Approved 2-19-90
Date

MINUTES OF THE Senate COMMITTEE ON Federal and State Affairs.

The meeting was called to order by Senator Edward F. Reilly, Jr. at
Chairperson

11:10 a.m./p.m. on February 14, 1990 in room 254-E of the Capitol.

All members were present except:

Committee staff present:

Mary Torrence, Revisor of Statutes Office
Mary Galligan, Legislative Research
Deanna Willard, Committee Secretary

Conferees appearing before the committee:

Attorney General Robert Stephan
Jonathan Small, Citizens for Sound Economic Development
Mark Ohlde, Palmer
Vicki Meyer, Washington
Alan Peterson, Morrowville
David Woods, Assoc. for the Betterment of Northeast Kansas
Jim Yount, Assoc. for the Betterment of Northeast Kansas
Elizabeth Taylor, Horton, Inc.
Jeff Teter, Horton, Inc.
Jim Kaup, League of Municipalities

The Chairman recognized special guests: his wife, Luci; Fran McCann, Ireland; pages Barry and Rory McCann, Ireland; and Danny Snow, Leavenworth.

Hearing on: SB 588 - concerning cities and counties; relating to prohibition of owning or operating certain correctional facilities

Attorney General Robert Stephan discussed Attorney General Opinion No. 89-139, Re: Cities and Municipalities. (Attachment 1)

Jonathan Small, Washington County Citizens for Sound Economic Development) presented testimony in support of the bill. (Attachment 2) Also distributed was a statement on private incarceration from Ira P. Robbins, a leading authority on privatization of corrections. (Attachment 3)

Mark Ohlde, Palmer, gave testimony in support of the bill. (Attachment 4)

Vicki Meyer, Washington, expressed her concerns about living near a prison and support for the bill. (Attachment 5)

Alan Peterson, Morrowville, urged passage of the bill as the concept of private prisons is so new and needs regulatory legislation. (Attachment 6)

David Woods, Association for the Betterment of Northeast Kansas, urged the passage of the bill to protect the rights of farmers and land owners. (Attachment 7)

Jim Yount, Association for the Betterment of Northeast Kansas, said that rules and regulations are needed. He expressed concern about HB 2835, which he said was written for Horton. People in three counties would vote on an issue that would affect only one county, which he felt would not be constitutional. He spoke of private prisons being built in Texas and of pending

lawsuits regarding them and talked about the fact that there would be competition to try to produce a profit.

Elizabeth Taylor, Horton, Inc., said they came to represent SB 588 only and that they represent many citizens who do support a prison in Horton. She said a lot of work has gone into HB 2835 and that it will answer many of the concerns raised today.

Jeff Teter, Horton, Inc., expressed appreciation for the concerns brought forward by the bill and thinks they have been addressed by amendments to HB 2835. He urged the committee to table or reject SB 588. (Attachment 8)

Jim Kaup, League of Kansas Municipalities, appeared in opposition to SB 588 as anti-Home Rule legislation. (Attachment 9)

The hearing will be continued Thursday, February 15.

The meeting was adjourned at 12:00 noon.

GUEST LIST

COMMITTEE: Senate Federal & State Affairs DATE: 2-14-90

NAME (PLEASE PRINT)	ADDRESS	COMPANY/ORGANIZATION
Alan Peterson	Rt 1 Box 4 Morrowville KS	CSEP
NANCY OHLDE	RR 1 PALMER, KS	CSEP
Randall Meyer	RR 1 Washington KS	CSEP
Vicki Meyer	Rt 1 Washington, Ks 66968	CSEP
MARK OHLDE	1-692-4340 PALMER, KS	CSEP
Jim Kaup	Topeka	League of Municipal
Jeff Peter	Horton	[illegible]
Charles Simmons	Topeka	DOC
ELIZABETH E TAYLOR	"	HORTON INC
Donna & Jim Vaught	Valley Falls	Betterment NorthEast Kansas
David Ewald	Horton KS	Betterment NE Kans
Terry W. [illegible]	Horton Ks	BNEK
Harold Mast	Horton Ks	BNEK
Frances Mast	Horton Kansas	BNEK
[illegible]	Horton KS.	BNEK
Whitney Damron	Topeka	McGill & Assoc.
Mary Horsch	Topeka	AG Office
Marilyn Lindberg	Topeka	AG "
Tom McCann	IRELAND	TOURIST
Luci Stratton-Reilly	Ir.	Tourist
Bob Stephan	Top.	A.G.

