MS. ROBINSON: Our next panel is on government oversight and I think it is a terrific follow on to the discussions we just completed before the break.

We're going to specifically be talking about issues relating to government oversight of both prisons and jails. We have before us this afternoon, the final panel of the day, three expert witnesses in the field; Professor Michele Deitch, Mr. William Yeomans, who I have to say is a former colleague of mine in the Department of Justice and delighted he is here, and Mr. Matthew Cate.

Our panelists are going to be providing an analysis for us of the strengths and weaknesses of the governmental correctional oversight models that currently exist in the United States. These include ombudsmen, inspectors general, and offices of independent review, and they're going to detail the factors, including independence, transparency and adequate resources, that are needed to sustain robust governmental oversight. The role of government investigation into litigation as a form of oversight is also going to be examined in their discussions. Let me introduce them specifically.

Professor Deitch is a 2005-2006 Soros...
Senior Justice Fellow and teaches criminal justice at the University of Texas's Lyndon B. Johnson School of Public Affairs. Her research is focused on the issue of independent prison oversight.

Bill Yeomans is the director of programs at the American Constitution Society in the area of law and policy, and I think, very importantly, he served for 24 years at the Department of Justice in the Civil Rights Division holding a series of important positions there, including acting as an assistant attorney general.

Mr. Cate has been serving as the inspector general in California and was appointed in that position in March of 2004 and was subsequently confirmed by the California Senate for a six-year term in that post. Prior to his appointment Mr. Cate served as the deputy attorney general in the California Department of Justice.

I want to thank all three of them for being here to today to address what I think is a very crucial topic in the explorations this commission is undertaking, and we will go ahead and begin with Professor Deitch.

MS. DEITCH: Thank you very much.

Thank you for the opportunity to appear before you
As we talk about oversight, I think we would all do well to remember that this is a term that tends to be possibly too loaded and, more importantly, misunderstood, it is misconstrued very easily, and, as a result, it doesn't give us any confidence that we're all using the word in the same way when we talk about oversight. I actually find it much more productive to reframe the concept of oversight, at least non-traditional prison oversight, as an umbrella term that actually encompasses at least six distinct functions. Those functions are regulation, audit, accreditation, investigation, reporting, and inspection and monitoring. I think that each one of these is essential but it is a separate part of prison oversight.

When we talk about prison oversight, the problem is that we tend to merge all those concepts and we assume that they're somehow in competition with one another or mutually exclusive or they're in competition with each other as to which one is most effective. What we have, what each of us has in mind is a different one of those functions. It makes communication about oversight very difficult because oftentimes we're talking at cross-purposes; one
person has regulation in mind, another person has
inspection in mind, for example.

We need to begin talking about these as
separate functions and we need to figure out how to
make each one of them stronger and more effective.
There's no one entity that can meaningfully serve
every one of those functions. There are different
constituencies that are served by them. In a
nutshell, let me try to mention some of the
differences.

Regulation is a function that's served by
those governmental entities that have enforcement
authority, they have the ability to wield a hammer
over the agency in some way, whether it is financial
or some other kind of penalties; the ability to close
an institution, for example.

The audit function is concerned with
whether the agency is meeting certain established
performance standards, performance indicators, or
policies. It could be internal, it could be
external. It is extremely important and it serves as
a management tool, it is a critical aspect of
effective management. It is critical that agencies
have effective internal accountability mechanisms
that are part of this audit function.
The accreditation function is yet different. It indicates accountability to fellow professionals, it indicates a stamp of approval.

The reporting function has to do with the role of the media or human rights organizations or even temporary commissions in bringing attention to prison conditions, helping draw public attention to prison conditions or to a particular incident.

Then there's the investigation function. That has to do with accountability for wrongdoing. It is redress for past violations, it is reactive. Critical, but it is very different from the other functions.

And, finally, we're talking about inspection and monitoring. Inspection and monitoring is perhaps the one we're least familiar with. It involves an independent outside entity, it involves routine and regular review of every institution as a preventive measure, it involves an entity that has unfettered access to every prison and jail facility, and it involves a holistic look of the impact of prison on prisoners. There's no enforcement mechanism that goes along with inspection and monitoring. It relies on persuasion, on cooperation, on public pressure for change, but, remember, there
are other functions served by other entities.

Independent monitoring and inspection provides an
opportunity for dialogue, it is not another layer of
management. As both Gary Johnson and Walter Dickey
indicated earlier, it is best seen as a partnership
between the agency and the monitoring entity.

Again in the last minute I have I would
like to stress that it is important that we not try
to compare and contrast these different functions,
the different mechanisms, but rather encourage a wide
range of oversight mechanisms, both inside and
outside of the agency. We need to look for ways to
strengthen each one of those critical functions.

MS. ROBINSON: Thank you.

Bill Yeomans.

MR. YEOMANS: Thank you, Commissioner
Robinson. And members of the commission, thank you
for having me here today.

I'm going to talk about two very dramatic
forms of external oversight involving the enforcement
of federal law by the federal government in federal
courts and, in particular, I'm going to talk about
how the Civil Rights Division of the Justice
Department goes about doing that. The first form is
criminal and the second would be civil.
The department enforces 18 USC 242 which is a post-Civil War statute that allows criminal prosecutions of individuals who interfere with constitutional rights and federal laws. It does that through the Criminal Section of the Civil Rights Division which consists of about 45 attorneys in Washington working in conjunction with U.S. attorneys around the country. In the course of a normal year, the division and the U.S. attorneys prosecute roughly 60 cases criminally. Obviously that's not very many nationwide, and that involves all law enforcement prosecution, so a good number of those are police officers or other public officials. So in any year, roughly a third of color-of-law prosecutions involve people working in prisons and jails.

