

Testimony for the United States Senate Permanent Subcommittee on Investigations

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Good morning, my name is Brenda V. Smith. I am a law professor at the American University, Washington College of Law, where I direct the Community Economic and Equity Development Law Clinic. I am also Director of the Project on Addressing Prison Rape. Women in every penal system in the United States, including the federal system, which we will discuss today, have experienced inequality of services and opportunities and physical and sexual abuse.¹ Indeed, inequality of opportunity and services is a crucial ingredient in abuse in any congregate setting, particularly institutional settings like juvenile facilities, prisons, jails, and immigration detention facilities.

I founded the Project over 30 years ago after representing a class of over 500 women in litigation on behalf of a class of District of Columbia women who experienced systematic physical, sexual, medical and psychological abuse in District of Columbia correctional facilities. I first became aware of the sexual abuse of women in custody as a Staff Attorney at the National Women's Law Center. I founded the Women's Education and Empowerment Series while employed at the National Women's Law Center.² The series provided women imprisoned at the Lorton Minimum Security Prison with education, resources, and assistance in addressing many of the issues that brought them into the correctional system – intimate partner abuse, child neglect, drug addiction, education, and employment training. In the course of directing that program, the Center learned that women prisoners were being denied access to educational and work opportunities comparable to those offered to male prisoners. This denial of access to education, work, and other opportunities, in addition to violating the U.S. Constitution's guarantee of equal protection created conditions that made the women particularly vulnerable to sexual predation.³

¹ See *Women Prisoners of D.C. Dep't of Corrs.*, Case No. 1:93-cv-02052 (D.C. 2004).

² See NAT'L WOMEN'S LAW CNT, *A VISION BEYOND SURVIVAL: A RESOURCE GUIDE FOR INCARCERATED WOMEN* (1995).

³ See *Women Prisoners of D.C. Dep't of Corrs.*, Case No. 1:93-cv-02052 (D.C. 2004).

District of Columbia women prisoners were forced to trade sex in exchange for food, work opportunities, visitation, preparation of reports and recommendations to the court detailing their progress. Women also challenged their lack of privacy, including cross-gender searches and viewing by male officers often while they were unclothed. Women complained of being viewed while they were disrobing or showering by staff of the opposite gender. They also complained of intrusive pat searches, being importuned for sex, and having to trade sex for food, work assignments, visits with family, and completion of paperwork for their probation, parole or release from custody. Additionally, women complained of poor medical and mental health care that resulted in women laboring and giving birth in shackles. One of my clients delivered her baby in her cell assisted by another prisoner. Other clients engaged in self-injurious behavior because of the lack of mental health services and untreated trauma. The U.S. District Court for the District of Columbia ruled that the District of Columbia Department of Corrections and key officials had engaged in a found pattern and practice of sexual abuse and denial of opportunities and services that violated the 8th Amendment, 14th Amendment, 5th Amendment, and state law.⁴ The Women Prisoners’ litigation ended shortly after the enactment of the Prison Rape Elimination Act. Thus, my immersion in the issues of sexual abuse in custody have continued unabated for the past 30 years.

The abuse that women in District of Columbia prisons experienced is not an isolated incident in a “bad” system. It is a problem that has plagued women in custody from the beginning of the origins of custodial settings and continues to today regardless of the reputation of the agency, facility or leadership.⁵ Separate women’s prisons came into being as the result of the rape and beating of Rachel Welch, a young woman who entered the Auburn Prison on January 5, 1825, and died a year later on January 6, 1826, six weeks after giving birth to a child who was clearly conceived in custody. A prison commission empaneled to investigate the causes and circumstances of her death found that her death was connected to the “discipline” she received. Ms. Welch’s death after being beaten and the resulting public outcry led to the creation of separate prisons for men and women.⁶ This tendency for outcry, reform, and then relapse is common to systems that are crisis driven—that describes many U.S. prisons and jails.

