

PRISON OVERSIGHT AND SYSTEMS OF ACCOUNTABILITY

Michele Deitch, J.D., M.Sc.*

*Prepared for the
National Prison Rape Elimination Commission Hearing
New Orleans, LA
December 6, 2007*

Introduction

It is an honor to be asked to provide testimony before this Commission on the subject of prison oversight.

Much of my research and writing over the last two years has been on the issue of prison oversight. I spent the 2005-06 year as a Soros Senior Justice Fellow focused on this topic, and my research took me to England to study a variety of oversight models in Europe as well as to various parts of the United States to examine domestic oversight structures. I also led a team of student researchers who reviewed all the relevant literature on this topic and who conducted a 50-state survey of prison and jail oversight models in this country. Additionally, I served for three years as the original Reporter to the American Bar Association's Task Force on the Legal Treatment of Prisoners Standards, and I drafted the proposed ABA standards related to oversight of correctional facilities. I also provided substantial input into a pending ABA resolution supporting the need for independent oversight of prisons and jails.

My personal experience with prison oversight began over two decades ago, when I served for a few years as a court-appointed monitor in the landmark Texas prison reform class action lawsuit, *Ruiz v. Estelle*. As a court monitor, I had unfettered access to every corner of every prison facility in the state, could visit at any time of day without notice to the prison authorities, could speak with any prisoner or staff member, and could review any document. I wrote reports to the court and the parties that included my findings and recommendations with regard to specific issues.

As many of you are aware, I also organized and chaired a major international conference held last year at the University of Texas called "Opening Up a Closed World: What Constitutes Effective Prison Oversight?" This invitation-only conference drew together 115 of the world's top experts on corrections policy and human rights to discuss a variety of oversight issues. Among the participants were 20% of the nation's corrections commissioners and directors. Alongside them were leading prisoners' rights

* Adjunct Professor of Public Policy, Lyndon B. Johnson School of Public Affairs, University of Texas at Austin. Former Soros Senior Justice Fellow; former court-appointed monitor of Texas prisons in *Ruiz v. Estelle*; Reporter, American Bar Association Task Force on Standards for the Legal Treatment of Prisoners, 2004-2007; Conference Chair, "Opening Up a Closed World: What Constitutes Effective Prison Oversight?," University of Texas, 2006.

advocates, scholars, journalists, judges, policy-makers, and representatives from most of the prison monitoring bodies that exist in the United States. We also had a number of high-profile international guests, including the British chief prison inspector, the chair of Europe's prison monitoring body, and the Swedish parliamentary ombudsman responsible for prison inspections. I doubt that a more impressive group with such a breadth of perspectives in the correctional field has been assembled in recent memory. The information presented at that extraordinary conference helped shape many of my views on this subject, and I will reference presentations made at the conference with some frequency in my remarks today.. I am also including as an Appendix to this paper a draft copy of the Conference Proceedings, which provides more detail about many of the issues raised in my testimony.¹

I mention this background because my comments today are drawn directly from the research I have been conducting on prison oversight, from my personal experiences in providing oversight, and from the experiences of numerous colleagues who have been deeply engaged in providing oversight or being on the receiving end of such reviews.² As I seek to provide this Commission with an overview of prison oversight mechanisms, I hope to convey the strong belief of many experts in the correctional and human rights field that prison oversight is absolutely essential to the safe operation of prisons. As this Commission seeks solutions to the tragic problem of sexual assault in the nation's prisons, jails, juvenile facilities, and other places of detention, it must look to the establishment of effective oversight mechanisms as one of the most important strategies in that campaign.

Systems of Accountability: An Overview

The twin goals of public transparency and accountability for the operation of safe prisons

Any discussion of oversight in the correctional context must begin with the recognition that oversight is not a goal in and of itself. Rather, oversight is a means of

¹ The Conference Proceedings contain summaries of each panel discussion at the conference, as well as copies of handouts providing detailed descriptions of many of the oversight models described in my testimony. It is a very helpful source of further information about each of the issues and models discussed in this paper. However, throughout this paper, I also provide citations to the websites of each of these organizations, as well as links to videos of the presentations made by some of the speakers at the conference, for benefit of anyone wanting more in-depth information.

² My thinking about these issues have been shaped not only by my own experiences and research in the field, but also by in-depth conversations I have had with many professional colleagues, especially: Silvia Casale, Andrew Coyle, Anne Owers, Lord David Ramsbotham, Baroness Vivien Stern, Michael Mushlin, Alvin Bronstein, Jamie Fellner, Carl Reynolds, Gary Johnson, Marty Horn, A.T. Wall, Jack Beck, Matthew Cate, Glenn Fine, Bob Gangi, Shirley Pope, Richard Wolf, and Malcolm Young. I am deeply grateful to all of them for sharing their insights and experiences with a variety of models of correctional oversight, and for helping me continue to think through the complexities of these issues.

achieving the twin objectives of transparency of public institutions and accountability for the operation of safe and humane prisons and jails. One of the main lessons of last year's conference is that correctional administrators and advocates for prisoners' rights share a goal of having prisons that are safe for both inmates and staff, that treat prisoners respectfully and humanely, that prevent re-offending, and that meet constitutional requirements. Effective oversight allows both the public and correctional administrators to know whether these goals are being met.

