

THE FEDERAL BUREAU OF PRISONS' ABUSES OF SOLITARY CONFINEMENT

Written Testimony of

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submitted to

REASSESSING SOLITARY CONFINEMENT II: THE HUMAN RIGHTS, FISCAL, AND PUBLIC SAFETY CONSEQUENCES

Hearing Before the Senate Judiciary Subcommittee on the
Constitution, Civil Rights, and Human Rights

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The Washington Lawyers' Committee for Civil Rights and Urban Affairs was founded in 1968 to address poverty and discrimination by mobilizing the pro bono resources of volunteer lawyers and law firms. The WLC's project areas include: Equal Employment Opportunity, Fair Housing, Disability Rights, Immigrant Rights, DC Prisoners, and Public Education.

As the successor to the DC Prisoners' Legal Services Project, the mission of the DC Prisoners' Project remains to advocate for the humane treatment and dignity of all persons convicted or charged with a criminal offense under DC law, housed in prisons, jails or community corrections programs; to assist their family members with prison-related issues; and to promote progressive criminal justice reform. Because of the unique nature of the District of Columbia, people convicted of local felonies are imprisoned in the Federal Bureau of Prisons. Over 5,000 DC prisoners currently live the BOP facilities, all across the country. Thus, the WLC is the only national legal advocacy organization that takes a systematic interest the BOP facilities.

From the outset, we wish to applaud the BOP for the Special Housing Unit Review and Assessment currently being conducted by CNA Analysis and Solutions. We look forward to the results and resulting discussion. When that study is done, we ask that this Committee hold another hearing looking specifically at the BOP and the findings and recommendations.

We also wish to note that solitary confinement cannot be viewed in a vacuum. Corrections systems, including the BOP, have become the default mental health care providers. It is a nationwide problem, and must be addressed on a national scale. With insufficient training and tools to treat people with mental health disabilities, corrections professionals often turn to solitary confinement as a means of control. Additionally, the BOP, like many other systems, is overcrowded. The inevitable stretched resources contribute to the overreliance on solitary confinement. We applaud the Administration for starting to address the underlying issues that have led to this crisis, and ask for more attention from Congress to the crowding.

That said, there are specific issues in the Bureau of Prisons that require attention immediately. The 215,000 people in the custody of the BOP cannot wait.

While Consensus Has Formed Against Lengthy Segregation, the BOP Has Moved To Harsher Use of Solitary Confinement

The BOP is out of sync with the rest of its correctional system peers. On August 1, 2011, the BOP began using a new regulation for disciplinary sanctions, including

disciplinary segregation. This new policy made significant changes from the one that came before. While many state systems were exploring ways to limit use of solitary confinement, the BOP was moving in the opposite direction.

The first major difference is that the previous policy allowed disciplinary segregation “only when other available dispositions are inadequate to achieve the purpose of punishment and deterrence,”¹ current policy allows disciplinary segregation to be imposed at the whim of the disciplining officer.

The second major difference is the length of time that a person can be sentenced to solitary confinement. The previous regulation only allowed for sixty days of confinement per offense. The current regulation allows for up to eighteen months.² Obviously, rule violations must be punished and criminal offenses can be referred for additional prosecution. But lengths of time in solitary confinement should not be measured in months or years.³

The allowable punishments also are simply beyond any sense of proportionality or reasonableness. Engaging in sexual acts, including masturbation may be punished with six months in segregation; or up to a year in segregation for the second offense within eighteen months. To be direct, if a nineteen year-old man masturbates twice within a year and half, the BOP regulations say that he can be sent to solitary confinement for an entire year. Other violations, like simple fighting, adulteration of food, or even self-tattooing can be similarly punished.

Refusing to obey any staff order (no matter how small) or “insolence” may be punished with three months of solitary confinement; six months if there are two or more violations within one year. Also included in this severity of punishment are failing to follow a staff member’s work instructions exactly; not perfectly following a material safety data sheet (MSDS) describing the handling of a cleaning product; failing to stand for count; or being “untidy.” Even “circulating a petition,” no matter the topic, can be grounds for three months of solitary confinement.

Using obscene language twice within six months can lead to three month in BOP segregation. While in no way do we condone any sort of rule violation by prisoners,

¹ Bureau of Prisons Policy Statement 5270.07.

² Bureau of Prisons Policy Statement 5270.08.

³ See Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Interim Rep. of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, U.N. Doc. A/66/268 (Aug. 5, 2011) (by Juan Mendez).

again, we must be clear. The BOP rules explicitly state that a prisoner who cusses twice in six months can be put in solitary confinement for three months.

These policies are out of step with the states, come with little protection from arbitrary and capricious application, and by the rest of the world are considered torturous, even at the low end of the BOP's scale.

