

23

(Off the record.)

24

CHAIRMAN KANEB:

25

Ladies and gentlemen, we're

1 slightly behind. We are due to start
2 our final panel at 11:00. And it's
3 close enough, but the clock is ticking.

4 This panel is External
5 Oversight: The Outside World's
6 Responsibility to Prevent and Respond
7 to Sexual Violence.

8 I think we're all here, so
9 would you all rise and be sworn in,
10 please.

11 (Four witnesses sworn.)

12 CHAIRMAN KANEB:

13 We welcome Matthew Cate,
14 Will Harrell, Jack Beck, and Margo
15 Schlanger.

16 The safety and security of
17 detention centers, lockup is
18 compromised by sexual violence in --
19 within the institutions. External
20 oversight agencies provide an option to
21 assess internal controls in order to
22 determine if those procedures are
23 effective to promote accountability and
24 ensure safety.

25 The panelist will discuss

1 examples of external oversight, both
2 formal and informal, highlights their
3 advantages and disadvantages, the
4 methods by which they improve
5 complement internal oversight systems.

6 Our first witness is Matthew
7 Cate, who is the inspector general and
8 chairman of California Rehabilitation
9 Oversight Board. Mr. Cate is
10 accountable to reporting to the
11 California legislature for progress
12 made in the Department of Corrections.

13 Mr. Cate.

14 MR. CATE:

15 Thank you. And I'd like to
16 thank all the Commissioners for having
17 me here today and to speak on this
18 important area.

19 I'm -- before becoming a
20 California inspector general, I was a
21 prosecutor. And in particular, I
22 recall multiple occasions sending
23 individuals to prison for 25 years to
24 life for offenses, such as drug
25 offenses and property crimes, and

1 thought nothing other. And thought
2 nothing of where they went for those 25
3 years to life after I did my job in the
4 courtroom. Then I became an inspector
5 general. And now I spend all of my
6 time thinking about how these men and
7 women are spending their time in
8 California's prisons. And frankly, as
9 I tour the prisons in California, I was
10 struck by the fact that those prisons
11 are diverse in some ways and homogenous
12 in some ways.

13 We have remote and urban
14 locations. We have new and old
15 facilities. Progressive and old style
16 warden, programming prisons, prisons
17 that are locked down. Every different
18 kind of problem that you can think of,
19 we have it at one prison or another.
20 Some work extraordinarily well, others
21 do not. But some things they have in
22 common, they are insular, opaque
23 places.

24 They're restricted access by
25 their very nature, communications

1 restricted in some respects. There's a
2 professional code of silence among
3 correctional officers just as there is
4 among individuals in any stressful
5 profession, the military, officers on
6 the street, physicians in an operating
7 room, or nurses in an operating room.
8 And there's a culture of might makes
9 right. And so that makes it very
10 difficult to know exactly what's
11 happening in these institutions, and
12 it's difficult to fix it.

13 Sexual abuse issues makes
14 that job even harder for inspector
15 generals. Victims rarely report.
16 Victim's and witnesses' credibility is
17 inherently suspect because they're in
18 prison for committing crimes, and so we
19 need cooperation, typically, to prove
20 up these offenses. Moreover, those --
21 that cooperation and evidence is
22 difficult to, in some occasions, to
23 properly handle and store. It's time
24 sensitive, biological evidence quickly
25 degrades. It requires sophisticated

1 investigative techniques that aren't
2 always present. And oftentimes,
3 perpetrators are judgment prove.
4 You're doing life in prison already,
5 what more can happen to you? And so
6 that makes this issue, in particular,
7 difficult.

8 Those observations have
9 impacted the way my office conducts
10 business. I'd like to highlight a few
11 aspects of the California model, and
12 then I'd like to talk about -- a little
13 bit about what we do, and then finally
14 a few things that I think we can do
15 better.

16 We do routine audits every
17 four years. We're required by law to
18 audit facilities. We also audit
19 facilities one year after a warden has
20 been appointed to check on that
21 warden's performance. We do
22 investigations both criminal and
23 administrative. We do -- we conduct
24 special reviews on statewide issues.
25 We conduct semiannual unannounced

1 inspections. And we review the entire
2 officer discipline process with a group
3 of attorneys with the Civil Rights
4 Employment Law and Criminal Law
5 background. What's new in my office
6 are beginning of project to conduct
7 medical inspections. We're -- we're
8 working on inmate questionnaires to try
9 to get to these issues of sexual
10 assault. And we're working more
11 closely with community stakeholders on
12 these issues.

13 Why we can do this is that
14 I -- and I think the reason we're
15 typically effective is highly -- I
16 believe highly in our model. I think
17 that the California inspector general's
18 office model is very effective for the
19 following reasons:

20 One, it's -- I'm
21 independent. I have a six-year fixed
22 term. My term runs after this
23 governor's term. So when Governor
24 Schwarzenegger's term's out, it will be
25 the next governor who decides whether I

1 stay or go. I have a budget that gives
2 me some modicum of independence in that
3 it's caseload base. So I show the
4 legislature my caseload and then they
5 fund it. That's what -- that's the way
6 it's supposed to work, and that's what
7 the penal code provides. And I don't
8 work for CDCR. We're also transparent.
9 All of our audits and reviews are
10 published on our website. A summary of
11 our investigations are published and on
12 no accountable on the court public
13 opinion as a result. We have full
14 access, the golden key. We can go
15 anywhere at anytime. We have subpoena
16 powers, we have arrest powers, and we
17 have a professionally trained staff.

18 I say that -- in closing, I
19 say the California model, I think, is a
20 terrific model for a standalone
21 oversight agency. The only problem is
22 that I don't recommend that you have a
23 standalone oversight agency in that I
24 think it's only one piece of effective
25 oversight of prisons. I think you need

1 something like the California inspector
2 general's office, but you also need
3 ombudsman and that you also need
4 community volunteers walking those
5 prisons. You also need internal audits
6 and reviews. You need all those
7 things, I believe, a multi-disciplinary
8 approach to try to get at these issues.

9 With that, I'll take your
10 questions. Thank you.

11 CHAIRMAN KANEB:

12 Because we have four panels,
13 I'm going to suggest questions be asked
14 after each person's testimony. We will
15 avoid -- I fell into with the last
16 panel with reading a previous witness'
17 testimony to a witness who was not
18 responsible for that testimony.

19 I'll start out with this.
20 It is our impression, from multiple
21 sources, that the State of California
22 is making great progress by leaps and
23 bounds in reforming and generally
24 improving the safety of prisoners,
25 hopefully, eventually the safety of the

1 public because of that. And in
2 particular, their safety from sexual
3 abuse. It is our hope to work with
4 your state. And I believe we will have
5 that opportunity in learning from you
6 and maybe giving you a few things by
7 which the California model can become a
8 model for other states and even for the
9 federal system.

10 So speaking for myself and,
11 I think, several commissioners, we are
12 impressed.

13 MR. CATE:

14 I'd have to say I didn't
15 think of it. We had a -- there was
16 a -- a few key legislators who put
17 this -- who put this model together in
18 cooperation with myself and in
19 cooperation with Governor
20 Schwarzenegger. So it really was a
21 effort by all branches of government,
22 including Judge Henderson in Madrid in
23 a lot of cases, also was an active
24 participant in that, so. That's all
25 that happened. And you're right.

1 Thank you.

2 COMMISSIONER FELLNER:

3 What -- what -- is there
4 anything that's not working, or any
5 part of it that needs to be
6 significantly either re-thought or
7 re-tinkered with and that we should
8 know about as we think about models of
9 external oversight?

10 MR. CATE:

11 I think that at one time --
12 funding is -- is an important issue.
13 Right now all the penal code says in
14 California is that I have to have a
15 caseload budget, but no one knows what
16 that means exactly. And no one knows
17 exactly how that would be enforced.
18 You know, would I sue the legislature
19 if it didn't happen at the governors
20 office? I don't think so. And so
21 instead, I think the -- a better idea
22 is to have the inspector general's
23 office or the -- the oversight office
24 funded by a certain percentage of the
25 corrections budget.

1 So for example, a quarter of
2 one percent of corrections budget,
3 whatever that is, would be the
4 inspection general's budget every year.
5 And I think that would provide just
6 some additional modicum of
7 independence. I think that --
8 otherwise, I think that it's -- it's
9 working fairly well.

10 COMMISSIONER FELLNER:

11 Let me just ask one other
12 follow-up.

13 California has an
14 astonishing overcrowded situation. I
15 was actually just reading the expert
16 testimony that's -- that have been
17 provided to the -- will be provided to
18 the three court panels -- the three
19 judge panel that's been set up about
20 how overcrowding makes it impossible to
21 provide medical care, mental
22 healthcare. And basically, everything
23 suffers. Every aspect of prisons is
24 suffering because of the overcrowding.
25 And I'm sure in your work you are seen

1 as two. And the impact of
2 overcrowding, including the impact of
3 overcrowding and on sexual violence, or
4 any kind of staff violence it may
5 cause. And I wonder if you have
6 something to say about that to us in
7 the connection between overcrowding and
8 your ability to do your work and the
9 prisons' ability to do their work are
10 being safe and humane.

11 MR. CATE:

12 It provides a challenge in
13 several respects. One is the sheer
14 volume of complaints concerning living
15 conditions. We, you know, we have
16 4,000 complaints a year in the
17 inspector general's office. Obviously,
18 that's way too many to address. And
19 when I go and walk the tiers, or when I
20 go to the gymnasiums that have been
21 converted to dorms -- or for example, I
22 was at a women's facility last month
23 that converted a storage area into a
24 bunk room where 30 women shared one
25 toilet. And it's just -- it can't

1 continue. I think everyone recognizes
2 that.

3 On the other hand, it makes
4 it challenging. Because as I audit
5 that institution, I have to couch every
6 recommendation and every finding, you
7 know, with the preface that under
8 current conditions we recommend the
9 following. And so I like to recommend
10 ideal reforms, but instead I find
11 myself recommending reforms under the
12 circumstances.

13 COMMISSIONER FELLNER:

14 Okay.

15 CHAIRMAN KANEB:

16 Mr. Nolan.

17 COMMISSIONER NOLAN:

18 Yes. Mr. Cate, you -- my
19 compliments to you for your
20 accomplishment in California.

21 You mentioned that
22 volunteers is an important aspect
23 because, despite the fact you have a
24 golden key, when you walk around the
25 yard everybody in the -- the whole

1 prison knows it, where you are and
2 when. Whereas, volunteers they're
3 pretty much under the radar.

4 My impression is thought
5 that most volunteers don't know you
6 exist, or -- be that you're
7 independent. And so it occurs to me
8 that it might be part of the training
9 and explanation of your office, you
10 know, that would bring the packet that
11 they're given an explanation of your
12 office, how to contact you. And the
13 fact that you are independent, that
14 would give you more eyes and ears of
15 folks that -- because, frankly, in my
16 experience, most of the volunteers are
17 troubled sometimes by things they see
18 and aren't sure to whom to turn.

19 MR. CATE:

20 Commissioner Nolan, I think
21 that was a good suggestion. I
22 should -- I should note that I think
23 California is improving in general.
24 And the credit obviously goes to the
25 administrators. I think that an

1 oversight agency can point out
2 problems, but we don't fix anything.
3 The correctional administrators fix
4 things, and deserve all the credit for
5 that.

6 We have signs that we post
7 in visiting rooms and the entrance of
8 each facility to let people know who we
9 are. But I think those get overlooked
10 often. And I'd like -- for example, in
11 the -- in the British model or in the
12 English model, the British inspector
13 and the citizens who independently walk
14 through those prisons, they work really
15 closely together. And I think that's
16 an area that the -- in California that
17 I can improve upon.

