

Statement of Keramet A. Reiter, J.D., Ph.D.
Before the
United States Senate
Committee on the Judiciary
Subcommittee on the Constitution, Civil Rights and Human Rights

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Dear Chairman Durbin and Ranking Member Graham,

My name is Keramet Reiter. I am an Assistant Professor in the Department of Criminology, Law and Society at the University of California, Irvine (as of July 1). I am an expert in the history and uses of solitary confinement in U.S. prisons; I have been researching and writing about this topic for nearly ten years.

In this testimony, I will discuss, in turn, three aspects of solitary confinement in the United States on which I have a particular expertise: (1) the history of the practice as an administrative (rather than legislative or judicial) innovation, (2) the lack of evidence that the practice promotes safety, either in prisons or in communities; and (3) the unprecedented scale of the practice – in terms of both numbers of people confined and durations of confinement.

(1) Solitary Confinement & Supermaxes: An Administrative Innovation

In 1890, the U.S. Supreme Court noted that solitary confinement as a punishment “was found to be too severe” and had been eliminated across the United States. The case concerned a condemned prisoner who had been held in isolation for one month prior to his execution; the Court ordered Medley’s release from prison.¹ And yet, more than a century later, there are tens of thousands of U.S. citizens being held in solitary confinement, from California to Maine. Moreover, these prisoners are spending not days or months in solitary confinement, but years and decades. In the United States today, 41 states and the federal prison system have at least one entire prison dedicated to confining people in long-term solitary confinement. These prisons range in size from a few dozen beds to more than 1,000 beds. Why did the United States return to this practice, so roundly condemned centuries earlier?

The answer lies at the intersection of mass incarceration and insufficient prison oversight. Between 1970 and 2010, the number of people in American prisons increased one-thousand-fold, from just over twenty thousand to just over two million.² Today, the United States has more people in prison than any other nation in the world (the closest second is China) and the highest *rate* of incarceration of any nation in the world (the closest second is Russia). Indeed, there are more people under correctional supervision in the United States today than there were in Stalin’s

¹ *In re: Medley*, 134 U.S. 160, 168, 161, 175 (1890).

² See Franklin E. Zimring and Gordon E. Hawkins, *The Scale of Imprisonment* (Chicago: University of Chicago Press, 1991), at Table 5.1; Heather C. West. & William J. Sabol, *Prison Inmates at Midyear 2008 - Statistical Tables* (Bureau of Justice Statistics, NCJ 225619, Mar. 2009).

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gulags.³ As the U.S. prison population rose throughout the 1980s and 1990s, states and the federal government built new prisons – often as fast as they could – to house this growing prisoner population.

During these prison-building years, forty-one of the fifty United States, as well as the federal prison system, built at least one *supermax* institution. Supermax prisons are explicitly designed to keep prisoners in solitary confinement, indefinitely. Arizona built the first supermax in 1986, and California built two more in 1988 and 1989. In both states, prison administrators, including wardens and high-level bureaucrats, collaborated with architects to design a new kind of prison. In both states, legislators had delegated control over prison design, location, and financing to correctional bureaucrats, as a means to expedite prison building.⁴ In California and Arizona, prison administrators, not legislators or governors or judges, designed a newly punitive supermax prison, which reinstated a policy that had been largely abandoned in the United States by the late nineteenth century.

Not only were the first supermax institutions designed by correctional administrators, but supermax institutions across the United States today are operated at the discretion of correctional administrators, with little judicial oversight. Judges do not assign prisoners to long-term solitary confinement in supermaxes; prison guards do. A prisoner in a supermax has either (a) been found guilty, in an in-prison administrative hearing, of breaking a prison rule or (b) been labeled a dangerous gang member through an in-prison, administrative evaluation process. A prisoner labeled as a dangerous gang member is usually sent to a supermax indefinitely – either for the duration of his prison sentence, or until he consents to “de-brief,” sharing incriminating information about other gang members.⁵

In reviewing the constitutionality of supermax prisons, federal courts have generally further expanded the discretion that correctional administrators have had to design supermaxes, and to assign prisoners to these institutions. Specifically, courts defer to administrators’ safety-and-security justifications for the institutions, with little evidence that these institutions actually promote safety and security.⁶ In sum, the administrative discretion underlying the design of

³ Adam Liptak, “U.S. Prison Population Dwarfs that of Other Nations,” *New York Times*, Apr. 23, 2008; Adam Gopnik, “The Caging of America,” *The New Yorker*, Jan. 30, 2012.

