

Written Testimony of Professor Jeanne Theoharis
For the Senate Judiciary Committee,
Subcommittee on the Constitution, Civil Rights, and Human Rights

Second Hearing on Reassessing Solitary Confinement:
Scheduled for February 25, 2014

Chairman Durbin and Honorable Committee members,

We want to begin by thanking the Committee for holding this important hearing. In concert with colleagues and human rights advocates across the country who are drawing attention to other key issues related to the use of solitary confinement, we submit findings on the pre-trial treatment that people accused of terrorism encounter in federal prisons, which often involves years of pre-trial solitary confinement, often additionally layered with Special Administrative Measures (SAMs). It is this often-overlooked pre-trial use of solitary confinement that is the subject of this written testimony, which we hope will prompt further investigation and needed oversight by the Committee.

We are devoting this testimony to the pre-trial use of solitary confinement, including SAMs, in terrorism-related cases, specifically as it is practiced at the Metropolitan Correctional Center (MCC) in New York City. Amnesty International and other researchers, United Nations experts, and members of the media have requested to visit the MCC and to interview detainees held in pre-trial solitary confinement there. These requests have all been denied, which has contributed to a dearth of publicly-available information about the nature of these pre-trial conditions and their impact on defendants' health and rights.

In the past twelve years since the tragedy of 9/11, we have witnessed the use of prolonged pre-trial solitary confinement in an increasing sample of cases where people are facing terrorism-related charges.¹ Solitary confinement in the cases we have observed is typically instituted at the beginning of the pre-trial detention, and appears to be related to the fact of a terrorism charge and not necessarily to the specific allegations at issue or the behavior in custody. Despite legal challenges in some of these cases, the solitary confinement has lasted the entire duration of the pre-trial confinement. This raises significant human rights and due process concerns.

We turn our attention to a federal penitentiary with some of the harshest of these pre-trial conditions – the treatment of suspects at the Metropolitan Correctional Center (MCC) in lower Manhattan. Many terrorism cases post-9/11 have originated in the Southern District of New York (SDNY), and defendants facing charges in the SDNY are held in the MCC. Within that facility, people accused of terrorism are often held in the highly

¹ A partial list of defendants held in prolonged pre-trial solitary confinement includes the cases of Syed Hashmi, Oussama Kassir, Tarek Mehanna, Talha Ahsan, Babar Ahmad, Abdel Bary, Ahmed Ghailani, Sheikh al-Moayad, Mohammed Warsame, Uzair Paracha, Ali al-Marri, Zacarias Moussaoui, Jose Padilla, Tarik Shah, Aafia Siddiqui, Ahmed Warsame, Ricardo Palmera.

restrictive “10 South” wing of the prison; there is also a “Special Housing Unit” where detainees are also held in solitary confinement.

The isolation in 10 South is severe. Based on information received from some detainees and their lawyers, we understand that suspects spend 23 hours a day in their cells.

Detainees shower inside their cells, so that they are literally alone in their cells almost all of the time. They are allowed one hour of recreation out of their cells, which takes place in an indoor solitary recreation cage. Recreation is periodically denied, so detainees can go days without leaving their cells. No outdoor recreation is allowed for detainees in 10 South, and cell windows are frosted. The only fresh air is through a window in the indoor recreation cage.

Detainees are strip-searched each time they go to court. These kinds of regular searches can be traumatizing and degrading. Defendants in some cases have requested not to attend their own court hearings because of these strip searches.² The conditions at the MCC are dirty and decrepit; detainees and lawyers report that the temperature is not sufficiently regulated and varies between extremely cold and hot. Legal visits are typically non-contact.