STATE OF KANSAS

OFFICE OF THE ATTORNEY GENERAL

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ROBERT T. STEPHAN
ATTORNEY GENERAL

November 20, 1989

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ATTORNEY GENERAL OPINION NO. 89- 139

Mr. Michael K. Schmitt
Horton City Attorney
P.O. Box 240
117 South Sixth Street
Hiawatha, Kansas 66434-0240

Re: Cities and Municipalities--Buildings, Structures and Grounds; Public Building Commission--Authorized

Constitution of the State of Kansas--Corporations--Cities' Powers of Home Rule

Synopsis: K.S.A. 1988 Supp. 12-1758, as amended by L. 1989, ch. 62, § 2, K.S.A. 12-1759 (as amended) and K.S.A. 12-1763 (as amended) are part of an enactment (L. 1989, ch. 62) which is not uniformly applicable to all cities. Accordingly, a city made by charter ordinance exempt itself from the provisions of those statutes and adopt substitute and additional provisions on the same subject, in accordance with article 12, section 5 of the Kansas Constitution. However, substitute and additional provisions in charter ordinance no. 10 of the city of Horton, which would authorize a public building commission to lease and operate a correctional facility for one thousand inmates, have a substantial impact on residents outside the territorial limits of the city of Horton. Recognizing that impact, it is our opinion that the substitute and additional provisions prescribed by charter ordinance no. 10 of the city of Horton do not fit within the "local affairs and government" language of article 12, section 5 of the Kansas Constitution and are outside the authority granted by that

constitutional provision. Cited herein: K.S.A. 12-1757; K.S.A. 1988 Supp. 12-1758; K.S.A. 12-1759; 12-1763; L. 1989, ch. 62, § 2; L. 1989, ch. 62, § 4; Kan. Const., Art. 12, § 5.

* * *

Dear Mr. Schmitt:

You request our opinion as to whether the Horton Correctional Facility Commission is authorized, under K.S.A. 12-1757 et seq., as modified by charter ordinances of the city of Horton, to lease and operate a correctional facility for approximately one thousand inmates. You indicate that a substantial amount of the inmates will come from governmental agencies located outside the state of Kansas, but that it is anticipated that the state of Kansas and its political subdivisions will eventually be significant suppliers of inmates for the correctional facility.

K.S.A. 12-1757 et seq. authorize any city to create a public building commission for certain purposes prescribed therein. The city of Horton has exempted itself, by charter ordinance nos. 9 and 10, from the provisions of K.S.A. 1988 Supp. 12-1758, as amended by L. 1989, ch. 62, § 2, K.S.A. 12-1759 (as amended) and K.S.A. 12-1763 (as amended), and has adopted substitute and additional provisions relating to its public building commission. The substitute provisions authorize the Horton Correctional Facility Commission to lease and operate a prison within the city of Horton, or no more than five miles outside the territorial limits of the city of Horton. The commission is also authorized to charge service fees or inmate per diem rates to any federal, state or county governmental agency, or any municipal corporation, wherever located, within or without Brown County or the state of Kansas.

All the statutes, enumerated above, from which the city of Horton has exempted itself by charter ordinance are part of an enactment (L. 1989, ch. 62) which is not uniformly applicable to all cities by virtue of section 4 thereof. That section places use restrictions on buildings located in cities having a population of more than 50,000 which are not applicable to buildings in other cities. Accordingly, it is our opinion that a city may by charter ordinance exempt itself from the provisions of the above-referenced statutes and adopt substitute and additional provisions on the same subject, in

accordance with article 12, section 5 of the Kansas Constitution. However, it is necessary to consider whether the substitute and additional provisions set forth in charter ordinance no. 10 of the city of Horton are in harmony with the home rule powers granted by article 12, section 5.

