

**Statement of
Mary Meg McCarthy, Executive Director
Heartland Alliance's National Immigrant Justice Center**

**Senate Committee on the Judiciary
Subcommittee on the Constitution, Civil Rights, and Human Rights
Hearing on "Reassessing Solitary Confinement II: The Human Rights, Fiscal, and
Public Safety Consequences"**

February 25, 2014

Chairman Durbin, Ranking Member Cruz, and members of the Subcommittee on the Constitution, Civil Rights, and Human Rights of the Senate Committee on the Judiciary:

Heartland Alliance's National Immigrant Justice Center (NIJC) applauds Senator Richard Durbin for his work to call attention to the important issue of solitary confinement. NIJC submitted testimony for the first congressional hearing on solitary confinement held by this Subcommittee on June 19, 2012.¹ While some important changes have occurred since that time, many of the problems we documented in our original testimony continue to exist in immigration detention facilities across the country.

NIJC is a non-governmental organization (NGO) dedicated to safeguarding the rights of noncitizens. With offices in Chicago, Indiana, and Washington, D.C., NIJC advocates for immigrants, refugees, asylum seekers, and victims of human trafficking through direct legal representation, policy reform, impact litigation, and public education. NIJC and its network of 1,500 *pro bono* attorneys provide legal counsel to approximately 10,000 noncitizens annually. NIJC conducts regular visits to jails detaining immigrants to provide "Know Your Rights" presentations. NIJC also works with colleagues across the country providing legal services to detained immigrants.

NIJC has played a major role in advocating for reform of the immigration detention system. As the co-convener of the Department of Homeland Security (DHS)/NGO Enforcement and Detention Working Group, NIJC facilitates advocacy and open dialogue between DHS and human rights organizations, legal aid providers, and immigrant rights groups. With a national membership of more than 100 NGOs, the Working Group advocates for the full protection of internationally recognized human rights, constitutional and statutory due process rights, and humane treatment of noncitizens.

Through our on-the-ground experience, NIJC has seen many instances of the misuse of solitary confinement with regard to immigrants detained in the custody of the DHS, especially among vulnerable individuals such as sexual minorities and those with mental

¹ Available at: <http://www.immigrantjustice.org/nijc-testimony-submitted-senate-judiciary-committee-hearing-building-immigration-system-worthy-ameri>

illness. We call on Congress to ensure that DHS ends the use of solitary confinement through legally binding detention standards and provide greater transparency and accountability.

I. Solitary Confinement in Immigration Detention

Immigration detention is the fastest growing incarceration system in the United States.² Every day, DHS holds an average of 34,000 individuals in immigration detention under a quota established in Congressional appropriations for fiscal year 2010 and renewed annually.³ Roughly two-thirds of detainees are held in a network of approximately 250 state and local detention facilities, which contract with the U.S. Immigration and Enforcement (ICE) to house immigration detainees.⁴ Other detainees are held in dedicated immigration detention facilities operated by ICE or contracted to private prison corporations.⁵

The purpose of immigration detention is not to punish immigrants, but to ensure that they appear for their hearings in immigration court and comply with orders issued by an immigration judge. Many detainees have never been convicted of a crime, and the vast majority pose no threat to public safety. In FY 2013, 41 percent of immigrants detained and deported had no criminal convictions.⁶ Among those with a criminal record, 28 percent were for the least serious convictions that are punishable by less than one year, such as possession of fraudulent immigration documents, traffic offenses, and marijuana possession.⁷ Despite the fact that immigration detention is not intended to be punitive, immigration detainees are held in jail-like conditions. In NIJC's experience, jail administrators and guards whose expertise and experience is with criminal incarceration, often are not equipped or trained to deal with the detained immigrant population. Solitary confinement too often becomes a default response when facilities are unable to contend with mental illness or psychological trauma among detainees. Individuals who struggle with these issues often include immigrant survivors of violence and persecution. Solitary confinement, often referred to as segregation, refers to a practice in which individuals separated from the general population and are held in total or near-total isolation.

As part of NIJC's 2012 report *Invisible in Isolation: The Use of Segregation and Solitary Confinement in Immigration Detention*,⁸ NIJC filed requests under the Freedom of Information Act (FOIA) with 250 immigration detention facilities to gain a better understanding of the scope of use of solitary confinement. DHS provided information showing that at the time, roughly 300

²See "Lost in Detention," PBS Frontline (October 18, 2011), available at:

<http://www.pbs.org/wgbh/pages/frontline/race-multicultural/lost-in-detention/map-the-u-s-immigration-detention-boom/>.