18 CHAIRMAN KANEB:

19 Commissioner Smith.

20 COMMISSIONER SMITH:

21 One of the things that I'm
22 very interested in, Mr. Cate, is your
23 past history as a prosecutor. And I
24 wonder if you could reflect a bit on
25 the impact of having an OIG -- OIG's

1 office has on prosecution of sexual
2 assault incidents in the State of
3 California.

4 MR. CATE:

5 Well, one thing that's, I
6 think, unique to the inspector
7 general's office in California is that
8 it -- it came to exist during a course
9 of a major federal lawsuit called
10 Madrid that dealt with officer
11 discipline process in California in
12 that officers weren't being effectively
13 investigated or disciplined, and so
14 that led to obvious abuse. And as a
15 fix, the court, in cooperation with the
16 governor, created the Bureau of
17 Independent Review within my office.
18 And so I have professionally trained
19 lawyers who are experts in civil
20 rights, criminal law, and employment
21 law who oversee corrections' internal
22 affairs process, and report on it
23 publicly on its health and on its
24 failings.

25 And as a result, the

1 internal -- those investigators are
2 doing a much better job, I think, of
3 handling those internal kind of
4 investigations and ensuring that the
5 relationships with the local D.A. has
6 improved as a result. The
7 investigations are better, the
8 relationship with the D.A.'s office is
9 better. So I think it helps.

10 Ultimately, it's county by
11 county because those D.A.'s face a lot
12 of pressure from powerful labor union
13 about any misconduct by officers. You
14 know, if you have a small voting block,
15 a D.A. can feel pressured not to file a
16 case that may be on the border line.
17 So it's county by county in some
18 respects.

19 COMMISSIONER SMITH:

20 I wasn't sure from your
21 testimony. But are investigations
22 handled through your office, or are
23 they handled at the facility's level?

24 MR. CATE:

25 They're -- corrections has

1 its own internal affairs department and
2 they have their own investigators,
3 criminal investigators. I have all
4 those same powers, but I typically
5 don't exercise them in situations where
6 corrections is able to do so in a -- in
7 a timely and professional manner.
8 Instead, I use my oversight abilities
9 to do that. I would be overwhelmed if
10 I try to do those kind of
11 investigations.

12 And so we limit our work to
13 investigations of correctional -- high
14 level correctional administrators,
15 investigations of internal affairs, the
16 officers themselves, and -- and
17 investigations that I think involve
18 particular notoriety, those kinds of
19 areas where we use our investigative
20 powers. Otherwise, we expect the
21 department to do their own
22 investigations.

23 COMMISSIONER SMITH:

24 But you talk about in your
25 testimony about sort of doing oversight

1 real-time. So if there's sort of a
2 standard investigation that the
3 offset -- various internal affairs is
4 carrying on, are you also monitoring
5 that as it goes along, or is it after
6 the fact of -- of doing an audit
7 process?

8 MR. CATE:

9 Yeah. We -- you're correct,
10 Commissioner Smith. We do -- I
11 wouldn't call them a standard
12 investigation. But all investigations
13 related to sexual misconduct, code of
14 silence, criminal conduct -- my lawyers
15 are doing real-time oversight of those
16 investigations. Meaning that from the
17 time that case gets to the warden,
18 we're tracking it to make sure it's --
19 it was professionally and timely
20 conveyed to internal affairs. And then
21 we meet with that officer and say, tell
22 me about your investigative plan. And
23 we critique that investigative plan in
24 a collaborative manner. And then we
25 work with the employment attorney for

1 the department that's going to handle
2 the case administratively, or the D.A.
3 who is going to be prosecuting them.
4 We don't have oversight of the D.A. but
5 we still butt our nose in there and
6 provide what we think is counseled
7 about these cases. And then we watch
8 what happens to them and we publicly
9 report.

10 CHAIRMAN KANEB:

11 Commissioner Puryear.

12 COMMISSIONER PURYEAR:

13 One question for you.

14 Indulge me in alternative history for a
15 second as we look at trying to prevent
16 the sort of -- we're obviously looking
17 to prevent sexual violence, but that
18 has a strong overlay with general
19 systemic problems.

20 If your office had existed
21 for the last 25 years and have been
22 funded the way you suggest, as percent
23 of the corrections' budget, do you
24 think that California's system would
25 have gotten into the shape that it's

1 got into?

2 MR. CATE:

3 I don't think -- well, I
4 don't believe so. I think much of what
5 happened is that we -- we expanded our
6 system so fast in the 80s and 90s that
7 oversight couldn't keep up. And it was
8 a -- and it was in its infancy anyway.
9 And so those problems, I think, built
10 up over time.

11 And one of the things I
12 tell -- I've told both the secretary of
13 corrections and Governor Schwarzenegger
14 that I thought they did wrong when the
15 governor started was not to yell and
16 scream about the conditions at that
17 time. I think that there's been a lot
18 of improvement over the last four or
19 five years, but I think that those
20 improvements would have happened sooner
21 had there been, again, effective
22 oversight back then.

23 COMMISSIONER PURYEAR:

24 Thank you.

25 CHAIRMAN KANEB:

1 Mr. Cate, getting back to
2 California doing it as a model, reading
3 your statement, it appears to me that
4 you don't report to anybody except the
5 public; is that correct?

6 MR. CATE:

7 Well, it's interesting
8 because, technically, that's true. The
9 governor can't fire me except for
10 cause. I consider the governor to be
11 my client as well as I do the public.
12 And so I serve the public and I
13 consider the governor and the
14 legislature and the department to be
15 clients who need this information.

16 The governor is a very
17 important client of mine. And when he
18 request that I do an investigation, I
19 always do that investigation. Now --
20 but the point is, is that if -- if a
21 different governor wanted to send me
22 one wild goose chase after another to
23 prevent me from being able to do the
24 investigations that were really
25 important, I would have the ability to

1 say no.

2 CHAIRMAN KANEB:

3 Okay. That's what I
4 thought. And you give an example of
5 sexual abuse situations, egregious one
6 if that. And this complaint came into
7 your intake unit, I assume through this
8 hotline procedure. Does that come
9 directly to you rather than through a
10 prison's administrative structure so
11 you -- and do you take, apparently,
12 some 4500 such complaints a year
13 directly?

14 MR. CATE:

15 Correct.

16 CHAIRMAN KANEB:

17 So this is sort of a
18 parallel system for an inmate. I mean,
19 they can call your 800 number, whatever
20 it is, or they can go to the
21 administration in their particular
22 facility?

23 MR. CATE:

24 Right. And most of those
25 4,000 cases, I send a letter back that

1 says, you should utilize the internal
2 processes, especially if they haven't
3 done that. That's -- that's almost
4 always my answer unless it's an
5 emergency situation.

6 In the case you're referring
7 to, my recollection is it was a tip
8 from a correctional professional -- a
9 correctional officer and not the inmate
10 that started that whole process. But
11 my -- I'm -- obviously, I don't do the
12 investigations myself. My staff does
13 it, so my memory about exactly how that
14 started is a little vague.

15 CHAIRMAN KANEB:

16 I'm not trying to dwell with
17 it. One last thing. I notice though
18 about this example. You referred this
19 complaint to U.S. Attorney rather than
20 a district attorney. Do you remember
21 why you would do that? Why it would be
22 taken to the federal court system?
23 Were you put there?

24 MR. CATE:

25 That's just discretion on my

1 part. I can send it to -- I can ask
2 the U.S. Attorney's office to look at
3 it, the D.A., or the State Attorney
4 General's office. All three
5 prosecuting agencies have jurisdiction.
6 In this case I chose it because I
7 thought it had civil right overturns.

8 CHAIRMAN KANEB:

9 Just for my education. I
10 mean, aren't most sexual violence
11 matters governed by state law rather
12 than federal law, unless there is some
13 civil rights aspect to it?

14 MR. CATE:

15 That's correct.

16 CHAIRMAN KANEB:

17 Okay. That's all I have.

18 Thank you.

19 COMMISSIONER FELLNER:

20 John, I wanted to follow-up
21 on that just to make it clear.

22 You -- Mr. Cate, you
23 mentioned earlier that, you know, it's
24 hard sometimes to get D.A.'s to take
25 cases because they are in areas where

1 they're not going to get political
2 points when they run for office, and it
3 may have a lot of members in that area.
4 And I wondered, separate from using the
5 federal courts which don't have -- they
6 may have the same problems with juries,
7 but at least the prosecutor is not
8 being elected. So that's one solution.
9 Another solution that some people talk
10 about is that there should be some kind
11 of like, you know, a statewide
12 prosecutor for sexual offenses or for
13 cases that involve correctional
14 officers as a way to avoid some of
15 these problems which happened all
16 across the country.

17 And I'm wondering in your
18 experience as a prosecutor -- this is
19 one of the other -- you know, it's one
20 of the issues we've been wrestling
21 with, how to ensure effective, timely
22 prosecution of cases. And I just -- if
23 we can't do it now, I think staff would
24 like to follow-up with you. If you have
25 words about it, it would be great. But

1 I would like to get your insights on
2 that. You're experienced on both sides
3 of that bar.

4 CHAIRMAN KANEB:

5 May I suggest that might be
6 better just in the interest of time.

7 MR. CATE:

8 I could address at least one
9 portion of Commissioner Fellner's
10 question in about ten seconds. And
11 that is, when I was a state prosecutor
12 I lobbied the legislature to make the
13 state attorney general's office the
14 primary place for prison crimes to be
15 prosecuted because of that very issue.
16 It didn't -- it didn't get passed, but
17 it is an interesting idea. And I'd be
18 happy to talk to staff at a later time
19 about that.

20 COMMISSIONER FELLNER:

21 Great. Thank you.

22 CHAIRMAN KANEB:

23 Thank you. Thank you, Mr.
24 Cate. We need to move on.

25 Will Harrell is appointed

1 governor -- by the governor conservator
2 for the State of Texas Youth
3 Commission -- that's right. There is a
4 conservator for the -- in May of 2007
5 to serve as independent ombudsman.

6 Mr. Harrell.

7 MR. HARRELL:

8 Thank you, Chairman. It's
9 certainly an honor to be here. I'm
10 kind of the new kid on the block as
11 Michele Deitch, in her testimony,
12 pointed out the office of Independent
13 of Ombudsman in Texas is in its stage
14 of infancy. But I can assure you that
15 we want to be just like Matt Cate when
16 we grow up. And Matt is too humble to
17 acknowledge that. When he started -- I
18 think you only had seven people on
19 staff?

20 MR. CATE:

21 About seven professional
22 staff.

23 MR. HARRELL:

24 Right. And threw in
25 something that's remarkable -- it's the

1 aspiration of other states, including
2 my own.

3 I have a background in
4 prison investigations and I consider
5 myself a disciple of the great Al
6 Braun's team, my first job out of the
7 American University of Law School, with
8 the ACA's vast project. And I've done
9 prison investigations in Latin America
10 and the United Nations. And as an
11 attorney have been involved with prison
12 reform. But I can assure you that in
13 the position of an independent
14 ombudsman, I think that I can have a
15 greater impact on the rights and the
16 dignity of youth incarcerated in Texas
17 Youth Commission, that in any other
18 role, certainly there's a problem.
19 And the way that the structure of my
20 office is -- almost meets all the, what
21 I call the Deitch eight essential
22 elements, except for three. And I'll
23 get into that.

24 But by way of background,
25 you all were in Austin, Texas, I

1 believe, last March. And so you're
2 fully aware of the crisis that were
3 afoot involving the Texas Youth
4 Commission. And to answer the question
5 that was posed to Mr. Cate is, had the
6 ombudsman office existed at that time,
7 I think it could have been avoided.

8 I think the West Texas State
9 School sexual misconduct case
10 demonstrates a complete failure in
11 oversight and -- and the importance of
12 a transparent system. The sexual abuse
13 of West Texas State School was going on
14 for years. And until the media exposed
15 it -- and Commissioner Fellner was
16 discussing the importance of the media
17 in this oversight context. I don't
18 think that can be overstated. I do
19 have some concerns about your
20 responsible media, however, especially
21 in the juvenile justice context.