The most common type of prosecution is the use of excessive force by a member of, staff member in a prison or jail, and can frequently, it can sometimes involve battery, sometimes sexual assaults, frequently results in bodily injury. Generally the FBI serves as the lead investigator under very tight reporting deadlines that apply only in civil rights cases. In part that comes out of history and tradition, these are not popular cases, it is necessary to have reporting deadlines to keep the
bureau moving forward. It is also important to remove a cloud of suspicion from a corrections officer as quickly as possible.

It has been a long-standing practice to require an investigation whenever the facts, if true, would make out a civil rights violation. That means there are thousands of potential cases every year that comes to the Civil Rights Division. There is a preliminary investigation. A vast majority of cases are disposed of through a preliminary investigation. It is necessary to have a preliminary investigation to winnow out the non-meritorious cases from the meritorious cases. That's a difficult thing to do because of the situations in which these cases arise. Generally the victims are powerless, they have difficulty acquiring and communicating the facts, and so it is necessary to have an outside look to determine what's really happening.

The cases are prosecuted under very difficult standard. It is necessary to show that a corrections officer acted with the intent to use more force than was reasonably necessary in the situation. That means that the corrections officer had to know at the time that he or she used the force that it was more than what was required at the time, so these are
difficult cases to make. Generally you need a
cooperating officer, a videotape, very strong
circumstantial evidence.

Criminal convictions are very important.
They're important because they send a message to an
institution, also to the inmates, that everybody in
the institution is bound by the rule of law and the
law will be applied both to inmates and people who
run the institution. But these are a very limited
tool. They have a limited impact because they
address very specific situations, they rarely get
into the underlying conditions that may have led to
violence, and so it is necessary to have the civil
enforcement as well.

And though I'm running out of time, let me
just mention that since passage of the Civil Rights
of Institutionalized Persons Act, actually starting
before passage of the act but certainly since passage
of the act, the Civil Rights Division has had the
authority to sue prisons and jails to correct
unconstitutional conditions of confinement and it has
done so. It has investigated roughly 400
institutions during that period. There is a very
clear progression in the number and type of
prosecutions since 1996 with the enactment of the
Prison Litigation Reform Act. There has been a clear drop-off nationwide in conditions cases. There are, I think, a variety of reasons for that that we can talk about. But what you see in particular in the Civil Rights Division is that in the last few years investigations and prosecutions involving conditions in prisons and jails has ground to a virtual halt, and I see the inexorable zero.

MS. ROBINSON: Mr. Yeomans, thank you very much.

Matthew Cate.

MR. CATE: Thank you, Commissioner Robinson, and thank you to all the commissioners for having me here.

To provide you with a little bit of background of who I am, I was a career prosecutor at the county level with the state attorney general's office focusing primarily on issues of corruption and wrongdoing by police officers and public officials when I was plucked from obscurity two years ago and plopped in this job. I obviously had a lot to learn about corrections and being an inspector general and I think I'm still learning.

What I found was that at the time I was appointed the inspector general was an at-will
position who was hired and fired by the governor.
The audits conducted by the inspector general's office were confidential, they were not available to the public. Staffing at that time was minimal. The inspector general's office funding rose and fell with other agencies depending upon the state coffers, and at the time I began we had only about eight auditors and investigators in the office and as you recall, in California we have 160 some -- five, 6,000 inmates and 50,000 staff members, and we began to see change immediately. In part it was due to cooperation between the California legislature and the governor but -- and I think that was in part due to the fact that the conditions at the prisons at that time were recognized to be poor, overcrowded, little programming, health care, both mental health and physical health care was determined to be broken by federal courts, and the courts also deemed the system unable to police itself, so part of the idea of addressing those issues was to invigorate the office of the inspector general.

I came in with the following priorities. The first was to rigorously audit and investigate to the extent that my resources would allow. The second was to be transparent in everything we did which
meant advocating for all of our reports to be a matter of public record. The third was to collaborate with the correctional officials. This isn't always as easy as it sounds because there could be a natural tendency towards conflict, as you might imagine, between an inspector general and the appointed correctional officials. And the fourth was accountability. In that I hoped that when we found things wrong and made recommendations for change, that those changes would actually occur rather than the problems just continuing to proliferate. And, finally, we hoped to do all of this with independence.

So if I could, I would just in my brief time explain what the California model looks like and then answer your questions about how it is working.

As you know, I was appointed by the governor. After my appointment as an at-will employee the law was changed and now I was reappointed with a six-year fixed term so I can only be removed for cause. Secondly, I'm responsible only for the California Department of Corrections and Rehabilitation so I don't have oversight authority over any of the other agencies in California. We're organized as a separate agency, I'm not a part of the
department at all, I operate completely autonomously
from the Department of Corrections and
Rehabilitation, funded separately, et cetera, and I
report directly to the governor in that capacity.

Next is staffing and budget is now caseload
based. Again through cooperation with the
legislature and the governor's office, we're no
longer a zero-based budget agency but I submit a
caseload budget to the legislature explaining how
many matters we're auditing and investigating and
what areas we're providing oversight and expressing
those in dollar figures as far as the need for
funding. Now that's brand new, this will be the
first budget cycle under that system, so it is still
in experiment.

Next, the inspector general's office has a
golden key so my deputies and I can go anywhere at
any time and into any facility and speak to any
inmate or any officer, we can demand any document and
it has to be provided or it is a misdemeanor.

Finally now, as a matter of statute, all my
reports are a matter of public record so anytime I
complete an audit my staff immediately posts that on
our website and we issue a press release announcing
it to the public. We provide summaries of our
investigations of misconduct which don't include the
officer's name but does provide the basic areas that
the misconduct occurred.

We have two major parts of the office. The
first is what I would call the traditional audits and
investigation function. By law now we're required to
audit every institution every four years. Again,
that's brand new and so we are just beginning with
that.

We also vet every warden, so every warden
before they're appointed has to be evaluated by the
inspector general's office and we submit a
confidential report to the governor on the
qualifications of that warden. If we find the
individual unqualified and the governor appoints
anyway, then our finding is made public. We also, as
I said, investigate wrongdoing by public officials at
the highest levels.