³ Public Law 111-38: "Department of Homeland Security Appropriations Act, 2010." (123 Stat. 2142; Date 10/28/2009) Text from: U.S. Government Printing Office. Available from:

<http://www.gpo.gov/fdsys/pkg/PLAW-111publ83/pdf/PLAW-111publ83.pdf>.

⁴ ICE, "Fact Sheet: Detention Management" (November 2011), available at <http://www.ice.gov/news/library/factsheets/detention-mgmt.htm>.

⁵ *Id.* According to ICE, about 3% of detainees are housed in Federal Bureau of Prison (BOP) facilities.

⁶ "FY 2013 ICE Immigration Removals." Department of Homeland Security, ERO Annual Report, 2013, pg. 1. Available at: <http://www.ice.gov/doclib/about/offices/ero/pdf/2013-ice-immigration-removals.pdf>.

⁷ *Id.*

⁸ National Immigrant Justice Center, "Invisible in Isolation: The Use of Segregation and Solitary Confinement in Immigration Detention," Sept. 2012. Available at: <https://www.immigrantjustice.org/invisibleinisolation>.

immigrants were held in solitary confinement on any given day.⁹ Based on NIJC's experiences representing individuals in solitary confinement and responses to the FOIA requests for the solitary confinement policies for immigration detainees at county jails that contract with ICE, we learned that immigrants often are held in cells about the size of a parking spot for 23 hours a day. They have limited access to programming available to detainees held in general population, such as recreation, legal orientation programming, access to phones to contact family members and attorneys, access to law libraries, and visitation.

There are two forms of solitary confinement: administrative and disciplinary segregation. Administrative segregation is a "non-punitive" status to ensure the safety of an individual and/or security of the facility. Also referred to as "protective custody," LGBT immigrant detainees and individuals with medical and mental health conditions are often placed in administrative segregation as a form of protection from or for the general population. Disciplinary segregation is a punitive status that results from a violation of facility rules. Despite the fact that administrative segregation is not supposed to be punitive, it often is indistinguishable from disciplinary segregation. As a result, detainees who suffer abuse or otherwise are particularly vulnerable in the general population often will not raise their concerns with jail officials for fear of being placed in solitary confinement.

II. ICE Segregation Directive & Detention Standards

In September 2013, ICE took a significant step to improve oversight of the use of solitary confinement by issuing a directive titled "Review of the Use of Segregation for ICE Detainees" ("Segregation Directive").¹⁰ This policy directs facility administrators and ICE personnel to notify ICE field office directors whenever detainees are in segregation for a period of 14 out of 21 days, again at 30 days, and at every 30-day interval thereafter. It states that age, physical disability, sexual orientation, gender identity, race, or religion may not provide the sole basis for placing individuals in involuntary segregation, and that detainees must be removed from segregation if it is believed to have caused deterioration in their mental health. Furthermore, facilities may not hold detainees who have been the victim of sexual assault in administrative segregation for more than five days except in unusual circumstances or at the detainees' request. Importantly, the directive explicitly states that solitary confinement should be used only as a last resort. In addition, the directive includes special reporting requirements for detainees with "special vulnerabilities," such as those with mental illness, severe medical illness or disability, pregnant or nursing women, elderly individuals, and those susceptible to harm due to their sexual orientation, gender identity, or because they have been victims of sexual assault.

While the Segregation Directive is a positive step in addressing the misuse of solitary confinement in immigration detention, challenges remain. The directive is not legally

⁹ These findings were reported in a front-page article in *The New York Times*. Urbina, I. & C. Rentz. "Immigrants Held in Solitary Cells, Often for Weeks." *New York Times*. Mar. 23, 2013. Available at: <http://www.nytimes.com/2013/03/24/us/immigrants-held-in-solitary-cells-often-for-weeks.html?pagewanted=all>.

¹⁰ U.S. Immigration and Customs Enforcement, *Review of the Use of Segregation for ICE Detainees*, Directive 11065.1, Sept. 4, 2013. Available at: http://www.ice.gov/doclib/detention-reform/pdf/segregation_directive.pdf.

enforceable and does not place an overall time limit on the use of solitary confinement. It does not prevent individuals from languishing in solitary confinement for stretches of time extending beyond 15 days, the point at which United Nations Special Rapporteur on Torture Juan Mendez has observed, based on scientific studies, that detainees may suffer irreversible damage to their mental health.¹¹ It likewise provides no oversight by the ICE field office director or headquarters for those in solitary confinement for up to 14 days unless a “special vulnerability” is identified. In addition, the directive does not mandate any mental health checks by specialists prior to placement in segregation or during their stay in solitary. Moreover, the directive places an over-reliance on ICE to police itself without any accountability to an independent third party.