⁴ See Mona Lynch, *Sunbelt Justice: Arizona and the Transformation of American Punishment* (Stanford: Stanford University Press, 2010); Keramet Reiter, *The Most Restrictive Alternative: The Origins, Functions, Control, and Ethical Implications of the Supermax Prison, 1976 – 2010*, University of California, Berkeley dissertation (Spring 2012).

⁵ For further discussion of this process, see Keramet Reiter, “Parole, Snitch, or Die: California’s Supermax Prisons and Prisoners, 1997-2007,” under final review at *Punishment & Society* (available from author upon request).

⁶ See, e.g., *Madrid v. Gomez*, 889 F. Supp. 1146 (N.D. Cal. 1995) (finding the concept of California’s supermax prisons to be fundamentally constitutional); *Austin v. Wilkinson*, 545 U.S. 209 (2005) (holding that placement in supermax prisons raises a liberty interest for prisoners, but is not unconstitutional).

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supermax prisons has only been expanded over the last twenty years of supermax operation and burgeoning uses of solitary confinement across the United States.

(2) There is Little Evidence that Solitary Confinement and Supermaxes Promote Public Safety

Correctional administrators justify extended uses of solitary confinement as necessary to maintain safety and security throughout a given state's prison system. However, there is little evidence that either extended solitary confinement or supermax institutions promote safety and security, either within a given state prison system, or within our communities.

Only a small handful of studies have looked at the potential relationship between supermaxes and violence (in Arizona, Illinois, Minnesota, and Utah), and these studies have found no effects on inmate-on-inmate assaults, and minimal decreases in inmate-on-staff assaults.⁷ Indeed, many states do not even systematically collect data about violence in-and-out of solitary confinement units or post-release recidivism statistics.

On the other hand, many studies have documented two serious, detrimental impacts of long-term solitary confinement on in-prison violence and public safety, more broadly: unconstitutional prisoner abuse and permanent mental health deterioration. First, the harsh conditions in supermax prisons and the extreme discretionary control prison administrators have over supermax prisoners often open the door to unconstitutional abuses – clear violations of human rights – in these institutions. As a result, especially when supermax prisons first open, serious prisoner abuses often occur. In California, at Pelican Bay State Prison, one supermax prisoner was dipped in scalding water until his skin peeled off. Also in California, at Corcoran State Prison, supermax prisoners from rival gangs were set-up to fight to the death, in “gladiator” fights on small exercise yards.⁸ Similar incidents of abuse following supermax openings have been documented by journalists and federal courts alike, in Arkansas, Colorado, Connecticut, Florida, and Virginia, to name just a few examples.⁹

⁷ Chad S. Briggs, Jody L. Sundt, and Thomas C. Castellano, “The Effect of Supermaximum Security Prisons on Aggregate Levels of Institutional Violence,” *Criminology*, Vol. 41 (2003): 1341-1376; Jody L. Sundt, Thomas C. Castellano, and Chad S. Briggs, “The Sociopolitical Context of Prison Violence and Its Control: A Case Study of Supermax and Its Effect in Illinois,” *The Prison Journal*, Vol. 88.1 (2008): 94-122.

⁸ See “Former Inmate at Pelican Bay Wins Judgment Against State,” *San Francisco Chronicle*, March 1, 1994: A-18; Matthew Heller, “They Shoot Prisoners, Don’t They?” *Independent*, Jan. 28, 2001.