Many terrorism suspects in 10 South have also been placed under SAMs or SAMs-like conditions. SAMs are prisoner-specific confinement and communication rules, imposed by the Attorney General but carried out by the Bureau of Prisons (BOP).³ Pursuant to 28 C.F.R. § 501.3, the Attorney General may authorize the Director of the BOP to implement SAMs only upon written notification “that there is a substantial risk that a prisoner's communications or contacts with persons could result in death or serious bodily injury to persons, or substantial damage to property that would entail the risk of death or serious bodily injury to persons.” The SAMs “may include housing the inmate in administrative detention and/or limiting certain privileges, including but not limited to correspondence, visiting, interviews with representatives of the news media, and use of the telephone, as is reasonably necessary to protect persons against the risk of acts of violence or terrorism.”⁴ Page after page, a prisoner's SAMs spell out in intricate detail the nature of his isolation, down to how many pages of paper he can use in a letter or what part of the newspaper he is allowed to read and after what sort of delay. It does not have to spell out the reasons for those particular restrictions.⁵

Originally, the federal government created SAMs to target gang leaders and prisoners in

² Benjamin Weiser, *Federal Judge Rejects Terrorism Suspect's Plea to Halt His Strip-Searches*, N.Y. TIMES, June 17, 2010.

³ 28 C.F.R. § 501.3. The statutory authority for the SAMs derives mainly from [5 U.S.C. § 301](#), which grants the heads of executive departments the power to create regulations designed to assist them in fulfilling their official functions and those of their departments, and [18 U.S.C. § 4001](#), which vests control of federal prisons in the Attorney General and allows him to promulgate rules governing those prisons.

⁴ 28 C.F.R. § 501.3(a).

⁵ 28 C.F.R. § 501.3(b) (“Designated staff shall provide to the affected inmate . . . written notification of the restrictions imposed and the basis for these restrictions. The notice’s statement as to the basis may be limited in the interest of prison security or safety or to protect against acts of violence or terrorism”).

cases where “there is a substantial risk that an inmate’s communication or contacts with persons could result in death or serious bodily injury to persons.”⁶ They instituted these restrictions on the communications of prisoners with a demonstrated reach beyond prison.⁷ Civil libertarians raised a series of alarms in 1996 when the SAMs regulations were first promulgated by the Department of Justice (DOJ), particularly around prisoners’ First Amendment rights to free speech and their Sixth Amendment right to counsel. But during the notice and comment process, there was no explicit discussion of these measures being used pre-trial.

After 9/11, DOJ substantially changed the standard for imposing and renewing SAMs. Finding the SAMs application and renewal process “burdensome” and “unnecessarily static,” they relaxed the standards considerably and expanded their use.⁸ The government now could impose SAMs for a year (previously it had been 120 days). And for renewals, which can recur annually without limit, the government did not have to demonstrate that the original reason the person was put under SAMs still existed, only that there existed a reason to maintain the measures. Significantly, the government expanded their use pre-trial. Cases in which the government asserted a relationship of the accused to “terrorist activities,” particularly alleged connections to al Qaeda, could be enough to justify these measures pre-trial. The requirement of establishing “demonstrated reach” was effectively jettisoned in the cases we observed.

Under SAMs – which, in cases we have observed, are layered on top of solitary confinement – detainee isolation grows even more profound, as communication with the outside world is severely circumscribed. Detainees at the MCC under SAMs do not get television or radio, and access to newspapers is delayed and censored. There is electronic surveillance inside and outside of their cells, so everything (going to the bathroom, showering, talking) is monitored. Detainees have also been punished for speaking through the walls. One man was given a four-month punishment for saying “Asalaam Aleikum” to another detainee. Another was reprimanded for making the call to prayer. Detainees are not always punished for talking through walls or doors, but there is always the threat of punishment, and sometimes guards exercise their prerogative to do so. Detainees report going months without any talking with other inmates. In response to these harsh conditions, there have been hunger strikes at the MCC as well as force feedings, but little public attention because information on the MCC is so circumscribed.