Men with Serious Mental Illnesses Are Housed at ADX Florence, in Violation of the United States Constitution

Courts have been uniform that the Eighth Amendment to the Constitution forbids housing people with serious mental illness in supermax conditions.⁴ The BOP has not taken notice.

In June 2012, the lawsuit styled *Bacote v. Federal Bureau of Prisons*⁵ was filed by eleven prisoners at ADX in the United States District Court for the District of Colorado. The lawsuit alleges that the defendants have violated BOP policy and the United States Constitution by failing to properly diagnose and treat prisoners at ADX with serious mental illness. It seeks a court order requiring a reformation of the mental health care system at ADX, among other relief. In December 2012, the original namesake of the case, Mr. Michael Bacote, asked to withdraw from the case. As a result, the first-named plaintiff is now Harold Cunningham, and the shorthand case name is *Cunningham v. Federal Bureau of Prisons*.

Also filed in the summer of 2012, *Vega v. Davis*⁶ is a wrongful death case on behalf of the family of a man who suffered from untreated mental illness at the ADX until he took his own life.

Both complaints used BOP's own records to detail the conditions for men living at the ADX. Rather than repeat these well-documented complaints, we note that they are both available at www.supermaxlawsuit.com. The BOP has chosen to fight both cases

⁴ See Ind. Prot. & Advocacy Servs. Comm'n, 2012 WL 6738517, at *19-20; Austin v. Wilkinson, No. 4:01-CV-071, at *27 (N.D. Ohio filed Nov. 21, 2001); Jones 'El v. Berge, 164 F. Supp. 2d 1096, 1125-26 (W.D. Wis. 2001); Ruiz v. Johnson, 37 F. Supp. 2d 855, 915 (S.D. Tex. 1999) rev'd and remanded by Ruiz v. United States, 243 F.3d 941 (5th Cir. 2001); Madrid v. Gomez, 889 F. Supp. 1146, 1265 (N.D. Cal. 1995).

⁵ Civil Action 1:12-cv-01570 (D. Colo.).

⁶ Civil Action 1:12-cv-01114 (D. Colo.)

tooth and nail. The defendants in both cases filed motions to dismiss them. U.S. District Judge Richard Matsch ruled both cases would go forward, although the BOP has taken an interlocutory appeal of the *Vega* case.⁷ These cases have attracted enormous media attention in outlets like the *Atlantic*, the *Wall Street Journal*, *Mother Jones*, and even the *International Business Times*. Media pieces are also collected on the website.

In most situations, litigants are especially cognizant of their behavior during the pendency of lawsuits, not wishing to appear before courts in a bad light. But even with BOP under the spotlight, plaintiffs were forced to file an emergency motion for a preliminary injunction on September 30, 2013 to save the life of Jonathan Francisco.

At the time of filing, Mr. Francisco had spent nearly five years displaying a persistent pattern of bizarre and worrisome signs and symptoms suggesting that he suffered from a severe and worsening mental illness. Sworn declarations tell that he was almost entirely mute, speaking very little, if any, to anyone. BOP's own records show that he was unresponsive to human social stimuli since 2009, well before his September 2011 transfer to ADX. He spent most of his time standing with his face very near a wall, staring blankly. He also obsessively hoarded and handled his own feces, placing it on food trays, rolling it into balls, making sculptures out of it, and smearing it on his walls and sometimes on his body or in his hair. He repeatedly defecated in common-use shower facilities, and on at least one occasion was seen eating his feces. He often had little if any personal property in his cell, frequently sleeping without even a mattress. Despite all of this, BOP own records reflected that he was receiving no meaningful ongoing mental health treatment; instead, he was essentially ignored. Occasionally officers forced him into a shower stall or piled sandbags outside his door in a futile effort to contain the overwhelming smell of feces emanating from his cell.

Within days of the motion being filed, the BOP did agree to transfer Mr. Francisco to a medical facility. He remains there, under intense medical and psychological treatment.

The motion that saved Mr. Francisco's life also detailed the stories of two other men whose mental health needs were ignored by the ADX: Mr. Richie Hill and Mr. Robert Knott.

⁷ Oral arguments are scheduled before the Tenth Circuit on March 20, 2014.

