rights, the United States, through ADX psychologist Dr. Paul Zohn, asserted that “[i]nmates who would be considered ‘seriously mentally ill’ would not be housed at ADX.”53 This last representation allowed the court to rule that there was no violation of the Convention for the Protection of Human Rights and Fundamental Freedoms to extradite a mentally ill man to the United States.54

49. Id.
54. Id. at 81.
Despite the clear dictates of both law and regulation, in 2010 the Washington Lawyers' Committee for Civil Rights and Urban Affairs ("the Lawyers' Committee") began receiving disturbing letters from, or on behalf of, men at the ADX that suggested that they had long histories of mental health disability and that they questioned their own placement there.

The Lawyer's Committee began investigating and quickly partnered with the law firm of Arnold & Porter, LLP, to conduct detailed interviews and background investigations of the men housed at the ADX. The results of our work overwhelmingly show that many inmates with SMI are housed at the ADX. Over the course of the last two years, our team has conducted over 335 interviews of approximately 120 men and gathered over fifty thousand pages of documents. We have confirmed that at least seventy men housed at ADX have serious mental illnesses. Based on our interviews and information about men who refuse to meet with us, we believe that we have identified only about half of the ADX residents with serious mental illnesses.

We filed a putative class action on June 18, 2012. Described in the complaint are the stories of five plaintiffs and six interested persons. The interested persons could not serve as plaintiffs at the time of filing because we could not confirm that they had exhausted their administrative remedies as required by the Prison Litigation Reform Act. The individual stories are nothing short of horrific. Here is a sample.

55. The men reached out to the Lawyers' Committee because many of them were originally from Washington, D.C. The D.C. Prisoners' Project of the Washington Lawyers' Committee advocates for the needs of incarcerated men and women from the District, whether housed locally or in the BOP. Washington, D.C., has no prison system of its own. Many of the men from Washington, D.C., have ended up in the ADX.

56. Letters on file with author (original wave of letters included correspondence from over one dozen men detailing histories of childhood psychiatric hospitalization, lifetimes of hallucinations, special education schooling, all varieties of SMIs, self-mutilation (including genital mutilation), and some letters so incoherent we still do not know what the writer was trying to communicate).

57. None of the documents originally relied upon were gathered through the Freedom of Information Act. This is due to the BOP's refusal to substantively respond to any request for information. See generally Memorandum of Points and Authorities in Support of Plaintiff's Motion for Summary Judgment, Aro v. Fed. Bureau of Prisons, No. 1:12-cv-01012-RMC (D.C. Cir. filed Nov. 9, 2012).

58. See 42 USC 1997e(a) (2006); see also Margo Schlanger & Giovanna Shay, Preserving the Rule of Law in America's Jails and Prisons: The Case for Amending the Prison Litigation Reform Act, 11 U. PA. J. CONST. L. 139 (2008) (offering a general discussion of the ways in which the PLRA perverts the American ideal of the rule of law and the courts' ability to preserve the Constitution).
A. Harold Cunningham

Harold Cunningham is a forty-two year old man originally from Washington, D.C. He has been housed in the Control Unit at ADX since 2001 and is serving a life sentence plus 380 years. He has been under the control of the criminal court system since he was eleven. At age sixteen, after a suicide attempt, he was committed to St. Elizabeth's Hospital, a psychiatric hospital in Washington, D.C. There, Mr. Cunningham was diagnosed with Conduct Disorder, Under Socialized Aggressive Needs, and Major Depression.

In 1996, while on trial for a series of crimes in the Washington metro area, Mr. Cunningham stabbed a witness in full view of the judge and jury. In the course of his trial for the stabbing, in which he asserted an insanity defense, he was diagnosed with Paranoid Schizophrenia, Antisocial Personality Disorder, Borderline Intellectual Functioning, history of Attention Deficit Disorder with Hyperactivity, and various forms of drug and alcohol abuse. Eventually, all the charges against him were dropped without clear explanation, and he was sent to United States Penitentiary, Marion. In Marion, BOP clinicians diagnosed Mr. Cunningham with Psychotic Disorder Not Otherwise Specified, Personality Disorder Not Otherwise Specified, and the effects of hallucinogen abuse. He was prescribed the antipsychotic Risperdal and the antidepressant Prozac.