These conditions can be devastating and result in mental health degradation – which is particularly destabilizing for people with pre-existing mental health issues. There is no independent outside medical oversight, and motions to get independent medical experts inside to provide evaluations and to help ameliorate defendants’ pre-trial conditions were

⁶ Prevention of Acts of Violence and Terrorism, 61 Fed. Reg. 25,120 (interim rule with request for comments) (May 17, 1996).

⁷ The legal standard was established in *United States v. Felipe*, a case that upheld extraordinarily restrictive conditions of confinement for a leader of the Latin Kings with a demonstrated history of directing murderous conspiracies from prison and communicating with an extensive network of co-conspirators inside and outside of prison.

⁸ National Security; Prevention of Acts of Violence and Terrorism, 72 Fed. Reg. 16,271-75 (Apr. 4, 2007).

generally denied by the court in the cases we observed.

The use of prolonged solitary confinement and SAMs during pre-trial detention thus raises significant due process concerns. Such conditions compromise the ability of defendants to participate actively and effectively in their own defense. The use of prolonged pre-trial solitary confinement can also exert extraordinary pressure on a defendant to cooperate or take a plea bargain to escape these conditions. Moreover, it compromises the right to a presumption of innocence, as pre-trial solitary and SAMs – extreme conditions that are punitive in their effect – are imposed on defendants whose charges have not been proven.

Such confinement has serious health effects, as documented by virtually every mental health study that has examined long-term solitary confinement. Having conducted his own empirical research as well as an exhaustive review of the psychological literature from “researchers from several different continents [with] diverse academic backgrounds and a wide range of professional expertise,”⁹ Dr. Craig Haney, a psychologist at UC-Santa Cruz who has studied the effects of solitary confinement for decades, summarizes the types of psychological harms suffered by prisoners held in long-term solitary confinement. These include “appetite and sleep disturbances, anxiety, panic, rage, loss of control, paranoia, hallucinations, and self-mutilations,” as well as “cognitive dysfunction, hallucinations, . . . , aggression and rage, paranoia, hopelessness, a sense of impending emotional breakdown, self-mutilation, and suicidal ideation and behavior.”¹⁰

This constellation of symptoms, referred to as “isolation panic” by social psychologist Hans Toch, “mark[s] an important dichotomy for prisoners: the “distinction between imprisonment, which is tolerable, and isolation, which is not.”¹¹

Haney has extensively documented the use of isolation as an interrogation and torture technique, explaining that “many of the negative effects of solitary confinement are analogous to the acute reactions suffered by torture and trauma victims.” Research suggests such effects are clear after 60 days. Indeed, Haney concludes, “There is not a single published study of solitary or supermax-like confinement . . . that failed to result in negative psychological effects.” Psychological studies have repeatedly found that prolonged solitary confinement and sensory deprivation can cause or exacerbate mental illness. Stuart Grassian, former faculty member at Harvard Medical School, has done extensive research with prisoners in solitary confinement. He has documented a specific psychiatric condition brought on by solitary confinement, even among people with no previous psychiatric issues. This includes hyper-responsivity to external stimuli, illusions and hallucinations, panic attacks, difficulty concentrating, intrusive obsessional and aggressive thoughts, paranoia, and problems with impulse control. Across the board,

⁹ Expert Report of Dr. Craig Haney, *Silverstein v. Bureau of Prisons*, 07-cv-2471-PAB-KMT (Apr. 13, 2009), citing CHRISTOPHER BURNEY, *SOLITARY CONFINEMENT* (1961); Frank Rundle, “The Roots of Violence at Soledad,” in *THE POLITICS OF PUNISHMENT: A CRITICAL ANALYSIS OF PRISONS IN AMERICA*, 163-172 (1973); Robert Slater, *Abuses of Psychiatry in a Correctional Setting*, 7(3) *Am. J. of Forensic Psych.* 41-47 (1986).

¹⁰ *Id.* (citing both U.S. and international literature on the adverse effects of solitary confinement).

