

# FBI

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Law Enforcement Bulletin



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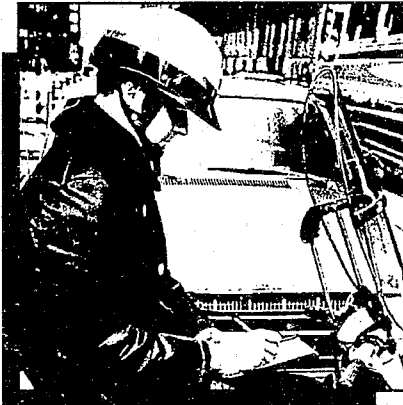
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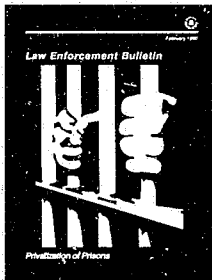


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William S. Sessions, Director

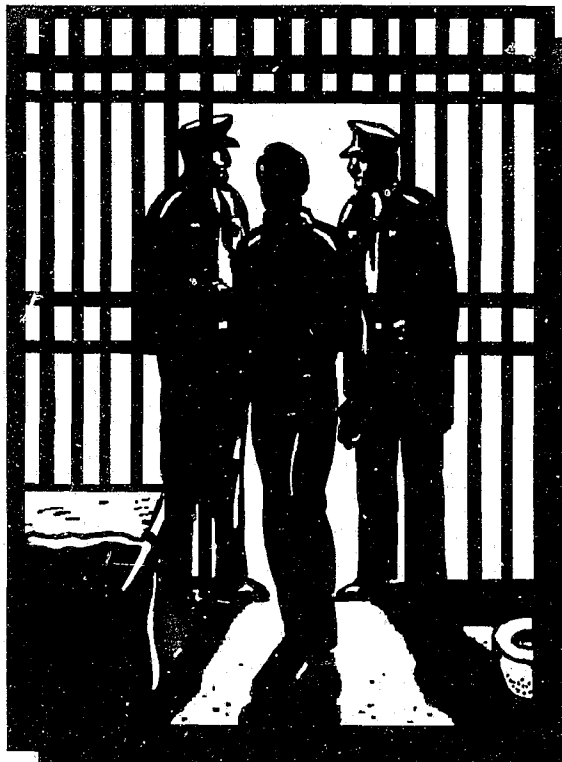
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# Privatization of Prisons Fad or Future?



By  
LT. DAVID K. BURRIGHT

Very few people would dispute that this Nation's prison system is in serious trouble. Corrections administrators are faced with grossly overcrowded conditions, shrinking revenues, and increased competition for operating capital. These problems are combined with soaring crime rates, a public cry for more jail sentences and longer incarcerations of criminals, and a Federal judiciary which all too often

imposes sanctions and restrictions in an effort to force needed change.

It's no wonder that in response to these pressures, public officials are grasping for ideas and solutions to the prison problem. One major idea continually being proposed is the private contracting and operation (privatization) of adult correctional facilities.

The concept of privatization fuels a very controversial and heated debate. Most arguments cen-

ter on whether private contractors can truly provide a better service at a lower cost than public practitioners while still not sacrificing quality, i.e., physical security, inmate programs, and support. An even more difficult issue involved in this controversy is whether corrections should either philosophically, ethically, or morally be turned over to private enterprise. However, questions still remain. Is privatization a panacea for the ills of correc-

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ACQUISITIONS



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**The concept of private  
 operations of  
 correctional facilities  
 is not a new one.**  
 ”

Lieutenant Burrigh is with the Linn County Sheriff's Office in Albany, OR.

**ARGUMENTS—PRO**

**Better Performance**

The proponents of the private operation of prisons and jails offer a variety of arguments to support their position. Many believe the government has not done a good job of management. "Costs have soared, prisoners are coming out worse off than when they went in, and while they are in they are kept in conditions that shock the conscience, if not the stomach."<sup>4</sup> Because the work would be performed under a service contract, proponents say that vendors can be forced to perform or face termination of the contract.

**Cost Savings**

Private vendors believe they can operate the facilities for a much lower cost, saving 10-25% of the Nation's corrections budget. These savings are possible because the vendors are unencumbered by politics, bureaucracy, and civil service that influence public operations.