Every public agency must have effective systems of accountability. The public and its elected representatives must have assurances that tax monies are being well-spent; agency managers must have access to good sources of information about agency operations; and consumers of services must have a basis for knowing whether the services they receive are appropriate and meaningful. In the correctional context, systems of accountability are even more critical, because the stakes are so much higher and because we are dealing with closed institutions, with total control over human beings. Human life and well-being are at risk.

Internal accountability measures and external oversight

Effective prison management demands both internal accountability measures and external scrutiny. The two go hand-in-hand, and neither is a replacement for the other. A robust system of correctional oversight involves sound internal auditing and accountability measures, complemented by credible and effective forms of external scrutiny.

I am very pleased that today's hearing will offer testimony on both of these topics, and I hope you will bear in mind as you listen to this testimony that the two systems of accountability are not in competition with each other. They serve different needs and different constituencies.

Systems of internal review offer a valuable management information tool for administrators, allowing them to identify and correct operational problems at an early stage. Whether the administrator reviews data about the number and types of incidents happening at a particular facility, reads prisoner grievances in order to know the inmates' complaints, watches videos of use of force incidents, has auditors assess staff compliance with policies, or disciplines staff for wrongdoing, the goal is to improve management capability and therefore improve agency operations.

External scrutiny may sometimes look similar, but the goal is to shine a light on what happens in correctional institutions. External scrutiny is essential any time that a closed institution is responsible for the control of individuals; it is a linchpin in any effort to ensure the safety of prisoners. It serves the goal of transparency as well as the goal of accountability. Such transparency provides both a form of protection from harm and an assurance that rights will be vindicated. External oversight responds to the public's need for information and provides a credible, objective assessment of conditions in

correctional facilities. There will always be public skepticism about an agency's ability to assess itself, and so the external review complements whatever internal assessments are conducted. Moreover, external involvement is necessary whenever staff or inmate behavior crosses the line from administrative wrongdoing to criminal actions. The power of the state must be called upon to investigate and prosecute such criminal behavior, as in the case of a sexual assault by a staff member or by an inmate.

At the same time that external oversight serves this transparency function, it also benefits administrators by providing them with the objective feedback they need about their performance. It adds to the toolkit of management information systems.

Oversight as an "umbrella concept"

I have been asked to provide an overview of the different methods and types of prison oversight. First, we have to achieve some clarity as to what is meant by "oversight." This is not a term of art, and so we all might have very different concepts in mind. One of the things my research and professional experiences have taught me—and one of the lessons from the Texas conference—is that "oversight" does not come in one flavor, and it is neither desirable nor effective to adopt a "one size fits all" strategy. There can be—and should be—many different effective ways to identify and correct safety problems in correctional institutions, and to increase public awareness. In combination, these mechanisms can work to provide the levels of transparency and accountability that public institutions demand.

I think the word "oversight" is best explained as an "umbrella" concept. It encompasses a range of discrete functions, including regulation, audit, accreditation, reporting, investigation, and monitoring.

Each of these functions is an essential—but separate—part of effective prison oversight. Each contributes to the overall goals of improving correctional institutions and making them more accountable. But there should be a variety of separate mechanisms in place to serve each of these functions. No one entity can meaningfully serve every function, if for no reason other than the fact that there are different constituencies involved with regard to each function. Some are designed to speak to corrections professionals; some are designed to address the public's need for information; some do both.

As this Commission considers ways in which oversight structures may help address the problem of sexual violence in correctional facilities, I hope it will identify ways to implement and strengthen a variety of oversight mechanisms. To ensure the greatest possible amount of transparency and accountability in corrections, we need to ensure that each of these critical functions is being served effectively.

For purposes of this hearing, however, my comments will focus on two of these functions—investigation and monitoring—because these two functions are most

immediately relevant when it comes to addressing the problem of sexual assault. Investigation is essentially a **reactive** form of oversight, providing accountability for past wrongdoing. Monitoring is a **preventative** form of oversight, seeking to prevent such occurrences in the future.

Models of External Prison Oversight

The research my students and I conducted last year on correctional oversight models in the United States was notable for several reasons. First, it provided a baseline of data by which we now know that most state and local jurisdictions have either extremely limited independent oversight structures in place or none at all. Second, it showed that the mechanisms that do exist vary widely in structure and purpose.

Through this research, I have come to believe that there is no one best way to develop a correctional oversight entity. There can be many variations that are effective at meeting the twin goals of increasing transparency and improving accountability for the operation of safe and humane prisons. Every state—indeed, every country—has its own culture, its own set of values, its own political dynamics, and its own governmental entities already in place, all of which will help determine what external scrutiny could look like in that jurisdiction.

