

# EFFECTIVE PRISON OVERSIGHT

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## Introduction

The call for increased prison oversight has been heard frequently in recent times, but there has been little effort made to understand what is meant by that phrase. There is also sparse literature on the subject. "Oversight" is a term that is, perhaps, too loaded to be useful, and too easily misconstrued to give us any confidence that we are all using the word in the same way. Although I am as guilty as anyone in relying on the word "oversight," I think we will be able to find more consensus if we shift the dialogue to a conversation about the need for transparency and accountability in corrections and ways to achieve these goals. 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 achieving the twin objectives of transparency of public institutions and accountability for the operation of safe and humane prisons and jails. In this paper, I will offer the Commission an analytic framework to guide its thinking about this subject in the non-judicial context; I will identify the critical elements of correctional oversight; I will mention briefly some examples of a variety of non-judicial correctional oversight mechanisms; and I will explain why there is an important need to expand the oversight function that is currently most lacking in the United States today—the inspection and monitoring function.

The information I am presenting today comes primarily from research I have been doing this year as a Soros Senior Justice Fellow. But my views about these issues are far from views formed in an ivory tower: they have been developed and constantly reshaped through a long history of professional experiences, some of which I would like to mention upfront.

## Relevant Background Experiences

My experience with prison oversight goes back two decades, when I served for a few years as a court-appointed monitor in the landmark Texas prison reform class action

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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. My job was to investigate whether the prison agency, then known as the Texas Department of Corrections, was complying with court orders to reform a variety of unconstitutional conditions. I wrote fact-finding reports to the court, all of which became part of the public record, and these reports became the basis on which the judge could either impose further sanctions on the agency or modify his orders to allow officials greater flexibility to manage their own institutions. The fact that I worked on this case in the final years of the Special Master's Office meant that I also had to work closely with the agency as it transitioned to an "internal oversight" structure.

I could go on in great depth about the role of a court monitor and what constitutes effective court oversight, but that is outside the scope of my remarks today.<sup>1</sup> Suffice it to say that the experience was a formative one for me, and gave me an incredible appreciation for the value of outside oversight and ongoing monitoring in helping shift an institutional culture to one that respects constitutional requirements. But at the same time, I respected the importance of the agency's development of effective internal monitoring mechanisms and investigative capabilities.

In the intervening years since I was a court monitor, I have worked in a number of capacities that could also be termed "oversight." I was the chief lawyer and staff director for a legislative committee in Texas that had responsibility for all things having to do with the prison system, including both legislation and operations. I held this position during a time of massive crises in the state's prisons and jails having to do with extreme overcrowding and, eventually, unprecedented expansion. Later, as an independent consultant over the last decade or so, I worked with a variety of governmental stakeholder groups around the country, including governmental commissions, task forces, state agencies, boards of county commissioners, and even directly with correctional agencies, to conduct performance reviews and/or investigations of problems in particular state prison systems or local jail facilities, including problems related to overcrowding, sexual assault of prisoners, and internal investigative capabilities.

These experiences have persuaded me 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. In combination, these mechanisms can work to provide the levels of transparency and accountability that public institutions demand. How effective any particular strategy will be is dependent upon a variety of factors, some of which are highly intangible, including factors related to trust and personality dynamics.

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<sup>1</sup> Some of my views about the role of court oversight and effective court monitoring are expressed in a book review essay I wrote about John DiIulio's book "Courts, Corrections, and the Constitution." Michele Deitch, *Rights, Remedies, and Restrained Reform*, 70 Texas Law Review 521 (December 1991).

With these introductory comments aside, I now turn to a more analytical discussion of these issues.<sup>2</sup>

### **“Oversight” as an Umbrella Concept**

It might be helpful if we begin to frame the concept of “non-judicial prison oversight” as a catch-all, umbrella term that refers to at least six distinct functions:<sup>3</sup>

- Regulation
- Audit
- Accreditation
- Investigation
- Reporting
- Inspection/Monitoring

I would argue that each of these functions is an essential—but separate—part of effective prison oversight. Each contributes to the overall goals of transparency and accountability. But there should be a variety of separate mechanisms in place to serve each of these functions. While there are certainly some examples of hybrid models combining two or three of these functions, it would be a mistake to seek to combine all these functions within one entity. 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.