I was appointed to the National Prison Rape Elimination Commission in 2003 by House Minority Leader Nancy Pelosi and served in that capacity through the promulgation of the final Prison Rape Elimination Act (hereinafter “PREA”) standards. Though the commission sunsetted in 2013, former commission members continue their investment in issues of sexual violence in custody. Many people, including the former commissioners, continue to be deeply troubled by and invested in the issues of safety in custodial settings, particularly those related to safety from sexual abuse and exploitation of men, women, and children in custodial settings.

⁴ While several provisions of the order related to equal services and opportunities were overturned by the D.C. Court of Appeals, the provisions related to addressing sexual abuse in custody remained. *See Women Prisoners of D.C. Dep’t of Corrs.*, Case No. 1:93-cv-02052 (D.C. 2004).

⁵ Updates of Criminal Laws Prohibiting Sexual Abuse of Individuals in Custody (2022).

⁶ *See Cayuga Museum of History & Art, The State Prison for Women*, <http://cayugamuseum.org/the-state-prison-for-women/>.

I serve as key partner in the PREA Resource Center providing resources, training, and technical support to agencies who seek assistance in complying with the standards. I have worked with the National Institute of Corrections, the Office of Juvenile Justice and Delinquency Prevention, and the United States Department of Justice, to provide research, training, and technical assistance aimed at preventing and addressing sexual victimization in custodial settings. Federal correctional wardens and staff attended those training. Finally, I have litigated and served as an expert in several cases challenging sexual abuse in custody.⁷ I have also testified before a variety of oversight agencies, both domestic and international, on the subject of sexual victimization in custody.⁸

II. The PREA Standards Amplify and Provide Strength to the Enforcement of Standards of Care in Female Correctional Settings

Having sat on the PREA Commission for a decade and having continued to work with a variety of stakeholders, there is no question that the PREA Standards can, if followed, prevent the abuse of women in custody. The PREA Standards were informed by the best practices for preventing, detecting, punishing, and prosecuting sexual abuse of women in custody, as well as providing trauma-informed care following abuse. The PREA Standards borrowed extensively from existing professional standards including those of the American Correctional Association, the National Commission on Correctional Health Care, the American Jail Association, and the American Probation and Parole Association. The standards were also informed by the voices of survivors, prisoners, prisoner's rights organizations, and victim services organizations. Agencies received and continue to receive funding, training, and technical assistance to assist in complying with the standards. In my opinion, the standards if followed could significantly reduce sexual abuse of women in custody and make custodial settings safer and more rehabilitative spaces.

The PREA standards outline strategies for prevention of sexual abuse, which requires robust supervision, reporting processes that are trusted and lead to a meaningful response when sexual abuse is detected or reported, investigations that lead to consequences, screening processes and training that ensure staff are able to identify vulnerable populations and know how to protect them, and trauma-informed care for victims. Implementing these standards with a commitment to their intent and investment in the culture shift they require assures a level of safety and standards of care for women in custody, as well as staff, and the broader community that both staff and incarcerated people return to. We know that well-run facilities that prioritize the safety of people in custody and promote a rehabilitative environment promise a more secure environment and community upon returning citizens' release.

At the same time, we know that while the PREA standards outline a successful approach to creating sexually safe institutions, staff and agencies too often do not follow them because they

⁷ See e.g., *Doe v. Macleod, et al.*, Case No. 3:18-cv-03191-SEM-TSH (C.D. IL); *Doe v. Mich. Dep't of Corr.*, Case No. 13-14356 (E.D. Mich. Nov. 5, 2018); *Fontano v. Godinez et.al.*, Case No. 3:12-cv-3042 (C.D. IL); *Fernandez v. Morris, et al.*, Case 3:08-cv-00601-H-PCL (S.D. Cal. 2008); In the Matter of Ava Marie Suah, A37-085-273, U.S. Dep't of Justice, Exec. Office for Immigration Rev., Office of the Immigration Judge (Miami, August 18, 2000).