While meaningful prison oversight mechanisms are still relatively rare in the United States, there are a handful of very interesting models that are worth highlighting for the Commission's consideration. In addition, there are some highly developed oversight models in other countries that can provide some guidance. I turn now to a brief discussion of these domestic and international oversight entities, recognizing that you will be hearing in more detail about some of these organizations from others who will be testifying today. For analytic purposes, it makes sense to group various oversight entities under more general descriptions. I am limiting my comments below to those organizations that have an explicit mandate and the legal authority to provide correctional oversight.

Independent Governmental Monitoring Bodies

In a substantial number of Western countries, but in only a very limited number of United States jurisdictions, the government has set up an independent governmental entity with the mandate to monitor conditions in correctional facilities and to publicly report their findings. Such entities are agencies separate and apart from the correctional agencies that they inspect, and so the monitors have clear indicia of independence.

The best known example of such an inspection body is the British Prison Inspectorate.³ Although it is located under the umbrella of the British Home Office, under which the British prison agency also falls, the Chief Inspector is appointed by the crown for a five-year term and is removable only for cause. The British Prison Inspectorate is charged with conducting routine inspections of all places of detention in the UK at least twice every five years. Teams of inspectors, which occasionally include outside experts on a particular issue, monitor conditions in these facilities through a combination of surprise in-depth inspections, follow-up visits, and prisoner surveys.

The goal of these inspections is to assess whether the facility meets the test of a “healthy prison. Rather than applying a checklist-type approach, the teams seek answers to the questions: are prisoners safe?; are they treated respectfully?; are they given purposeful activities?; and are they prepared for re-entry? The Inspectorate issues detailed reports following each visit, and it alone controls the substance and timing of its reports. The prison agency is provided an opportunity to respond in writing to each report, and is required to file an action plan for complying with any recommendation unless there is a written objection. In addition to facility-specific reports, the Inspectorate also prepares and writes reports on special topics that cut across operations of the entire prison agency. It is worth emphasizing that the British Prison Inspectorate’s work is entirely preventative in nature; the office does not conduct investigations of particular allegations of wrongdoing nor does it seek to assess blame for past problems. The aim is to identify problems and correct them before they lead to deeper concerns. It is also critical to understand that the Inspectorate does not audit the Prison Service—the focus is strictly on the treatment of prisoners.

Somewhat similarly, the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) is an international treaty body falling under the auspices of the Council of Europe.⁴ Every European country that is a member of the Council of Europe (this includes 47 countries) signed a treaty that allows the CPT to inspect conditions in their prisons, jails, and other places of detention. The CPT is comprised of one representative from each European country, each of whom has expertise in correctional matters, and delegations of these CPT members make routine, surprise visits to selected prison facilities in every country every few years. The most significant difference between the British Prison Inspectorate and the CPT is that the CPT’s work remains confidential. Reports are issued solely to the leadership of the country that has been the subject of the inspection. However, each country is strongly

³ For more information, see: <http://inspectrates.justice.gov.uk/hmiprison/about-us/>. Also, Chief Inspector Anne Owers provided an in-depth description of the Inspectorate in her presentation at the “Opening Up a Closed World” conference, which may be viewed at: <http://www.utexas.edu/lbj/prisonconference/view.php?m=3>.

⁴ For more information, see: <http://www.cpt.coe.int/en/about.htm>. The President of the CPT, Silvia Casale, gave an address at the Texas conference, and a video of her presentation can be viewed at: <http://www.utexas.edu/lbj/prisonconference/view.php?m=12>.

encouraged to publish the CPT's report, along with its own response to the report. To date, only Russia has refused to issue the reports. Thus, there is a healthy tradition of open dialogue about the prison conditions that exist in each country, despite the fact that the CPT cannot release its own reports. As with the British Inspectorate, the CPT is solely focused on preventative, systemic concerns; there is no effort made to investigate particular incidents of wrongdoing.

In the United States, we have the California Inspector General (IG), Matt Cate, who will also be testifying before you today. The California IG is an independent body charged with both investigative and monitoring responsibilities for the state's adult and juvenile corrections facilities.⁵ With a staff of 95 and a budget of \$15.3 million, the California IG is well-equipped to conduct routine inspections of these facilities and to conduct criminal investigations of alleged wrongdoing by high-level officials. The IG issues public reports containing its findings and recommendations for improvement. The structure of Mr. Cate's office is unique in the United States. To the best of my knowledge, California has the only Inspector General whose office is located outside the structure of the agency it investigates, a position that obviously gives it much more independence to publicly identify concerns about the agency and more credibility with the public.

At the federal level, there is also the Inspector General of the United States Department of Justice.⁶ The responsibilities of this Inspector General, Glenn Fine, are broader than those falling within the California IG's realm, since issues relating to the Federal Bureau of Prisons are only a part of the wide-ranging issues arising for the DOJ. The DOJ Inspector General has issued a number of hard-hitting reports about federal prison matters, but these reports tend to be issue-specific, arising on the heels of a scandal or complaint. While the IG has the authority to inspect any federal prison facility or to follow-up on any area of concern, there is no mandate to routinely monitor every facility in order to assess conditions generally or to investigate whether prisoners are treated safely and humanely.