The home rule amendment grants cities the power to determine "their local affairs and government." While the Kansas Supreme Court has adopted the position that the constitutional language was never intended to restrict city home rule power to matters of strictly local concern, City of Junction City v. Griffin, 227 Kan. 332, 337 (1980), it is clear that there are some cases where the extraterritorial impact of a home rule ordinance will result in a finding that it is outside the authority granted by article 12, section 5 of the Kansas Constitution. This conclusion was reached by Professor Barkley Clark of the University of Kansas in State Control of Local Government in Kansas: Special Legislation and Home Rule, 20 U. Kan. L. Rev. 631, 676-677 (1972). In that article, which was quoted with approval in the Griffin case, supra, Professor Clark offers the following guidance to the Kansas Supreme Court in interpreting the home rule amendment:

> "[T]he court should . . . be wary of ordinances which may not 'conflict' with statutory ~~law but~~ which have a substantial impact on interests outside the boundaries of the municipality. After all, these interests may not be represented in city legislative deliberations, and municipal parochialism should not, in the name of home rule, be allowed to trample over adversaries unable to protect themselves." Id. at 677.

Additionally, in the above-quoted article, Professor Clark suggests that "ordinances involving . . . substantial extraterritorial impact do not fit within the 'local affairs and government' language of article 12, section 5." Id.

It seems clear that the portion of charter ordinance no. 10 which authorizes the operation of a one thousand inmate prison has a substantial extraterritorial impact on county and township residents living outside the city of Horton. Specifically, there may be a perceived compromise of their personal security from the threat of inmates escaping from the prison. Further, inmates will be transported in and out of

the city of Horton on county and local roads, and "friends" and "business associates" of convicted felons will converge on the area for visitation at the prison. Under the charter ordinance, the prison may even be established outside the city limits and in the midst of the county and township residents. For these reasons, it is our opinion that the substitute and additional provisions prescribed by charter ordinance no. 10 of the city of Horton do not fit within the "local affairs and government" language of article 12, section 5 of the Kansas Constitution, and are outside the authority granted by that constitutional provision.

Very truly yours,

Robert T. Stephan

ROBERT T. STEPHAN
Attorney General of Kansas

TRH

Terrence R. Hearshman
Assistant Attorney General

RTS:JLM:TRH:jm

1976 Feb 24, 421
manual for city officials

1-4

JONATHAN P. SMALL, CHARTERED
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Suite 304, Capitol Tower
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Topeka, Kansas 66603
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BEFORE THE SENATE FEDERAL AND STATE AFFAIRS COMMITTEE

TESTIMONY OF JONATHAN P. SMALL
RE: SENATE BILL 588
FEBRUARY 14, 1990

I am Jonathan Small and I represent Washington County Citizens for Sound Economic Development (WC/CSEP) which is a non-profit association of several hundred citizens who oppose private prisons, especially any contemplated to be built and operated in Washington County, Kansas.

The members of WC/CSEP strongly support Senate Bill 588 and urge this Committee to consider it favorably. Senate Bill 588 is a two sentence enactment which is simply designed to allow government to function properly and responsibly. Its purpose is to restore a sense of caution to rein in the blind rush being made by municipalities who are willing to build and operate maximum/medium security prisons without first defining the duties, obligations and liabilities of the several governmental entities which will necessarily be involved in an incredibly complex infant industry.

Private prisons as a municipal industry for rural Kansas is not an idea whose time has come. Unlike state operated correctional facilities, private prisons are not a known, definable entity with carefully drawn lines of elaborate responsibility and liability. The opposite is true however of private prisons owned and operated by small municipalities. Who knows what to expect from the creation of such industries it will be starting from scratch in Kansas.

We have much to learn about an industry of which little is yet known. SB 588 will give us and you time to evaluate the wisdom of allowing the birth of such an enterprise in Kansas.

Ira P. Robbins, a nationally respected authority on privatization of prisons, has provided this committee with well- researched and documented overview of the private prison issue nationwide. He opines directly upon the wisdom of SB 588. He states:

> "My conclusion is that private incarceration is clearly unwise and arguably even unconstitutional. There are numerous complex, and possibly insurmountable, issues that must be addressed. I believe that Senate Bill No. 588, by requiring further study, takes a proper, cautious approach in dealing with the many difficult short- and long-term problems."

I have delivered his research paper to the committee with the hope that it will serve as a point of departure for approving this bill.