22 Sometimes the -- the motives
23 of the media is to get headlines to
24 sell newspapers, not to protect the
25 interest of -- of juveniles. And to

1 the extent that they would be willing
2 to waive the confidentiality of these
3 youth, could ultimately be very
4 damaging to the youth. And I would say
5 the same for adults, that I do think
6 there is a role in the media in this
7 process. And were it not for the
8 media, I wouldn't be sitting here today
9 because the West Texas State School
10 scandal wouldn't have been exposed and
11 the legislature wouldn't have come to
12 their feet and address the failures of
13 the -- of the Texas Youth Commission
14 through this.

15 Three of the elements of
16 the, again what I call the Deitch
17 essential elements that are lacking in
18 my office here is, one, independence.
19 I think we're independent on paper, but
20 it's difficult to be truly independent
21 when you are appointed by the governor
22 and answer, essentially, to the
23 governor, which is the same master of
24 the Texas Youth Commission.

25 Fortunately in my case, the

1 governor staffed Mr. Alfonso Royal, who
2 is as much as a child advocate as I
3 will ever be. And there's been no
4 conflict. There's been no attempt to
5 downplay some of the -- the problems
6 that I identified. But structurally,
7 that could happen.

8 And so as to the extent this
9 Commission is going to be looking at
10 perfect models, some alternatives to
11 that structure might be considered.
12 And I hope this is just the beginning
13 of a conversation, 'cause there's far
14 too much to really get into in the
15 short period of time. But I would
16 personally volunteer Michele Deitch to
17 continue to advise the Commission, and
18 I would be happy to help that as well.

19 Resources are a current
20 problem. I was grossly under-funded,
21 but I think that will over time be
22 addressed. But one critically positive
23 aspect of Senate Bill 103, was
24 created -- ombudsman. It gives me the
25 authority to consult without external

1 experts, and I have done so. And they
2 have been proven to be critically
3 important. In fact, I have a -- an
4 example of the work that was provided
5 in support of my office by the center
6 of -- Dana Schroederburg and Mark
7 Philmar drafted a memo to an analysis
8 of youth support policy that goes well
9 beyond the sophistication that my
10 office probably can provide. So while
11 I'm out there investigating the field,
12 I'm getting expert research done by
13 external entities. And so I'm meeting
14 the -- the inadequacy of my current --
15 by reaching out in forming
16 relationships also with academic
17 institutions and others.

18 Another element that's
19 missing from the construction of my
20 office is a requirement that the agency
21 responds and addresses my critique.
22 Fortunately, however, I have been met
23 with -- with supportive and
24 collaborative staff people at the Texas
25 Youth Commission. There's some

1 superintendents who are genuinely
2 receptive and supportive of my mission
3 and appreciative of what I'm able to
4 identify and address and bring to their
5 attention. That isn't always the case,
6 of course. But in many instances, it
7 has been. And I think if you take
8 anything from my testimony it would be
9 this, is that the -- any ombudsman or
10 any external monitoring entity is only
11 as good as the administration of the
12 agency monitors.

13 We don't have the authority,
14 and probably shouldn't have the
15 authority, to force change. But to the
16 extent that the agency is willing and
17 receptive as oppose to defensive and
18 dismissive of our recommendations,
19 progress can be had.

20 I want to allow more time
21 for questions. I know I'm out of time.
22 But again, it's an honor to be here and
23 I look forward to any questions. And I
24 happily will continue to collaborate
25 with the office -- with this

1 Commission.

2 And I just want to mention
3 that the -- the testimony of the
4 earlier packet is not the update. I
5 added and have elaborated
6 significantly, and I'll submit that to
7 you, to the Commission.

8 One more note about --
9 something that Ms. Deitch brought up is
10 there -- it's critical to address
11 individual complaints as well as
12 systemic issues. And, you know, I'll
13 write a memorandum on the details of
14 the systemic problems and try to
15 address that with the highest levels of
16 the agency.

17 But if there is a missing
18 toothbrush, I want to bring that to the
19 attention of the case workers at the
20 very local level, dorm by dorm. But
21 the case of the missing toothbrush is a
22 great analogy of what I do. If a kid
23 is missing a toothbrush, it could be
24 simply that that kid lost his
25 toothbrush, but it could mean that

1 there's a problem with the vendor. It
2 means that there's a statewide problem
3 involving. But I want to get that
4 kid's toothbrush, meanwhile dig deeper,
5 peel the onion to figure out what is
6 underlying the absence of that kid's
7 missing toothbrush. Could it be that
8 he's a young entrepreneurial and
9 missing many toothbrushes because he's
10 providing those shanks for other
11 inmates, or does it mean that somebody
12 is stealing from the warehouse, or does
13 it mean that the vendor isn't coming
14 through on their end of the deal?

15 And so any -- any complaint
16 that an individual child bring to my
17 attention could actually represent a
18 much more systemic problem that needs
19 to be addressed. Thank you.

20 CHAIRMAN KANEB:

21 Mr. Harrell, you've given
22 examples of what -- what your office
23 has done in its infant months. And
24 what I'm trying to understand is -- I
25 understand it's -- your in the

1 beginning of -- of the evolution of
2 your office. But you -- you accept and
3 review complaints, appeals, whatever,
4 from parents and family of inmates,
5 efficacy groups. And inmates
6 themselves, what direct access, if any,
7 do they have to your office?

8 MR. HARRELL:

9 At the moment, I go
10 personally to -- I've been to every TYC
11 facility, 13 in the state, and all the
12 halfway houses. Now that I'm going to
13 have staff, we're going to make it more
14 easy for kids to contact our office. I
15 have intentionally avoided that up
16 until now, because the last thing I'd
17 like to see happen is for a kid to call
18 my office and I can't get back to that
19 kid in five, six, seven, ten days. And
20 there will be further disillusion and
21 lose confidence in my office. But now
22 that I have staff, I can adequately
23 respond to complaints that come in
24 through the telephone. We'll -- we'll
25 make ourselves available that way.

1 CHAIRMAN KANEB:

2 So there will be, when
3 you're ready, an ability for an inmate
4 to directly contact your office?

5 MR. HARRELL:

6 That's correct. And right
7 now actually we have just finished
8 drafting a -- a pamphlet to distribute
9 to kids. The first one of a series
10 addressing, actually, sexual assault
11 and what your kids need to know. The
12 myths related to that and what they
13 need to know, and then the way to
14 contact their office.

15 With that said, my office
16 is -- is one -- the one thing
17 restricted in the legislation is that I
18 cannot investigate what could be
19 criminal activity. I immediately refer
20 those cases to the inspector general
21 who actually was also an entity created
22 by Senate Bill 103 that didn't exist
23 before this legislation was passed. I
24 referred about 15 cases to the
25 inspector general.

1 The fact that I can't
2 investigate criminal behavior doesn't
3 mean I don't look for it. And I do
4 look for -- for allegations of crime,
5 particularly sexual abuse. But I refer
6 that over to the law enforcement for
7 the entity -- within the entity to
8 investigate it and prosecute.

9 CHAIRMAN KANEB:

10 Maybe Doug in his statement
11 answered my question. So to whom does
12 the IG report to?

13 MR. HARRELL:

14 Well, they are -- Senate
15 Bill 103 does not give them
16 independence. They're actually
17 supposed to report to the executive
18 director or acting executive director
19 of the agency; however, they are
20 operating with independence. And
21 that's just a choice that's been made
22 by the agencies and by the governor.
23 So at this moment, essentially, they
24 report to the governor's office. But
25 we all also report to the legislature.

1 CHAIRMAN KANEB:
2 We all meaning your office?
3 MR. HARRELL:
4 My office as well as the
5 inspector general as well as the Texas
6 Youth Commission.
7 CHAIRMAN KANEB:
8 Regular reports are required
9 or --
10 MR. HARRELL:
11 Regular reports are
12 required, but I get legislative
13 inquiries regular -- often. I just got
14 one on the email today. So, I mean,
15 regular contact with the legislative
16 staffs who are focused on the issue.
17 CHAIRMAN KANEB:
18 Thank you.
19 Questions? Yes,
20 Commissioner Smith.
21 COMMISSIONER SMITH:
22 You actually refer to a
23 number of interesting documents that I
24 think will be useful in terms of our
25 work. I think one was the draft of a

1 handbook and also a report on youth
2 enforcement. Will you be willing to
3 provide those to the Commission?

4 MR. HARRELL:

5 Yeah. I'd be happy -- this
6 is a memorandum that was drafted by --
7 I drafted it for a senator to give him
8 an analysis of current Texas Youth
9 Commission Youth Support Policy, an
10 analysis, and a recommendation related
11 to pose revision of that policy. I
12 have that. And this is just a
13 memorandum I wrote. It's basically a
14 red flag memo that talks about my
15 concerns related to an increased
16 reliance of the agency on isolation
17 programs. I'd be happy to give them to
18 you, and neither of them identifies
19 juveniles by name. I'd be happy to do
20 that, yes.

21 COMMISSIONER SMITH:

22 Please attach them to your
23 testimony and give them to -- your
24 advice testimony that you give to the
25 staff.

1 MR. HARRELL:

2 That'd be fine. Sure.

3 COMMISSIONER SMITH:

4 Thank you.

5 COMMISSIONER FELLNER:

6 Do your reports, are they
7 usually public? It wasn't clear to me
8 to what extent information such as that
9 or others disseminated to the public
10 when you report quarterly to the
11 governor, the lieutenant -- I mean, how
12 much are you -- how transparent are you
13 allowed to be?

14 MR. HARRELL:

15 Well, I'm required to report
16 quarterly to the legislature. That
17 will be an open record. And frankly,
18 all of this is open record.

19 What -- through a lot of the
20 reports that I do are sort of -- I do
21 what's called the preliminary site
22 report. I don't have any of that
23 today, but I can provide you with that
24 as well, if you'd like. That is a
25 useful report for the public or for the

1 legislature. It's useful for me and
2 the agency. And it's -- what I'll do
3 is go to a facility and document things
4 that I see in sort of general
5 conclusions analysis of the culture but
6 also individual cases with youth
7 specific instances, complaints that
8 have come to my attention.

9 And it's really more of a --
10 of a tool to document, bring it to the
11 agency, and address the individual
12 problems. But the quarterly report
13 will be something different than that.
14 The site visit reports are just really
15 an instrument to negotiate resolution
16 of individual problems as well as
17 inform the agency of general comments
18 and observations I have with regards to
19 a specific facility.

20 COMMISSIONER FELLNER:

21 But if people wanted to see
22 those, obviously deleting the names of
23 the youth for their confidentiality, do
24 you not think there's also a public
25 purpose to be served in having even

1 those however -- you know, with all the
2 caveats as to what they are, do people
3 know what's going on in these places?

4 MR. HARRELL:

5 It could be unfortunately
6 misleading. I mean, it's -- it's
7 really a snapshot of what I saw on any
8 particular day. And some of the
9 information that I get might not pan
10 out. So I think what would be useful
11 is if I would provide that report to
12 the agency, the agency would -- within
13 a reasonable period of time, is going
14 to respond and address that. And then
15 we can negotiate a corrective action
16 plan. And then that would become, you
17 know, a document that would be useful
18 for the legislature and for the public
19 in general.

20 COMMISSIONER SMITH:

21 Just one comment that I'd
22 like to make in general, and I didn't
23 make it for the last panel, and I
24 thought about it after the last panel.
25 Which is the degree -- because it seems

1 like these oversight structures operate
2 at a fairly high level. And I wonder
3 if what you find out actually were,
4 even in the other panel, actually gets
5 back to line -- gets back to line staff
6 so they understand really what the
7 status of the agency -- you know, what
8 is the agency of the state -- the
9 status of the agency?