Finally, despite the new directive, there is a lack of independent oversight of the use of solitary confinement in immigration detention. While the directive permits the DHS Office of Civil Rights and Civil Liberties (CRCL) to participate in ICE meetings where segregation reports to headquarters are reviewed, CRCL is not authorized to use information learned in those meetings for the purposes of a CRCL investigation. Importantly, ICE and CRCL are offices within DHS and no independent entities or objective third parties have any functional oversight role. Allowing third parties to conduct site visits and participate in the oversight committee is critical to creating greater transparency and accountability in immigration detention.

In order to successfully eradicate the misuse of solitary confinement in the immigration detention system, not only must the ICE Segregation Directive be fully and meaningfully implemented, but so too must all other standards governing the detention of immigrants in ICE custody. Currently, ICE detention facilities are subject to the Performance-Based National Detention Standards (PBNDS), which have been amended on two occasions: the original version of the standards was promulgated in 2000, with revisions in 2008 and 2011. While the 2011 PBNDS are not as robust as NIJC would like – and continue to lack oversight and transparency provisions – they are an improvement on previous standards and should apply to all facilities.

III. Senator Blumenthal’s (D-CT) Solitary Confinement Amendment to S. 744

Apart from ICE’s Segregation Directive, the other significant development for immigration detainees facing solitary confinement was the bi-partisan passage in May 2013 of Senator Richard Blumenthal’s (D-CT) amendment to the Senate’s immigration reform bill S. 744, the Border Security, Economic Opportunity and Immigration Modernization Act.¹² That amendment categorically prohibits solitary confinement for immigration detainees under the age of 18 and places strict limitations on the length and conditions of solitary confinement for those with serious mental illness. The amendment further requires vigilant medical and mental health monitoring of those in segregation and oversight of solitary confinement practices by the Secretary of Homeland Security. It also included important oversight provisions, requiring an annual report to Congress on the prevalence, reasons for, and

¹¹ U.S. News Centre, “Solitary confinement should be banned in most cases, UN expert says,” Oct. 8, 2011. Available at: <https://www.un.org/apps/news/story.asp?NewsID=40097#.UwvPbG3ejoY>

¹² Available at: [http://www.judiciary.senate.gov/legislation/immigration/amendments/Blumenthal/Blumenthal2-\(MDM13517\).pdf](http://www.judiciary.senate.gov/legislation/immigration/amendments/Blumenthal/Blumenthal2-(MDM13517).pdf)

duration of solitary confinement. Although S. 744 has not been passed by the House or signed into law, this amendment is a noteworthy accomplishment in that its strong protections received wide bipartisan support and is therefore more likely to be included in any final immigration bill that passes Congress.

IV. Ongoing Human Rights Abuses in Solitary Confinement

While acknowledging that implementation of ICE's Segregation Directive is still in its earliest stages, NIJC reiterates the following key concerns expressed in testimony submitted to this Subcommittee in June 2012, which continue to be reported by individuals in DHS custody:

➤ **Administrative segregation continues to be used as an improper substitute for mental health and medical treatment.**

Isolation is sometimes used as a substitute for proper medical treatment; detainees are isolated for observation or to contain the spread of disease. Facilities' medical amenities are often understaffed since an inadequate number of doctors are required to oversee more patients than they can handle. Because facilities often lack the capacity to handle the needs of detainees with mental illness or other medical issues, facility staff may place these individuals in solitary confinement in lieu of providing treatment.

Solitary confinement is also often used instead of proper mental health services for detainees with severe mental illness and for those who become suicidal as a consequence of their isolation. The Inter-American Commission on Human Rights has held that the use of solitary confinement as part of a person's mental health rehabilitation plan can rise to the level of "inhuman and degrading treatment."¹³ The on-site presence of a mental health practitioner such as a psychiatrist or psychologist is not mandated under ICE detention standards, so many facilities rely on off-site facilities and under-qualified on-site personnel to provide such care to detainees. Mental health evaluations of individuals held in segregation are often also extremely limited, at times merely requiring a medical staff member, often a nurse, to confirm the detainee is alive in his or her cell; these check-ins also only occur after the detainee has been in segregation for 30 days.

Although PBNDS permits the use of solitary confinement for individuals who express suicidal ideations, such a practice is used too frequently and without meaningful consideration of the further consequences that placement in solitary confinement will cause. ICE should consider alternatives to solitary confinement for those who express a desire to hurt themselves. Solitary confinement may further exacerbate suicidal thoughts or psychological ailments. Studies have also shown that solitary confinement can lead to hallucinations, paranoia, memory loss, and random acts of violence and self-harm.