SENATE F&SA
2-14-90
Att. #2

If the state of Kansas is to seriously consider permitting private prisons to operate as a municipal industry let us first know the answers to what the people are expected to live with. Let us carefully and wisely analyze the hundreds of questions which surround the issue to allow us all an opportunity to be informed on an issue of such importance. To err on the side of caution is prudent; to rush headlong into this incredibly complex issue without first seeking resolution of the concerns of many who will be affected is folly at best.

We urge you to put reason and good government back into the process and approve Senate Bill 588.

QS0214T1

Statement on Private Incarceration
(Senate Bill No. 588)
Presented to the
Members of the Federal and State Affairs Committee
of the Kansas Senate

February 14, 1990

Ira P. Robbins*

Preliminary Information

By way of background, I am a graduate of the University of Pennsylvania and the Harvard Law School. I have been on the faculties of the Georgetown University Law Center and the University of Kansas School of Law (from 1975 to 1979), and currently am a tenured professor of law at The American University, Washington College of Law, in Washington, D.C.** I have written many books and articles on prison law and corrections, including Prisoners' Rights Sourcebook: Theory, Litigation, Practice (Clark Boardman Co., Ltd., 1980), The Law and Processes of Post-Conviction Remedies (West Publishing Co., 1982), and Prisoners and the Law (Clark Boardman Co., Ltd., 1989).

I have studied privatization of corrections since its inception, and served as the Reporter for the American Bar Association's Study on Privatization of Prisons. I have testified widely on the subject of private incarceration, including presentations before the President's Commission on Privatization, the United States House of Representatives, and the Tennessee Legislature. My publications in this area include a book entitled The Legal Dimensions of Private Incarceration (American Bar Association, 1988), and numerous articles.

Because I cannot appear before this Committee on February 14, 1990, due to other commitments, I present this statement in support of Senate Bill No. 588, which "prohibit[s] cities and counties from authorizing, constructing, owning or operating any type of correctional facility for the placement or confinement of

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* Barnard T. Welsh Scholar and Professor of Law and Justice, The American University, Washington College of Law, 4400 Massachusetts Ave., N.W., Washington, D.C. 20016. Tel: (202) 885-2646.

** I present this background information for identification purposes only. The points of view expressed in this Statement are my own, and should not necessarily be taken as the position of any of the institutions or organizations with which I am affiliated.

inmates from one or more state or federal agencies until such time as the legislature has reviewed and provided a public policy regarding such activity." My conclusion is that private incarceration is clearly unwise and arguably even unconstitutional. There are numerous complex, and possibly insurmountable, issues that must be addressed. I believe that Senate Bill No. 588, by requiring further study, takes a proper, cautious approach in dealing with the many difficult short- and long-term problems.

Finally, please note that I have no financial or interest, one way or the other, in the outcome of this debate. My interest is purely academic, from having studied and written about incarceration, including private incarceration, for many years.

Introduction

We have been witnessing throughout the country a great controversy concerning prison and jail inmates. Simultaneous with a public demand to lock up criminals is the overwhelming problem of what to do with the offenders. Prison and jail populations have doubled in a decade, and -- with preventive detention, mandatory minimum sentences, habitual-offender statutes, and the abolition of parole in some jurisdictions -- there is no relief in sight. Two-thirds of the states are under court order to correct unconstitutional prison and jail conditions. And it is costing the taxpayers more than $20 million a day to operate the facilities. Several commentators have not so facetiously noted that we could finance college educations at less cost for all of the inmates in the country.

To reduce some of this stress on the system, a new concept has emerged: the privatization of incarceration, sometimes known as "punishment for profit" or even "dungeons for dollars." The idea is to remove the operation, and sometimes the ownership, of an institution from the local, state, or federal government, and turn it over to a private corporation. (There are currently about two dozen such facilities in the country -- but they are mostly juvenile, mental-health, or immigration facilities. There are presently no adult medium- or maximum-security facilities under private control.)

At the outset, it should be emphasized that private incarceration is different from the notion of private industries in prison, which, by giving inmates jobs, seeks to turn the inmates into productive members of society. They work at a decent wage and perform services or make products that can be sold in the marketplace. (In the process, the prisoners can also pay some of the costs of their incarceration and, we would hope, gain some self-esteem.) Privatization is also different from the situation in which some of the services of a facility -- such as medical, food, educational, or vocational services -- are operated by private industry.