⁹ See Andy Davis, “State settles pepper-spray suits: Ex-inmate at Varner Supermax Unit to get \$4,000 for ’05 cases,” *Arkansas Democrat-Gazette*, Feb. 17, 2011, available online at: <http://epaper.ardemgaz.com/webchannel/ShowStory.asp?Path=ArDemocrat/2011/02/17&ID=Ar00902> (last accessed 20 Feb. 2012); *U.S. v. LaVallee*, 269 F. Supp. 1297 (D. Colo. 2003) and *U.S. v. Verbickas*, 75 Fed. Appx. 705 (10th Cir. 2003) (detailing gruesome abuses of prisoners at the federal supermax facility in Colorado officers were sentenced to three-plus years in prison); American Civil Liberties Union, “ACLU Sues CT Corrections Chief Over Abuse of Prisoners

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Second, the harsh conditions in supermax prisons can cause severe mental health problems, or can exacerbate existing mental health problems. Indeed, prisoners are often sent to solitary confinement *because* they have mental health problems that preclude their adjustment to standard prison life. Once in solitary confinement, these problems often worsen. And prisoners who did *not* have pre-existing mental health problems often start to experience problems – from hallucinations, to suicidal ideation, to suicide itself – the longer they spend time in isolation. The testimony of Dr. Craig Haney at this hearing, as well as the statements of many former prisoners and advocates, further document these mental health impacts.

These two problems inherent to supermax confinement lead to a third, with devastating social implications: prisoners are often released *directly* from solitary or supermax confinement onto parole, or to the streets. In California, between 50 and 100 prisoners *per month* are released directly from supermax institutions onto parole.¹⁰ Colorado, Connecticut, Florida, Indiana, Massachusetts, and Pennsylvania, to name just a few documented examples, also release prisoners directly from long-term solitary confinement onto the streets.¹¹ Given the documented mental health challenges these prisoners are likely to face, the potential public safety challenges of these policies can well be imagined, though little research has investigated the recidivism statistics of this particular former prisoner population.

In sum, although solitary confinement and supermaxes are often justified as necessary safety and security measures in a given state or federal prison system, there is almost no evidence that the practice of solitary confinement or the institution of the supermax provides this benefit. There is, however, abundant evidence that supermax institutions facilitate abuse of prisoners, cause or exacerbate mental health problems, and then export these abused and ill prisoners back into

Housed at Notorious Virginia ‘Supermax,’” Press Release, Feb. 7, 2001, available online at: www.clearinghouse.net/chDocs/public/PC-CT-0001-0002.pdf (last accessed 22 Feb. 2012); *Osterback v. Moore*, Case No. 97-2806-CIV-HUCK (S.D. Fl.), Defendants Revised Offer of Judgment, Oct. 20, 2003, available online at: www.clearinghouse.net/chDocs/public/PC-FL-0011-0002.pdf (last accessed 23 Feb. 2012);

¹⁰ Reiter, *supra* note 5.

¹¹ Bonnie L. Barr, Chuck R. Gilbert and Maureen L. O’Keefe, *Statistical Report: Fiscal Year 2010* (Colorado Department of Corrections, Feb. 2011), available online at: <http://www.doc.state.co.us/opa-publications/97> (last accessed 20 Feb. 2012); Connecticut Department of Correction, “Northern Correctional Institution Administrative Segregation Program,” at 4, 6, available online at: www.ct.gov/doc/lib/doc/pdf/northernascc.pdf (last accessed 21 Feb. 2012); *Osterback v. Moore*, Case No. 97-2806-CIV-HUCK (S.D. Fl.), Second Report of Craig Haney, at para. 25 (on file with author); Jamie Fellner and Joanne Mariner, *Cold Storage: Supermaximum Security Confinement in Indiana* (New York: Human Rights Watch, 1997); Bruce Porter, “Is Solitary Confinement Driving Charlie Chase Crazy?” *New York Times Magazine*, Nov. 8, 1998: 52 (discussing Massachusetts supermax release policies); Terry Kupers, *Prison Madness: The Mental Health Crisis behind Bars and What We Must Do about It* (San Francisco: Jossey-Bass, 1999): 35 (discussing Pennsylvania supermax release policies).

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society, significantly less adapted to healthy societal participation than they were before entering prison.

(3) The Scale of the Use of Solitary Confinement in the United States is Unprecedented

In California, prisoners released from solitary confinement or supermax prisons have spent an average of approximately two years in isolation. Many more California prisoners serving life sentences expect never to be released from solitary confinement. As of this writing, more than 500 prisoners in the state have each spent more than 10 years in continuous isolation.¹² Individual prisoners' challenges and journalistic investigations in states like Colorado, New York, and Virginia suggest that prisoners in other states spend comparably long periods – years to decades – in total solitary confinement.¹³ Many states, however, do not even collect data about average lengths of stay of state prisoners in solitary confinement, so more systematic national data is simply not available.