In 2001, the BOP transferred Mr. Cunningham to the ADX. His initial psychological assessment at ADX stated that he was a “very antisocial individual” and found that “mental illness . . . can certainly not be conclusively ruled out at this point.” Nevertheless, the BOP stopped all of his psychiatric medication and placed him in the Control Unit.

As of the date of writing, Mr. Cunningham still receives no mental health treatment, despite repeated requests and a federal lawsuit.

59. Search for Harold Cunningham, Fed. Bureau Prisons, http://www.bop.gov/iloc2/LocateInmate.jsp (in the “Search By Name” box, type “Harold” for first name and “Cunningham” for last name; then, hit the “Search” button).
60. Cunningham Complaint, supra note 6, at 50.
61. Id. at 51.
62. Id.
63. Id.
64. Id.
65. Id. at 51–52.
66. Id. at 52.
67. Id.
68. Id.
69. Id. at 53–54.
70. Id.
71. Id.
B. Jeremy Pinson

Jeremy Pinson is twenty-six and from Oklahoma City.72 He is serving time for written threats he sent to the President, a federal judge, a Secret Service Agent, and a juror.73

Mr. Pinson began having auditory and visual hallucinations around the age of seven.74 He began treatment by age eight and inpatient treatment by age ten.75 When he was thirteen, he sent threatening letters to both his mother and to the President of the United States, stabbed a classmate with a pen, and threatened to blow up his school. He was hospitalized for suicide attempts and psychotic symptoms at the ages of twelve, fifteen, and sixteen.76 In 2005, pursuant to an assessment for competency to stand trial for threatening the President of the United States, the court’s forensic report reported, "Mr. Pinson had not experienced any significant period of effective psychological functioning since early childhood [and o]nly with long-term psychiatric and psychotherapeutic intervention [would he] have any hope of developing into a mature and psychologically healthy individual."77

The court found him competent to stand trial but recommended that he be committed to the Federal Medical Center at Butner to receive psychiatric treatment.78 The BOP ignored that recommendation.79

Without treatment, Mr. Pinson wrote another letter threatening to kill a Secret Service Agent who testified at his earlier sentencing hearing.80 The court “strongly recommended” that the BOP conduct a “full-blown” evaluation of Mr. Pinson’s “mental and physical needs and the drugs required to deal with both” at a capable facility, recommending treatment at the Medical Center for Prisoners at Springfield or at the Federal Medical Center at Butner.81 The BOP continued to ignore the recommendations.

In Mr. Pinson’s institutional documents, the BOP acknowledges that he has a long history of mental health diagnoses and currently suffers from schizophrenia and other psychiatric disorders.82 BOP physicians have prescribed him the antipsychotics Olanzapine, Quietapine, Risperidone, Fluphenazine, Haldol, and Perphenazine; additionally, he was also prescribed antidepressants (Amitriptyline, Bupropion, Mirtazapine, and Ser-
traline), an antimanic (Depakote), and anti-anxiety medication (Buspirone).  

In February 2011, the BOP placed Mr. Pinson in the ADX anyway. He remains there as of this writing.

C. Jack Powers

John Jay ("Jack") Powers is fifty years old. He grew up in upstate New York and lived in Florida immediately before his incarceration in 1990. He is now housed in the "General Population" Unit at ADX after being held in the Control Unit for nearly ten years.

In 1995, Mr. Powers began to experience symptoms of Post-Traumatic Stress Disorder, after witnessing the murder of a fellow inmate and testifying against the perpetrators. In 1997, a BOP psychologist formally diagnosed him with PTSD. In late 2001, after a conviction for an escape, Mr. Powers was transferred to ADX and placed in the Control Unit. He went untreated and his mental health declined markedly.

In July 2002, Mr. Powers rammed his head into the metal door jam of his cell. The BOP transferred him to the inpatient psychiatric facility at the Medical Center for Federal Prisons Springfield ("MCFP Springfield") for a psychiatric evaluation. In his month at MCFP Springfield, BOP clinicians reaffirmed his PTSD diagnosis and prescribed medication. After one month, he was returned to the ADX Control Unit, and his medication was discontinued. Rather than treat his self-harm symptoms, the BOP issued him disciplinary incident reports for self-mutilation in October 2002, October 2004, and February 2005.

In October 2005, after severely lacerating his scrotum with a piece of sharp plastic, he was again transferred to MCFP Springfield. BOP clinicians once more confirmed his PTSD and stabilized him with medication. In December 2005, the BOP returned him to the ADX Control Unit. They again abruptly discontinued his medication.