Rather, the developing idea is to have the government contract with a private company to run the total institution. Private incarceration is more than a simple matter of cost and efficiency. My comments address some of the major issues that are raised by privatization of a correctional or detention facility -- in the categories of policy questions, legal questions, and moral (or symbolic) questions.

Policy Questions

There are three fundamental policy benefits that are commonly stated for privatization incarceration: first, that the private sector can build and operate facilities more cheaply than the public sector can, thereby reducing overcrowding; second, that the private sector can manage the facilities more efficiently; and, third, that privatization will reduce or eliminate governmental liability in suits that are brought by inmates and employees.

The critics respond on many fronts. First, regarding policy objections, they claim that it is inappropriate to operate prisons or jails with a profit motive, which provides no incentive to reduce overcrowding (especially if the company is paid on a per-prisoner basis), no incentive to consider alternatives to incarceration, and no incentive to deal with the broader problems of criminal justice. On the contrary, a fact of correctional life is that, if we build more prison and jail space, we will fill it. And this is not necessarily the best answer to our problems.

The critics further assert that cost-cutting measures will run rampant, at the expense of humane treatment. But questions concerning freedom should not be contracted out to the lowest bidder. One good example of this point is that the director of program development of the Triad Corporation, a multimillion-dollar Utah-based company that had been considering proposing a privately run county jail in Missoula, Montana, has stated the following: "We will hopefully make a buck at it. I am not going to kid any of you and say that we are in this for humanitarian reasons." [Deseret News, June 20-21, 1985, at B7.]

Privatization also raises policy concerns about the routine quasi-judicial decisions that affect the legal status and well-being of inmates. To what extent, for example, should a private-corporation employee by allowed to use force, perhaps serious or deadly force, against an inmate? Or, should a private-company employee be entitled to make recommendations to parole boards, or to bring charges against an inmate for an institutional violation, possibly resulting in the forfeiture of good-time credits toward the inmate's release? Decisions in the parole and good-time areas can certainly increase one's period of confinement.

Consider the prospects for accountability in the process when, for example, the employee who is in charge of reviewing disciplinary cases at a privately run Immigration and Naturaliza-

tion Service facility in Houston recently told a newspaper reporter, "I am the Supreme Court." [N.Y. Times, Feb. 19, 1985, at A15.] This concern can be especially sensitive, raising a possible conflict of interest, if the private company is paid on a per-inmate basis, or if the company's employees are given stock options as a fringe benefit. Both of these conditions now exist in some contracts.

Finally, critics claim that the financing arrangements for constructing private facilities improperly eliminate the public from the decisionmaking process. Traditionally, corrections facilities have been financed through tax-exempt general-obligation bonds that are backed by the tax revenues of the issuing governmental body. This debt requires voter approval. Privatization, however, abrogates this power of the people. In Jefferson County, Colorado, for example, the voters twice rejected a jail-bond issue before E.F. Hutton underwrote a $30 million issue for private-jail construction.

The corporation can build the institution and the government can lease it. The cost of the facility then comes out of the government's appropriation, avoiding the politically difficult step of raising debt ceilings. Once the lease payments have fulfilled the debt, ownership of the facility shifts to the governmental body, thus completing an end run around the voters. The Supreme Court of New Mexico held last year that a similar arrangement violated the state constitutional requirement of voter approval before county indebtedness can be created for the erection of public buildings. [Montano v. Gabaldon, 108 N.M. 94, 766 P.2d 1328 (1989).]

One example of the possibly egregious effects of reducing accountability and regulation is a proposal by a private firm in Pennsylvania to build an interstate protective-custody facility on a toxic-waste site, which it had purchased for $1. The spokesperson for the Pennsylvania Department of Corrections is reported to have said the following: "If it were a State facility, we would certainly be concerned about the grounds where the where the facility is located. As for a private prison, there is nothing which gives anyone authority on what to do about it." [Nat'l Pris. Proj. J., Fall 1985, at 10, 11.] (The aftermath of this episode is that, faced with a moratorium on private prisons in Pennsylvania, the company abandoned its plan in that state, attempted to sell the toxic-waste site for $790,000, and was seeking to open the protective-custody facility in Idaho.)