An additional incentive to economize is the competition from other private vendors. Others claim that costs can be lowered by reducing employee turnover through better training, recruiting and supervision, and reduced use of overtime.

**Efficiency**

Many private vendors employ administrators who are highly experienced in corrections; in fact, a large number have served in the public sector.<sup>5</sup> When facilities are transferred to the private sector, the public employees on staff are of-

tions in the United States? Is it a fad or is it the future?

**BACKGROUND**

The concept of private operations of correctional facilities is not a new one. After the Civil War, many States entered into contracts with private businesses to operate State prisons. The inmates, however, were used virtually as slaves, and the practice degenerated to "...a well documented tale of inmate abuse and political corruption."<sup>1</sup> By the late 1800's, the practice of complete operation of prisons by private vendors had been abolished and control was taken by the States and counties.

Since then, public opinion and pressure have vacillated regarding the treatment of lawbreakers. At times, public opinion has been one of "reform," with the idea that criminals should be treated and not necessarily incarcerated. This was evident in the 1960s and early 1970s when the building of new prisons

and jails was very unpopular and thought unnecessary. Many practitioners believe this is the one reason that there is such a shortage of jail/prison beds today.

In the meantime, private businesses recognized a potential market and began offering specialty programs and began contracting for medical and food service and housing for low-security juveniles and illegal aliens being held for the Immigration and Naturalization Service (INS). However, it was not until these private vendors began pressing for the opportunity to take over the complete management and operation of full-scale adult prisons and jails that opposition began to mount. Even so, by 1987, three States had adopted legislation authorizing the private operation of the State facilities, and a dozen more were actively considering it.<sup>2</sup> Today, there are 64 private companies in this business, and several States and counties have prisons being operated by these companies.<sup>3</sup>

ferred the opportunity to be hired by the private operators in most instances, thereby assuring trained, qualified employees are manning the prisons. A private business could also contract with two adjoining States to house prisoners in a common facility, resulting in increased efficiency for both the public and the vendor.

### **Reduced Civil Liability**

Some vendors have agreed to indemnify the government should lawsuits be filed against the facility. As a means of further reducing the government's potential for liability, these operators consent through their contracts to run the facility in accordance with American Correction Association (ACA) standards.

### **ARGUMENTS—CON**

#### **Reduced Costs or Service?**

Opponents to privatization strongly question whether there will be any real savings by contracting out the operation of prisons and jails.<sup>6</sup> They argue that cost cutting can only be at the expense of humane treatment or security measures. Since the majority of operating costs center on personnel, especially in maximum security facilities, any significant reductions would have to be made in the daily costs of inmate care or in measures that would jeopardize the security of the facility.

Even though vendors point to lower inmate costs per day of the current privately run operations, opponents state that most of the private experience is with short-term minimum security facilities and special program operations (juvenile facilities, INS lock-ups, halfway

houses, etc.). Operating expenses for these facilities are much less than for a maximum security prison or jail, which requires additional staff, security measures, and inmate programs.

Opponents also question whether the "lower costs" include the full cost of contract administration and management. To ensure the vendor is complying with all contractual obligations, especially in a large multifacility operation, would require governmental monitoring and administration resulting in an additional level of bureaucracy.<sup>7</sup>

#### **Uncontrollable Future Costs**

Opponents fear that once private vendors take over facility operations and the government dismantles its organizational structure, it will significantly reduce the public's leverage on contracts

and the resultant problems and costs of regaining control would be staggering.

#### **Lateral Hiring of Personnel**

Corrections administrators fear that the private sector will lure away the best, most experienced employees, making it even more difficult to manage the facilities remaining under government control. Unless carefully monitored, the private vendor may also attempt to have low-security inmates assigned to their facilities, thereby leaving the high-risk, higher cost inmates to the government.

#### **Civil Liability**

Opponents to privatization argue that the government cannot contract away its civil liability as it relates to the proper management and operation of corrections

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***Corrections administrators are faced with grossly over-crowded conditions, shrinking revenues and increased competition for operating capital.***

”

negotiated in future years. This reduced leverage and lack of alternatives could result in huge future costs.