By contrast, in New York in the 1820s, the experimental practice of solitary confinement was abandoned completely after 18 months, because so many prisoners suffered such obvious deterioration.¹⁴ And in legal challenges to short-term solitary confinement in the 1970s, federal courts across the United States noted that prisoners usually only spent a few days, to a month at most, in solitary confinement.¹⁵

Not only do American prisoners today spend unprecedentedly long periods of time in solitary confinement, but there is an unprecedentedly large number of prisoners being held in these

¹² Reiter, *supra* note 5; Julie Small, "Under Scrutiny, Pelican Bay Prison Officials Say They Target Only Gang Leaders," 89.3 KPCC Southern California Public Radio, Aug. 23, 2011.

¹³ James Austin, and Emmitt Sparkman, *Colorado Department of Corrections Administrative Segregation and Classification Review*, Technical Assistance No. 11P1022 (Washington, D.C.: NIC Prisons Division, Oct. 2011), available online at: <http://www.aclu.org/prisoners-rights/colorado-department-corrections-administrative-segregation-and-classification> (last accessed 14 Feb. 2012): 18 (documenting average length of stay in Colorado supermax of 24 months, or two years); *Lockdown New York: Disciplinary Confinement in New York State Prisons* (The Correctional Association, Oct. 2003), available online at: www.correctionalassociation.org/publications/download/pvp/issue_reports/lockdown-new-york_report.pdf (last accessed 14 Feb. 2012) (documenting average length of stay in one New York solitary confinement facility as 37 months, or more than 3 years); Adam Ebbin, Charniele Herring, and Patrick Hope, "Why All Virginians Should Care about the Overuse of Solitary Confinement," *The Washington Post*, Jan. 20, 2012 (noting prisoners had been in solitary confinement as long as 12 years).

¹⁴ Peter Scharff Smith, "The Effects of Solitary Confinement on Prison Inmates: A Brief History and Review of the Literature," *Crime & Justice*, Vol. 34 (2006): 441-528, at 457.

¹⁵ Keramet Reiter, "The Most Restrictive Alternative: A Litigation History of Solitary Confinement in U.S. Prisons, 1960-2006," *Studies in Law, Politics and Society*, Vol. 57 (2012): 69-123.

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conditions. Whereas in the 1970s, prior to the American prison-building boom, a small handful of prisoners in the highest security prisons might have been held in solitary confinement, today thousands of prisoners in nearly every state are held in solitary confinement. All but nine states have a supermax unit or prison, with at least a few dozen, if not a thousand, beds dedicated to total, long-term solitary confinement in each of these states. Today, there are more than 20,000 prisoners being held in more than 50 supermax prisons across the United States. And an additional 50,000 prisoners, or more, are being held in solitary confinement or segregation in shorter-term, smaller facilities scattered throughout state prison systems.¹⁶

Both the long terms prisoners spend in solitary confinement in the United States and the large number of prisoners being held under these conditions deserve further scrutiny and oversight. Are these conditions constitutional, effective, or necessary? The answer to this question is, at the very best, that we do not know.

In sum, I applaud the Senate Judiciary Subcommittee on the Constitution, Civil Rights, and Human Rights for hosting a hearing on solitary confinement in U.S. prisons. The use of solitary confinement in U.S. prisons is largely invisible, unchecked, and brutal. Congressional attention raises visibility, and will facilitate efforts to decrease the prevalence of civil and human rights violations in U.S. prisons.

Sincerely,



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¹⁶ These numbers are based on the author's own unpublished research. For published estimates of the numbers of prisoners in segregation, solitary confinement, and supermaxes across the United States, see Chase Riveland, *Supermax Prisons: Overview and General Considerations* (U.S. Department of Justice, National Institute of Corrections, January 1999), available online at: <http://www.nicic.org/pubs/1999/014937.pdf> (last accessed 13 Feb. 2012); Alexandra Naday, Joshua D. Freilich, and Jeff Mellow, "The Elusive Data on Supermax Confinement," *The Prison Journal*, Vol. 88 (1): 69-92 (2008).