Another example, in a slightly different context, was reported late last year by The Washington Post. It concerns a Reston, Virginia company that had been leasing prefabricated jail cells to the State of Massachusetts. The company has now threatened to repossess the buildings, which house about 360 inmates, because of long-unpaid bills.

These, I think, are telling examples of the potential for

major problems, including lack of accountability, in the private-incarceration industry.

Legal Questions

Turning to the legal questions (which, of course, overlap quite a bit with the policy questions), for present purposes they can be separated into constitutional and contractual issues.

There are two major constitutional issues concerning prison privatization: first, whether the acts of a private entity operating a correctional institution constitute "state action" under the Civil Rights Act (42 U.S.C. § 1983), thus allowing for liability for violation of an inmate's civil rights; and, second, whether, in any event, delegation of the corrections function to a private entity is itself constitutional.

On the state-action issue, there is no doubt whatsoever that state action will be held to be present in the full-scale privatization context, under any of the various tests that can be employed (including the public-function test, the close-nexus test, and the state-compulsion test). In West v. Atkins, [487 U.S. 42 (1988)], for example -- the closest United States Supreme Court case -- the Court decided unanimously in 1988 that state action was present when the State of North Carolina contracted out one facet of its prison operation (in this case, medical services). If state action is present when the state contracts out its obligation to perform one service, then state action is clearly present when the government contracts out the entire operation of a prison or jail facility.

Concerning the privately run Immigration and Naturalization Service facility in Houston, for example, a federal district court found what it termed "obvious state action." [Medina v. O'Neill, 589 F. Supp. 1028, 1038 (S.D. Tex. 1984).] The United States Supreme Court in 1982 stated, regarding privatization generally, that "the relevant question is not simply whether a private group is serving a 'public function,' but whether the function performed has been 'traditionally the exclusive prerogative of the state.'" [Blum v. Yaretsky, 457 U.S. 991, 1005 (1982).] Certainly this is true of the incarceration function.

As Justice Brennan has written in the non-incarceration context: "The government is free . . . to 'privatize' some functions [that] it would otherwise perform. But such privatization ought not automatically release those who perform government functions from constitutional obligations." [San Francisco Arts & Athletics, Inc. v. United States Olympic Comm., 107 S. Ct. 2791, 2993 (1987).] In short, if the private entity were not held responsible, the state could avoid its constitutional obligations simply by delegating governmental functions to private entities.

Thus, there will be no reduced liability on the part of the

government for violation of an inmate's constitutional rights. If there is any benefit to be derived from private incarceration, it will have to come in some other form.

The issue of whether the delegation of the incarceration function to a private body is itself unconstitutional is more problematic. A sufficiently broad delegation of a traditionally exclusive governmental function, such as incarceration, might well invoke the nondelegation doctrine of the Kansas and federal constitutions.

We have to make an important distinction here: We are not dealing the mere property interests of individuals; in such cases, delegations to private hands often are upheld. Rather, with incarceration, we are dealing with an individual's liberty. In such a case, new standards are likely to be applied. And other issues will undoubtedly arise under the Kansas Constitution.

To test the constitutionality of a delegation to private hands we also have to distinguish among different types of privatization. Privatization of airports, for example -- or mass transit, or firefighting services, or water-treatment services, or garbage-collection services -- involves the provision of services. Privatization of prisons and jails, on the other hand, involves more than the simple provision of services; it also provides the doing of justice. Just as it would almost certainly violate the state and federal constitutions to privatize our criminal courts, it may similarly be unconstitutional to privatize our prisons and jails.

There are, no doubt, those who would argue that, because private incarceration has not been declared unconstitutional in the approximately seven years that it has been around, it is therefore not going to be held unconstitutional in the future. I submit that such a view is wishful thinking and reflects a naive view of the legal process. Our state and federal judicial systems operate slowly and cautiously, reaching decisions only when there is a live case or controversy. The few legal tests of private incarceration across the country to date have been decided on other grounds.

If the constitutional hurdles are overcome, however, a great deal is going to come down to the contract itself between the government and the corporation. Consider some of the major questions that will have to be addressed, including the following:

- What standards will govern the operation of the institution?
- Who will monitor the implementation of the standards? (And how much will such monitoring cost?)
- What type of access to the facility will the public have?

- What recourse will members of the public have if they do not approve of how the institution is operated?

- Who will be responsible for maintaining security and using force at the institution?