And then I see I'm at zero but in the last
30 seconds I will tell you that we also have a new
function called the Bureau of Independent Review
which was, frankly, stolen from the Los Angeles
County Sheriff's Department, and what that function
involves is we have hired attorneys with expertise in
criminal law, employment law and civil rights, and as
teams they provide realtime oversight of all internal
affairs cases that reach a certain level of
importance and so they evaluate those cases as
they're conducted and then they publicly report on
the quality of those investigations and on the
discipline that's ultimately determined so that the
idea being that the public, and in this case the
federal court that's providing oversight, is
comfortable with the officer discipline process and
knows that if there are bad apples, that those cases
are being handled effectively and that the discipline
is fair to the officers also, so that's our function,
and we're all open to your questions.

MS. ROBINSON: Is that last function
you described the bulldog accountability, is that --
MR. CATE: Oh, that's different.
MS. ROBINSON: Okay. Can you tell us
about that? I know you mentioned that in your
statement.
MR. CATE: I'm slightly embarrassed to
admit, I invented that term.
MS. ROBINSON: I thought it was quite
catchy.
MR. CATE: Thank you.
And it is brand new so we will see how many
teeth that bulldog actually has as time goes on, but here is the idea. Traditionally in an inspector general's office or a state auditor will conduct an audit and then a year later conduct a followup audit to see how many of the recommendations have actually been carried out and whether there's actual change. The only thing that bulldog accountability adds is that I promised my correctional administrators that I work with if you don't fix it a year later, then what I'm going to do is I'm never going to let that go, I'm going to keep reporting that that same problem exists again and again and again until they kick me out and so that's the idea, and with the hope that if my people go to all the trouble to find the problem and bring it to light, they darn well better fix it or I will try to embarrass you, that's it.

MS. ROBINSON: Let me step back as we start questioning and ask the three of you to reflect back on the last panel that we had and, in particular, the concept that I think Walter Dickey and really all of them talked about on the question of kind of a partnership between an oversight or monitoring person or persons and the agency, to what extent does that, should that play a part. And I suspect, Professor Deitch, that you might say it
might play a different part in different of the sectors or roles that you laid out, but I would be interested in reflections on that or any of the other kind of major themes that the last panel brought out, and, Professor Deitch, why don't we start with you.

MS. DEITCH: Sure.

I think the notion of partnership is absolutely criticality but, as you suggest, I think it plays out in the inspection monitoring function and less so in, say, the investigation function. I think it does play an important role in the accreditation function as well and auditing.

Given that the role of an inspector or a monitor is to aid in improvement, try to help the agency move beyond where it is, that can only happen through a collaborative process, through dialogue. I think that both a monitoring entity and the correctional agency share a set of values that has to do with wanting safe and humane institutions and wanting them to operate according to the rule of law, and by working together they can point out ways that improvement can occur.

I think there's a lot that correctional administrators would like about the inspection and monitoring process. For example, the outside entity
is often saying the same kind of things that the
Department of Corrections has been saying for a long
time but coming from an outside entity it is going to
carry a lot more credibility with the public or
legislators, for example. Also information that's
produced by monitors can be an excellent management
tool for the agency. You can stave off lawsuits by
taking into account some of the things that are being
pointed out by a monitor or inspector. You are
solving problems before lawsuits are filed, you are
decreasing suspicion by letting the outside folks
know what's happening inside the agency, and you are
preventing problems because it is acting as a form of
informal social control over people within the
agency. It can help leverage resources for the
agency. That's a very important aspect of it being a
partnership. And I think it is really part of
professionalism in corrections to look for ways for
an agency to improve, to recognize that it often
takes an outside set of eyes to draw attention to a
problem.

This summer I was spending a lot of time
studying the British system and I spent time with the
director of operations for the British Prison Service
and I was asking him about this. And he said to me,
"If you ever believe everything is okay you shouldn't be in this job, there's always ways that we can improve," and that's what I think an inspector and monitor can do and why it is such a partnership.

MR. YEOMANS: I certainly would never come out against partnerships and cooperation, but it does seem to me that it is, in the world in which I function, sometimes important to maintain an adversarial relationship, to maintain leverage, and that can happen during an investigation. It is important at times to insist that you are getting what you need. It is sometimes important in negotiations, in trying to develop a remedy for a situation, to maintain an adversarial relationship. Certainly it is good to be as cooperative as possible, but not to the extent of coming up with a weaker remedy than is necessary. But certainly, certainly once there is a resolution, then working together, cooperation, collaborative monitoring is essential to make sure that the resolution is properly and fully implemented.

MR. CATE: This is a touchy point. I've had a good relationship with Secretary Hickman who has been the only secretary since I have taken my position, and I think that's been helped by the fact
that he knows that I'm required by statute to publish
every audit that I conduct and so we can on one hand
say on a collegial basis, you know, here is what I
think is wrong and here are my ideas for fixing it
and he tells me, you know, you don't understand the
complexities of X, Y and Z and we have a good give
and take in that respect, but I think because he
knows I have to publish in the end, that we maintain,
I think, enough independence. It is always the push
and pull. On one hand you want to collaborate and
help improve the system and, on the other hand, you
don't want to be co-opted by someone because you get
to know them and like them.

I think the same is true for other
stakeholders. Whether they're plaintiffs' lawyers or
advocates for reform or labor, each group has their
own agenda that they would like to see go forward for
what they see is the betterment of the system and so
I try to listen to those groups when they want to
talk and, again, because of resource or a difference
of agreement over what we should be looking into we
don't always agree, but I think it is having an open
doors and an open phone and I think that's very
important.

MS. ROBINSON: Matt, do you find that
there are approaches that other states are using that
you have been able to pick up ideas from and model
some of your approaches on?