10 MR. HARRELL:

11 Right.

12 COMMISSIONER SMITH:

13 You know, so it's fine to
14 make the reports to the legislature and
15 to the executive and to the inspector
16 general. But in terms of changing the
17 culture of an agency, it seems like
18 there needs to be some sort of way to
19 funnel that information back down to
20 staff so that they get a snapshot.
21 Sometimes it's useful to have that come
22 from someone other than who's running
23 the facility.

24 MR. HARRELL:

25 That's right. And the way

1 that it works -- and we're going
2 through some transition because -- the
3 agency is going through a profound
4 restructuring transformation. People
5 have been reassigned through the
6 agency, the organizational chart is
7 changing, things are very much in flux
8 right now. But thus far -- Stan
9 DeGerolami is a director of residential
10 services, which means that he is in
11 charge of all superintendents. And so
12 I would have a report and I will
13 address it with him, and he will
14 address it with his staff.

15 But often, I will, depending
16 on the receptiveness, I am more than
17 happy to debrief on the way out of the
18 facility while I'm there and have a
19 conversation about this, you know, the
20 things that I observed. And they often
21 fill in the missing information that
22 I'm not getting or clarify certain
23 things or just didn't know about it.
24 You know, sometimes we miss things.

25 If you walk by a problem

1 every single day, you begin to think
2 that's just the way that it is. To
3 bring in external fresh eyes is usually
4 helpful to a local administrator to
5 bring something that was right in their
6 face but they never noticed it being a
7 problem. I've actually been told that
8 by some of these administrators in the
9 field.

10 CHAIRMAN KANEB:

11 Other questions of Mr.
12 Harrell?

13 MR. HARRELL:

14 I just -- a couple of things
15 that ya'll mentioned about the
16 prosecution issue. That's a --
17 Commissioner Fellner raised this very
18 important issue.

19 In the West Texas State
20 School there was a failure in so many
21 levels. The sexual abuse was happening
22 in far rural areas. The prosecutor's
23 constituents were not there, those
24 children nor their parents are the
25 prosecutor's constituents. The

1 prosecutor in -- in the West Texas
2 State School has a very well documented
3 detailed report from a Texas ranger
4 regarding the sexual abuse that was
5 happening in that facility and sat on
6 it for over two years. To address
7 that, the Senate Bill 103 does two
8 things.

9 It provides money for rural
10 prosecutors who often claim that they
11 will be willing to prosecute cases but
12 don't have the resource. So there is
13 available state money at the attorney
14 general's office that can be afforded
15 local prosecution. Also, the Texas --
16 the adult system faced that issue years
17 ago and created a special prosecutor
18 unit in Austin, Texas and had the
19 jurisdiction prosecute crimes committed
20 in TDCJ facility pending with the
21 state. That jurisdiction by way of
22 Senate Bill 103 was expanded to include
23 jurisdiction over Texas Youth
24 Commission facility. And the
25 Appropriations Bill created six new

1 prosecutor positions in the special
2 prosecutor's unit with crimes committed
3 in the Texas Youth Commission.

4 CHAIRMAN KANEB:

5 Well, if that -- if a system
6 is now in place, when you just
7 described having existed, would the --
8 the rangers report have gone to the
9 IG's office?

10 MR. HARRELL:

11 Yes. Yes. And the rangers
12 actually now do collaborate very
13 closely with the -- with the inspector
14 general's office.

15 CHAIRMAN KANEB:

16 Because of practice or
17 because they -- they are required to by
18 the new organization?

19 MR. HARRELL:

20 In the beginning there was a
21 multi-agency agreement. And in fact,
22 that -- before the legislation
23 passed -- before the Appropriations
24 Bill passed and became effective in
25 this fiscal year, which started in

1 September, there was multi-agency
2 agreement with the TDCJ, inspector
3 general's office, the Attorney General,
4 and the Texas ranger. And they did a
5 massive blitz throughout the state --

6 CHAIRMAN KANEB:

7 We read --

8 MR. HARRELL:

9 -- in -- in every facility.

10 And now the A.G. and rangers are
11 winding down from that process now that
12 the inspector general is hiring, I
13 think, about 16 new police officers to
14 work in the Texas Youth Commission.

15 CHAIRMAN KANEB:

16 I don't want to take the
17 time. I guess my question answered off
18 line. I'll leave it at that.

19 Are there other questions of
20 Mr. Harrell?

21 Yes, Commissioner Smith.

22 COMMISSIONER SMITH:

23 Nothing that we can get into
24 probably now. But certainly one of the
25 things is sort of, how does all of your

1 office link to medical care? We had a
2 conversation -- you can't answer it
3 now. -- with Dr. Raimer yesterday about
4 the system for adults. And I'd be
5 interested, particularly since we're
6 talking about victimization of youth,
7 right, sort of what are those medical
8 procedures and how is your office
9 involved in that? And our staff will
10 get back in contact with you.

11 MR. HARRELL:

12 I can just say one brief
13 thing. Is that the Senate Bill 103
14 creates the office -- in the statement
15 you'll see that it requires -- it was
16 created for the purpose of
17 investigating, evaluating, security
18 rights of the children committed to
19 commission, including a child release
20 under supervision of court final
21 discharge.

22 Those services, even though
23 Texas Youth Commission contracts with
24 UTMB, those are services provided to
25 those kids. So I do have jurisdiction

1 to inspect and investigate delivery of
2 those services. Personally, I do not
3 have the expertise to do that. But
4 again, the statute gives me the
5 authority to contract with experts, and
6 I do plan to do that.

7 COMMISSIONER SMITH:

8 Particularly because the
9 issues of sexual victimization around
10 youths have such a broad impact
11 downstream, so. We'd be very
12 interested in receiving any information
13 that you get in that area.

14 MR. HARRELL:

15 Certainly.

16 CHAIRMAN KANEB:

17 Thank you, Mr. Harrell.

18 MR. HARRELL:

19 Thank you.

20 CHAIRMAN KANEB:

21 Our next witness is Jack
22 Beck. He's going to testify in his
23 capacity as director of the Prison
24 Visiting Project Correctional
25 Association of New York. As I read his

1 statement, I became aware that New York
2 has a -- a truly unique organization
3 and system with a long history. I mean
4 unique in the real sense of that word,
5 one of a kind.

6 We're most interested to
7 hear from you, Mr. Beck.

8 MR. JACK BECK:

9 Well, thank you very much.
10 And thanks to the Commission for
11 inviting me. And I am not going to go
12 through all my -- my testimony. I want
13 to highlight a few -- a few items and
14 then I'll -- we might have a chance for
15 some discussion.

16 What I really wanted to
17 focus on, one of the barriers and
18 opportunities about investigating
19 sexual violence in the prisons, you
20 need from -- from other aspects. I --
21 for all the other aspects, I basically
22 100 percent endorse Michele's statement
23 of the elements that I think are
24 necessary, and we don't necessarily
25 have all those elements. And if you

1 want to talk about that, we can.

2 But I think her model is the correct
3 model.

4 I do want to note though,
5 there's been some discussion about
6 enforcement versus what is the role of
7 a monitor. And I -- I believe it's
8 very important that it is a -- a
9 monitor's role is one to bring facts to
10 light, to make recommendation, but not
11 be an enforcer for two reasons.

12 One is that I believe a
13 monitor should be talking about best
14 practices. If you have an enforcement
15 role, that almost always turns out to
16 be minimal standards. What are the
17 minimum standards that you have to
18 comply with? And I think a monitor
19 should be looking beyond that and
20 looking at recommendations that go with
21 best practices. And I also think
22 that -- I agree with several people
23 that talk about unless the agency is
24 going to buy into recommendation, it's
25 not going to happen. I think even

1 as -- I'm an attorney, and for 23 years
2 I litigated for the Prison's Right
3 Project Legal Aid Society, and I know
4 about enforcement. And it's a very
5 long and difficult task even when you
6 have the court. And so I believe the
7 role of the monitor is to try to
8 identify problems and try to develop
9 ideas and work with an agency to try to
10 get them implemented.

11 What are the barriers? One
12 thing that I want to talk about is the
13 issue of confidentiality, and even the
14 gold key. We don't have the gold key
15 in the sense that we are -- we are --
16 when we go -- I can go anywhere in the
17 prison where I want to go to, but
18 there's going to be security staff with
19 me in some respects. They might not
20 hear all the conversations because they
21 are aware.

22 And I want to get to this
23 particular point when you're looking at
24 sexual violence. The very fact that an
25 individual is talking to someone about

1 that topic, even if the agency doesn't
2 know what the substance of it is, has
3 ramifications and implications. And
4 that's -- and what I mean by that is
5 that they know that there's -- if
6 you -- if they know the exact substance
7 of what you're talking about in the
8 sense of the topic, not the words, that
9 there are -- there are complications
10 that result from that. And that's why
11 I would also endorse Michele's notion
12 that you want an agency that
13 investigates much broadly than just
14 sexual issues. I think that if you do
15 have sexual issues, there's going to be
16 such barriers for people coming
17 forward.

18 And that gets to my point of
19 what the -- what I think one of the
20 greatest advantage of an outside agency
21 is that an individual can come forward
22 to an outside agency without having the
23 negative sides that often come with
24 talking about an allegation of sexual
25 abuse. And what I mean by that is

1 there's a huge downside for anybody to
2 allege sexual abuse inside. There's
3 issues of, will they be adequately
4 protected if there's a formal
5 investigation? Will they receive
6 services? Will they be isolated? Will
7 they be denied programs in that
8 isolation, even if it's extensively for
9 their protection? Will they be
10 transferred and, therefore, lose their
11 home? And that's what -- for a lot of
12 these people this is their home.
13 There's a huge downside. And also when
14 you have the fact that few of these
15 cases are substantiated, you know, an
16 allegation that is non-substantiated,
17 there's a lot of baggage that that
18 person is going to carry. So there's a
19 lot of risk associated that.

20 The advantage of an outside
21 monitor is that they can at least start
22 that dialogue with us without
23 necessarily invoking the formal
24 process. That does put a burden on the
25 outside agency of advising them about

1 what is the consequences, and I think
2 you have to do that realistically and
3 fairly. But I believe there's an
4 opportunity for people to come forward
5 to an outside agency that they might be
6 very reluctant to do with the formal
7 inside mechanisms that can
8 automatically evoke that.

9 On the other hand, that also
10 puts us in that very difficult role of
11 what is -- what is the role of a
12 monitor. Is that an agent or an
13 advocate, or is that someone that's
14 just being objective? And I think we
15 have to realize that it's a little
16 complicated. I believe that you have
17 to, and I hope the standards might
18 address some of these, you have to be
19 concerned about a number of aspects.
20 You have to be concerned about the
21 protection of that individual. You
22 have to be concerned about whether that
23 individual is going to get needed
24 services, medical and psychiatric
25 services. And I think, in some sense

1 of that, the investigation is going to
2 be a fair and complete investigation.

3 On the other hand, I think a
4 monitor's role is not to be the
5 advocate to be pushing that
6 investigation, not to be doing the
7 investigation. I think it is to -- is
8 to have the limit of advising a person
9 of how to proceed and then turning it
10 over to others. It is very useful.
11 And I can say in New York we have this,
12 that there are other entities that we
13 can -- if we get somebody that raises
14 this issue, we can refer them to --
15 there are -- there are legal entities
16 in the state that can represent people,
17 and there are some other advisory
18 groups that don't have the complicated
19 hat of monitor and can be a pure
20 advocate. And so I think that's
21 important.

22 I also want to stress the
23 notion of -- so this is about
24 confidentiality and being able to
25 protect people coming forward in a way

1 that it's not going to immediately
2 appear that they're raising a
3 complaint. It could be more general.
4 And then they can decide whether or not
5 they want to pursue it.