Detainees in ICE custody may suffer from pre-existing psychological conditions, including issues related to past trauma or persecution, that have not been diagnosed. In detention, their symptoms begin to exhibit more prominently, and lead guards to believe they are lashing out, resulting in placement in solitary. Facilities are not required to have

¹³ Inter-American Commission of Human Rights, *Rosario Congo v. Ecuador*, Report 63/99, Case 11.427 of April 13, 1999 at 59; *See also Keenan v. the United Kingdom*, European Court of Human Rights, April 3, 2001, Application No. 27229/95 at 113.

detainees undergo mental health evaluations prior to being placed in solitary, where the symptoms of their psychosis may worsen and continue to go untreated.

Samuel (pseudonym), a Jamaican national, came to the attention of an NGO which learned that Samuel was mentally ill and suffered from hallucinations. He had been placed in solitary confinement during the pendency of his immigration proceedings, but due to poor record keeping, his pro bono attorney had no idea how long he had been placed in segregation. He consistently begged his attorney to help get him out of solitary confinement, expressing a desire to be placed in the general population where he could have human contact with others; however, he remained detained in solitary confinement for more than four months, during which time his mental health declined substantially and he became incomprehensible. Samuel was finally released after his proceedings were terminated based on incompetence. Since then, Samuel is receiving medical attention for his mental illness and works with a social worker who helped him get into a program. He continues to participate in the program, and is doing much better.

➤ **LGBT immigrants are inappropriately held in “protective custody.”**

Administrative segregation is disproportionately used against the most vulnerable populations in immigration detention, such as LGBT individuals. U.N. Special Rapporteur Méndez noted that “Although segregation of [LGBT] individuals may be necessary for their safety, lesbian, gay, bisexual and transgender status does not justify limitations on... access to recreation, reading materials, legal counsel, or medical doctors.”¹⁴ NIJC maintains that if ICE is unable to hold individuals in a safe, humane manner, they should not be detained.

In April 2011, NIJC filed a mass complaint with CRCL on behalf of 13 detained LGBT immigrants who were targeted for physical, sexual, and emotional abuse in immigration detention.¹⁵ In October 2011, four additional ICE detainees joined the civil rights complaint. Many of these individuals were inappropriately held in solitary confinement, often for months at a time without formal determinations of the necessity of solitary confinement and without an appeals process. To date, NIJC has not received a final response from DHS with regard to this complaint.

In NIJC’s experience, alternatives to detention (ATDs), such as supervision or ankle bracelet monitors, are often a better arrangement for LGBT individuals and other vulnerable populations. It allows individuals to leave inappropriate housing situations where DHS may not be able to guarantee their safety. This is particularly an issue for transgender detainees, since individuals are not placed according to their self-identified gender. In addition, release on ATDs allows transgender detainees better access to hormone therapy. Other vulnerable populations enjoy increased access to mental health and medical treatment and the support of family members. Moreover, expanded use of ATDs would result in huge cost savings to

¹⁴ See Interim Report of the Special Rapporteur of the Human Rights Council on Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment at 19 (August 5, 2011) (available at:

<http://solitaryconfinement.org/uploads/SpecRapTortureAug2011.pdf>)

¹⁵ See

<http://immigrantjustice.org/sites/immigrantjustice.org/files/CRCL%20Global%20Complaint%20Letter%20April%202011%20FINAL%20REDACTED.pdf>

taxpayers. In comparison to the \$159 daily cost to detain an individual, ATDs cost as little as 70 cents to \$17 per day.¹⁶

➤ **Facility officers inappropriately sentence immigrants to disciplinary segregation.**

NIJC continues to receive reports of cases in which individuals were placed in disciplinary segregation as punishment for minor, frivolous infractions. Furthermore, lack of proper investigation by detention officers means individuals sometimes are subjected to disciplinary segregation based on false accusations. Disciplinary segregation also continues to be used to punish individuals who complain or organize to protest harsh detention conditions or otherwise exercise their civil and religious rights.

Syed Maaq-Shah is a young Pakistani man. While in detention at Tensas Parish Detention Center (Waterproof, Louisiana), a large group of immigration detainees participated in a hunger strike to protest harsh detention conditions, including being given soiled and/or torn clothing; inadequate food; and exposure to second-hand smoke. Mr. Maaq-Shah calmed his fellow inmates down and encouraged them to engage in peaceful, non-violent hunger strikes rather than participate in a violent protest. Following the hunger strike, Mr. Maaq-Shah was transferred to another facility and placed in solitary confinement for a week. In violation of ICE's Performance-Based National Detention Standards (PBNDS), Mr. Maaq-Shah was never provided with information on why he was being placed in solitary confinement or information on the length of his confinement. In addition, he was not allowed to communicate with his attorney while in solitary. As of the time of writing, Mr. Maaq-Shah received notification that he will be deported on February 24, 2014.