Mr. Powers continued to harm himself. On July 18, 2006, Mr. Powers amputated one of his testicles. On September 6, 2007, Mr. Powers bit off one of his own fingers. On April 1, 2008, Mr. Powers inserted a

83. Id.
84. Id. at 62.
85. Id. at 69.
86. Id.
87. Id. at 70.
88. Id.
89. Id. at 70–71.
90. Id. at 71–72.
91. Id. at 72.
92. Id.
93. Id.
staple into his forehead.\textsuperscript{94} In December 2008, he amputated one of his fingers, tore out the stitches used to close the wound, and then swallowed a toothbrush.\textsuperscript{95} On February 2, 2009, Mr. Powers cut a triangular flap of skin out of his face and inserted several staples into it.\textsuperscript{96}

On July 6, 2009, Mr. Powers cut his wrist and was found unconscious by ADX staff members.\textsuperscript{97} Several weeks later, the BOP again transferred Mr. Powers to MCFP Springfield. This time, a BOP psychologist determined he was just fine. Mr. Powers was again returned to ADX and again placed in the Control Unit with no mental health treatment. Four months later, on December 3, 2009, Mr. Powers bit off his pinkie.\textsuperscript{98} On December 20, 2010, Mr. Powers amputated his scrotum.\textsuperscript{99}

In March 2011, Mr. Powers completed his term in the Control Unit and was transferred back to the so-called general population.\textsuperscript{100} However, the self-harm did not stop. On January 12, 2012, Mr. Powers amputated his earlobes, using pencils as tourniquets.\textsuperscript{101} On March 21, 2012, Mr. Powers sawed through his Achilles tendon with a sharp piece of metal, nearly severing it.\textsuperscript{102} In May 2012, Mr. Powers again mutilated his genitals.\textsuperscript{103}

In the early summer of 2012, a few weeks after the BOP became aware that Mr. Powers was visited by a forensic psychiatrist retained by his counsel, the BOP began treating him with the powerful antipsychotic medication Haldol.\textsuperscript{104} However, he still has no access to psychological counseling or other mental health care.

D. William Sablan

William Concepcion Sablan is forty-seven years old. He is originally from Saipan, in the United States Commonwealth of the Northern Mariana Islands.\textsuperscript{105}

In 1995, Mr. Sablan suffered two tragedies, and his mental health deteriorated. His six-year-old daughter Mae was killed by a hit-and-run driver who was never caught. Mr. Sablan, traumatized by her death, became intensely paranoid and obsessed with finding the driver. He disappeared into the jungle for days at a time, claiming to be looking for her.

\textsuperscript{94} Id.  
\textsuperscript{95} Id.  
\textsuperscript{96} Id.  
\textsuperscript{97} Id. at 73.  
\textsuperscript{98} Id.  
\textsuperscript{99} Id.  
\textsuperscript{100} Id. at 73–74.  
\textsuperscript{101} Id. at 74.  
\textsuperscript{102} Id.  
\textsuperscript{103} Id.  
\textsuperscript{104} Id.  
\textsuperscript{105} Id. at 78.
killer. Mr. Sablan also believed he saw his dead daughter walking around his house. In public, he became extremely aggressive when he saw adults being mean to children. Then, that September, Mr. Sablan was attacked by several men, one of whom hit Mr. Sablan in the head with a machete. He received a five-centimeter gash on the back of his head, shaving off a three-centimeter disc of his skull and another five-centimeter gash on his right front scalp. After the machete attack, Mr. Sablan's demeanor and mood changed. He began to misunderstand events and lose track of conversations; he would become furious if anyone asked him about his changed behavior. Mr. Sablan began harboring delusions that someone was after him and would burst into flight when he thought someone was pursuing him. He would climb coconut trees and stare into the jungle all night, looking for his imaginary pursuers.

In a Mariana prison in 1997, Mr. Sablan was prescribed Depakote and Haldol. He was diagnosed with PTSD, post-traumatic brain injury, and possibly temporal lobe epilepsy. In 1999, after participating in a prison riot and escape attempt, Mr. Sablan was transferred to the continental United States. The BOP did not give Mr. Sablan his psychotropic medication.