MR. CATE: Yes. To some extent
there's, in some respects this system, this model has
been put together through the political process and
either the governor's office or myself will implement
change and that would be codified by the legislature
or the legislature would implement change and we
would execute that change. Each system is so
different. For example, most inspector generals work
inside of the agency but have dual reporting to the
agency head and to the governor's office or to a
statewide inspector general, so it is hard to put
those together. There are good enforcement tools
that people are using to try to ferret out fraud and
abuse and I have learned from those and, thanks to
Professor Deitch, I started reading about what the
British inspectorate is doing and the tone of their
reports is terrific as far as using what I would call
least force necessary, they don't embarrass the
officials but just point out the problems in a
constructive way, so try to learn as we go. But
really this is kind of a new area of public
administration and so we're learning it as we go and
certainly don't claim to have all the answers because we're just starting here in California.

MS. ROBINSON: Professor Deitch, as you see this kind of emerging feel around the country, are there any kind of suggestions that you could make to us as a commission as we're kind of thinking about recommendations that we can be including in our final report.

MS. DEITCH: How long do we have?

MS. ROBINSON: I would say not forever, we have a dinner tonight.

But, I mean, in terms of general principles, I mean, obviously we're thinking about kind of on the broader scale, but in terms also of balance of trying to achieve objectives and recognizing our goals, but recognizing also the need for kind of the operational side and management concerns.

MS. DEITCH: There's a couple ways I could answer that question. My first point is to go back to what I said before which is the need to strengthen each one of those functions and I can point out good examples of each one of those functions and we can talk about things that are good and bad about them. But if you are looking for a way
to structure some kind of entity, I can't tell you there's one way to do it. I think that every state has its own culture, every country has its own culture, and you need to look at what are the options in that state, what kind of entities exist there that we can strengthened in some way.

When I started doing my research I assumed there was going to be an ideal way to structure some kind of entity. There isn't. I have seen it work in ways as varied as a nonprofit organization doing inspection work, to a legislative inspection entity. The Ohio Correctional Institutions Inspection Committee is based at the legislature but they have inspectors that do work that looks a lot like what the British inspectorate does.

You can have a body like what Mr. Cate was describing. There are regulatory agencies such as in Texas there's the Texas Commission on Jail Standards which inspects every jail according to various standards. It has the ability to decertify a jail if it doesn't meet those standards. I can go on with various other examples, but the point is there's no magic way to do it, you just need to find out if each of those functions is being served.

MS. ROBINSON: Bill Yeomans, let me go
back to you and your comments about the kind of
changing function of the Civil Rights Division in the
Justice Department and the degree to which the Civil
Rights of the Institutionalized Persons, the CRIPA
Act, is to a great degree being used to a much lesser
extent than it was in the past.

To what extent should or could Congress be
exercising a greater oversight function there? I
know you allude to that question in your testimony
and you didn't really have a chance to address it in
your oral remarks.

MR. YEOMANS: Yes. I think it would be
extremely important for Congress to do some
oversight. There has been a major failure of
oversight by Congress not only in the civil rights
area, but other areas as well, but civil rights has
suffered a great deal. There have been, obviously,
policy decisions made within the Civil Rights
Division that have never been explored and those
policy decisions have resulted in far fewer
investigations of prisons and jails and far fewer
cases filed. It seems to me that it would be well
worthwhile for Congress to take a look at what's
motivating those decisions. Certainly it is possible
that people have concluded there's been a lot of
progress and there simply isn't occasion to file as many lawsuits, it could be that there are legal impediments that need to be explored, but certainly it is not a decision that should be made without some public airing of policy.

MS. ROBINSON: But generally, Bill, from the standpoint of oversight of prisons and jails, even if CRIPA were used to a larger degree, I think you used the term "lightening strike" in your testimony which I thought was a good kind of term to show that at best it is going to be kind of an example or a highly publicized usage and not something that's going to be kind of a regularized use such as a regular monitoring of facilities. I guess in the broadest sense, what is the role that that kind of litigation plays in terms of government oversight?

MR. YEOMANS: Well, let me just distinguish. When I said lightening strike, I was speaking mostly about the criminal side where it really is a lightening strike because officers simply are sort of stunned when they are singled out for criminal prosecution, and it has become that way on the civil side because there's so little litigation being pursued. It seems to me that it doesn't
necessarily have to be that way. Now it may be that
the golden age of conditions litigation has passed
but surely the need for that kind of lawsuit has not
passed entirely and it is not a grand remedy, it
certainly is not the be all and end all in this area,
but it does seem to me to be a necessary component of
ensuring oversight, of ensuring compliance with
constitutional and statutory minimum, and that
component is being lost.

MS. ROBINSON: Let me turn to my fellow
 commissioners. Margo.

MS. SCHLANGER: This is a direct
 followup.

As you know, Bill, I used to work in the
Civil Rights Division and I did those CRIPA lawsuits
and I'm interested in your perspective on a question
that I never asked myself when I did that 10 years
ago.

It seems to me that when the Civil Rights
Division lawyers go into a new facility, that the
kind of inspection that they do looks a fair amount
like the inspection we heard about in Europe. They
come in with, you know, a forensic psychiatrist and a
correctional medicine guy and a sanitation person and
a couple of lawyers and in a cooperative jurisdiction
had pretty free ranged. It is announced but other
than that, it looks a lot like what we were hearing
about in Europe, and yet we heard from Ms. Chunn that
she thought that would be a terrible model for the
United States so I wonder if you think that, in fact,
that model, that confrontational model from the
outside of fighting federal against state government,
has had the kinds of bad effects that she -- I'm not
talking about the exact same thing but that she
thought might come from that same thing, or if, in
fact, it turns out that conflict gets managed and
progress is made, and I mean this very sincerely. I
didn't think in those kind of grand terms when I was
a lawyer doing this stuff and so I'm very interested
in what your thoughts are on that.