6 I think it's very important
7 that anybody investigating this has
8 adequate training and expertise to do
9 this job more appropriately. There is
10 so many issues here, posttraumatic
11 stress disorder. A lot of these people
12 have had issues of violence in their
13 life even before they got incarcerated.
14 And I have to say this is a very real
15 problem though I've had the National
16 Commission Correctional Healthcare.

17 I do IRB work and other --
18 and somebody who's describing some --
19 you know, college students that's
20 wanting to come in and study violence
21 inside the prison and talk to a bunch
22 of women. And they had no concept
23 of -- you know, you open the Pandora's
24 box, but what do you do? Do you have
25 any follow-up? And to abandon these

1 people after they kind of told their
2 story, I think is irresponsible. You
3 have to be able at least think about
4 what are the consequences of -- of
5 someone revealing to you this very
6 sensitive information and how they can
7 be protected.

8 And obviously, an outside
9 agency can take that on, but you have
10 to at least thought about that. And
11 that's another one where you have
12 responsibility with information.
13 And -- and hopefully, you can establish
14 some relationship with the department
15 that -- that if you see something going
16 on, you can assure -- you can at least
17 make contact to assure that they're
18 getting the services that they need.
19 But you need expertise and training to
20 do this.

21 Also, there are issues of
22 transgender in the view of inmates
23 about homosexuality. These are all --
24 I think fall into if you're involving
25 and you're looking at sexual violence.

1 And then finally, you have to look
2 at -- and I read a comment earlier.
3 Sexual violence is also a subset of
4 just violence inside the prison, and
5 you have to be sensitive to that. So
6 there's a lot of training that I think
7 is necessary.

8 And finally, I want to talk
9 about the issue of access to adequate
10 information. I have presented some
11 preliminary results we have. I'm not
12 going to talk about them unless you
13 have questions about it. But the
14 bottom line of that is, you know,
15 garbage in, garbage out. If you don't
16 really get accurate information, how do
17 you know that you're measuring
18 anything? And actually, you're
19 misleading yourselves in thinking that
20 you -- that you have a handle on the
21 problem. And what I attempted to
22 present there is that you can -- if you
23 look at this element from different
24 ends, you see very different results.

25 I mean, we have almost a

1 thousand misbehavior reports about
2 something that's related to sexual
3 misbehavior, and yet in the PREA
4 reports they're reporting one or two
5 incidents of inmate on inmate violence.
6 What is the reality?

7 Similarly, with officer
8 misbehavior and misconduct. There's a
9 huge number of open investigations in
10 New York. And I wish that -- I hope
11 that as PREA goes along, that they will
12 not just do their annual snapshot. At
13 least in New York, you're talking about
14 200 cases and 100 -- I mean, 70 open
15 investigations. Well, what happened to
16 all those open investigations? So I
17 think there really needs to be access
18 to data.

19 I'm wondering whether the
20 information that gets to PREA could be
21 shared more broadly in trying to really
22 find out a way to get liable
23 documentation. That goes in many
24 different ways. And I would urge for
25 you to kind of think about looking at,

1 not only just getting their -- their
2 data through their questionnaires, but
3 also looking at more generically, like
4 inmate discipline and officer
5 discipline independently so that they
6 can kind of try to cross correlate and
7 have some accountability. Certainly,
8 from an outside entity where I'm all
9 about data, it'd be great if that could
10 also be made public so that we could
11 have a better sense. Because --
12 finally, I want to end with the notion
13 that somebody -- you talked early,
14 Commissioner, about the system.

15 Now, if you talk only about
16 systems in New York, we have 70
17 different facilities. If you're
18 talking about systems, you're really
19 missing the story. The story is not
20 about systems as much as what is
21 happening at a prison. There are
22 different cultures, as I tried to
23 emphasize. You know, one place we get
24 two percent of sexual violence, and
25 other place we have 50 percent of

1 people reporting it in a very broad
2 definition. So you can't really -- if
3 you put that data together, you're
4 really not seeing the picture. And
5 that's another area where -- the way
6 PREA is being reported. If it's on the
7 system wide basis, I think you're
8 really missing the story. You have to
9 get down on a facility basis.

10 And so I welcome comments
11 and questions. Thank you.

12 COMMISSIONER AIKEN:

13 Just a follow-up, Mr. Beck.
14 Your comments in relationship to
15 culture and leadership, et cetera,
16 on -- I mean, I'm making sure I
17 understand. -- it can be institution
18 aid with the same level of security of
19 inmate populations, the same type of
20 behavior patterns of inmate population
21 as it relates to classification and
22 public endangerment. And then
23 institution B, with the same type of
24 institution, maybe the same design of
25 institution for that matter. And you

1 find a difference in the prevalence of
2 this type of behavior pattern, deviant
3 behavior pattern. Is that correct?

4 MR. JACK BECK:

5 It is a -- you know, almost
6 every prison is a little different.
7 It's very hard to say that they're
8 exactly the same. And some of this is
9 a self-selecting process. So what I
10 mean by that is -- let me give you an
11 example.

12 We have a prison, Eastern
13 Correctional Facility, that has -- it's
14 a maximum security prison. If you
15 actually look at the length of
16 sentences, they're even longer. But
17 these are people that are very
18 interested in programs and given a lot
19 more responsibility. The
20 administration believes in
21 communication. And there's almost no
22 violence there.

23 You get to another prison,
24 Attica, which everybody is pretty
25 familiar with. Older prison, very

1 problematic there. There's a totally
2 different culture there. And the
3 inmate population is not identical, but
4 I do believe that the culture has a
5 huge impact on the level of violence
6 that goes on there. And I believe when
7 you create a level of violence, it
8 manifest itself in many different ways.

9 I found a correlation
10 between inmate on inmate violence and
11 staff violence. If people don't feel
12 empowered, they don't feel where they
13 can use the informal mechanisms,
14 they're going to use violence as a
15 tool. Similarly -- actually, we don't
16 have a huge gang problem, but gangs are
17 a lot more prevalence in those prisons
18 where people don't feel safe and where
19 they don't feel they have a mechanism
20 to communicate.

21 COMMISSIONER AIKEN:

22 Exactly. And what I'm
23 saying is they're not identical people
24 but the same basic classification of
25 inmate population, the same type of

1 staff department, the same type of rule
2 and regulation, policy and procedures
3 that their umbrella agency are
4 expecting them to operate in these
5 facilities.

6 Second point. And -- and
7 this is something I really need your
8 input on, as if I didn't need to have
9 the other input. Investigations.
10 There is allegations. The allegations
11 is made, the person that has allegedly
12 been violated has fully cooperated with
13 dates, times, place, everything. And
14 then you see on and on and on for a
15 long period of time under
16 investigation, under investigation,
17 under investigation, and it just create
18 a life of its own.

19 Do you do any tracking or do
20 you recommend any remedies, or how do
21 you balance between being fair and
22 honest with the investigation or foot
23 dragging? How -- how do you manage
24 that?

25 MR. JACK BECK:

1 Well, that's a very good
2 question. And -- and I have to say we
3 have not really looked at
4 investigations the way I would have
5 liked to, as a matter of fact. My
6 violence study is recommending that we
7 do a follow-up to look at the
8 investigative side because in New York,
9 there are clear deficiencies in
10 investigations of any misbehavior. The
11 staff is dissatisfied because it takes
12 so long, and the inmates are usually
13 dissatisfied because there are very few
14 instances where staff are ever
15 disciplined. It's a very ineffective
16 system.

17 And it goes to all the
18 points that we've heard about that the
19 advantage of California that we don't
20 have. There's not independence. The
21 inspector general's office doesn't have
22 any of that level of independence. And
23 it just doesn't work.

24 And finally, even after when
25 the IG makes a recommendation, there's

1 a separate administrative hearing. And
2 in New York, it turns out that even
3 those few cases that they find are
4 substantiated to go to prosecution in
5 the administrative role, they often
6 don't succeed at that level,
7 particularly in a sexual violence
8 level. If you don't have physical
9 evidence, you're just never going to
10 win those cases. So it's -- it's a
11 very disturbing process.

12 And I think there's huge
13 barriers for people coming forward.
14 You don't have people coming forward
15 because, essentially, they never win.
16 And that's -- or it's rare. And that's
17 very difficult. And unless you find
18 ways of showing that there's some
19 benefit. And a rational person doing
20 risk benefit analysis are going to say,
21 what do I gain from this? You know,
22 what am I -- am I going to be safer for
23 it? And that's very hard.

24 COMMISSIONER AIKEN:

25 And thus have an impact on

1 the institutional culture in the ways
2 of, for example, a person saying, well,
3 if they can't take care of the
4 situation, I'll take care of it myself
5 versus the person's committing
6 self-mutilation, suicide. Doesn't it
7 have an impact on these institutional
8 culture?

9 MR. JACK BECK:

10 Absolutely. We have found
11 where -- where there are mechanisms --
12 and it go from grievance systems to
13 communication directly to the
14 administration to inmate organizations.
15 If you feel like you have some way of
16 resolving your problem nonviolently,
17 most people are going to take that
18 avenue. If you find that you don't
19 have that, it drives that whole
20 violence system. So I agree with you
21 100 percent. And -- and our prisons
22 are more violent because we don't deal
23 with violence appropriately. And
24 sexual abuse is just a subset of what's
25 going on.

1 COMMISSIONER AIKEN:

2 And whether it's an
3 investigation or whether it's a
4 grievance mechanism, if they are not
5 impartial, fair, and responsive, it has
6 a negative impact on the institution of
7 the culture as well as the leadership;
8 is that correct?

9 MR. JACK BECK:

10 I very much agree with that.

11 CHAIRMAN KANEB:

12 Are there other questions of
13 Mr. Beck?

14 Yes, Commissioner Smith.

15 COMMISSIONER SMITH:

16 Mr. Beck, you referred to
17 two publications that would be very
18 important to the Commission. One, your
19 violence survey. I'd really appreciate
20 it if you could provide it to the
21 Commission. And in your last comments,
22 you talked about information that you
23 had about the impact of grievance and
24 communications on the levels of
25 violence and in institution. And it'd

1 be good if you share that information
2 as well.

3 MR. JACK BECK:

4 Thank you.

5 CHAIRMAN KANEB:

6 Other Commissioners?

7 Mr. Beck, we are in
8 admiration of your long career. And I
9 must say I personally am in great
10 sympathy with you and your folks. When
11 I read your statement and contrasted it
12 with what Mr. Cate put before us, I was
13 just blown away by the -- the
14 structural difference. All the
15 goodwill in the world, and now you have
16 a better relationship with the governor
17 than you have with the previous
18 governor. It's the structure that --
19 that really has to matter in the end,
20 so. I just made that observation.

21 MR. JACK BECK:

22 And it's also a resource
23 question. The problem with being an
24 outside entity, we have to raise all
25 our own money. I mean, I have -- you

1 know, we got 63,000 people. I have one
2 project associate and then I have a
3 bunch of interns. And, you know,
4 that -- and I'm trying to go to all
5 these institutions and work on six
6 different topics. It makes it very
7 difficult. And so it's not a mandate.
8 We work really hard. But you know, if
9 you don't have adequate resources, you
10 really can't cover it. And that's why
11 we don't do any of the ombudsman sort
12 of work, which I think is crucially
13 important. But we don't have time to
14 do that. We have to really stay on a
15 much higher level in terms of trying to
16 look at systemic trends and inform it
17 that way.

18 CHAIRMAN KANEB:

19 I love the fact that you
20 retain visiting --

21 COMMISSIONER SMITH:

22 Yes.

23 CHAIRMAN KANEB:

24 It's so 19th century.

25 MR. JACK BECK:

1 Well, it is.

2 CHAIRMAN KANEB:

3 I mean that as a compliment.

4 MR. JACK BECK:

5 No. I actually appreciate

6 it. And we -- and we really struggle

7 with that. I do very much believe it's

8 important to bring those outside, not

9 just the experts. I mean, I've been

10 doing this a long time, 25 years, and I

11 bring in experts. But it's very

12 important to bring other people. We

13 bring in, you know, the head of the Bar

14 Association but other -- others as well

15 to try to educate. And I think there's

16 nothing more educational than walking

17 inside and walking around.

