STATEMENT OF FRED COHEN, LL.B., LL.M

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

Chairman: The Honorable Dick Durbin

My name is Fred Cohen and I am a graduate of the Temple and Yale Law Schools (LL.M. 1961). I have taught at a number of excellent law schools and helped found, then retired from, the S.U.N.Y. at Albany, School of Criminal Justice (2000). I have written a number of articles and books on law and corrections and serve as the Executive Editor of the *Correctional Law Reporter* and the *Correctional Mental Health Report*.

Since 1995 I have served as a federal court monitor, expert witness, and litigation consultant in a number of states with an emphasis on the mentally ill in prison. Most recently, I was appointed as the principal investigator in the case of **Rasho v. Walker**, No. 1:07-CV-1298-MMM-JAG (C.D. Illinois 2011). Our Team spent nine months visiting and observing Illinois' prisons, studying files, interviewing staff and inmates.

I authored a 180-page Report, which issued on March 6, 2012 and made explicit findings about the conditions in Illinois prisons including the hundreds of inmates with serious mental illness (SMI) who are held for extended terms in segregation. The parties to the **Rasho** litigation are now engaged in settlement discussions, as I understand it, with a particular urgency regarding those inmates with SMI held for extended periods of isolation.

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I congratulate this Committee for its historic decision to conduct hearings on the human rights, fiscal and public safety consequences of the extraordinary use of solitary confinement in our penal institutions. The precise number of inmates in solitary confinement is not known but about 82,000 is a reasonable estimate for the state and federal prison systems. *See,* How Many Prisoners Are in Solitary Confinement in the United States? (Solitary Watch, Feb. 1, 2012)

In my experience and based on my studies, the contemporary use of penal isolation is one of the most psychologically damaging, penologically unnecessary, and needlessly expensive correctional measures currently in use. Whether analyzed from a human rights or an empirical perspective, our current practices with penal isolation are properly subject to condemnation and candidates for early reform.

Clearly, some inmates must be separated from each other and staff for legitimate reasons of security. A short-term restriction on movement and loss of amenity can be a useful disciplinary sanction, especially when accompanied by a process that encourages and rewards positive behavior. Inmates may need to be <u>insulated</u> from each other, and for a variety of valid reasons, but <u>insulation</u> (separation) and contemporary penal <u>isolation</u> are quite different concepts and operations. The process of insulation need not lead ineluctably to conditions of extreme social and sensory deprivation.

Being locked down in an archaic, 6' x 9' cell with another inmate for 23 hours a day (or more), seven days a week, with limited showers and exercise opportunities, no congregate meals or other activities is a recipe for madness. Safety is not enhanced by such barbaric, inhumane measures.

An Illinois inmate I recently interviewed and who is subjected to such a regimen concluded with me by saying, "I just don't know who I am anymore." Another such inmate explaining to me why he rejected outdoor exercise in what he (and others) call the "dog run" explained, "They do a full body search going in and out. I'm not going to let them inspect parts of my body I've never seen." He is not alone.

Whether the physical confines of extended penal isolation are the antiseptic sterility of the newer Supermax variety on the medieval-like cells in prisons like Menard, Pontiac, or Stateville in Illinois, the negative impact on the individual appears to be the same. There is a retreat into the recesses of one's psyche and either the "discovery" of a hiding place or of demons so frightening that self-destruction and unimaginable self–abasement emerge. Bodies are smeared with one's own excrement; arms are mutilated; suicides attempted and some completed; objects inserted in the penis; stitches repeatedly ripped from recent surgery; a shoulder partly eaten away.

Even Edward Munch's "The Scream" fails to capture the hidden horrors emerging from some of the men and women in longer-term (over 30 days) penal isolation. Every example I just gave comes from actual cases I have encountered.

It is very expensive to control inmates in a high security classification or segregation. There are two, perhaps three, officers assigned to every such inmate who for whatever reason must leave his or her cell (e.g., a dental or medical appointment, a visit, a disciplinary hearing). I recently observed such prison disciplinary hearings and they moved with the speed of light with each inmate-defendant manacled and a different pair of officers at each shoulder.

There is no enhancement to public safety for our current reliance on penal isolation. Indeed, the anger that is created in these subjects suggest public safety is diminished. For corrections, segregation is an easy response and requires no thinking or planning; no work at changing offenders' behaviors. For some officers, it is an ideal assignment: no real interaction with inmates, nothing but control is on the daily menu.

Officers' unions, not surprisingly, are not opposed to the current use of segregation.

Judicial decisions have brought some relief in this area to juveniles and inmates who are SMI or even especially psychologically vulnerable to extended and right-less confinement. For others, Professor Mushlin correctly writes, "Virtually every court which has considered the issue has held that the imposition of solitary confinement, without more, does not violate the Eighth Amendment. Arguments that isolation offends evolving standards of decency; that it constitutes psychological torture and that it is excessive because less severe sanctions would be equally efficacious, have routinely failed."[1]

In **Austin v. Wilkinson**, 545 U.S. 209 (2005), the Supreme Court did recognize a liberty interest in the avoidance of confinement at Ohio's Supermax (OSP). The due process response is a paper-review type of procedure. Even a more stringent procedural solution than **Austin** to a substantive problem — i.e., the very conditions to be endured — is hardly a solution.

The destructive dimensions of this practice and the magnitude of the problem sit astride a correctional system that either welcomes or condones the practice. Is this a cancer that can be removed without more basic reform; more rehabilitative and educational opportunities, less time served for less serious offenses, for example? Yes, I believe so and if reform undertaken

[1] Michael B. Mushlin, Rights of Prisoners, 92-93 (3rd ed 2002)

here is labeled "mere tinkering" I would insist on a survey of those inmates whose incarcerative lives might acquire the normality of "mere imprisonment."

An Approach

The federal government can play a vital role in affecting change here. First, the government can solicit proposals for a first-rate national study of the number of state and federal prisoners held in penal isolation. It should not be difficult to arrive at criteria for data inclusion on long-term penal isolation and to then survey the states.

Second, the federal government could convene a National Commission to draft national standards for jails and prisons on the use of penal isolation (or whatever term is deemed felicitous). The ABA Standards for Criminal Justice, which I assisted with, Standard 23-3.8, "Segregated Housing" is a good starting reference point.

Federal funding for corrections can be tied to the adoption, oversight, and enforcement of such standards. In this fashion, constitutional minima and constant judicial intervention and oversight might be obviated.

James B. Jacobs and Kerry T. Cooperman in "A Proposed National Corrections College," 38 New Eng. J. on Crim & Civil Confinement 57 (2012), make a very persuasive case for a full-fledged, national-level training and research institution devoted to making our corrections systems as effective and humane as possible. My earlier suggestion for a temporary Commission to create national standards is fully consonant with the more ambitious Jacobs and Cooperman, national academic and training institution.

The National Institute of Corrections (NIC), in my view, is far too invested in nuts-and-bolts, how-to-do-it training to serve as the vehicle for the college these authors propose. There

was a day when the School of Criminal Justice (SCJ) in Albany, N.Y. might have been a "partner" in something like this. Where the NIC is too parochial, the SCJ has evolved into just another school of criminology and ranks high on the opacity scale for many of its research products.

There is a vital role here for the federal government. States have shown some willingness to make changes in penal isolation, particularly where the mentally ill are involved. The whip of judicial intervention, however, typically is the driving force. Governors do not run on a "reform prison segregation" platform. Indeed, we have not heard a word from this presidency on prisons and the segregation crisis.

This committee can be the spark.

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