The problem is that when we speak of “oversight,” we tend to merge these concepts and assume that they are in competition with each other when it comes to which is “most effective.” Moreover, we each have in mind a different one of these functions when we talk about oversight, which makes communication about these issues very difficult: we are often talking at cross-purposes. I think we need to begin to talk about these as separate functions, and consider how to make each of these specific functions as strong and effective as possible.

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<sup>2</sup> Some of these ideas were explored earlier in a paper I presented at the American Correctional Association's 135th Congress of Corrections in Baltimore, Maryland, on August 9, 2005. That paper was later published in the *Correctional Law Reporter* and it will be reprinted in the forthcoming ACA's *State of Corrections*. Michele Deitch, *Why You Should Love Watchdogs: The Case for Effective Prison Oversight and the British Experience*, XVII *Correctional Law Reporter* 40 (October/November 2005).

<sup>3</sup> I think there is also a place—still undefined—in this concept for the role of those individuals outside the agency who provide technical assistance to the agency, those who conduct research, those who are given the opportunity to tour facilities for educational reasons, and those who provide volunteer services to prisoners. Although each of these is indeed a form of external scrutiny, I am not dealing with them explicitly in this paper because they are informal in structure.

### ***How Regulation, Audit, Accreditation, Investigation, Reporting, and Monitoring Differ***

Let me be more precise about the key differences I see among each of these oversight functions:

The **regulation** function is served by those governmental entities that have some ability to wield a hammer over the correctional agency. Those entities may set mandatory standards or policies, and they have the power to enforce these standards and policies through, for example, the imposition of fines, the ability to close an institution, the ability to hire or fire directors, or the ability to control the purse strings of the agency. The key concept here is "enforcement authority." The most familiar example, of course, would be the state legislature, in the case of prisons, or a board of county commissioners, in the case of a county jail, both of which typically control a correctional agency's budget, even though the corrections department is an executive branch agency. Some states, including Texas, also have an appointed board of citizens at the helm of the state criminal justice agency, which functions as the equivalent of a board of directors. But there could also be separate regulatory bodies, such as the Texas Commission on Jail Standards, which inspects county jails around the state to ensure that they comply with various statutorily adopted standards, and, in some cases, takes action when a facility does not meet those standards (for example, by "decertifying" a jail facility).

The **audit** function is concerned with whether the agency is meeting established performance indicators, standards, or policies. These could be performance indicators mandated by the legislature; they could be standards required by an accreditation body such as the ACA; they could even be requirements set by the agency itself. The auditing tasks could be fulfilled either by an internal auditing mechanism or by an outside entity. It could be as simple as a paper review involving a checklist; it could be a more complex audit to see if an agency is worthy of accreditation. But as a general matter, the auditing function is designed to give either prison administrators or those who regulate them some objective measures of how the agency is doing and/or whether tax monies are being well-spent. An important thing to remember is that auditing tends to aggregate information (for example, auditors might report percentages of prisoners participating in a program, or the percentages of parolees who recidivate). The emphasis is on the audit as a management tool: are agency staff following established policy or standards? Is there any gap between policy and practice? Are statistics changing over time and, if so, why? Answers to those questions are very valuable to prison administrators and they aid in effective and proactive prison management. Thus, agencies such as the Texas Department of Criminal Justice have come to support and rely on internal auditing mechanisms of this type.<sup>4</sup>

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<sup>4</sup> For a detailed review of the variety of internal auditing mechanisms that have become a standard part of operating procedures within the Texas Department of Criminal Justice, I recommend the following article: Carl Reynolds, *Effective Self-Monitoring of Correctional Conditions*, 24 Pace Law Review 769 (Spring 2004).