MR. YEOMANS: I think, of course, there
are a lot of variables that can play in whether or
not it works in any given instance, but I do think
that the approach to it, I agree with you that the
approach we go in with is very similar to the one
that's described, and it can produce, as you know, a
fairly informed and detailed findings letter which is
then shared with the jurisdiction along with the
suggestion that these are some things that you ought
to do and, by the way, if you don't do them, there
could be legal consequences.

It seems to me that that is a very good way to lay out for a jurisdiction a blueprint based on considerable expert opinion, expert examination of what can be done to improve an institution. And I think that, as I said before, some adversarial contexts can be helpful in that it keeps the push going and obviously some cooperation is also helpful too. In a jurisdiction that is inclined to make the kinds of changes that are necessary to bring the facility into compliance with the law, it can be a very cooperative and a very constructive process, so I guess I would disagree with the previous witness that it is a terrible model and I do think that, for the most part, it has beneficial effects.

MS. DEITCH: Can I just add on to that one point.

While there are similarities to the models, I think it is important to point out that the kind of inspection and monitoring we heard about from the last panel was regular, regular and routine, it is not once a problem has been identified.

MS. ROBINSON: Other questions from the panel? Tim.

MR. RYAN: I never thought I would get
to this point, but one of my worst nights as a
supervisor in the jail was the night after CRIPA
investigators came in and had total chaos in the jail
because of what they said to the inmates. They said
lots of things. They wouldn't allow us in the room.
One of your words concerns me in that, if I heard it
correctly, that an adversary is good, that
sensitivity sometimes is not necessary or some words
like that. I'm probably not saying it correctly.

I believe that if we are going to take a
look at ourselves and allow the federal government to
come in, which we are required to do, and I was
required to stay outside the door where they went in
with a bunch of inmates, and then they proceeded to
leave at five o'clock, and my shift, my seven
officers and myself, and 1,200 inmates had to deal
with the repercussions of your office coming in.

My concern as a person who has had to live
through something like that which went on for three
nights until we got control of the place again is
that there needs to be sensitivity, there needs to be
an assessment of what the adversarial situation is
and what the goal is in accomplishing those tasks, so
I hope I didn't hear what I thought I heard.

MR. YEOMANS: No, certainly I didn't
suggest there that should not be sensitivity, there
should be sensitivity. Obviously there needs to be
sensitivity as to the needs of the institution and to
the continuing safe function of the institution, but
I do think there also needs to be sufficient
independence that the investigators can get to the
facts and that's, as you point out, a very delicate
situation that needs to be managed carefully.

MR. RYAN: Thank you. I got that off
my chest now after 25 years now.

MR. YEOMANS: I'm glad I gave you the
opportunity.

MR. RIPPE: A question for Matthew.
You talked to us about how you satisfy
yourself that standards are being in fact followed
and if they're not, how you can ensure that the
situation is corrected so the standards are followed
so my question is, what's the book of standards that
you all use. Is it ACA or something that because of
your culture in California along with ACA you
developed or how do you do that?

MR. CATE: Primarily we base our
standards on either the California Penal Code or
Title 15 of the California regs and then, third, the
department's own operating manual. And so our view
is what does the law say, what do the regs say and
what do you say you should be doing and then we judge
them according to their own standards, and the
department's operating manual is usually the one that
they get hung up on the most.

MR. RIPPE: Thank you.

MR. KRONE: In our criminal justice
system, if you are investigated by the police and it
goes to prosecutor and they believe that you are the
one that did it, from what I have read and understood
from you it sounds almost like they tell the guy you
better change your ways or we're going to put your
name on the Internet. I'm wondering, is there a step
that we can go farther to further enforce that rule?
From what I read it sounds like you do your auditing,
you find problems, you identify it to the warden. He
may or may not implement that and there's no system
where he has to with the exception of public ridicule
by your website. Is that true?

MR. CATE: Well, you have your choice.
You either are going to be a part the system, meaning
I would work for the secretary, and then have some
authority with the secretary to make change that way
but lose a degree of independence, or I work outside
the box of the administration and I have great
independence but little authority to say what happens
so I don't think you can have it both ways. I do
have a bully pulpit in that I can, whether it is hold
a press conference or just publish my findings, I
think that is powerful, and I have assess to the
governor and so from time to time if I find something
that merits his attention I can go all the way to the
top and make my pitch and then the people that are
elected then decide whether they're going to
implement that or not.

MR. KRONE: To maintain that little bit
of independence or what independence you have so that
you don't kind of make waves for the groups that
don't have any further enforcement except passing it
on to higher-ups that can then take the proper
action; is that correct?

MR. CATE: I think so.

MR. KRONE: It is hard for me to
understand a system where you just say look, I wish
you would do this and if you don't, nothing is going
to happen.

MR. CATE: Well, that's the nature of
an outside auditor, there's no other way about it.
And I think the most -- again, it is early, and so we
may look back in five years and say you know what,
this independence thing is for the birds, you are
better off working inside the system, but I don't
think that was working very well and so my view is
independence is better, my view is transparency is
better, and I think that so far we're starting to see
change and it is too early to tell, admittedly, but I
think that's better than the alternative.

MR. KRONE: As to your initial figuring
out how to work that system, do you project down the
road that you will make changes, the asked for
changes, more power, strength to cure your findings?

MR. CATE: It is a Titanic-sized system
and I'm a little rudder, but it is my hope that we
are going to start, we will turn in the right
direction, and the think that the correctional
administrators are earnest in their desire to do
that. They have been forthright with me and I have
leveled 10 different broadsides into their ship and
they're still nice to me when I come in. I think one
of the things that was mentioned is that you have
this high turnover rate and that's another area
where, frankly, you look at the pros and cons of the
California system. On one hand I've got an at-will
employee in Mr. Hickman that I have oversight of and
so rapid turnover of that position probably isn't
conducive to progress. On the other hand, it is my
job to publicly, you know, yell about every problem I
see. And, of course, the media picks up on all of
those so that's a tug of war also that I think has to
be dealt with by the policymakers.

MS. ROBINSON: Let me leap in here,
Matt, and just kind of follow up on that.