➤ **Detainees may be placed in solitary confinement arbitrarily and with no explanation.**

According to PBNDS 2011, individuals who are placed in segregation must be provided with a copy of the segregation order. Detainees should have an understanding of why they have been placed in segregation regardless of the purpose of placement. This is particularly important because detainees placed in administrative segregation, for instance, are given the right to challenge their placement in segregation. Without clarity and transparency, detainees cannot exercise their rights.

Charles (pseudonym) spent 41 days—30 of them in lockdown—in solitary confinement at a Federal Bureau of Prisons (BOP) facility in Oakdale, Louisiana with no explanation whatsoever. On his second day in segregation, an officer reviewed his case and said that he would make a recommendation to release him back into the general population, but he was never taken out. While in solitary, Charles was allowed to shower every three days, but was placed in shackles for the duration. When he wasn't in lockdown, he had one hour of recreation time daily. In addition, while in segregation, he was not able to access the law library. The BOP guards would not do anything to address his situation because he was under ICE custody, and responded that it wasn't their problem. Charles sent a letter to DHS complaining about his situation, but never heard back. Eventually, he was transferred to another facility after an NIJC attorney intervened.

¹⁶ National Immigration Forum. *The Math of Immigration Detention*. Aug. 2013. Available at: <http://www.immigrationforum.org/images/uploads/mathofimmigrationdetention.pdf>.

IV. Recommendations and Conclusion

ICE detention standards and the Segregation Directive offer only unenforceable guidelines for the operation and oversight of a massive detention system. In order to increase accountability and limit abuse, DHS and Congress must take immediate steps to address the misuse of solitary confinement in immigration detention.

1. Congress should require DHS to implement legally binding regulations to govern the use of solitary confinement and other conditions of confinement for individuals in DHS custody.
2. The 2013 ICE Segregation Directive establishes a Detention Monitoring Council, which is in part responsible for tracking and reporting on the use of solitary confinement for individuals in DHS custody. DHS should publicly report this body's findings at regular intervals. Independent third parties also should be engaged in the oversight process.
3. DHS should end the use of solitary confinement for individuals with mental health and chronic medical conditions, LGBT detainees, and other vulnerable populations for whom release or alternatives to detention (ATDs) are more appropriate.
4. Solitary confinement should never be used as "protective custody" for transgender individuals. Transgender detainees should not be detained at all except in extraordinary circumstances. Those individuals who are should be housed according to their gender identity rather than their biological sex to ensure they are safe in the general population.
5. To the extent that administrative segregation remains necessary, individuals in that placement should be afforded the rights as other detainees, including equal access to recreational time, medical facilities, and legal orientation programs.
6. DHS should prohibit the use of disciplinary segregation for detainees who have serious mental illnesses and instead provide psychiatric care. If DHS cannot safely hold detainees as part of the general population, then they should release them on ATD programs.
7. DHS should prohibit the use of solitary confinement as punishment for participation in hunger strikes, political speech, or frivolous infractions.
8. DHS should require immigration detention facilities to properly investigate accusations against detainees before placing individuals in disciplinary segregation. DHS must also require facilities to afford detainees the opportunity to confront the evidence against them.
9. Congress should amend the immigration laws that require certain individuals to be held in mandatory detention and permit access custody reviews, including the consideration of ATDs, for individuals who cannot be safely detained with the general population.

10. Congress should increase funding for ATDs in order to facilitate ICE's expanded use of the program.
11. DHS should draw from the New York City Department of Corrections' recent reform efforts,¹⁷ including:
 - a. Prohibit the use of disciplinary segregation for detainees with mental illnesses and instead direct them to appropriate psychiatric care.
 - b. Provide daily psychiatric monitoring of individuals in solitary confinement licensed medical professionals.
 - c. Recognize that counseling services are medically necessary, and offer psychological treatment accordingly.

¹⁷ "Solitary Jailing Curbed: New York City Department of Correction Stops Solitary Confinement for Mentally Ill Inmates Who Break Rules," *Wall Street Journal*, Jan. 5, 2014. Available at: http://online.wsj.com/news/articles/SB10001424052702304617404579302840425910088?mod=rss_newyork_main.