When it comes to conditions in local jail facilities, Texas has an unusual entity—the Texas Commission on Jail Standards. This independent governmental body sets standards applicable to jail facilities in the state and monitors facility compliance with these standards.⁷ The Commission has the authority to sanction and even de-certify jails that are not in compliance. It is worth noting, however, that the standards are silent on many issues relevant to the treatment of prisoners, and tend to be more relevant with regard to the physical structure of the facilities and overcrowding concerns.

⁵ For more information, see: <http://www.oig.ca.gov/>. Matthew Cate's presentation at the "Opening Up a Closed World" conference may be viewed at: <http://www.utexas.edu/lbj/prisonconference/view.php?m=3>.

⁶ For more information, see: <http://www.usdoj.gov/oig/>.

⁷ For more information, see: <http://www.tcjs.state.tx.us/>.

In a couple of major cities, there are local governmental entities that have been established to monitor conditions in the local jail facilities on behalf of city and county-level officials. New York City has the Board of Corrections, established in 1957, which sets standards for the city's jails and monitors conditions in these facilities.⁸ And Los Angeles has both the Office of Independent Review, set up by Sheriff Lee Baca in 2001, and the Office of the Special Counsel, which reports to the Board of County Commissioners, both of which provide oversight of conditions and treatment of prisoners in the Los Angeles jail system.⁹

The primary advantage of having a separate governmental entity responsible for providing oversight of a jurisdiction's correctional facilities lies in the fact that the entity is independent. It is not subject to pressure by the agency under inspection or investigation, and it has control over the substance and release of its reports. This fact alone, however, does not determine whether the oversight agency is effective in its work. There are other factors, to be discussed below, that have a large impact on the effectiveness of the oversight function.

The other advantage provided by these bodies is that they conduct routine on-site inspections, and have the ability to address systemic concerns in their reports. They are not limited to investigations of individual allegations, nor need they wait to investigate until a complaint has been raised. Routine monitoring allows these oversight bodies to see what works well in the correctional facility, as well as those issues that are problematic. And it allows for a more proactive approach to identifying problems within the agency.

Specially-Created Legislative Committees

While almost every state has one or more legislative committees responsible for providing legislative oversight of the state's correctional agency, only Ohio has a special committee set up for the purpose of conducting routine monitoring of conditions in prison facilities. The Ohio Correctional Institutions Inspections Committee is comprised of a bipartisan set of legislators from both houses and it has a full-time staff, headed by Shirley Pope, whose sole responsibility is to conduct inspections, issue reports, and respond to prisoner complaints.¹⁰ Visits to the prison facilities are conducted by teams of staff members accompanied by some legislators.

⁸ For more information, see a video of Executive Director Richard Wolf's presentation at the "Opening Up a Closed World" conference: <http://www.utexas.edu/lbj/prisonconference/view.php?m=3>.

⁹ For information about the Office of Independent Review, see: <http://www.laoir.com/> and for information about the work of Special Counsel Merrick Bobb, see: <http://lacounty.info/bobb.htm>.

¹⁰ For more information, see: <http://www.ciic.state.oh.us/>.

The Texas conference on prison oversight last year featured a panel¹¹ on this Ohio model of oversight, which offers several advantages. Most notably, this arrangement provides legislators with a close-up look at the challenges faced by the agency for which they have responsibility. Legislators become invested in seeing some of the recommended changes get made, and the agency has allies when it comes to seeking resources to improve conditions and programming opportunities for prisoners. By all accounts, this Ohio oversight body has been extremely effective at working in a collaborative manner with the corrections department and in implementing numerous reforms.

On the other hand, locating an oversight body within the legislative structure may compromise some of the entity's independence. While agency staff maintain that they are not subject to political pressure when it comes to the substance of their reports, the Committee's history reveals that several years ago the agency's budget was cut to zero, possibly in reaction to some controversial recommendations. Eventually the funding was restored, but independence within a political environment can be tough to ensure.

Texas recently set up a Joint Legislative Committee on the Operations and Management of the Texas Youth Commission, in response to the high-profile sexual abuse scandals that dominated the media in the spring of 2007. Unlike the Ohio CIIC, the Texas Joint Committee does not have any mandate to inspect facilities or monitor conditions for the juveniles housed in these state facilities. Nevertheless, the Committee has held several hearings and staff routinely check into issues with agency operations as they emerge. This is a more proactive form of legislative oversight than tends to exist as a routine matter in most states, but it cannot really qualify as either a fully-functioning investigative model (like an Inspector General) or a preventative inspection model of correctional oversight (such as the Ohio CIIC).

Ombudsmen

The Ombudsman concept originated in Scandinavia, and the term applies to an individual with responsibility for resolving complaints about a particular person's treatment by an agency. Many correctional agencies employ an Ombudsman to look into prisoner grievances and to handle concerns raised by family members of the inmates. For the most part, the work of these Ombudsmen is confidential and does little to enhance the transparency of the agency. On the other hand, having an Ombudsman can provide an avenue for relief for those prisoners who have suffered some kind of loss or who believe themselves to be at risk in some way. Typically, an Ombudsman does not look into

¹¹ A video of the panel discussion on the Ohio model may be viewed at:
<http://www.utexas.edu/lbj/prisonconference/view.php?m=5>

criminal allegations and would refer such cases to an appropriate law enforcement entity, such as an Inspector General for the agency.