We've had discussion off and on throughout the
course of the commission's life and today about the
importance of public attention to corrections and how
oftentimes the public isn't very interested. Do you
find that the public is interested when you issue
reports and is the legislature interested? We know
Gloria Romero, who is a member of our commission, is
interested, but generally are legislators interested,
is the public generally interested?

MR. CATE: The media, you would be all
surprised to hear, is more interested in the bad news
than the good it seems, but there was coverage
recently when the federal court announced that he had
seen, that Judge Henderson had seen progress in
health care, that made the newspapers, and so that
was a positive. And I can't cast the legislature all
with one role. As you said, some are very interested
in the issue and others appear to be interested in
other issues, I guess, to be generous.

MS. ROBINSON: And the public generally, or do you have any sense about that beyond the media?

MR. CATE: I don't have any more insight than anybody else except that people always ask me what do you do what is that, and it seems to me that the general public just wants to be safe. And there seems to be a rising tide of people who are interested in making sure that everyone in our society is treated in a humane way, even those that are incarcerated, at least I hope so, but I don't think we're anywhere near the majority and most folks just want to be safe.

MR. SCHWARZ: This is to Mr. Yeomans. You have, I guess, just recently joined a really important organization and in terms of what the public interest is in these issues, I wonder if the American Constitutions Society has taken positions on prisons, a yes or no. Indeed if they have, what they are.

MR. YEOMANS: We have not simply because the society as a society does not take positions, we work through our members who speak out on various topics, so we have not taken any positions
as a CS.

MR. SCHWARZ: Here is a very progressive organization that for one reason or another hasn't taken a position on important issues.

MR. YEOMANS: We don't take positions at all.

MR. SCHWARZ: You do. You take very enlightened positions on some things.

MR. YEOMANS: Well, we try to promote people who take enlightened positions but the society itself does not take enlightened positions or other positions. For instance, Commission Schlanger is an active ACS member.

MS. ROBINSON: Are there further questions?

Let me then, let me shift the topic to maybe a large extent. We really haven't raised this subject today of privately run prisons and jails. What do we do about government oversight there? Obviously we have, you know, oversight of contracts in contracted facilities generally, but does that really do it as far as private prisons are concerned?

MS. DEITCH: Let me take a stab at this.

First of all, when you talk about oversight
of privately run facilities, the most important thing we have going right now is control over the contract and monitoring process, contract monitoring process, which means you have to have contracts that deal with all of these issues. Most of them don't. Texas actually has really a model system for writing contracts and then for monitoring compliance with the contract but that's all they have the right to do is to monitor compliance with it. So most privately run jails in particular and prisons in most parts of the country do not have that level of specificity in the contracts and, as a result, there's really very little knowledge about what's going on in those facilities.

I think it is a critical issue. I think that any kind of entity that is set up to monitor public prisons and jails needs to cover the private facilities as well. It took a long time, for example, in Texas before the Texas Commission on Jails Standards, before the standards even applied to private jail facilities, so they are often left out of the decision and it is critical.

MS. ROBINSON: So are there examples now of states where, I gather Texas is an example, where it is including private prisons and other
facilities in those kinds of oversights or models?

MS. DEITCH: What I'm saying is the Texas Department of Criminal Justice, when it contracts with a private facility the contracts are well written and allow monitors to be stationed in each of those facilities to do contract monitoring.

MS. ROBINSON: I see.

Bill.

MR. YEOMANS: With us it comes down to a legal question usually as to whether the person involved or people involved are state actors on the one hand or are acting under color of law and, for the most part, certainly at least on the criminal side, we have argued that they are; that they are acting on behalf of, at the behest of the state because they have this contract to perform these, basically these state activities.

MS. ROBINSON: Is that settled law?

MR. YEOMANS: Not entirely. So it imposes difficulty.

MS. DEITCH: Can I add one comment that I was talking about prisons and not jails in Texas.

MS. ROBINSON: Right.

Matt, how do you deal with that here in California?
MR. CATE: Well, first of all, I agree there's oversight and we can go into the private prisons. We have issued one audit on fiscal areas involving private institutions, but primarily the issue is resources from my office and these are Level 1 and Level 2 inmates at the most, and I spent I think about 50 percent of our resources dealing with the juveniles and the young people in our Youth Authority, former Youth Authority, now Division of Juvenile Justice, and so between that and prisons with the highest level inmates, it is difficult to cast those resources towards the private prisons which they need. So although the availability is there, frankly we haven't done as much of that as I think is probably necessary yet.

MS. ROBINSON: Has the state legislature focused at all on that question or has it been too absorbed with what's already on its plate with the public facilities?

MR. CATE: Again, it is a mixed bag. Some are interested in what happens in the private facilities and from time to time we'll have a riot or something will happen and the question will be raised are the private individuals, private security sufficient to provide the necessary safety for the
inmates and staff and so you'll see that raised
oftentimes if there's a large fight or riot in an
institution and that will get legislative attention.
And then sometimes the funding issue comes into play
and you will see that grab the legislature's
attention because the question is always raised is it
truly less expensive to run a private institution
versus a public when you look at the level of inmates
that are there and long-term costs, et cetera, so we
see those kind of issues come up most often.
Conditions of confinement we don't see come up that
often.

DR. DUDLEY: Just a comparative
question of a different type. I mean, I realize we
have been talking about different types of government
monitoring and different aspects, but I'm wondering
when we look across the board at the range of issues
that should be considered when monitoring a prison
system through any of these methods, whether we're
talking about the health services or the mental
health services or whatever, do you find that, are
there areas, no matter which approach we are talking
about, which tend to be ignored or not adequately
monitored or explored when you look across the
breadth of the elements that go into corrections
systems.

MS. DEITCH: In terms of substantive areas?

DR. DUDLEY: Right.

MS. DEITCH: I guess my feeling is that there's so little monitoring that's going on right now that you couldn't possibly narrow the scope of that.