The **accreditation** function is a form of oversight insofar as it requires an agency to meet certain standards in order to be eligible to receive what amounts to a stamp of approval by a professional organization in the field. The best known accrediting agencies in this country are the American Correctional Association and the National Commission on Correctional Health Care. Accreditation is typically a voluntary process in the correctional context, which means that it is initiated from within the agency.

**Investigations** are a critical aspect of oversight because they offer a means to ensure accountability for wrongdoing. This function can encompass everything from a grievance coordinator's investigation of a prisoner's complaint, to an internal affairs investigator's review of an excessive use of force claim, to a prison ombudsman's handling of a family's concerns, to an independent entity's review of agency operations in the wake of a series of complaints, to criminal prosecution and civil lawsuits. This Commission is well aware, for example, of the work of the Office of the Inspector General in the U.S. Department of Justice, California's Inspector General, Los Angeles County's Office of Independent Review, the Civil Rights Division of the U.S. Department of Justice, and the great many internal affairs operations within most state correctional agencies. What distinguishes the investigation function from some of the other oversight functions is that it is essentially reactive. The function is only triggered once a complaint is received or a scandal breaks.

The **reporting** function refers to the role of the media, human rights groups, and temporary commissions in exposing prison conditions or investigating a particular incident. This function goes to the heart of the goal of transparency, of course, because it increases public awareness of prison-related issues. In some cases, this can lead to public pressure on elected or appointed officials to change policies or practices, so it serves the goal of accountability as well. Typically, those who perform this oversight function do not have the ability to demand access to prisons, so information has to be gathered through other means. The distinguishing feature of the reporting function is that it primarily serves the needs of the public for information and analysis of prison conditions. We can all think of particularly good examples of investigative journalism regarding prison conditions and books or reports we've read that drew attention to a particular aspect of life in prison. Think, for example, of the Human Rights Watch report "No Escape," which helped create momentum that led towards the passage of the Prison Rape Elimination Act. Even this Commission could be considered to fall within this function, as would, say, the Harshbarger Commission that focused on the Massachusetts prison system or the Stern Commission that investigated mismanagement of Boston's jail system.

Finally, there is the **inspection and monitoring** function. Because this function is so rarely seen in the United States, it is the hardest to explain, but it is extremely critical if we wish to ensure transparency and safety in prisons. Monitoring involves an entity outside of the corrections agency with the power and the mandate to routinely inspect correctional institutions and to report on how people within that prison or jail are

treated. There are four distinguishing features of this function. First, it involves routine and regular review of every institution as a preventative measure; it is oversight to help in improvement, not to point out what went wrong. Second, it involves an outside entity, a body not answerable to the management of the agency and a body without a potential conflict of interest. It necessarily involves external scrutiny. Third, the focus of the inspection function is on how prisoners are treated and how prison life affects them. The monitor looks holistically at interactions and institutional cultures that are not always captured by standards and policies, or even by performance measures. What's more, an inspector does not aggregate the data he or she finds, recognizing that in some instances, aggregation could mask the fact that appropriate treatment or services may have been denied to certain prisoners. Fourth, there is no enforcement mechanism; the recommendations of an inspector are advisory in nature and the outside entity must rely on persuasion and/or public pressure to achieve change. The best developed examples of the inspection function are two models that will be discussed at this hearing—the British Prison Inspectorate and the European Committee for the Prevention of Torture (the CPT). In the United States, examples of entities with routine monitoring responsibilities are few and far between, but some notable models exist, including the Ohio Correctional Institutions Inspection Committee (a legislatively-based entity), the Correctional Association of New York (a non-profit advocacy group with legislative authority to visit prisons), and the New York City Board of Correction (an independent jail monitoring body within the city government structure).

In sum, oversight should be thought of as an umbrella concept rather than as a term of art. A robust system of correctional oversight is one that is multi-faceted and involves numerous players both inside and outside the correctional agency. “Oversight” is not a word with a single meaning, and it by no means suggests the ceding of management authority to an entity outside the correctional agency. Important changes have come about through every one of these forms of oversight, and each offers remarkable management tools for the correctional administrator who is seeking to make his or her agency as professional as possible. 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.

