

Reassessing Solitary Confinement:
The Human Rights, Fiscal, and Public Safety Consequences

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

June 19, 2012

Statement submitted by
The American Bar Association

For the Hearing Record

Members of the Subcommittee on the Constitution, Civil Rights, and Human Rights:

I am Thomas M. Susman, Director of the American Bar Association (ABA) Governmental Affairs Office. I am submitting this statement on behalf of the ABA for inclusion in the hearing record of the Subcommittee's hearing on June 19, 2012, "Reassessing Solitary Confinement: The Human Rights, Fiscal, and Public Safety Consequences."

The ABA commends the Subcommittee for its examination of the important issue. We share a growing concern with many others over what has become the prolonged solitary confinement instituted in federal and state prisons and jails. The costs—to the public fisc, to prisoners, and to the communities to which the vast majority of prisoners once isolated will return—are immense. For that reason, segregation—while occasionally necessary for safety reasons—should be imposed in the most limited manner possible. The ABA urges the Subcommittee to undertake a further investigation as to how the use of long-term solitary confinement may be restricted so as to promote the safe, efficient, and humane operation of prisons.

The Subcommittee's attention to this issue is timely. Over the past fifteen years, the use of solitary confinement has attracted growing concern due to its documented human and fiscal costs. Anthony Graves and others provided written and oral testimony about personal tolls from living in solitary confinement for extended periods. Their individual experiences—as noted in Dr. Craig Haney's testimony—find support in a variety of studies that suggest that isolation decreases brain activity and can provoke serious psychiatric harms—including severe depression, hallucination, withdrawal, panic attacks, and paranoia—some of which may be long-lasting. Some data suggest that prisoners who have spent long periods in isolation are more likely to reoffend, and many report that these prisoners have a more difficult time creating lasting social bonds that are necessary to reintegration.

These concerns have prompted a flurry of litigation over the past two decades. The Supreme Court in *Wilkinson v. Austin*, 545 U.S. 209 (2005), recognized that prisoners have a liberty

interest in avoiding placement in so-called “supermax” facilities, the severe restrictions of which represent a steep departure from typical prison conditions. While the Eighth Amendment boundaries of solitary confinement are not yet precisely drawn, a number of lower courts have held that, due to the deleterious effects of long-term isolation, administrators may not place prisoners with serious mental illness in supermax prisons. Just this past month, two more class actions have been filed challenging the placement of mentally ill prisoners in California and federal supermax prisons.

The ABA has long been committed to promoting a criminal justice system, including humane and safe prisons, that reflects American values. Since the 1960s, the ABA’s multivolume Criminal Justice Standards¹ has guided the development of law and practice in the American criminal justice system. In 2004, the ABA began the work of updating its standards—last drafted in 1981—governing the treatment of prisoners. Drafters consulted with a range of institutional actors to devise a set of standards that were grounded in legal and constitutional principles, recognized the rights prisoners, and provided sufficient operational leeway for administrators’ professional judgment. In February 2010, a set of ABA Standards for Criminal Justice on the Treatment of Prisoners was approved by the ABA House of Delegates.

The ABA Standards contain specific guidance as to the use of prolonged isolation and apply to all prisoners in adult correctional facilities, including jails. The standards regarding solitary confinement center around a core ideal: “Segregated housing should be for the briefest term and under the least restrictive conditions practicable and consistent with the rationale for placement and with the progress achieved by the prisoner.”² The ABA Standards regulate various forms of segregation, including administrative and disciplinary segregation, long- and short-term. The Standards recognize that “[c]orrectional authorities should be permitted to physically separate prisoners in segregated housing from other prisoners” but stipulate that such separation “should not deprive them of those items or services necessary for the maintenance of psychological and physical wellbeing.” (23-3.8) The Standards forbid in all instances “extreme isolation,” which is defined to “include a combination of sensory deprivation, lack of contact with other persons, enforced idleness, minimal out-of-cell time, and lack of outdoor recreation.” (23-3.8). In short, while it may be necessary physically to separate prisoners who pose a threat to others, that separation does not necessitate the social and sensory isolation that has become routine.