While most Ombudsmen tend to be agency employees who deal solely with individual complaints, that is not necessarily the case. Some Ombudsmen are charged with routine inspections of conditions in facilities and do get to investigate proactively systemic issues. The task of the Swedish Parliamentary Ombudsman, for example, is to ensure that public authorities comply with laws and discharge their obligations properly, including with regard to respect for the rights of prisoners.¹² The Swedish Ombudsman not only investigates complaints from inmates and those outside the prison system, but can make inquiries on its own initiative, can conduct prison inspections, and can identify systemic concerns. The Ombudsman can even act as a special prosecutor in the case of serious malfeasance, and can impose certain disciplinary measures. Significantly, that office is structured so that it falls outside the executive branch of government. The Swedish Ombudsman reports directly to Parliament, which elects the person that holds the post.

Also, you will be hearing today from Will Harrell, who was recently appointed as the Ombudsman of the Texas Youth Commission. This new office was legislatively given the dual responsibilities of investigating and resolving concerns of individual juveniles, and conducting routine monitoring of juvenile facilities. The role of the TYC Ombudsman was designed to be much further-reaching than is typically the case for Ombudsmen in the United States, and may well prove to be a worthy model for other jurisdictions. Nevertheless, this office is still in its infancy and there are still issues to be sorted out. Clearly, the office was intended to be as independent as possible, but its placement within the Texas Youth Commission raises some questions, for example, as to whether the inspection reports are intended to be public documents, and whether the Ombudsman will be able to help make the agency transparent.

Inspectors General and Specialized Prosecution Units

Most corrections agencies have an investigatory arm, sometimes called an Inspector General but often it is an Internal Affairs Division. These entities are charged with investigating criminal wrongdoing within the department and coordinating with “free-world” prosecutors. Often, Inspectors General investigate fraud and waste-type concerns as well as allegations regarding maltreatment of prisoners. Investigations may involve wrongdoing by prisoners as well as by staff.

¹² For more information, see: http://www.jo.se/Page.aspx?MenuId=12&ObjectClass=DynamX_Documents&Language=en. Also, Swedish Parliamentary Ombudsman Cecilia Nordenfelt spoke at the Texas conference, and her presentation may be viewed at: <http://www.utexas.edu/lbj/prisonconference/view.php?m=3>

With the exception of the California Inspector General and the U.S. Department of Justice's Inspector General, both discussed above, these entities are typically located within the agency structure. They may have a measure of independence within the department so that they report to an outside body rather than to the prison administrators, as is the case with the Inspector General for the Texas Department of Criminal Justice¹³, but they are not a separate governmental entity and they are still considered employees of the agency.

As some IG offices have become more professionalized in recent years, their work has become more meaningful. Some IGs have investigators who are certified as peace officers, and they have the full panoply of investigative tools. In Texas, there is also a Special Prosecution Unit for the state that deals strictly with criminal offenses originating in the prison system. The IG is able to coordinate efforts with the specialized prosecutors, which avoids many of the problems of prosecutors who are reluctant to take on these cases because they involve inmate-victims.

Notably, when the Texas Youth Commission erupted in scandal last spring due to widespread allegations of sexual violence, one of the Texas Legislature's solutions was to create a new Office of the Inspector General for the juvenile justice agency and to expand the Special Prosecution Unit's authority to deal with cases originating in TYC. This new IG currently has a full plate of investigations, many of which have been referred from the new Ombudsman, who does not have authority to investigate criminal matters.

It is essential that every correctional agency have an internal investigation arm with sufficient independence to review allegations without interference from the leadership of the agency and with sufficient tools to enable meaningful prosecution in cases where prisoners have been abused by either staff or other prisoners. However, such investigative bodies do not substitute for having effective forms of external scrutiny. One reason is that the work of IGs and other investigatory bodies is almost always confidential. Thus, their work does not contribute to the goal of public transparency with regard to the agency, even if it aims to hold wrongdoers accountable. Moreover, the work tends to be strictly reactive in nature, responding to complaints, allegations, or other evidence of misbehavior. The preventative monitoring task remains to be fulfilled—some entity outside the correctional agency should be charged with routine inspections to identify problems before they result in criminal violations.

Non-Governmental Organizations

While many non-governmental organizations consider themselves to be providing a watchdog function with regard to prisons and jails in their jurisdiction, the vast majority of them do not have a formal oversight role. But there are three statewide advocacy

¹³ For more information, see: <http://www.tdcj.state.tx.us/inspector.general/inspector.gnl-home.htm>.

groups that have either formal or informal access to correctional facilities in order to monitor conditions and assess the treatment of all prisoners.