In 1999, Mr. Sablan killed his cellmate in a notoriously gruesome murder. Mr. Sablan's defense counsel sought to have him found incompetent to stand trial. In July 2001, Mr. Sablan was diagnosed with PTSD and a Psychotic Disorder Due to a Manic Episode. He was prescribed Haldol. Also in 2001, he was diagnosed with neuropsychological deficits stemming from the prior brain damage and prior emotional or psychological disturbances. Later that year, he was additionally diagnosed with an Anxiety and Mood Disorder with Psychotic Features. Noted were his delusions, including claims that he was the chief of the Chamorros (his indigenous tribe), that he had the psychic ability to determine the outcome of his own trial, and that he knew the location of Amelia Earhart's plane.

In 2003, Mr. Sablan experienced auditory hallucinations of three different people talking to each other. Mr. Sablan claimed he could hear them talking via a satellite connection and a computer located in his brain.
Mr. Sablan also claimed that the government could hear all the thoughts of everyone in the world through the use of satellite connections.\textsuperscript{113}

On June 10, 2004, a court found Mr. Sablan mentally incompetent to assist properly in the defense of his murder charge.\textsuperscript{114} The court ordered that Mr. Sablan be hospitalized and treated for up to four months to determine whether he could attain the capacity for the trial to proceed. Mr. Sablan was transferred to FMC Butner.\textsuperscript{115}

While at FMC Butner, Mr. Sablan was floridly delusional. He made a series of claims about Amelia Earhart and her plane, including that he found her plane twenty years earlier and that Earhart’s spirit had been pursuing him ever since, trying to get him to solve the mystery. He relayed his claim in a letter to the Amelia Earhart Foundation. Mr. Sablan also spoke frequently about brain interference from satellites and his continuing frustration that his daughter’s killer had never been caught. BOP physicians expressed doubt that Mr. Sablan’s condition was the result of malingering, and hypothesized that he could be suffering from Delusional Disorder or Late Onset Schizophrenia. They prescribed him antipsychotics Depakene, Risperdal, and Remeron.\textsuperscript{116}

At the end of four months, pursuant to the BOP’s request, the court ordered an additional 120 days of attempts to render Mr. Sablan competent.\textsuperscript{117} In January 2005, the BOP clinicians at FMC Butner concluded that Mr. Sablan was competent to stand trial. Nonetheless, Mr. Sablan continued to have the same delusions, only slightly diminished. In April 2005, Mr. Sablan was still claiming that he had found Amelia Earhart’s plane but admitted that the plane he found would require verification to prove its origin. He also admitted that he was still receiving interference from the satellites but said that watching television helped him ignore it.\textsuperscript{118} His final report from FMC Butner noted that he had Psychotic Disorder, Not Otherwise Specified (“NOS”); Major Depressive Disorder, Single Episode, Moderate; Cognitive Disorder NOS; Antisocial Personality Disorder; and addictions to various drugs.

In April 2005, the court found that Mr. Sablan had recovered sufficiently to stand trial.\textsuperscript{119} After conviction by jury, Judge Daniel sentenced Mr. Sablan to life imprisonment and recommended that “the Bureau of

\textsuperscript{113} Id. at 81.

\textsuperscript{114} The standard to be able to stand trial is much lower than the standard for not being able to be housed in a supermax facility due to an SMI. A defendant must show that he is “unable to understand the nature and consequences of the proceedings against him or to assist properly in his defense.” to be declared incompetent to stand trial. 18 U.S.C. § 4241 (2006); see also U. S. v. Zovluck, 425 F. Supp. 719 (S.D.N.Y. 1977).

\textsuperscript{115} Cunningham Complaint, supra note 6, ¶ 254.

\textsuperscript{116} Id. at 82.

\textsuperscript{117} Id.

\textsuperscript{118} Id.

\textsuperscript{119} Id. at 83.
Prisons continue, on an uninterrupted basis, with a regimen of medicines (previously referred to as psychotropic medications) and other therapeutic treatment (including art supplies) currently in place to provide the defendant with the maximum ability to serve his life sentence with minimal disruptions to himself or others. "120

Since sentencing, Mr. Sablan has been housed at the ADX. While he receives medication, the BOP refuses to give Mr. Sablan any psychological or other therapeutic treatment in accordance with Judge Daniel's sentencing order.121

Mr. Cunningham, Mr. Powers, Mr. Pinson, and Mr. Sablan are unfortunately not unique. They, the three other original plaintiffs,122 and the four other original interested individuals are set apart from the majority of the other mentally ill men at the ADX only by their ability, determination, and bravery to communicate with counsel. The fact that the ADX is full of men who, like them, suffer from serious mental illnesses must be obvious to anyone who spends a minimal amount of time reviewing the situation.123

If that were not enough, at least fourteen different pro se lawsuits, filed since the ADX opened in 1994, have raised the issue of the housing of men with serious mental illness.124 The U.S. government continues to maintain that no one with a serious mental illness is housed at the ADX. And in doing so, it continues to house desperately sick men there.