A broad array of reasons may justify placement in short-term segregation (23-2.6), whereas administrators should use “long-term segregated housing sparingly” and only where serious

¹The full text of the ABA Standards is published at http://www.americanbar.org/content/dam/aba/publishing/criminal_justice_section_newsletter/crimjust_policy_midyear2010_102i.authcheckdam.pdf. Relevant standards have been reproduced in the Appendix to this Statement.

²AM. BAR ASS’N, ABA STANDARDS FOR CRIMINAL JUSTICE: TREATMENT OF PRISONERS intro. (3d ed. 2011), available at http://www.americanbar.org/content/dam/aba/publishing/criminal_justice_section_newsletter/crimjust_policy_midyear2010_102i.authcheckdam.pdf; see also Margo Schlanger, Margaret Love & Carl Reynolds, CRIMINAL JUSTICE MAGAZINE (Summer 2010).

safety concerns are at stake. (23-2.7).³ Placement in long-term segregation requires notice and hearing (including the ability to present evidence and available witnesses) and a showing by a preponderance of the evidence that the requirements have been met. (23-2.9) Continuing segregation requires an individualized plan so that the prisoner understands what is expected, as well as meetings between administrators and the prisoner at least every 90 days. For prisoners who are placed in long-term segregation, the Standards call for the effective monitoring and treatment of their mental health needs. (23-2.8) Finally, prisoners with serious mental illness may not be placed in segregation; the Standards instead call for the development of high-security mental health housing appropriate for prisoners whose mental illness interferes with their appropriate functioning in general population.

The ABA Standards reflect a growing trend among states—especially commissioners of corrections—that are seeking alternatives to long-term isolation. As the Subcommittee heard from Mississippi Corrections Commissioner Christopher Epps, many states are finding that it is possible to reduce reliance on solitary confinement without sacrificing the safety of prison staff, other prisoners, or the public. Following a public report at the behest of the state legislature, Maine Commissioner Joseph Ponte enacted a series of reforms to reduce reliance on solitary confinement. New York enacted a law making it more difficult to put seriously mentally ill prisoners in solitary confinement. The Colorado Department of Corrections is undertaking a legislatively mandated audit of its use of segregation and alternatives thereto; the Department announced in March 2012 that it would close a 312-bed Supermax facility by early 2013. Texas and New Mexico are undertaking similar studies, and the Illinois Governor has announced that Tamms—a supermax prison—will close in the end of August 2012.

We greatly appreciate the Subcommittee’s attention to this important matter.

³ The term “long-term segregated housing” means segregated housing that is expected to extend or does extend for a period of time exceeding 30 days. AM. BAR ASS’N, ABA STANDARDS FOR CRIMINAL JUSTICE: TREATMENT OF PRISONERS, Standard 23-1.0 (o): Definitions, (3d ed. 2011).

APPENDIX

ABA Standards for Criminal Justice (Third Edition), Treatment of Prisoners (2010)

Standard 23-2.6 Rationales for segregated housing

- (a) Correctional authorities should not place prisoners in segregated housing except for reasons relating to: discipline, security, ongoing investigation of misconduct or crime, protection from harm, medical care, or mental health care. Segregated housing should be for the briefest term and under the least restrictive conditions practicable and consistent with the rationale for placement and with the progress achieved by the prisoner. Segregation for health care needs should be in a location separate from disciplinary and long-term segregated housing. Policies relating to segregation for whatever reason should take account of the special developmental needs of prisoners under the age of eighteen.
- (b) If necessary for an investigation or the reasonable needs of law enforcement or prosecuting authorities, correctional authorities should be permitted to confine a prisoner under investigation for possible criminal violations in segregated housing for a period no more than [30 days].