The most established of these organizations is the Correctional Association of New York, whose Prison Visiting Project is authorized under state law.¹⁴ Since 1846, the Correctional Association (CA) has had the right of access to prisons and the duty to issue public reports on the conditions it finds in these facilities. Notably, the CA uses inspection teams comprised of interested citizens. You will be hearing testimony from Jack Beck, the director of the Prison Visiting Project, and so I will not go into detail here about the organization's work. Two other organizations, the Pennsylvania Prison Society¹⁵ and the John Howard Association of Illinois¹⁶, have somewhat similar responsibilities, though the groups differ in some respects, including the extent of their access to the facilities.

NGOs such as the CA have the ultimate level of independence, when compared to other oversight bodies. They are not only separate from the agency they inspect but they fall entirely outside the governmental structure. They are not dependent upon governmental funding, and they can be vocal advocates who take reform-oriented positions in their reports. On the other hand, there is nothing that requires the agency to take the work of these groups seriously. Reports can be issued by the CA and then be ignored by the correctional agency. Often, the organizations find themselves distrusted by the agency, which sees them as having an "agenda" rather than reporting neutrally on their observations. Groups like the CA often find themselves battling with the agency under inspection just to preserve their rights of access to the facilities and the prisoners. Organizations that have only a limited right of access—or informal rights to visit the facilities—may find themselves being cautious in their comments about conditions for fear that their access rights will erode if they are too controversial. Thus, independence can be a double-edged sword, in some instances.

Also falling within the category of non-governmental organizations providing an oversight role are federally-funded protection and advocacy (P&A) organizations.¹⁷ Under federal law, every state must designate a particular entity—sometimes it is a governmental body and sometimes it is an NGO—to advocate on behalf of individuals with mental disabilities, including those who are housed in correctional facilities. In

¹⁴ For more information, see: http://www.correctionalassociation.org/PVP/PVP_main.htm. Correctional Association Director Bob Gangi spoke at the "Opening Up a Closed World" conference, and a video of his presentation may be viewed at: <http://www.utexas.edu/lbj/prisonconference/view.php?m=4>.

¹⁵ For more information, see: <http://www.prisonsociety.org/index.shtml>.

¹⁶ For more information, see: <http://www.john-howard.org/>.

¹⁷ The P&A Laws refer to the federal Protection and Advocacy for Persons with Mental Illness (PAIMI) Program and the Protection and Advocacy for Persons with Developmental Disabilities (PADD) Program, both created by the Developmental Disabilities Assistance and Bill of Rights (DD) Act of 1975.

Texas, for example, that role is filled by a legal organization called Advocacy, Inc.¹⁸ These P&A entities are given a formal right of access to correctional facilities in order to ensure that persons with mental or physical disabilities are not being ill-treated. While most P&A entities around the country have little time to focus on the rights of the incarcerated (as opposed to the rights of the mentally disabled in the community or in mental institutions), there are a handful of these organizations for whom this incarcerated mentally ill population is a priority. Still, such groups do not tend to conduct routine inspections of prisons or jails, but rather they seek access to facilities where their potential clients appear to be having problems.

Lay Citizen Oversight Boards

England has long had lay “Boards of Visitors,” recently renamed to be “Independent Monitoring Boards,” or “IMBs.”¹⁹ Each prison has its own IMB, made up of local citizens from all walks of life who provide oversight of the prison on a volunteer basis. These individuals are in and out of the prison on a weekly if not daily basis, becoming fixtures around the institution. They provide a link between the prison and the community in two ways: as monitors, they are the public’s eyes and ears and a voice of community opinion about prison conditions, and as community members, they help link prisoners to opportunities in terms of jobs and programs.

Whereas the British Prison Inspectorate gets a snapshot view of a particular prison every few years, the IMBs have a more dynamic understanding of the facility and, if the members are doing their job, they catch problems and bring them to the warden’s attention immediately. Every IMB issues an annual report that is published and provided to the Home Secretary. But the report is meant to be a culmination of the year’s activities—it is not the place where problems are first noted. As one might expect, IMBs vary tremendously in the quality of their monitoring work and in the degree to which the members are co-opted by the staff, whom they come to know well in the course of their duties.

United States equivalents of the IMB are rare, but Maine has its own version of a lay citizen oversight board. The Maine State Prison Board of Visitors is a board of five Governor-appointees, one of whom must be licensed in Maine to provide mental health

¹⁸ For more information, see: <http://www.advocacyinc.org/institutions.cfm>.

¹⁹ For more information, see: <http://www.imb.gov.uk/>. Baroness Vivien Stern, who is the Honorary Chair of the UK’s Independent Monitoring Boards, spoke about the work of these boards at the Texas conference, and a video of her presentation may be viewed at: <http://www.utexas.edu/lbj/prisonconference/view.php?m=7>.

services.²⁰ The Board's job is to represent the interests of the people of Maine in prison matters. The primary focus is on the safety and security of the public, prison staff, and inmates, as well as on prisoner health, prison industries, and programs. The Board has only advisory authority, but members have the ability to go anywhere in the prison at any time and to raise concerns directly with the prison administrators. If unsatisfied with the administration's resolution of a problem, Board members can take their concerns to the Governor, Commissioner, or legislative committee responsible for prison issues. The Board of Visitors also produces an annual report and provides it to key state officials.