The public must also be prepared to reassume control of the facilities on short notice should the contracting vendor be unable to fulfill its contract. In this situation, unlike in the public sector, the government would not have the option of simply shutting down the operation,

facilities, and this position appears to be supported by the courts.<sup>8</sup> Also, the mere fact that a contractor agrees to abide by ACA standards does not guarantee that a civil rights complaint will not be successfully litigated, as the courts have not recognized any set standard to be followed in these cases.<sup>9</sup>

With regard to indemnification, although promising in appearance, there has not yet been a

court case to be able to judge the practicality of this. In addition, opponents are concerned as to if and how vendors will be insured. Will they be able to financially survive in the face of a large settlement, and if not, who will bail them out?

### Constitutional/Moral/Ethical Issues

Probably the most important of all arguments against privatization deals with the question of whether the government should delegate the authority for such a traditional and important governmental function as the deprivation of freedom to citizens (criminals). Opponents say that corrections centers on issues at the very core of American government and that it has no business being in the hands of private enterprise.

For instance, absent any special legislation or deputization, private contractors have only the authority of a private citizen to arrest, use force in defense of themselves or others, and to carry firearms. They have no special police powers or authority.<sup>10</sup> This has tremendous implications when considering incarceration and the use of force to maintain control and security.

Another important constitutional issue deals with decisions affecting parole. The American Civil Liberties Union's position on the issue is quite clear:

"...we do see civil liberties implications in the situation where private entities or persons can affect or impact the length or duration of confine-

ment of a prisoner. Plainly it is in the interest of private entrepreneurs to increase the number of prisoners in facilities because they are paid by the head ... any decision which impacts these numbers must be made by government officials with no ties to a private contractor. A concrete example is in the disciplinary realm where jail or prison officials are empowered to take away good time or file adverse disciplinary reports which will in turn affect parole release."<sup>11</sup>

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**The move toward the privatization of adult correctional facilities in America is more than a passing fad.**  
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### CONCLUSION

The move toward the privatization of adult correctional facilities in America is more than a passing fad. Private enterprise is showing a willingness to commit millions of dollars in an attempt to break into what it believes to be a very lucrative market.

But, is it really the future? On this, the "jury is still out." Both sides present convincing arguments. Proponents tout reduced costs and increased efficiency, while opponents ask if the savings are real and question the basic legitimacy of privatization. The problem is that

neither side has been able to conclusively prove its case.

The President's Commission on Privatization has recommended that "proposals to contract for the administration of entire facilities at the federal, state, or local level ought to be seriously considered."<sup>12</sup> Perhaps that's good advice, but the issue will have to be ultimately decided by the people within the affected jurisdictions and the courts.

**LEB**

### Footnotes

<sup>1</sup> John J. DiIulio, Jr., *Private Prisons* (Washington, DC: Government Printing Office, National Institute of Justice, 1989), p. 3.

<sup>2</sup> *Ibid.*, p. 1.

<sup>3</sup> Telephone interview with Dean Moser, National Sheriffs' Association, Alexandria, VA, January 19, 1989.

<sup>4</sup> House of Representatives, 99th Congress, Hearings Before the Subcommittee on Courts, Civil Liberties, and the Administration of Justice of the Committee of the Judiciary, Privatization of Corrections, quoting statement of Ira P. Robbins, *Concerning Privatization of Corrections* (Washington, DC: Government Printing Office, 1985), p. 6.

<sup>5</sup> *Ibid.*, p. 38.

<sup>6</sup> Opposition or concern has been voiced by the American Bar Association, American Civil Liberties Union, National Sheriff's Association, and various labor organizations.

<sup>7</sup> Corrections Corporation of America (CCA) includes the cost of 1 government monitor in the cost of their contracts.

<sup>8</sup> *Medina v. O'Neill*, 589 F.Supp. 1028 (S.D. Texas, 1984), which held the INS responsible for constitutional violations against 16 illegal aliens who were held at the direction of the INS by a private contractor.

<sup>9</sup> *Bell v. Wolfish*, 441 U.S. 520, 995 S.Ct. 1861, 60 L.Ed.2d 447 (1979).

<sup>10</sup> Private Security Advisory Council, *Scope of Legal Authority of Private Security Personnel* (Washington, DC: Government Printing Office, Department of Justice, 1976), p. 1.

<sup>11</sup> *Supra* note 4, quoting ACLU Position on Privatization of Prisons and Jails, p. 3.

<sup>12</sup> *Report of the President's Commission on Privatization* (Washington, DC: Government Printing Office), p. 150.