MR. YEOMANS: I'm not sure I can give categories of things that are being ignored more than other things. Certainly in looking at medical care, issues can arise across the board from mental health services to provision of basic first aid emergency care, so I'm not sure that can I single out any particular area.

MR. CATE: In California we have a lawsuit for every issue almost so plaintiffs' counsel and the federal courts have largely monitored the health care area and so that gets quite a bit of attention, at least it has recently, the officer discipline process. The mentally ill also, that area is monitored, and parole is monitored. The Division of Juvenile Justice is monitored by the courts. I'm sure I'm missing three or four.

So I think one area that I would like to
see more attention to is programming, and one of the
things I think the ACA is doing well or the ACA and
the administration of state correctional officials,
is they're working towards standards that can be
utilized by everyone on issues like who is really
being rehabilitated, what are the true rates, what's
a true level of comparison when you account for all
the different factors. No one really looks into the
programming issues because, frankly, I think, from
many points, as long as there's people dying on
condition of confinement issues resources have to go
to that, and once that is taken care of, then you can
probably turn to issues like inmate programming,
rehabilitation, and trying to prevent future victims.

DR. GILLIGAN: This is for Mr. Cate.

A few years ago I was invited by a
committee in the California senate to work with them
on formulating a law which the legislature and state
assembly passed to monitor violence in the California
prison system, particularly, of course, lethal
violence; homicides, suicides and so forth, to really
have a comprehensive summary of these sort of year by
year, how many occurred, who were the perpetrators,
who were the victims, what were the circumstances,
which institutions seemed to be most dangerous,
et cetera, with real investigations of each and every case and a public reporting of what was being done to reduce the level of violence.

They passed the law and appropriated the money for it but, unfortunately, Governor Gray Davis vetoed it.

I'm just curious with the program that you have in place now, is there any sort of systematic emphasis on monitoring the sort of extreme violence that occurs throughout that system and get a systematic handle of what's causing this, are things getting better or worse, what can be done, that sort of thing.

MR. CATE: In some circumstances in some areas, yes. For example, the department, the agency is currently working on a new death review process where they have a team of experts who are going to, who have just started to review inmate deaths and are going to triage those, if you will, to Internal Affairs or to professional peer groups, to licensing boards, et cetera, so they're starting to get more systems in place there. But I think one of the areas that the department has struggled with over the last few years is that they really don't have a great -- information technology is still in the real rudimentary stages.
We do have oversight investigation of at least the officer discipline process, and we're also putting in place memorandums of understanding between the various prisons and the county D.A.s and sheriffs to try to get homicides investigated in a professional way, that's an ongoing process, but there's nothing as comprehensive as you described in place, as I understand it.

MS. ROBINSON: Tim.

MR. RYAN: One of things that we do and as a society is we're very credential of ourselves. You go in and it feels like criticism, it may not be, but obviously you will find things that have gone a little bit sideways. A lot of our energy in this commission has to be put forward to how do we make it safe, how do we make it a safe organization, and one of the things that I would be familiar with is the National Institute of Corrections which spends a great of time in training.

What sort of efforts can your agencies do towards helping us getting better at what we do when you see a problem out there? How do you educate me as an administrator either through NIA, ACA, your local state agency, how do you help us get better when you find a bad thing, how do you help us get
best practices out there, what could you do to educate me to be a better correctional administrator today, tomorrow and in the future?

MR. CATE: Well, frankly you know a lot more about this than I do so that's a challenge. I think I take -- and that's true for most of the correctional people that I work with. They have been doing it for 25 years, I have been doing it for two. But I can let you know where you are out of compliance with you're own rules, I'm trained to do that, and I can collaborate with you and as they used to say use the brains that the good Lord gave me and sit down with you and collaborate and say all right, this seems to me to be broken and it seems like we have a couple options here, don't you think that this might be a better approach, but I think it is the dialogue that is really the most effective tool. The professor probably has a greater knowledge of many of these things than I do, but my experience in California has been when we sit down face to face and we talk in a non-adversarial way, when we respect the knowledge that you bring as a correctional administrator into the dialogue, then we get further than we do if I just sit down and tell you you are wrong and here is what you should be doing.
MS. ROBINSON:  Gary.

MR. MAYNARD:  I've been thinking about the advantages of state oversight or federal oversight and most of us administrators who work in the field, we work very hard to advise our legislatures about the issues of mental health, mentally ill in prison, substance abuse problems in prison and also our congressional delegations, and it seems that Congress has been reluctant to put money into our dealing with the mentally ill and substance abuse funds are being cut back and I'm just curious as to how responsive they would be to oversight if they would open up all those doors and create all that cost.

MR. CATE:  The first goal of oversight is to figure out what's going on and try to identify what the needs are. And you don't necessarily get action out of oversight, but what you get is transparency, you get an understanding of what's going on, and then you think about whether there are things that need to be done. And I agree with you that it is unlikely at this point that the federal government is going to be passing out increased funding for a variety of programs, that seems to be a budget reality at this point. But I do think that it
is important to find out what's going on, what the facts are and what the needs are and whether the federal government can meet them now or in the future or whether they can be met now by states or some other bodies. I think any way that they're met is good.

MR. WOOL: I'm hearing Professor Deitch talk about the rarity of independent inspection and monitoring, perhaps two or three state systems only across the country, and Mr. Yeomans is talking about the diminution in civil litigation from the federal government and we're going to hear tomorrow about the Prison Litigation Reform Act, restrictions on private litigation. I'm wondering if you could comment on the causes, the reasons for this diminution, if that's what we are seeing, and also the consequences.