Lay citizen monitoring boards offer the advantage of having a group of individuals with the ability to keep close tabs on particular correctional facilities. With board members in and out of the facility on a daily basis, it would be hard to hide problematic conditions for long. Such boards also keep the public directly involved in and knowledgeable about correctional matters. The more volunteer organizations and lay monitoring groups that come into a prison or jail, the more transparent that facility will become.

Nevertheless, these boards have shortcomings. For facilities located in remote areas or in small communities, it can be hard to assemble a group of citizens with the requisite interests or without conflicts of interest. Also, it is very easy for lay citizens—especially those who have not been specially trained for this work—to overlook areas of concern or to take at face value what they are told by administrators. Co-optation is also a serious risk.

The use of lay monitoring boards may be most appropriate in conjunction with other forms of correctional oversight, to supplement the work of professional oversight bodies. It also may make most sense to consider using these boards when it comes to oversight of urban jails or prison facilities located near sizeable cities.

Court Oversight

Finally, I want to briefly mention the role of court oversight of correctional facilities. This is truly a last resort, when all efforts to provide routine oversight of these facilities have failed and conditions have deteriorated to the extent that lawsuits have been filed and a court has ordered (or the parties have agreed) that unconstitutional conditions must be remedied.

Court oversight has taken many forms over the last 25 years. Judges have appointed Special Masters, often with full-time staff, as Federal District Judge William Wayne Justice did in Texas in the landmark case of *Ruiz v. Estelle*, 503 F. Supp. 1265 (S.D. Tex. 1980). Other judges have appointed court monitors or court experts (e.g., in

²⁰ For more information, see: <http://www.maine.gov/corrections/Facilities/msp/mspBoVisitorsNew.htm>.

Ohio, with regard to medical and dental care, and in Los Angeles with regard to overcrowding in the jail). Such appointments appear to be a more typical approach in recent years since the passage of the Prison Litigation Reform Act of 1996 placed tighter restrictions on the court's remedial options. Yet another version of court oversight is Federal District Judge Thelton Henderson's appointment of a receiver over the California prison system with regard to health care matters. The receivership is the most extreme version of court oversight, since it involves a takeover of the management of the agency by the court's appointee.

The U.S. Department of Justice also provides a form of correctional oversight as a precursor to court involvement. The Special Litigation Section of the Civil Rights Division can conduct investigations of correctional agencies under the Civil Rights of Institutionalized Persons Act ("CRIPA"). If its investigation reveals a significant problem, the DOJ enters into an agreement with the agency that it will make certain reforms, and a monitor is appointed to assess agency compliance with the reform measures. In some instances, these CRIPA monitors provide technical assistance to the agency even as they report on the agency's progress in implementing reforms. Failure of the agency to comply with the settlement agreement will result in a lawsuit filed by the DOJ and the likelihood of a significant court order.

Court oversight has the advantage of having the power of the judicial process backing up any ordered reforms. Agencies that do not cooperate in providing information to monitors risk sanctions from the court, and judges unhappy with the pace of reform have many tools in their kit to get the attention of policymakers who control the purse strings of the agency. Many experts argue that when an agency's problems are systemic and require substantial funding to address, court involvement is essential.

The downside, of course, is that court oversight only enters into consideration once the existence of serious constitutional violations has been established. Thus, court oversight is helpful in remedying problems, but is not a vehicle for prevention and early identification of conditions and treatment concerns, unlike preventative monitoring bodies. Moreover, court oversight is extremely expensive and time-consuming, not only for the judge but also for the parties. Moreover, correctional administrators lose significant control over their agencies once courts get involved.

The Essential Elements of Effective Prison Oversight

I began my research about prison oversight assuming that I would be able to identify the best way to structure a correctional oversight mechanism. But the more I examined this issue, the more I realized that it is less critical that all oversight mechanisms look alike than it is that they have in place the essential elements for effectiveness as an oversight body. Those essential elements are as follows:

(1) They must **be independent of the correctional agency**, and able to do their work without interference or pressure from the agency or any other body.

(2) They must have a **mandate to conduct regular, routine inspections** of the facilities under their jurisdiction, and the authority to investigate, and issue reports on, a particular problem at one or more facilities.

(3) Monitors must have a “golden key,” giving them **unfettered and confidential access** to facilities, prisoners, staff, documents, and materials, and they should have the ability to visit any part of a facility at any time of day without prior notice.

(4) They must be **adequately resourced**, with sufficient staffing, office space, and funding to carry out their monitoring responsibilities, and the budget must be controlled by the monitoring entity.

(5) They must have the power and the **duty to report** their findings and recommendations, in order to fulfill the objective of transparency, and they should control the release of their reports.

(6) They must take a **holistic approach to evaluating the treatment of prisoners**, relying on observations, interviews, surveys, and other methods of gathering information from prisoners as well as on statistics and performance-based outcome measures.