Standard 23-2.7 Rationales for long-term segregated housing

- (a) Correctional authorities should use long-term segregated housing sparingly and should not place or retain prisoners in such housing except for reasons relating to:
- (i) discipline after a finding that the prisoner has committed a very severe disciplinary infraction, in which safety or security was seriously threatened;
 - (ii) a credible continuing and serious threat to the security of others or to the prisoner's own safety; or
 - (iii) prevention of airborne contagion.
- (b) Correctional authorities should not place a prisoner in long-term segregated housing based on the security risk the prisoner poses to others unless less restrictive alternatives are unsuitable in light of a continuing and serious threat to the security of the facility, staff, other prisoners, or the public as a result of the prisoner's:
- (i) history of serious violent behavior in correctional facilities;
 - (ii) acts such as escapes or attempted escapes from secure correctional settings;
 - (iii) acts or threats of violence likely to destabilize the institutional environment to such a degree that the order and security of the facility is threatened;
 - (iv) membership in a security threat group accompanied by a finding based on specific and reliable information that the prisoner either has engaged in dangerous or threatening behavior directed by the group or directs the dangerous or threatening behavior of others; or
 - (v) incitement or threats to incite group disturbances in a correctional facility.

Standard 23-2.8 Segregated housing and mental health

- (a) No prisoner diagnosed with serious mental illness should be placed in long-term segregated housing.
- (b) No prisoner should be placed in segregated housing for more than [1 day] without a mental health screening, conducted in person by a qualified mental health professional, and a prompt comprehensive mental health assessment if clinically indicated. If the assessment indicates the presence of a serious mental illness, or a history of serious mental illness and decompensation in segregated settings, the prisoner should be placed in an environment where appropriate treatment can occur. Any prisoner in segregated housing who develops serious mental illness should be placed in an environment where appropriate treatment can occur.
- (c) The mental health of prisoners in long-term segregated housing should be monitored as follows:
- (i) Daily, correctional staff should maintain a log documenting prisoners' behavior.
 - (ii) Several times each week, a qualified mental health professional should observe each segregated housing unit, speaking to unit staff, reviewing the prisoner log, and observing and talking with prisoners who are receiving mental health treatment.
 - (iii) Weekly, a qualified mental health professional should observe and seek to talk with each prisoner.
 - (iv) Monthly, and more frequently if clinically indicated, a qualified mental health professional should see and treat each prisoner who is receiving mental health treatment. Absent an individualized finding that security would be compromised, such treatment should take place out of cell, in a setting in which security staff cannot overhear the conversation.
 - (v) At least every [90 days], a qualified mental health professional should perform a comprehensive mental health assessment of each prisoner in segregated housing unless a qualified mental health professional deems such assessment unnecessary in light of observations made pursuant to subdivisions (ii)-(iv).

Standard 23-2.9 Procedures for placement and retention in long-term segregated housing

- (a) A prisoner should be placed or retained in long-term segregated housing only after an individualized determination, by a preponderance of the evidence, that the substantive prerequisites set out in Standards 23-2.7 and 23-5.5 for such placement are met. In addition, if long-term segregation is being considered either because the prisoner poses a credible continuing and serious threat to the security of others or to the prisoner's own safety, the prisoner should be afforded, at a minimum, the following procedural protections:

(i) timely, written, and effective notice that such a placement is being considered, the facts upon which consideration is based, and the prisoner's rights under this Standard;

(ii) decision-making by a specialized classification committee that includes a qualified mental health care professional;

(iii) a hearing at which the prisoner may be heard in person and, absent an individualized determination of good cause, has a reasonable opportunity to present available witnesses and information;

(iv) absent an individualized determination of good cause, opportunity for the prisoner to confront and cross-examine any witnesses or, if good cause to limit such confrontation is found, to propound questions to be relayed to the witnesses;

(v) an interpreter, if necessary for the prisoner to understand or participate in the proceedings;

(vi) if the classification committee determines that a prisoner is unable to prepare and present evidence and arguments effectively on his or her own behalf, counsel or some other appropriate advocate for the prisoner;

(vii) an independent determination by the classification committee of the reliability and credibility of confidential informants if material allowing such determination is available to the correctional agency;

(viii) a written statement setting forth the evidence relied on and the reasons for placement; and

(ix) prompt review of the classification committee's decision by correctional administrators.