The BOP allowed Mr. Hill to remain actively psychotic and develop severe malnutrition and systemic staph infections. He was on the verge of death when the BOP finally evacuated him on an emergency basis to a medical facility in November 2012, where he remains today. While at ADX, he ate rocks, styrofoam, radio parts, and frequently, balls of his own feces. He attempted suicide approximately ten times, including once by placing pencil lead, rocks and pencil particles up his penis. From the depths of his illness, Mr. Hill repeatedly begged the staff for help with his mental issues, and repeatedly asked to be transferred to a mental hospital. The BOP responded to his pleas with bureaucratic gobbledygook about his supposed failure to attempt informal resolution of his issues, his violation of a technicality requiring prisoners to confine their administrative remedy forms to a single issue, and his supposedly untimely submission of his requests. Without care, he deteriorated even further and developed a persistent delusion that diamond rings were embedded inside his legs. From his attempts to retrieve diamonds from inside his legs, his legs became severely infected; at one point, a worm emerged from one the wounds.

After his emergency evacuation to a medical facility, Mr. Hill was diagnosed with severe multiple systemic infections, appeared to be chronically and acutely septic, and had multiple draining deep sores. He was also suffering from “severe malnutrition,” according to the BOP’s own medical records. His life was in danger, and doctors were worried that even if they could save Mr. Hill, they might have to amputate his legs. Doctors were able to save Mr. Hill and his legs, but he remains under intensive psychological care. He still resides at the medical facility, over one year later.

Mr. Knott was not so fortunate. His acute psychosis was ignored until he hung himself in his cell at ADX on September 7, 2013. Public records make clear that at the time of his 1988 conviction for kidnapping, and subsequent life sentence, Mr. Knott had been diagnosed with schizophrenia.⁸ In 2002, the Department of Justice even petitioned to have him civilly committed so he could be involuntarily medicated. Yet, when not receiving medication for short periods of time he spent at a medical facility, Mr. Knott spent years at ADX, with only intermittent mental health care. In the fall of 2013, Mr. Knott again went off his medications, again decompensated, again started yelling and screaming, again became incoherent, wrote “Heaven” on the wall of his cell, and finally, during the evening of Saturday, September 7, hanged himself from a sheet attached to his cell bars.

Mr. Knott was the seventh person known to have taken his own life at the ADX.

⁸ United States v. Knott, 894 F.2d 1119, 1121 (9th Cir. 1990).

In response to Judge Match's instructions, plaintiffs in *Cunningham* have filed a motion to certify a class on December 20, 2013. This motion simply asks the court to declare that all men at ADX can have their claim that they are entitled to an accurate assessment of whether or not they have a serious mental illness evaluated together. Rather than address the claim, the BOP is opposing class certification. Briefing is ongoing and Judge Matsch will eventually decide.

While these cases and other litigation will continue through the court system, there are distinct lessons that have emerged. Regardless of the outcome in court, we ask that this Committee consider addressing these issues through persuasion or legislation.

The BOP Has Made Up Its Own Definition of "Mental Illness"

Some illnesses, like colds, generally get better with time. Some illnesses, like infections, may be cured with medications. Mental illness is neither something that resolves itself or can be cured.⁹ Medications and therapy may help control mental illness, but a person who has one will always have one.

The BOP continues to insist, both publically and in court filings, that mental illness is like a cold or infection, not a permanent condition. They are the only prison system known to use this concept. No one else in the corrections or psychology field takes this position. In the BOP's view, men living with 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."¹⁰ Director Samuels testified at this Committee's first hearing on solitary confinement, "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."¹¹

⁹ See Information about Mental Illness and the Brain, Nat'l Inst. on Health, www.ncbi.nlm.nih.gov/books/NBK20369/; What is Mental Illness?, Nat'l Alliance on Mental Illness, www.nami.org/Template.cfm?Section=BY_Illness.

¹⁰ Deborah Golden, *The Federal Bureau of Prisons: Willfully Ignorant or Maliciously Unlawful?*, 18 Mich. J. Race & L. 275, 293 (2013).

¹¹ See, e.g., *Reassessing Solitary Confinement*, Panel 1: Hearing Before the Subcomm. on Constitution, Civil Rights and Human Rights of the Sen. Comm. on the Judiciary, 112th Cong. (2012) (statement of Charles Samuels, Dir. Fed. Bureau of Prisons), available at <http://solitarywatch.com/wp-content/uploads/2012/06/transcript-of-the-hearing.pdf>.

Simply, that is not a definition of “mental illness.” No other system defines mental illness like Director Samuels and the BOP.

This obduracy can only be the product of willful choice. By insisting men and women with mental illness, but without immediate acute symptoms are “not mentally ill,” the BOP continues to claim that no one with a mental illness is in BOP segregation. Unfortunately, that clearly is a lie.

The BOP Contradicts Positions Taken by the Civil Rights Experts in the Department of Justice

The Civil Rights Division of the Department of Justice was created to enforce civil and constitutional rights, including the rights of people in state or local jails, prisons, and juvenile detention facilities. While it has no power over its sister agencies of the Department of Justice, the Division speaks as our government’s expert of civil rights enforcement.