⁸ Testimony before the United States Commission on Civil Rights hearing in *Women in Custody: Seeking Justice Behind Bars* (2019); Testimony before the U.S. Department of Justice Review Panel on Prison Rape (2020).

believe: (1) the standards are nitpicking and not consistent with their lived experience of people in custody or correctional settings; (2) that women in custody who complain about sexual abuse are trying to “game” the system;⁹ (3) it would be too expensive or take too much time to follow the standards; (4) the standards are there but you don’t really have to pay attention until there is an audit; and (5) auditors will not question practice or the sufficiency of a facility’s compliance with the standards as long as apparently compliant policies are in place.

III. Abuse of Women in Federal Correctional Settings

Given my many years working with women convicted of criminal offenses in the District of Columbia, I am familiar with the Federal Bureau of Prisons facilities.¹⁰ District of Columbia women serving sentences longer than a year are imprisoned in federal facilities.¹¹ Many of the women I represented served their sentences in federal facilities and returned to the District of Columbia after their discharge from federal facilities. When the District of Columbia decided to house its own prisoners serving long-term sentences in 1988, those women spoke of abuse they had observed or experienced in a number of the federal facilities that are the subject of this hearing today.

Over the last decade, there has been sexual abuse litigation in a number of federal prison housing women. The most recent incidents involving FCI Dublin, MCC Brooklyn, FPC Alderson, and FMC Lexington¹² are instructive but not unusual. In other words, this is not new behavior. The abuse of women in federal custody is longstanding and widespread. The abusers represent staff from a broad cross section of the work force—chaplain, correctional officers, volunteers, and warden.¹³ The abuse of women in federal prisons is systemic. Given the systemic nature of this abuse, a fair question is how could this have happened in these facilities given that each was determined PREA compliant.

⁹ Games inmates play; how to avoid inmate manipulation, etc. See Kenzie Koch, *How to be Aware of Inmate Manipulation*, GUARDIAN RFID (Oct. 15, 2021), <https://guardianrfid.com/blog/how-to-be-aware-of-inmate-manipulation>.

¹⁰ As a result of the National Capital Revitalization and Self-Government Improvement Act of 1997, women serving felony sentences are transferred to the Federal Bureau of Prisons.

¹¹ *Id.*

¹² Press Release, Dep’t of Just., Federal Prison Chaplain Sentenced for Sexual Assault and Lying to Federal Agents (Aug. 31, 2022), <https://www.justice.gov/opa/pr/federal-prison-chaplain-sentenced-sexual-assault-and-lying-federal-agents>; Michael Balsamo and Michael R. Sisak, *AP Investigation: Women’s Prison Fostered Culture of Abuse*, AP (Feb. 6, 2022), <https://apnews.com/article/coronavirus-pandemic-health-california-united-states-prisons-00a711766f5f3d2bd3fe6402af1e0ff8>; Benjamin Weiser, *U.S. Pays \$4.2 Million to Victims of Jail Guard’s Long-Running Sex Abuse*, NY TIMES (July 18, 2022), <https://www.nytimes.com/2022/07/18/nyregion/mcc-officer-sex-abuse-victims-payout.html>; Christian Martinez, *Correctional Officer Sexually Abused Three Inmates at FCI Dublin, Federal Prosecutors Say*, LA TIMES (Oct. 1, 2022), <https://www.latimes.com/california/story/2022-10-01/correctional-officer-sexually-abused-three-inmates-at-fci-dublin-federal-prosecutors-say>; Jeffrey Schaub, *Trial to Begin in Former Dublin Prison Warden Sexual Abuse Case*, KCBS RADIO (Nov. 28, 2022), <https://www.audacy.com/kcbsradio/news/local/trial-to-begin-for-dublin-prison-warden-sexual-abuse-case>; Romy Ellenbogen, *Lawsuit Settled in which 15 Women Alleged Sexual Abuse at Florida Prison*, TAMPA BAY TIMES (May 5, 2021), <https://www.tampabay.com/news/florida/2021/05/05/lawsuit-settled-in-which-15-women-alleged-sexual-abuse-at-florida-prison/>.