### **The Inspection/Monitoring Function—A Closer Look**

Every one of the above types of oversight warrants closer analysis, because, naturally, it is possible to have either weak or strong examples of how that function plays out in practice and because different oversight functions require different sets of tools. For example, an entity focused on the investigative function, which may reveal criminal wrongdoing, needs some different tools in its arsenal than would an accrediting agency. What makes one regulatory body a meaningful and tough reviewer of correctional operations, and another a co-opted, rubber-stamping committee? What makes one investigation of an inmate death a cover-up and another a response trusted by the public? Time and space do not permit me to examine these questions in this paper, and I know

that this Commission has received extensive testimony about effective investigations and the accreditation process, which can help guide its thinking in these areas. I do, however, want to share my thinking with regard to the inspection and monitoring function, because this is an under-used form of oversight in the United States, and it offers so much value, both to the public and to correctional administrators.

***What does the Inspection/Monitoring process offer above and beyond what the other oversight functions provide?***

Of those oversight functions designed to enhance transparency through external scrutiny, the inspection/monitoring function is the only one that is intended to be preventative in nature. (Investigations, for example, are focused on past behavior.) Problems are identified through inspection and monitoring (and hopefully corrected) before there are lawsuits about conditions or incidents that make the front page of the newspaper. Monitoring is not about blame for past mistakes, it is about preventing occurrences in the future. It is about finding ways to meet agreed-upon goals. Moreover, the routine and regular inspection process ensures that this form of oversight applies equally to all correctional facilities within the jurisdiction of the monitor, not just those with publicized problems. Regular monitoring helps keep the quality of correctional services high, because the staff's knowledge that an inspector could arrive at any time acts as a means of informal control over staff behavior. In other words, it "keeps staff on their toes."

The monitoring process allows for an outside set of eyes to provide feedback to correctional administrators. Outside observers challenge correctional administrators, and help them avoid complacency. Professional administrators know that their agencies can always be improved. As the Director of Operations of the British Prison Service told me, "If you ever believe everything is good, then you shouldn't be in this job." Part of professionalism in any field involves seeking outside feedback on performance, even when you think things are going well. Outside monitoring also provides administrators with leverage when it comes to requesting resources and programming in their facilities.

Of all the oversight functions, monitoring is the only one that proactively examines operations from the prisoners' standpoint. Internal audits, in contrast, might look at the same set of issues, but the focus would be on management information needs rather than on the impact of prison on prisoners.<sup>5</sup> External scrutiny of this type helps

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<sup>5</sup> An example might make this clearer: an auditor interested in safety issues might ask "how many confirmed reports have there been of prisoner-on prisoner rape?" An inspector would also want to know the following: "Do prisoners here feel safe?"; "Are their allegations of rape taken seriously?"; "Are the conditions in the facility conducive to good health and safety?"; "Are homosexual and transgender prisoners treated respectfully by staff?" Audit responses tend to be quantifiable, whereas information gathered through inspections is more qualitative (though the methodology for gathering the data should still be very rigorous). There is also a legitimate question as to whether prisoners would be willing to provide internal auditors with this qualitative information; external sources may engender more trust among prisoners.

reassure citizens that prison and jail conditions are appropriate and consistent with constitutional requirements. Regardless of the quality of internal forms of operational review, the public will always remain skeptical that self-regulation is sufficiently objective or rigorous. In any event, most internal processes are designed to remain confidential. They support the needs of management for information and accountability without furthering the goal of public transparency.

### *The essential elements of a monitoring system*

I began my research about monitoring systems assuming that I would be able to identify the best way to structure a correctional monitoring mechanism. The fact is that, the more I examined this issue, the more I realized that it is less critical that all monitoring entities look alike than it is that they contain 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 (what exactly constitutes independence is an important and complicated issue that justifies a separate paper on this topic alone);
- (2) Monitors must have **unfettered and confidential access** to facilities, prisoners, staff, documents, and materials, and they should have the ability to visit at any time of day without prior notice;
- (3) 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;
- (4) 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; and
- (5) 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.