On May 13, 2013, DOJ issues a findings letter detailing the results of an investigation into the use of prisoners with serious mental illness at the Pennsylvania State Correctional Institution at Cresson in Cambria County, Pennsylvania.¹²

The Department found that locking prisoners with serious mental illnesses into segregation for months or years at a time put those men at such risk of serious harm that the Eighth Amendment was violated.

The Department’s descriptions of the conditions at Cresson could easily have been about ADX Florence:

- The “prolonged isolation prevents prisoners with serious mental illness from obtaining the mental health treatment they need.”¹³
- “Too often, instead of providing appropriate mental health care, [the] response to mental illness is to confine vulnerable prisoners in its isolation units without meaningful services or activity.”¹⁴
- “Most of the prisoners housed in the isolation units experience little in the way of human interaction.”

¹² Available at http://www.justice.gov/crt/about/spl/documents/cresson_findings_5-31-13.pdf.

¹³ Id, at 2.

¹⁴ Id, at 3.

- “The typical prisoner rarely speaks to or sees others, except for when an officer peers through the prisoner’s cell window during rounds, or the occasional mental health staff member asks about how he is doing.”
- “Facility staff severely limit the opportunities prisoners have to speak to friends or loved ones by telephone or during non-contact visits. The only human touch prisoners usually experience is when they are placed in handcuffs or restraints.”¹⁵

In the letter of findings, DOJ explains that solitary confinement is fundamentally incompatible with proper mental health care for people with serious mental illness. Proper care “requires meaningful out-of-cell activities, such as individual and group therapy, peer and other counseling, or skills building, as well as unstructured activities, such as showers, recreation, or eating out-of-cell.”¹⁶

The Department of Justice filed the same statement in the *Coleman v. Brown* litigation in California.¹⁷ The express purpose was to inform the court of the Department’s positions on the use of “solitary confinement on prisoners with serious mental illness.”¹⁸

There is no apparent explanation for the BOP persisting in a course of conduct that the Civil Rights Division of DOJ had repeatedly found unconstitutional.¹⁹ Respectfully, this Committee may wish to question someone from a Department of Justice office with oversight of the BOP and Director Samuels to find out why this schism is allowed to persist.

Next Steps and Solutions

¹⁵ Id, at 15.

¹⁶ Id, at 11.

¹⁷ Available at http://www.justice.gov/crt/about/spl/documents/coleman_soi_8-9-13.pdf.

¹⁸ Id, at 2.

¹⁹ This failure of the BOP to adhere to civil rights standards is seen in other legal areas. For example, while the Civil Rights Divisions enforces the right to effective communication for state and local prisoners who are deaf and hard of hearing, *see, e.g.*, Settlement Agreement Among the United States of America, the County of Arapahoe, Colorado and Arapahoe County Sheriff J. Grayson Robinson and Plaintiffs in *Lawrence v. City of Englewood*, available at <http://www.justice.gov/iso/opa/resources/834201332117453273491.pdf>, the BOP has fought at least three recent lawsuits seeking the same level of communication for people in its custody: *Berke v. Bureau of Prisons*, Civil Action 1:12-cv-01347 (D.D.C.); *Bryant v. Bureau of Prisons*, Case No. CV 11-00254 (C.D. Cal.); and *Heyer v. Bureau of Prisons*, Civil Action No. 5:11-CT-3118 (E.D.N.C.).

The state of solitary confinement in the BOP has reached this crisis from a failure of leadership. Past BOP Directors and Director Samuels have been content with the status quo. Unfortunately, there has also been a failure of leadership on the part of Attorney General Holder, and, respectfully, Congress. It is time to change that. The following steps must be taken immediately.

1. Upon release of the CNA Special Housing Unit Review and Assessment, this Committee should hold a follow up hearing focusing on solitary confinement in the BOP.
2. The Executive Branch must take every available measure to reduce the overcrowding in the BOP.
3. Congress must give the Executive Branch more tools to reduce the population, or make mandatory those optional tools that already exist.
4. Excessive disciplinary segregations sentences must be stopped.
5. The BOP must use the commonly accepted definition of “serious mental illness,” not attempt to redefine it to mean “currently acutely symptomatic.”
6. The BOP must immediately cease placing prisoners with serious mental illnesses in any segregated confinement.
7. The BOP must not bring Thomson on line to be another supermax. It must focus on reducing the number of people in segregation, not adding new segregation beds.

Addressing solitary confinement from a federal level is an important goal. But the first priority must be assuring that the Federal Bureau of Prisons comes into compliance with the Constitution and accepted modern correctional practices. The lives of the men and women in the custody of the United States depend on it.