¹³ *Id.*

A. The Incidents at Issue Here Point to Ongoing Challenges to Efforts to Prevent Abuse of Women in Custody

On February 14, 2015, Officer Mullings was working as a correctional officer at the MCC Brooklyn. While overseeing a female inmate, who was cleaning the hallways and corridors of the MCC, he sexually assaulted her in the corridor. After the assault, Mullings returned to the hallway to ensure no security cameras had caught the assault. A DNA test later confirmed that Mullings had engaged in sex with the victim and he pled guilty to sexual abuse of an inmate on November 23, 2015.

James Highhouse, a former chaplain at Federal Correctional Institution (FCI) Dublin sexually abused an incarcerated woman on multiple occasions and lied to federal agents about his misconduct.¹⁴ Highhouse pled guilty to five felonies on February 23, 2022. According to court documents, Highhouse was employed by the BOP as a corrections worker and chaplain starting in 2016 at FCI Dublin. He led religious services, offered spiritual guidance to incarcerated women, and taught religious-based classes about boundaries and self-worth. Given his duties, he was acutely aware of the trauma histories of the women and exploited it. In addition to being the chaplain and other duties, he could discipline the female prisoners by firing them from their jobs, writing them up for infractions, handcuffing them and referring them for disciplinary actions. Highhouse sexually assaulted the victim in the chaplain's office.

The December 8, 2022 conviction of Ray Garcia, the former warden of FCI Dublin of seven counts of sexually abusive conduct and one count of making false statements to government agents along with the guilty pleas of three of his staff demonstrates the depth of the problem.¹⁵ In that case the behavior included sexually assaulting the women and taking nude photographs of them. Warden Garcia also provided training to prisoners on how to prevent and report abuse in custody.¹⁶

In several instances, facilities conducted their own investigations into the allegations of sexual abuse and failed to substantiate the claims—did not, in fact, have any way to protect women from their abusers when the abuse was happening from the top-down. Ideally, a PREA audit should have uncovered the inadequacy of the investigations. The PREA standards include requirements that, according to the OIG's report regarding the abuse at FCI Dublin, were not followed by investigators or administrative decision-makers at the BOP. The weaknesses in the investigations conducted by the FBOP in the Dublin case are the same weaknesses that are evident in prison investigations into sexual abuse in systems throughout the country where systemic abuse is uncovered, and if audited and enforced properly, the PREA standards should begin to address these weaknesses. The outcome for the women in Dublin, and for incarcerated

¹⁴ Elisha Fieldstadt and The Associated Press, *Federal Prison Chaplain Pleads Guilty to Sexually Assaulting Inmate*, NBC NEWS (Feb. 24, 2022), <https://www.nbcnews.com/news/us-news/federal-prison-chaplain-pleads-guilty-sexually-assaulting-inmate-rcna17578>.

¹⁵ Garcia was placed on administrative leave in July 2021 and retired in October 2021 while the investigation was pending.

¹⁶ Ramon Antonio Vargas, *Former California Prison Warden Convicted on Sexual Abuse Charges*, THE GUARDIAN (Dec. 8, 2022), <https://www.theguardian.com/us-news/2022/dec/08/ray-j-garcia-california-prison-charges>.

people around the country, would be quite different if abuse they reported were substantiated and the appropriate protections and consequences flowed from those reports. However, the PREA audit as it exists now, conducted by auditors paid for directly by the prisons being audited, most of them without the expertise or perspective to question long-standing practice within corrections because they come from those same systems, has not produced the accountability or spurred the change necessary to prevent the kind of systemic abuse I've spent my career working to end.