¹¹ *Id.*

solitary confinement has these effects.¹²

In a pre-trial situation, these effects then raise a host of due process issues, both in terms of punishment before conviction and the ways these conditions abridge a suspect's due process and other fair trial rights. As Amnesty International has observed, "[t]he conditions also appear incompatible with the presumption of innocence in the case of untried prisoners who have not committed offences within the institution and whose detention should not be a form of punishment."¹³

What is also troubling about the use of pre-trial isolation is its potential as a coercive tool. These conditions of prolonged isolation are designed to produce stress and cooperation. The use of solitary confinement can help create the landscape for convictions by making it difficult for defendants to participate effectively in their own defense, severely impairing their mental health and judgment. And such impaired judgment has obvious implications for the voluntariness of plea deals and the legitimacy of those resulting convictions.

Pre-trial solitary confinement also raises questions regarding the United States' human rights standing in the world. Cases before the European Court of Human Rights, by suspects fighting extradition to face charges in the United States, have raised the issue of treatment of suspects and the use of solitary confinement in US prisons. As more people encounter this pre-trial treatment, one can expect growing international attention. The UN Special Rapporteur on Torture recently issued a public statement about the conditions of confinement of one previous defendant, Syed Hashmi, who was kept for three years pre-trial at the MCC in solitary confinement under SAMs:

I found no justification for the fact that he was kept in solitary confinement during his prolonged pre-trial detention (in the US although not in the UK during his pre-extradition detention), and that he was later placed under "special administrative measures" amounting to solitary confinement under another name, after a conviction based on a negotiated plea. The explanation I was given made no mention of Mr. Hashmi's behavior in custody as a reason for any disciplinary sanction; it appears that his harsh conditions of detention are related exclusively to the seriousness of the charges he faced. If that is so, then solitary confinement with its oppressive consequences on the psyche of the detainee is no more than a punitive measure that is unworthy of the United States as a civilized democracy.

¹² See, e.g., Stuart Grassian, *Psychiatric Effects of Solitary Confinement*, 22 J. L. & POL'Y 325, 331 (2006) (noting that "even a few days of solitary confinement will predictably shift the EEG pattern toward an abnormal pattern characteristic of stupor and delirium").

¹³ Amnesty International statement available at: <http://www.amnesty.org/en/library/asset/AMR51/029/2011/en/867a8f0e-9fd1-4dbf-a084-cfe644c774b0/amr510292011en.pdf>

Amnesty International in a letter to Attorney General Holder addressed the pre-trial conditions of confinement that existed in MCC 10 South, which “fall short of the USA’s obligations [to international law] in this regard and the combined effects of prolonged confinement to sparse cells with little natural light, no outdoor exercise and extreme social isolation amount to cruel, inhuman or degrading treatment.” In our view, the years-long pre-trial solitary confinement of defendants in MCC 10 South also rises to the level of torture by international standards. As Amnesty International stated in their letter:

The USA has ratified the Convention against Torture and the International Covenant on Civil and Political Rights (ICCPR), both of which affirm the absolute prohibition of torture or cruel, inhuman or degrading treatment. ...[The UN Human Rights Committee] has noted that prolonged solitary confinement may amount to torture or other ill-treatment prohibited under Article 7 of the ICCPR (General Comment 20/44, 1992). The UN Committee against Torture has made similar statements, with particular reference to the use of solitary confinement during pre-trial detention.¹⁴

In sum, we have documented the use of prolonged pre-trial solitary confinement, including SAMs, on people facing terrorism charges; the significant rights issues this treatment raises; and the potential coercive climate that pre-trial solitary confinement creates. We hope that the Committee will investigate and provide oversight and regulation on the use of solitary confinement in this context, as well as other contexts being described by other submissions and testimony to this hearing.

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¹⁴ Amnesty International statement *available at*:
<http://www.amnesty.org/en/library/asset/AMR51/029/2011/en/867a8f0e-9fd1-4dbf-a084-cfe644c774b0/amr510292011en.pdf>