18 CHAIRMAN KANEB:

19 I have an idea. Will

20 Harrell created the division in Texas

21 and --

22 MR. HARRELL:

23 I want to -- actually on

24 that point, the Juvenile Detention

25 Alternatives Initiative of the Casey --

1 Casey's Foundation is an excellent
2 program called self-inspections. And
3 what they do is get staff and, you
4 know, civic community leaders and train
5 them to go and do site inspections.
6 And it's become very effective, and
7 maybe a model ya'll might want to take
8 a look at. And I can also forward you
9 information about the program.

10 CHAIRMAN KANEB:

11 We must move on. And we
12 have one more witness, and a very
13 important witness. Margo Schlanger
14 is -- and I have just managed to
15 misplace the page. -- is a professor of
16 law, I believe, university --
17 Washington University in St. Louis.
18 Ms. Schlanger is the director of the
19 Civil Rights Litigation Clearinghouse
20 and the leading authority on the inmate
21 litigation constitution of law
22 governing prison and jail conditions.

23 We have read your statement
24 with interest and look forward to your
25 testimony.

1 MS. SCHLANGER:

2 Thank you. It's a great
3 privilege to be here. So I have really
4 two things that I want to talk about.
5 One, is the ways in which litigation is
6 useful as an accountability and
7 oversight mechanism. And the second is
8 the way in which that usefulness has
9 been undermined in the past decade by
10 the prison litigation format. So I'm
11 going to start with the first and move
12 to the second.

13 Generally, litigation is
14 enormously important for jails and
15 prisons. Now, part of that is because
16 of the absence of other oversight
17 mechanisms in many, many jurisdictions.
18 Part of it is also because litigation
19 is the way that individuals effectuate
20 their rights, and that's true in jails
21 and prison as well as in other areas.
22 So -- so it's really been a crucial
23 avenue for addressing problems and
24 effectuating reform.

25 And generally speaking, what

1 does that -- the way that that's
2 happened is, I talk about in my
3 statement three regulatory paths. One
4 is institution specific regulation,
5 sometimes jurisdiction regulation, by
6 way of injunctive court orders, such as
7 the Madrid court order that we heard
8 about earlier and many, many others
9 that I think probably the
10 Commissioners, and certainly all the
11 witnesses, are familiar with. A second
12 way is that litigation encourages
13 transparency and public accountability
14 not from the regulation that results
15 from it, but from the process of
16 litigation. And the third way is that
17 litigation, and especially damage
18 action litigation, deters
19 unconstitutional behavior. It provides
20 an incentive for the prevention of
21 unconstitutional misconduct on the part
22 of those systems. And those are three
23 quite separate paths. I think that
24 they're separate analysis.

25 One preface remark is, to

1 keep in mind, is that the comments
2 about -- that was made earlier about if
3 you have enforcement power you end up
4 doing minimal standards. That's very
5 much true of litigation. Litigation is
6 about constitutional minimum. It's not
7 about best practices. It's not about
8 achieving the most humane, the most
9 productive, the most socially --
10 pro-social -- the most pro-social
11 correction system possible. It's about
12 constitutional minimum, and that is
13 definitely something to bear in mind.
14 And those constitutional minimums are
15 low. Let me just be clear. The duty
16 to avoid deliberate indifference is a
17 very minimal duty. Nonetheless, it's a
18 really crucial place in which reform
19 has happened. Okay.

20 So litigation, among the
21 leading topics of litigation, has for
22 many years been violence and sexual
23 violence, especially violence more
24 general which encompasses sexual
25 violence within. So let me talk just

1 one second about three lawsuits.

2 Injunctive lawsuits that
3 tend to involve lawyers of different
4 types that leads to court orders or
5 settlement agreements that regulate
6 prison systems or individual prisons.
7 This is a -- a fairly common
8 phenomenon. So the last published
9 account was in 2000 for prisons. The
10 Bureau of Justice statistic show that
11 court orders govern 23 percent of our
12 nation's state prisons. And those 23
13 percent of state prisons houses between
14 them about 40 percent of prisoners.
15 So this is a big deal.

16 Now some of those orders are
17 very minimal. Some of those orders
18 have to do with, you know, access to
19 Native American religious
20 accommodations in all of the prison
21 system in New York, for example, right?
22 And so I don't mean to say that these
23 are deeply regulatory orders. I just
24 mean to say that court orders touch
25 a -- a large chunk of the prison and

1 jails in the country. And a number of
2 those orders are not about Native
3 American Religious Act, but are about
4 the topic that this Commission is most
5 interested, prison and jail sexual
6 violence, both prisoner on prisoner
7 violence and staff on prisoner
8 violence.

9 So I pass through my
10 testimony two sample orders along those
11 lines just for you all to get a sense
12 of them. If you want to read more, I'm
13 happy to provide them. As a matter of
14 fact, they're publicly acceptable on
15 the Civil Rights Litigation
16 Clearinghouse, which I am director of,
17 and I'd be happy to help your staff
18 kind of get a whole library of them if
19 that would be useful to you.

20 I think it's clear that
21 these orders have been helpful in
22 sexual misconduct in prison. And so I
23 could talk about that if you all ask me
24 some questions.

25 Now, individual lawsuits has

1 had the transparency function that I
2 have talked about. There's nothing
3 like a good juicy lawsuit to get press
4 interested in what goes on in a jail
5 and prison. And so you can get some
6 real public interest and public
7 attention to problems from a lawsuit.
8 They've also been, as I say, deterrent.
9 And I think that -- given that I just
10 saw a sign that I have one minute, I'm
11 going to kind of skip over that. The
12 thing --

13 CHAIRMAN KANEB:

14 We have a little more than
15 one minute.

16 MS. SCHLANGER:

17 Okay. Good. The thing I
18 want to emphasize is talking about the
19 deterrent impact, is that it tends to
20 lessen the availability of lawyers. If
21 there are no lawyers, it's really,
22 really, really hard to bring a lawsuit
23 that ends up with liability. But it's
24 even harder to bring a lawsuit that,
25 even after liability, ends up with any

1 substantial damages.

2 Prisoners are just no good
3 at proving damages. They just aren't.
4 So the -- and 96 percent of the
5 prisoner's docket in federal court at
6 the last count, which is a little
7 out-of-date, was pro se. So the -- I'm
8 going to come back to the PLRA in the
9 way that it undermines the availability
10 of lawyers. But -- but you have to
11 remember that without a lawyer, even if
12 you win your case, you end up winning a
13 thousand, \$2,000 \$3,000. You don't end
14 up with any real damages. And without
15 real damages, if you're counting on
16 damage action as a deterrent where
17 somebody says, I don't want to pay out
18 big money. Well, without the prospect
19 of real money, that's just not going to
20 work out.

21 Okay. So how is the prison
22 litigation issue format operated in
23 this system? Well, the first thing is
24 that it's made it much harder to get
25 decree because no longer can -- can

1 defendants settle cases without
2 basically conceiving liability. That's
3 a big obstacle to settlement and it has
4 made -- it has made decrees, or at
5 least forcible decrees, much harder to
6 come up. That's the first thing.

7 The second way is it's made
8 old decrees, and even not very old,
9 slightly old decrees, much easier to
10 get rid of. The PLRA says that the
11 plaintiff has this obligation to
12 re-prove their case every two years on
13 motion by the defendant, and so that's
14 an enormous burden. And it means that
15 the plaintiff, instead of working with
16 the defendants to effectuate reform,
17 have to have it ever present in their
18 mind that they might go back to court
19 next month or the month after to
20 re-prove their case. They have to keep
21 doing discovery rather than moving on
22 to remediation, and that's been a big
23 obstacle.

24 Third, and probably most
25 important -- it's possible I should

1 have started with this in the
2 exhaustion of time. The -- the PLRA
3 requires that -- that if, as certainly
4 interpreted by the Supreme Court, what
5 it says is that when prisoners have not
6 managed to successfully navigate the
7 often complex systems of administrative
8 remedies available to them in jails and
9 prisons that they forfeit their federal
10 claims, and that's a new
11 interpretation.

12 But -- well, new in some -- in some
13 circuits. And it doesn't look like
14 that would be so terrible.

15 I mean, we all know, and you
16 have heard, that grievance systems are
17 a terrific accountability mechanism,
18 and I agree with that. I think
19 grievance systems are among the most
20 effective accountability system that
21 exist. So what's the problem, you
22 might ask, with the PLRA channeling
23 things into the administrative system.
24 And the answer is because that PLRA
25 encourages prisons and jails to come up

1 with non-merit reasons to deny claims.
2 Because if there's a non-merit reason
3 to deny the claim, then it can't go to
4 federal court. And so rather than
5 encouraging them to take it seriously,
6 to address it on the merits and deal
7 with it, it encourages -- it encourages
8 the prison system to direct every
9 procedural barriers to full -- gradual
10 with the administrator grievance.
11 Because if there is such a non-merit
12 way to strike that claim, that
13 non-merit way applies in federal court
14 and immunize the system and officers
15 for damage actions later in injunctive
16 suits.

17 So there's an -- if the
18 prison system elects to deal on the
19 merits with the claim, for example, if
20 it's untimely. Say you got a time
21 limit that says you got to file the
22 administrative grievances within 15
23 days. You file it on the 18th day,
24 they say, you know, what, this is
25 pretty serious. We're going to deal

1 with it even though it's untimely.
2 They're then at risk for damages -- for
3 damages later on in federal court. If
4 instead they say, we're not going to
5 deal with it. It's untimely. You're
6 three days late. You're out of luck.
7 No damages.

8 So the PLRA provides this
9 enormous incentive to undercut this
10 inner accountability mechanism, that is
11 administrative grievances. It also, of
12 course, undercuts the external
13 accountability of litigation. And I
14 think it's problematic for both
15 reasons, but equally for the first as
16 for the second. It's a really terrible
17 set of incentive to give to jails and
18 prisons. Okay.

19 The -- the third way in
20 which the PLRA has problematic -- or
21 maybe it's the fourth. It depends on
22 how you count. -- is the physical
23 injury provision which says that,
24 prisoner plaintiff may not recover
25 damages necessitated from force of

1 physical injury suffered while in
2 custody without showing physical
3 injury. So -- boy, that covers a lot
4 of ground. You know, that covers a lot
5 of groping, for example. No damages.
6 What's the physical injury?

7 Many -- several courts. I
8 shouldn't say many. But at least
9 several, and possibly many courts, say
10 that that covers coerced rather than
11 forced rape, because there's no
12 physical injury with coerced. So if a
13 prisoner has sex with an officer
14 because the officer says that otherwise
15 he'll take away her visitation rights,
16 that's coerced. It's not -- it's not
17 forcible. No physical injury.

18 Now, I don't mean to say
19 that every court interpret this
20 provision has gone that far, but some
21 of them has and it's a deep, deep
22 problem. I have other issues with
23 physical injury positions but doesn't
24 have anything to do with sexual
25 violence. I should just say that given

1 the subject matter of this Commission,
2 I thought I'd focus on that one.