(b) Within [30 days] of a prisoner's placement in long-term segregated housing based on a finding that the prisoner presents a continuing and serious threat to the security of others, correctional authorities should develop an individualized plan for the prisoner. The plan should include an assessment of the prisoner's needs, a strategy for correctional authorities to assist the prisoner in meeting those needs, and a statement of the expectations for the prisoner to progress toward fewer restrictions and lower levels of custody based on the prisoner's behavior. Correctional authorities should provide the plan or a summary of it to the prisoner, and explain it, so that the prisoner can understand such expectations.

(c) At intervals not to exceed [30 days], correctional authorities should conduct and document an evaluation of each prisoner's progress under the individualized plan required by subdivision (b) of this Standard. The evaluation should also consider the state of the prisoner's mental health; address the extent to which the individual's behavior, measured against the plan, justifies the need to maintain, increase, or decrease the level of controls and restrictions in place at the time

of the evaluation; and recommend a full classification review as described in subdivision (d) of this Standard when appropriate.

(d) At intervals not to exceed [90 days], a full classification review involving a meeting of the prisoner and the specialized classification committee should occur to determine whether the prisoner's progress toward compliance with the individual plan required by subdivision (b) of this Standard or other circumstances warrant a reduction of restrictions, increased programming, or a return to a lower level of custody. If a prisoner has met the terms of the individual plan, there should be a presumption in favor of releasing the prisoner from segregated housing. A decision to retain a prisoner in segregated housing following consideration by the classification review committee should be reviewed by a correctional administrator, and approved, rejected, or modified as appropriate.

(e) Consistent with such confidentiality as is required to prevent a significant risk of harm to other persons, a prisoner being evaluated for placement in long-term segregated housing for any reason should be permitted reasonable access to materials considered at both the initial and the periodic reviews, and should be allowed to meet with and submit written statements to persons reviewing the prisoner's classification.

(f) Correctional officials should implement a system to facilitate the return to lower levels of custody of prisoners housed in long-term segregated housing. Except in compelling circumstances, a prisoner serving a sentence who would otherwise be released directly to the community from long-term segregated housing should be placed in a less restrictive setting for the final months of confinement.

Standard 23-3.8 Segregated housing

(a) Correctional authorities should be permitted to physically separate prisoners in segregated housing from other prisoners but should not deprive them of those items or services necessary for the maintenance of psychological and physical wellbeing.

(b) Conditions of extreme isolation should not be allowed regardless of the reasons for a prisoner's separation from the general population. Conditions of extreme isolation generally include a combination of sensory deprivation, lack of contact with other persons, enforced idleness, minimal out-of-cell time, and lack of outdoor recreation.

(c) All prisoners placed in segregated housing should be provided with meaningful forms of mental, physical, and social stimulation. Depending upon individual assessments of risks, needs, and the reasons for placement in the segregated setting, those forms of stimulation should include:

- (i) in-cell programming, which should be developed for prisoners who are not permitted to leave their cells;
- (ii) additional out-of-cell time, taking into account the size of the prisoner's cell and the length of time the prisoner has been housed in this setting;

- (iii) opportunities to exercise in the presence of other prisoners, although, if necessary, separated by security barriers;
- (iv) daily face-to-face interaction with both uniformed and civilian staff; and
- (v) access to radio or television for programming or mental stimulation, although such access should not substitute for human contact described in subdivisions (i) to (iv).

(d) Prisoners placed in segregated housing for reasons other than discipline should be allowed as much out-of-cell time and programming participation as practicable, consistent with security.

(e) No cell used to house prisoners in segregated housing should be smaller than 80 square feet, and cells should be designed to permit prisoners assigned to them to converse with and be observed by staff. Physical features that facilitate suicide attempts should be eliminated in all segregation cells. Except if required for security or safety reasons for a particular prisoner, segregation cells should be equipped in compliance with Standard 23-3.3(b).

(f) Correctional staff should monitor and assess any health or safety concerns related to the refusal of a prisoner in segregated housing to eat or drink, or to participate in programming, recreation, or out-of-cell activity.