MR. YEOMANS: I think the reasons are broad and they go well beyond this specific area. I think that we have seen doctrinal shifts obviously in the law, we have seen a changing political climate that has contributed to those shifts, and so that there is at this point simply far less tolerance for structural injunctive litigation than there was in the past. Part of that is because the bench is more conservative, part of it is that there simply is not
the kind of political will that once existed to
address those problems, and, frankly, it is
inconceivable that today Congress would pass anything
resembling CRIPA, that instinct simply doesn't exist,
and it is largely, I think, a political change. It
is also a result of, I think, political attacks on
courts and the way courts operate. We hear endlessly
about judges who legislate from the bench or judges
who read their own predilections into the
constitution and what that really means is that they
rule against you, but we hear that rhetoric over and
over again, and I think it has an effect. And
obviously because we have had conservatives
consistently appointed to the bench, there are fewer
judges now who approach this kind of litigation with
the kind of sensitivity and aggression which really
is necessary to make it effective.

MS. DEITCH: I would agree with all of
that and I would just add, I was a court monitor in
the Ruiz case, the big Texas prison reform case, and
so I have a personal sense of the extent to which
there was tremendous resentment among legislators,
among corrections officials, among really many
different layers of government, about the intrusion
of the courts into correctional affairs.
I think that the costs that resulted for the state as a result of this kind of court intervention, while perfectly appropriate, just led to a sense of we want to cut this off, we can't have the federal government telling us what to do in the states, we can't have federal judges determining correctional policy, et cetera. The whole reason why the courts were intervening in the first place was that there were no other mechanisms, the courts were all there was, that was the problem and that's what needs to be remedied.

MS. ROBINSON: Matt, do you want to add anything to this?

MR. CATE: Well, I guess I was kind of mulling this over and I think that much of the independence of the inspector general's office in California has occurred over the last 18 months, two years, and I hope the governor hasn't regretted it, but I'm the bearer of -- the fact he calls, I don't know if he remembers my first name, but he remembers me as the guy who always brings bad news, and not only that, but I always bring it publicly, and so what worst combination could you have for an elected official. And so it is difficult, I think, for an executive to decide to sign off on someone to
publicly report on things that aren't working well,
that's the nature of the beast.

MS. ROBINSON: Any followup?

MR. WOOL: The consequences side, what
are the consequences for prison conditions for
prevalence of issues of safety and abuse of somewhat
weak systems of oversight, other than what's emerging
in California, as seen as generally the case across
the country at least in the prison systems, we
haven't talked much about jails.

MS. DEITCH: Well, one consequence is
that we have very little way to know what's going on,
we end up dealing with anecdotes. Whether people
think things are good or things are bad, we don't
have information, we don't get regular reports about
what's going on, we rely on what was reported in the
newspaper or an individual lawsuit, but to how much
widespread these problems are, we don't have that
kind of information.

MR. YEOMANS: I would second that. We
don't really have an empirical basis to know what the
consequences have been. I think we can speculate
that we wouldn't have been all engaged in these
activities if we didn't think they were reported and
they certainly had results in the past, and so you
can imagine a world where litigation and other forms of oversight don't exist, and I think that would be a world where prisoners were less safe and it was less humane.

MS. ROBINSON: I think we're getting near to wrapping up for the afternoon but I do want to throw out one other question to you, we kind of danced around it a little bit, but clearly there are different challenges between monitoring and oversight for prisons as opposed to jails and, Michele, I think you allude to that in your paper primarily, you do, but, Bill, clearly you have dealt with that issue as well in litigation, and I'm wondering if each of you can fairly quickly touch on that, what some of the differing challenges are there, and, Michele, why don't we start with you.

MS. DEITCH: Sure.

I think that jails in particular, specifically smaller jails, more rural jails, a lot of them fly under the radar screen, frankly. They're not regulated and we get very little information about what's going on, and these are jails that are more likely to have people at the helm that are not trained, they're not brought into national associations, et cetera, et cetera, and the state in
many cases has very little control over what's going on in these places; they're not brought before the legislature. They're accountable typically only to, say, in Texas the Board County of Commissioners, whatever the county body is that funds them, but those bodies don't have any expertise in jails. They know they spend a lot of money on it but typically their concerns are do we need a new jail, not what's in fact happening in the jail. Those inquiries just plain don't happen. So I guess the short answer is we need to think of mechanisms that would allow those jails to come under some body, some entity, whether it is a state governmental entity or something else, to find out what's going on, to ask the hard questions.

MR. YEOMANS: I think it is important to distinguish among jails and obviously there are the kinds of jails that Michele was just talking about that are rural, small, generally run by one guy that has a lot of power, and those tend to be less professional. They tend to produce for us a disproportionate percentage of our criminal prosecutions simply because they're not professionally run and because a person who is there is basically unchecked and is more likely to resort
to force and more likely to inflict unlawful
punishment. Obviously other jails, large, the L.A.
County jail, these are large institutions that are
much more professionally run and much more like
prisons.

I think one of the principal
c characteristics, though, obviously that distinguishes
jails from prisons is the length time that inmates
are there, and I think that that has, and I haven't
seen a lot of empirical work on this, but I think
that has some effect of the likelihood of litigation
simply because inmates who are there for a shorter
term are less likely, first of all, to have the time
to try to change the institution but, second, to have
as much a need to change the institution. They know
they're moving on or getting out, getting released.

People who are in a prison facility for the
long haul and are living with the conditions are
going to think long and hard about how to improve the
living conditions that they may be with for years.

MS. ROBINSON: Anything to add, Matt?

MR. CATE: No, that's outside of my
jurisdiction and outside of my depth as well, I
think.

MS. ROBINSON: And you are not
volunteering to take it on.

MR. CATE: No.

MS. ROBINSON: On that note I want to thank our panel, you have been very helpful.

We're going to wrap up for the afternoon.

I don't know if Jenni is in the room or if Alex has any words for us. Any announcements that you want to make before we wrap up?

MR. BUSANSKY: We have another day to go, nine o'clock tomorrow morning. I think it will be interesting and exciting in its own way, I hope all of you will return, and hope to see you all tomorrow. Thank you very much.

MS. ROBINSON: Thank you.

(Hearing concluded at 4:19 p.m.)