These factors are far more critical than whether a monitoring entity is set up as an independent governmental body (e.g., the British Prison Inspectorate or the New York City Board of Correction), a legislative committee (e.g., Ohio's Correctional Institutions Inspection Committee), a court-created monitoring structure (e.g., a Special Master or a court monitor), a non-profit organization (e.g., the Correctional Association of New York), or a lay citizens' oversight group (e.g., England's Independent Monitoring Boards). What structure is chosen for any given jurisdiction—i.e., where the monitoring mechanism is located—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.

Ironically, too much independence can end up backfiring (i.e., a non-governmental structure can offer control over funding streams and the ability to advocate forcefully for change, but can also cause tension and mistrust between the agency and the monitors), while structures in which independence appears lessened due to placement in the governmental structure can actually end up making the monitoring body more effective by giving the entity more prestige and apparent authority. But, of course, the pros and cons of such compromises need to be carefully assessed prior to the creation of a monitoring entity in any jurisdiction.

It is important to emphasize that effective monitoring does not include the power to enforce recommendations. The monitoring body should not become another layer of management, and the external entity should not exercise control over an agency or its staff. Prison inspectors are not managers, and they are not policy-setters. If there is to be any enforcement function, it must come from a regulatory body, a budget-setting body, or the courts. The monitor's strength come from the power of persuasion, not control.

### ***Towards Effective Monitoring***

Monitoring offers an opportunity for dialogue, for ongoing conversations about ways to improve prisons and jails. It is most likely to be successful in circumstances when the monitoring body and the entity being monitored believe that they have a shared set of values and a common understanding of the challenges faced by correctional administrators. That is not to say that they must agree on operational strategies for meeting those challenges or that they must come from the same professional background. It does suggest, however, that monitoring is less likely to be effective when there is mistrust between the parties and when the entity being monitored is suspicious of the motives of the inspector. Trust is more likely to be engendered when the monitoring body is a professional entity with staff knowledgeable about corrections management and the applicable laws and standards, and when there is a demonstrated willingness to work cooperatively with the agency being monitored. Inspectors must show that they are not playing a game of "gotcha," trying to catch every mistake made by agency staff, however minor, but rather that they are looking for systemic problems capable of repetition in the future. They must also show a willingness to report positive findings, and to identify "best practices" within the agency.

It may never be an entirely comfortable experience for correctional administrators to be on the receiving end of external scrutiny, but one could hope over time to reach a point when the relationship between the monitoring entity and the correctional agency is viewed by correctional administrators as "a partnership." This is the description that was offered to me by Ohio's Director, Reggie Wilkinson, in reference to the relationship he has with his oversight entity, the Correctional Institutions Inspection Committee. It is a term that suggests mutual respect and an appreciation of the value that the monitor adds to the prison manager's role.

## **Conclusion**

Most corrections professionals and most advocates for prisoners would find common ground in their belief that prisons and jails should be safe and humane places that respect inmates' constitutional rights. Effective oversight allows both the public and correctional administrators to know whether that goal is being met. External scrutiny is essential any time that a closed institution is responsible for the control of individuals. Such transparency provides both a form of protection from harm and an assurance that rights will be vindicated. External oversight also benefits administrators by providing them with the objective feedback they need about their performance. At the same time, systems of internal review offer a valuable management information tool for administrators, allowing them to identify and correct operational problems at an early stage. Internal and external forms of oversight are neither in competition nor mutually exclusive—they are designed to meet entirely different needs.

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. Efforts must be made to keep prisons transparent and accountable. The best way to ensure that oversight is effective, however, is not to compare and contrast the value of different oversight functions, but to encourage the development of a range of different oversight mechanisms both inside and outside the correctional agency. And I especially urge that greater attention be paid to the importance of routine inspection and monitoring of correctional facilities: without such monitoring mechanisms in place, prison oversight will never be as meaningful and effective as it could be.