IV. Recommendations

Thank you again for holding this oversight hearing on sexual abuse of women in federal correctional facilities. These hearings play an important role in shining a light on urgent issues of national concern. The ongoing sexual abuse of people in custody—men, women, children, citizens, immigrants—is a stain on and a tear in the fabric of our democracy. It is a stain that we cannot clean but hopefully a tear that we can begin to repair. These are my recommendations for repairing the integrity of our constitutional and ethical commitments to providing safe and humane conditions to people who are in the care and custody of the state.

A. Reform the audit process of the Prison Rape Elimination Act.

Audits are intended to give an early warning of problems or practices that affect protecting people in custody from sexual abuse. The current audit structure is not well designed to ensure its success. The requirements to become an auditor and the marketplace for auditors make it very difficult for anyone who does not work in corrections to become a DOJ certified PREA auditor. The PREA standards, implemented meaningfully, require critical culture change and auditors from within the field too often lack the perspective to know what that change should look like. Moreover, agencies hire and pay the auditors for conducting the audit, so ultimately, the auditors work for the agencies they audit, making independence aspirational. This creates a financial disincentive to identify problems. Some agencies are audited through “consortia,” which means that state corrections agencies send their staff to audit another state’s facilities in a round-robin arrangement that has not eliminated potential conflicts in those arrangements. The cost of audits and the time that agencies or third-party auditing bodies that employ auditors allow for the conduct of audits do not adequately compensate auditors or allow them the time necessary to conduct the audit methodology laid out by the DOJ. Each of the facilities that are the subject of the hearing passed their audits, with only minimal issues identified. Necessary reforms include:

1. Neutral auditors from an independent external auditing authority
2. Diversify the auditor pool to include individuals with experience in working with victims
3. Ongoing training for auditors with a focus on auditing investigation standards and meaningful responses to retaliation, and more rigorous oversight of auditors’ reports and evidence by the DOJ
4. Ongoing training for auditors and review of their reports

B. Address Conditions of Confinement that Create Vulnerability for Women in Custody

There are common elements of vulnerability in each of these women prisoner's victimization. First, these women, as you know, often bring multiple well-known vulnerabilities into the correctional setting—past histories of childhood and adult physical and sexual abuse; poverty; involvement with powerful systemic actors like courts, child protection, housing, and immigration authorities that control their existence and their families' existence; fear and deprivation that is part of the custodial experience. I could name many more elements, as could you. These factors create the levers of pressure that correctional staff can employ to ensure compliance with both legitimate and illegitimate requests. Given this inequality of power, women bargain, capitulate, and comply even as they fear for their lives, their freedom and often for their families. Combine these levers with a toxic culture, the forced compliance that is a part of the custodial environment, and powerful system actors who appear to be all powerful and above rules, regulations and indeed the law, women make the choice to survive even if survival means rape.

Though there are constitutional limitations on cross-sex supervision, male staff have still found ways to have unfettered unsupervised access to female inmates in their care. Clearly, identifying and implementing better supervision strategies are in order. These strategies include increasing the numbers of female staff at every level including leadership of women's correctional facilities. They also include decreasing the numbers of women in custodial settings. Women inmates are still incarcerated for primarily non-violent offenses. Increasing opportunities for supervision in the community would help to keep women safe from the pervasive sexual abuse culture we are discussing today.

C. Vigorous Prosecution and Enhanced Penalties

The penalties for abusing a person in custody should be commensurate with the harm and damage they do to women in custody, their families, the community, and to our ideals of the rule of law. The sentences that prison sex offenders receive are not commensurate with the injury they inflict or the harm they cause. In my view, the penalties should be comparable to the offenses for other individual victims who have been framed by the law as unable to consent. That would include people with developmental and other disabilities, children, and individuals in institutional settings including prisoners.

Thank you for taking up this issue and thank you for giving me the opportunity to testify before the committee.