3 And then finally, the PLRA
4 has undermined the availability of
5 counsel even for meritorious cases by
6 undoing the -- the private attorney
7 general standard in Section 1988 of the
8 Civil Rights title. I'm saying that
9 instead of getting reasonable
10 attorney's fees, you're only entitled
11 to compensation at the CJA rate, which
12 is a low rate and a rate that doesn't
13 include the possibility of not
14 recovering anything if you lose. And
15 more important yet, that you only
16 recover damages up to 150 percent --
17 I'm sorry, you only recover attorney's
18 fees up to 150 percent of the -- of the
19 damages that are proven, which given
20 that prisoners never have economic
21 damages. The damages tends to be low.
22 And so -- and given the Personal Injury
23 Provision which says, you can't recover
24 for emotional damages, emotional
25 injuries, the damages tends to be very

1 low. And so detained lawyers that --
2 even when they win, that if the damages
3 are low, those cases are not going to
4 be compensated like other civil rights
5 cases, but are instead going to be
6 capped off at 150 percent of -- of the
7 proven damages. That's a very large
8 incentive.

9 So those are the ways that
10 PLRA has undermined litigation. And I
11 really do think that litigation is a
12 vital accountability mechanism, so.

13 CHAIRMAN KANEB:

14 Thank you. Thank you,
15 Ms. Schlanger. We have at least one
16 commissioner who is keenly interested
17 in talking to you about PLRA. So I
18 will not preempt his or other
19 questions, except to this degree.

20 If you have a suggestion
21 about how a defendant entity might
22 settle without admitting liability, I
23 think we'd be interested in hearing
24 about this. I mean, I understand if
25 the SEC doesn't know, it's fine for you

1 to say, well, okay. We didn't -- we
2 didn't do anything wrong, but we won't
3 do it again --

4 MS. SCHLANGER:

5 Right.

6 CHAIRMAN KANEB:

7 -- type of --

8 MS. SCHLANGER:

9 Right. That's a very
10 standard sort of a settlement. And it
11 was prevalence prior to the PLRA. The
12 PLRA, by stating that -- that any court
13 enforceable order, including one
14 entered on consent, needs to rest on
15 a -- a -- on a finding of a violation
16 of a followed right put that ordinary
17 type of settlement beyond the realm of
18 what's allowed in prison cases. And so
19 that's the problem.

20 CHAIRMAN KANEB:

21 Would you opine as to
22 whether a defendant -- a typical
23 defendant in an institution would, in
24 fact, support at least the concept of
25 being able to settle without admitting

1 liability?

2 MS. SCHLANGER:

3 I think so. I think that
4 what ends up happening is that -- is
5 that you end up with some litigation
6 where the defendant is unable to --
7 basically this is a -- this is a --

8 CHAIRMAN KANEB:

9 The answer is you think so?

10 MS. SCHLANGER:

11 Yeah, I do.

12 CHAIRMAN KANEB:

13 I think our staff will want
14 to talk to you. But I want to -- I
15 want to recognize Commissioner Nolan
16 right at this time.

17 COMMISSIONER NOLAN:

18 Well, actually Dr. Schlanger
19 and I testified before on this to the
20 committee, and she was just excellent.
21 You can see, literally, see members of
22 Congress's mind beginning to change
23 because of her compelling testimony.
24 And she really has been at the
25 forefront of the effort in trying to

1 change this.

2 CHAIRMAN KANEB:

3 Commissioner Smith.

4 COMMISSIONER SMITH:

5 It also sounds like we
6 probably need to get the -- the
7 proceedings from PLRA as part of our
8 stuff.

9 Professor Schlanger, one of
10 the questions that I asked in the
11 earlier panel that I want to get back
12 to, which was -- you know, is enhancing
13 sort of the power of the special
14 litigation division an option?

15 MS. SCHLANGER:

16 Right.

17 COMMISSIONER SMITH:

18 Are there ways that you
19 could see that that might be helpful?

20 MS. SCHLANGER:

21 Well, you know, the Civil
22 Rights of Institutionalized Persons Act
23 authorize the attorney general to sue
24 local government in incarcerated
25 settings and the unit of the justice

1 department that does special
2 litigation, which is where I first got
3 into the prisons. I used to work
4 there.

5 COMMISSIONER SMITH:

6 Right.

7 MS. SCHLANGER:

8 I would say two things.

9 Number one, CRIPA does not allow the
10 special lit to enforce statutory
11 rights. So just sort of know that as
12 of -- as of preface, right? So that
13 will include compliance with whatever
14 standards you all come up with. CRIPA
15 does not allow the special litigation
16 section to enforce statutory rights,
17 only constitutional right in prison.
18 But put that to one side.

19 I guess there's an inherent
20 to limitation, and there's a reason why
21 CRIPA enforcement has never been what
22 the members of the civil rights
23 community had hoped it would be back
24 when they got CRIPA in 1979. And that
25 is -- it's just so political, you know.

1 Those cases have names like -- the
2 first one I recall is United States
3 versus Montana. It's a big deal to sue
4 Montana. It's a very, very big deal.
5 And so I think that -- that it will
6 never be a primary mechanism for the
7 enforcement of civil rights.

8 Now, could it be better than
9 it is? Absolutely. Absolutely. I do
10 not know how many lawsuits have been
11 brought, or even how many complaints
12 have been brought in the past four
13 years by that section. And the reason
14 I don't know is because they haven't
15 filed their mandated congressional
16 report. But were those -- but were
17 those available, I think what we would
18 see is that there have been very, very
19 little enforcement. Not none. I mean,
20 I don't want to say none. Very little.
21 I don't think that's unique to this
22 administration. I think that, in
23 general, there's always a lot of
24 reasons why prison and jail cases get
25 short shift.

1 COMMISSIONER SMITH:

2 But one of the things that I
3 do understand that happens with those
4 investigations is there's a significant
5 amount of oversight, right? And
6 there's a significant amount of sort
7 of, as I understand it, excavating
8 information that is made public --

9 MS. SCHLANGER:

10 Right.

11 COMMISSIONER SMITH:

12 -- would be very important
13 pushing --

14 MS. SCHLANGER:

15 But I think it is made
16 public. They publish their findings
17 letters. I don't think expert reports
18 are published, but the findings letters
19 are pretty comprehensive. They're not
20 published in a way that's terribly easy
21 to get to, but they're all on the web
22 now. So there is -- and there's
23 nothing -- and even apart from the
24 public accountability, there's
25 nothing -- I mean, I was very

1 interested in Mr. Harrell's testimony
2 because, you know, you walk into a
3 prison as a -- a lawyer for the justice
4 department and you're there
5 representing the United States. And
6 when you say, gosh, could I see this,
7 this, this, this, this, this, this,
8 this, and this, and they bring it all
9 to you in a room and you start talking
10 to people and you start figuring out
11 what really goes on. That's a very
12 powerful tool, even before you get to a
13 findings letter, to a -- it's very,
14 very powerful. It's only as effective
15 as the lawyers who do it. But it can
16 be very, very powerful.

17 So I -- I think CRIPA's
18 enforcement is terrific. I just don't
19 want this Commission to put too heavy a
20 weight. I think it's never going to be
21 more than exemplary in terms of the
22 number of institutions and what it can
23 do. But it could be a good set of
24 examples.

25 COMMISSIONER SMITH:

1 John, just one other
2 question.

3 One of the things that John
4 mentioned earlier is our role vis-a-vis
5 the Federal Bureau of Prisons. My
6 sense, and I'm glad that you included
7 the Lucas settlement here, is that
8 the -- the Bureau of Prison tends to be
9 fairly impenetrable around litigation.
10 And I would be interested in you
11 talking briefly about, you know, what
12 are the mechanisms to hold the Bureau
13 accountable through litigation.

14 MS. SCHLANGER:

15 Well, the Bureau, of course,
16 has, in addition to constitutional
17 causes of actions, has the Federal
18 Torts Claim Act. So it's a slightly
19 different legal setup than -- than
20 other places. Federal judges think
21 very well of the Bureau of Prison.
22 It's not an easy kind of a litigation
23 to persuade a judge meritorious when
24 one sues the Bureau.

25 Now, I don't have the

1 experience with the BOP to be able to
2 tell you that it is the model that many
3 people say it is, or that it is not the
4 model that many people say it is.
5 I don't -- I don't have the expertise
6 to do that. I will say that I think
7 litigation has been a little bit less
8 salient in its operations than in some
9 systems.

10 Now, at the same time,
11 the -- the Bureau takes damage actions
12 quite seriously, so injunctive
13 litigation is not a very present threat
14 at all over the Bureau of Prison.
15 Damage action, quite a different story.
16 And there have been a number of large
17 judgments entered against the Bureau.
18 And my understanding is that those
19 large judgments tend to lead to real
20 institutional change. But that's
21 probably a little bit vague as -- and
22 that's much more of an expression than
23 something that I would want to kind
24 of --

25 COMMISSIONER SMITH:

1 But that's a good direction
2 for us to proceed in, in terms of
3 trying to get some sort of analysis of
4 damage judgment against the Bureau of
5 Prison in this area, and looking at
6 where that has led in terms of change,
7 so. Thank you.

8 MS. SCHLANGER:

9 There was some recent
10 litigation in the -- and I got a hold of
11 all of them. And I did have to go to
12 court to get them.

13 COMMISSIONER SMITH:

14 Well, do you know who has
15 them?

16 MS. SCHLANGER:

17 Oh, sure. I'd be happy to
18 share the details with anyone who asks.

19 COMMISSIONER SMITH:

20 Great.

21 CHAIRMAN KANEB:

22 Commissioner Puryear.

23 COMMISSIONER PURYEAR:

24 Just to follow-up. Were some
25 of the large damage judgments against

1 the BOP result litigation post the
2 enactment of the prison litigation
3 format?

4 MS. SCHLANGER:

5 That's an interesting
6 question. The ones that -- that I
7 actually know about were ones where I
8 did a set of interview with BOP lawyers
9 and they were pre-PLRA judgments.
10 So -- and they were post-PLRA reform as
11 a result. Some of them were '95. They
12 were all in 1995. So I'm not going to
13 be able to answer that question. I
14 just don't know the answer.

15 COMMISSIONER PURYEAR:

16 But you will be able to provide
17 us the --

18 MS. SCHLANGER:

19 Oh, absolutely. Now, one
20 thing that I can say is, if you die in
21 prison PLRA doesn't cover your losses.
22 Just to be clear. 'Cause it only
23 governs prisoners. And if you're dead,
24 and you're not...

25 COMMISSIONER PURYEAR:

1 Also, while we're talking
2 about the scope of PLRA. Could you
3 just inform some of the committee
4 members who may not be lawyers as to
5 what actions PLRA applies and to which
6 action it does not?

7 MS. SCHLANGER:

8 The PLRA covers -- you may
9 be speaking of something different, so
10 I'd be very interested if I have this
11 wrong according to what you're
12 thinking. But the PLRA covers all
13 action brought in federal court under
14 any federal causes of action, and
15 certain kinds of state -- state law
16 things that are brought in federal
17 court, although it's less common. It
18 also governs any federal causes of
19 action brought in state court, but not
20 state causes of action brought in state
21 Court.

22 Now, I think it's about 35
23 states that passed their own version of
24 the PLRA, which tends to do basically
25 the same thing in state court, but

1 that's not the federal system.

2 COMMISSIONER PURYEAR:

3 Let me just ask you as a --
4 I think it was Holmes that once said
5 that a lawyer's job is to predict
6 future rulings by judges. It's really
7 just a game of prediction. And you
8 know that there are some -- a few cases
9 that are out there on the physical
10 injury requirement with respect to
11 sexual assault. I think there's one in
12 your materials from the Southern
13 District of Mississippi that concluded
14 that sodomy does not account as
15 physical injury?

16 MS. SCHLANGER:

17 Right.

18 COMMISSIONER PURYEAR:

19 Would you say that that is
20 an outlying case? If you're predicting
21 the trend, what would you say is the
22 likely finding with respect to whether
23 sexual assault is a physical injury as
24 a general rule in this country?