V. THE BOP MAINTAINS ITS STATUS QUO

Despite these facts, the BOP has shown no serious attempt to address the housing of men with SMIs in the ADX. The agency remains committed to the delusion that it is acting within the bounds of the law. To do so, it employs machinations and double-speak.

For example, while some illnesses, like colds, get better with time, SMIs do not.125 SMIs can be more or less controlled, but the BOP confuses having a controlled condition with not having it all.

120. Id.
121. Id.
122. Since the filing of the lawsuit, one of the original plaintiffs, Michael Bacote, has withdrawn voluntarily, citing his belief that members of the legal team are agents of the government. See Motion to Withdraw, Bacote v. Fed. Bureau of Prisons, No. 1:12-cv-01570-RPM (D. Colo. filed Nov. 21, 2012).
124. Cunningham Complaint, supra note 6, 35-38.
In 2009, then-BOP Director Harley Lappin testified before Congress in a hearing regarding people with mental illness in prisons:

We have a pretty heavy presence of medical and mental health professionals there [at ADX] who do ongoing assessments. There are no unstable mentally ill inmates. If they become unstable, we remove them from there. We put them in a hospital until we gain their stability, at which time they would be returned to those conditions. So there are inmates there who have mental illnesses, who came there with mental illnesses, but they are controlled and they are stable during the period of time they are there, and they are monitored very closely.126

He stood by that position under questioning:

CHAIRMAN DURBIN: And you indicated that if an inmate is put in isolation and there is a detection of a deteriorating mental condition, they are removed from isolation.

LAPPIN: Well, we remove them to a hospital.

CHAIRMAN DURBIN: To a hospital.

LAPPIN: To return them to a stable condition.

. . .

So these supermaxes are the extreme only because these folks resist and they are not going to comply. And as a consequence, they end up in segregation or isolation for longer periods of time than what most inmates find themselves in those conditions that confine them.

In the BOP’s view, men who have undeniable mental illness can be sent out for the mental equivalent of Nyquil, cured, and returned to conditions that the Constitution and BOP regulations clearly prohibit.

When that fails, the BOP tries to claim it does not understand that the conditions described in caselaw exist in ADX, or even to have considered how to define them. The deposition testimony of then-ADX Warden Ronnie Wiley in 2008 in Saleh v. BOP was as follows:

Q: Do you consider the ADX general population to be solitary confinement?

A: I do not. . . . I don’t have a definition of solitary confinement. I just know what I see on TV. And when they say solitary confinement on TV, they generally have a person in a

place that's dark and no contact with anyone. And they open a little slot and slide in a tin plate or something with bread and water or something like that. That's my only frame of reference for solitary confinement. So based on that, my only knowledge of it, at the ADX, those are the differences.

Q: So you have no personal basis, apart from watching television, for the definition of solitary confinement?

A: I do not.127

Politically, it would not be easy for the government to admit any other position. ADX is the crown jewel in the federal prison network. It is the “Harvard of the system.”128 Like a prestigious university, the ADX has its own reputation to protect. It must save face (and resources)129 by refusing to admit that “Harvard” is filled with people who do not come close to meeting the admission criteria.

CONCLUSION

The good news is that the BOP is not a person. Unlike an individual human being, the BOP of course does not have a diagnosable mental illness. It has no brain with chemical malfunctions; it has no history of childhood trauma warping its personality. Rather, like all institutions, it only moves in the direction of the integrated will of its individual members. Unlike a person, the BOP can easily change its behavior by force of the will of the people who comprise and supervise it. The BOP, the Department of Justice, and the U.S. Government must face the truth: people with Serious Mental Illness are housed at ADX though they should not be. To operate legally, the BOP cannot feign innocence and continue to house inmates with SMIs in these conditions. If the BOP will not change its behavior, then we stand ready to use the court system to force the change.