(7) There must be **a means of fulfilling both the investigative function and the monitoring function**, in order to provide accountability for past wrongdoing in individual cases and to prevent future problems. These functions need not be performed by the same oversight body.

(8) The **agency must be required to cooperate fully** with the oversight body and to **respond promptly and publicly** to its findings.

These factors are far more critical than whether a monitoring entity is set up as an independent governmental body, a legislative committee, an Ombudsman, an Inspector General, a non-profit organization, a lay citizens’ oversight group, or a court-created monitoring structure. What structure is chosen for any given jurisdiction must necessarily take into account the culture and norms of that jurisdiction and the oversight mechanisms that are already in place.

Each way of structuring a monitoring entity presents its own challenges, often involving trade-offs between the extent of independence and the ability to be effective. Structural independence may be seen as falling along a continuum: bodies located within the organizational structure of the agency to be monitored have the least independence, and those bodies with no connection to government have the most independence. But

that alone does not determine effectiveness. Too little independence from the agency being monitored can cause skepticism about the work of the oversight body, but gives the monitor greater access to sources of information. Too much independence, on the other hand, allows the oversight body to speak freely about its concerns, but it can end up backfiring because there is too much tension and mistrust between the agency and the monitors. Having some connection to the government may also provide the oversight body with more prestige and apparent authority. The pros and cons of any such compromises need to be carefully assessed prior to the creation of a monitoring entity in any jurisdiction.

There is some disagreement among experts in this field as to whether an oversight body should have enforcement authority when it comes to the power to implement their recommendations. My own view is that such enforcement authority is neither essential nor desirable, if we are talking about a monitoring entity. The investigation and monitoring functions should not be confused with a regulatory function. Prison inspectors are not managers, and they are not policy-setters; they should not exercise control over an agency or its staff, for in doing so they become yet another layer of management. Enforcement should come from a regulatory body, a budget-setting body, or the courts. In contrast, the monitor's strength comes from the power of persuasion, not control.

Conclusion

Systems of accountability must be developed to ensure that prisoners are safe and are being treated appropriately. There must be effective internal accountability measures so that correctional administrators can better manage their facilities. And there must be meaningful forms of external scrutiny, including routine monitoring of correctional facilities and investigation of prisoner complaints.

As correctional agencies in the United States have become more professionalized in recent years, there has been a greater emphasis on internal accountability measures. While more can and should be done to enhance these measures across the board, there are many positive signs of change.

In contrast, however, there is an enormous need for additional correctional oversight mechanisms in the United States, which lags behind the rest of the world in this respect. The United States is one of the only Western nations that lack a comprehensive mechanism for ensuring the routine external monitoring of all correctional facilities. While the size of our country and the federal structure make design of an oversight body somewhat more complicated than in most other countries, we should ensure that every state and local government, as well as the federal system, has effective oversight structures in place to ensure transparency and accountability of the detention facilities based within that jurisdiction.

This overview of the variety of correctional oversight models should provide substantial evidence that effective oversight can come in many forms. The goal should not be to reproduce one model in every jurisdiction, but to ensure that whatever model is developed and adopted in a particular jurisdiction contains the essential elements of effective oversight. Moreover, it makes sense to have multiple forms of oversight in a jurisdiction, because one entity cannot serve all the purposes for which oversight is necessary. Meaningful correctional oversight calls for a layered approach, involving complementary models.

I want to end on a note of caution, however. Even the most effective correctional oversight mechanism will not solve the problem of sexual assault in prisons. External oversight is a piece of the puzzle, a way to ensure that the public knows what happens in prisons and jails, and a way to ensure that wrongdoers will be punished for criminal behavior. It allows both the public and correctional administrators to know whether the goal of having prison be a safe and humane place is being met. Transparency provides both a form of protection from harm and an assurance that rights will be vindicated. But effective and safe administration of correctional facilities is, ultimately, a task that falls squarely at the feet of corrections officials. Even the most effective oversight system will not prevent sexual abuse in a correctional facility where leadership is lacking and the culture, policies, and practice do not support safe operations.

External oversight, to quote New York City Corrections Commissioner Martin Horn, who spoke at the Texas conference, “makes us better; ...it forces us to question what, why, and how things are done.”²¹ Similarly, a top British prison administrator commented to me that when outsiders routinely come into an institution, it acts as a means of informal control over staff and inmate behavior. If external oversight can help administrators improve the level of safety in their correctional facilities in these ways, then it must be looked to as part of the solution to eliminate sexual assault in prisons and jails. As this Commission moves to write its report, I encourage Commission members to see oversight as the linchpin in any effort to ensure the safety of prisoners.

Thank you again for the opportunity to present you with this information today.

I DECLARE UNDER PENALTY OF PERJURY THAT THE FOREGOING IS TRUE AND CORRECT. EXECUTED ON THIS 21st DAY OF NOVEMBER, 2007.

Michele Deitch

²¹ For a video of Martin Horn’s presentation at the Texas conference, see: <http://www.utexas.edu/lbj/prisonconference/view.php?m=2>