25 MS. SCHLANGER:

1 I -- I would say two things.
2 One, I'm aware of one circuit court
3 opinion. It's come out the other way
4 in the second circuit. And the cases I
5 know of that come out the way we're
6 talking about, those are district court
7 cases. I guess what I would say is
8 that it's been ten years. I mean, it's
9 not as if we're only in the first year
10 of this statute. And I would have in
11 1996 predict that it would take a year
12 or two for this to settle out, and then
13 we all know that, of course, sexual
14 assault is a physical injury.

15 I mean, I couldn't -- it
16 would never have occurred to me that we
17 could go on ten years without having a
18 definitive answer to that. And that's
19 making me doubt my own capability. But
20 of course, I think it's crazy and,
21 therefore, I don't think circuit courts
22 do crazy things. You know, I would
23 like to tell you, of course, they're
24 going to end up doing the right thing,
25 but it's been ten years.

1 COMMISSIONER PURYEAR:

2 Is some of that potentially
3 related -- we talk about the reluctance
4 to report the mere occurrence of a
5 sexual assault. Much less, they go to
6 the next step and file a lawsuit in
7 federal court for a sexual assault
8 might be -- could your explanation have
9 something to do with the paucity cases,
10 in general, around sexual assault?

11 MS. SCHLANGER:

12 It could be an paucity of
13 appeal as well, right? The other thing
14 that PLRA does is it says that
15 prisoners do not get the full benefit
16 of the -- of the provision for indigent
17 filing. They have to pay their filing
18 fee even if they don't have any money.
19 They get scammed over time. They have
20 to pay them. It's currently -- in the
21 past it's about -- I can't remember if
22 it was \$75 or \$85 to file it. It's
23 currently \$350 to file a case and \$450
24 to appeal it. Which means that if you
25 have been re-victimized by one of these

1 decisions in the district court, and
2 now you have to think about whether
3 you're going to spend \$450 to appeal it
4 to get it to the court of appeals.
5 That's a lot of money in prison. It's
6 a lot of money. So it could be some --
7 something to do with that.

8 Let me just say one thing.
9 I do not have any expectation that
10 groping is going to become -- groping
11 and non-penetrative of sexual assaults.
12 There's not going to be physical
13 injury.

14 COMMISSIONER FELLNER:

15 And there are cases in which
16 female staff have forced male inmates
17 to masturbate in front of them. And
18 again --

19 MS. SCHLANGER:

20 Not going to be a physical
21 injury.

22 COMMISSIONER FELLNER:

23 -- it's not a physical
24 injury. Humiliation is not a physical
25 injury.

1 MS. SCHLANGER:

2 Right. Right.

3 COMMISSIONER FELLNER:

4 And it's very clear.

5 COMMISSIONER PURYEAR:

6 One last question. You
7 mentioned that one of the possible
8 outcomes is that grievance systems
9 would not be taken seriously if there's
10 non-merit denials. And I was just --
11 the number sort of struck me. I just
12 happened to asked the prior panel, I
13 don't know if you were here, about the
14 number of inmates sustained
15 grievances -- or grievances were
16 sustained by the inmate. We had the
17 Montgomery County --

18 MS. SCHLANGER:

19 Right.

20 COMMISSIONER PURYEAR:

21 -- official say it's 45
22 percent. He knew that right off the
23 top of his head. I think the other two
24 guessed at around 25 --

25 MS. SCHLANGER:

1 Right.

2 COMMISSIONER PURYEAR:

3 -- percent. Is that
4 consistent with what you're seeing in
5 other jurisdictions, or do you have any
6 comment on that? 'Cause that sounds
7 like -- at least there they're taking
8 some of them seriously.

9 MS. SCHLANGER:

10 I think that's true. I
11 guess what I would say it's not -- you
12 have not picked at random which
13 correctional administrator you're
14 testifying -- or testifying to you.
15 And there are an awful lot of systems
16 where an awful lot of grievances get
17 dismissed for non-merit reasons. And
18 you read them, and your mouth drops
19 open sometimes. Now, how common is
20 that? You know, I don't know. I just
21 know that you read them and they're the
22 ones where the guy miss the deadline
23 because he was in the hospital after
24 the assault.

25 COMMISSIONER FELLNER:

1 We also don't know from the
2 testimony which kinds of grievances
3 tend to get validated or sustained
4 versus not, which will also be a
5 breakdown we will want to know to
6 assess that 25 or 40 percent.

7 MR. JACK BECK:

8 If I could just jump in
9 that. I really urge -- unless you
10 start going into category, that's not
11 really reliable data. I have some data
12 just in our -- it's not about
13 sustainable, 'cause they actually don't
14 answer that question. It's only on
15 appeal, but. You know, there's a huge
16 difference in the way staff misconduct
17 grievances are handled versus other
18 more administrative matters. And I
19 would really suspect that these numbers
20 would tinker tremendously, at least on
21 those categories.

22 COMMISSIONER FELLNER:

23 Can I ask you -- if
24 sometimes one of the things that were
25 then -- I think it was in Doug Dretke's

1 presentation on Texas, was the first
2 level of investigative unit. And my
3 understanding, and maybe kind of more
4 because you're the expert, is that in
5 some cases -- in some prison systems to
6 file an grievance the first step is
7 that you have to complain directly to
8 the person who you think have treated
9 you badly.

10 MS. SCHLANGER:

11 You know, what I have heard
12 about Texas, in particular --

13 COMMISSIONER FELLNER:

14 I don't know if that's the
15 case in Texas, but I agree.

16 MS. SCHLANGER:

17 Right. So -- so is it -- in
18 many, many systems, a person who have
19 to complain to is the unit manager. So
20 that when the person you're complaining
21 about is the unit manager, then that's
22 happens. Now, I'm not -- there are
23 other systems that require an attempted
24 informal resolution. And I guess that
25 informal resolution might require that

1 you go and confront the person with
2 whom you have the beef with. But I'm
3 not actually aware of any place that's
4 specifically says, look, you have to go
5 complain to the person who -- who
6 you're complaining about. You have to
7 go deal with them first.

8 Now, that doesn't mean it
9 doesn't happen, but I'm not aware of
10 them. But I will say that -- that
11 there are a number system that tells
12 you who you have to complain to. And
13 if that person is the person you're
14 complaining about, they don't have an
15 exemption. It works out to the same
16 place, yeah.

17 COMMISSIONER SMITH:

18 One last thing is that, it
19 sounds like in this conversation we
20 talk a lot about the adult system, but.
21 Just like Prison Rape Elimination Act
22 applies to juvenile settings, it also
23 applies to -- PLRA also applies to
24 juvenile settings as well, doesn't it?

25 MS. SCHLANGER:

1 It does. And it's -- I say
2 the grievance provision, in particular,
3 are especially unfortunate as applied
4 to juvenile settings. Because in some
5 systems when a parent complains about
6 the mistreatment that her child has
7 faced, that complaint is not deemed
8 adequate for exhausted grievances. And
9 the requirement is the child has to
10 complain himself.

11 COMMISSIONER SMITH:

12 Do you know of anybody
13 who's -- I mean, have you done an
14 analysis about the impact of PLRA on
15 sort of conditions or litigation in a
16 juvenile context?

17 MS. SCHLANGER:

18 You know, the thing about
19 juvenile litigation is that there's
20 very, very little of it. And so what
21 you'd expect to see is even less. It's
22 very hard. I mean, that's a very,
23 very, tricky kind of social science
24 question. And it's certainly not one
25 that I have ever seen any data

1 available that would facilitate the
2 kind of analysis you're talking about.
3 So what you can see is when people do
4 sue, what happens to their lawsuits if
5 those lawsuits resulted in published
6 opinions. And the answer is it's not
7 pretty.

8 But -- and I'd be happy to,
9 you know, provide -- although I have a
10 feeling that your staff already knows
11 about the ones that I know about, but
12 I'd be happy to provide a couple of
13 completion, as a matter of fact. But a
14 real rigorous, empirical analysis? I
15 haven't done one. I don't think anyone
16 has done one. And I don't think anyone
17 has the data to do one, although maybe
18 Mr. Harrell does.

19 MR. HARRELL:

20 I would say, Commissioner
21 Smith, that I -- my understanding on --
22 I'm out of the loop. But I think that
23 there is a -- there is an effort to
24 strip PREA from the -- excuse me, the
25 PLRA from the juvenile context in

1 gathering some momentum, I understand,
2 in Washington D.C. But I lost track
3 with that.

4 COMMISSIONER SMITH:

5 Thank you.

6 CHAIRMAN KANEB:

7 Yes, Commissioner Puryear.

8 COMMISSIONER PURYEAR:

9 Just to follow up on the
10 exhaustion requirement. Let's just,
11 you know, assume for the sake of
12 argument that PLRA continues to be the
13 law of the land, and, you know, it
14 isn't overturned in the near future. I
15 know that there are different views on
16 that. But if you could rewrite the
17 exhaustion requirement short of just
18 saying there is no requirement to go
19 through the grievance process, how
20 would you rewrite it?

21 MS. SCHLANGER:

22 I would -- I would say that
23 prisoners bringing lawsuits are
24 required to present their -- before
25 they can -- before the lawsuit can be

1 adjudicated, that the prisoner would be
2 required to present their grievance to
3 prison officials. And that a lawsuit
4 would be stay or held -- I don't know,
5 something pending the resolution within
6 the prison system.

7 I would say that that's --
8 that, nonetheless, leaves a very large
9 incentive on the part of prisoners to
10 file grievances in effective systems,
11 because they don't have to pay \$350 to
12 file a grievance. And so if they face
13 any prospect of resolution from filing
14 a grievance, boy, it's a much better
15 path for them. It's faster, it's
16 cheaper, and it actually is closer to
17 the ground that has the possibility of
18 fixing the problems more disputed. So
19 I think that leaves lots of incentives
20 on their part. But that's the way I
21 would rewrite it.

22 COMMISSIONER PURYEAR:

23 Just to follow up. Would
24 there be standards -- is something that
25 the Commission should look at standards

1 regarding the grievance process in
2 terms of deadlines and simplicity of
3 the process?

4 MS. SCHLANGER:

5 That's such a good question.

6 The proceeding statute to
7 the PLRA. The PLRA amended CRIPA, the
8 Civil Rights of Institutionalized
9 Persons Act. And prior to the PLRA,
10 CRIPA actually had such standards in
11 place. It's not a mandatory standard
12 but as, you know, advantageous
13 standards. And they were singularly
14 effective.

15 Now, that doesn't mean that
16 no such standards could ever work. But
17 I think that that's -- that would be
18 better than nothing. I continue to
19 think that the most important thing is
20 to have -- have a system that -- that
21 encourages prisons and jails not to
22 come up with reasons not to entertain
23 grievances. I mean, that's the most
24 important part.

25 CHAIRMAN KANEB:

1 Not to entertain what?

2 MS. SCHLANGER:

3 Not to come up with reasons

4 not to take the grievances on the

5 merits, right? That's the most

6 important part. But the second most

7 important part, which remains really

8 important, is that access to federal

9 courts is a civil right. And I

10 don't -- civil rights lawsuit don't

11 have administrative exhaustion

12 requirements imposed on them in

13 general. The only area where they do

14 is prisons and jails. And actually,

15 prisons and jails are an area where

16 those requirements are most onerous,

17 most problematic for the would be

18 plaintiffs. And so I'm all in favor of

19 grievance system. I think that good

20 grievance procedures reduce litigation.

21 They reduce liability. They prove that

22 they are good. I am all in favor of

23 grievance system.

24 But grievance system that

25 function as a bar to civil rights

1 litigation, I see no real reason for
2 that saying, being the law of the land.

3 CHAIRMAN KANEB:

4 Well, thank you.

5 Thank you panel and anybody
6 from previous panels who are still in
7 the room. This two-day session has
8 been most educational for this
9 Commission. And that's what we need,
10 education. Thank you and good luck in
11 your work in making prison systems
12 better.

13 We are adjourned.

14 (Off the record.)

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