- Who will be responsible for maintaining security and controlling the institution if the private personnel go on strike, or if the company goes bankrupt, or if the company simply goes out of business because there is not enough profit?

- Will the private corporation be able to refuse to accept certain inmates -- such as those who have contracted AIDS?

- What options will be available to the government if the company substantially raises its fees?

- What safeguards will prevent a private contractor from making a low initial bid to obtain a contract, then raising the price after the government is no longer able to assume the task of operating the facility -- for example, due to a lack of adequately trained personnel)?

- What safeguards will prevent private vendors, after gaining a foothold in the incarceration field, from lobbying for philosophical changes for their greater profit, such as by pandering to the public's fear of crime?

These are just a few of the many hundreds of questions that have to be addressed. But we should be aware that the constitutional questions and the contractual questions may well be inextricably intertwined. A delegation to private hands, for instance, may more likely violate the Constitution if it involves delegation of, say, the use of force or prisoner-classification questions, than if it does not. Thus, the issues may well come down to whether incarceration, or various features of incarceration, are proper nongovernmental functions, and whether the private company will remain accountable.

A separate question, of course, is whether privatization will actually save money. I don't think it will, for many reasons, two of which are the following: First, to operate a medium- or maximum-security adult institution, or an institution that contains such secure areas, will cost a great deal more than to operate any other type of institution. Security costs are enormous, and most of the prison-conditions litigation -- some of it successful and costly -- is filed by inmates in these types of institutions.

Second, prison privatization has many hidden costs, which

have not been calculated in many of the current accountings. These include, for example, the cost of monitoring compliance with the contract, the costs that are associated with increased liability resulting from the contractor's lack of immunity in situations in which the government would have been fully protected, and new layers of liability that arise from the privatization arrangement -- such as liability stemming from the government's failure to monitor a facility adequately or liability from third-party-beneficiary contract claims that will be available to inmates and the public.

Even if the costs of privatizing are not greater, however, should we privatize simply to get slightly lower costs? I think not. We should want either substantially reduced costs, or substantially better quality care at the same cost. Tennessee, for example, the home of Corrections Corporation of America (reported to be the largest private-incarceration provider), requires by statute that the private proposer's annual cost projection be "at least 5% less than the likely full cost to the state of providing the same services." [Tenn. Code Ann. § 41-24-104(c)(1)(E) (Cum. Supp. 1987).] Texas requires at least 10% cost savings from private facilities, which by statute must offer "a level and quality of programs at least equal to those provided by state-operated facilities that house similar types of inmates." [Tex. Rev. Civ. Stat. Ann. art 6166g-2, § 3(c)(4) (Vernon Supp. 1988).] Arizona permits the renewal of a private contract "only if the contractor is providing at least the same quality of services as [the] state at a lower cost or if the contractor is providing services superior in quality to those provided by [the] state at essentially the same cost." [Ariz. Rev. Stat. Ann. § 41-1609.01(L) (Supp. 1987).]

Moral (Symbolic) Questions

Finally, I shall address the moral questions of private incarceration -- what I call the hidden issue of symbolism -- which may be the most difficult issue of all for privatization of correctional and detention facilities.

In its 1985 policy statement on privatization, the American Correctional Association began: "Government has the ultimate authority and responsibility for corrections." [American Correctional Association, National Correctional Policy on Private Sector Involvement in Corrections (Jan. 1985).] This position should be undeniable. When it enters a judgment of conviction and imposes a sentence, a court exercises its authority, both actually and symbolically. Does it weaken that authority, however -- as well as the integrity of a system of justice -- when an inmate looks at his keeper's uniform and, instead of encountering an emblem that reads "Federal Bureau of Prisons" or "State Department of Corrections," he faces one that says "Acme Corrections Company"?

That is to say, apart from questions of cost, apart from

questions of efficiency, apart from question of liability, and assuming that inmates will retain no fewer rights and privileges than they had before the transfer to private management, the question is simply this: Who should operate our nation's prisons and jails? In an important sense, this is what the constitutional-delegation issue is really all about, in that it could be argued that virtually anything that is done in a total, secure institution by the government or its designee is an expression of government policy, and therefore should not be delegated. I cannot help but wonder what Dostoevsky -- who wrote that "the degree of civilization in a society can be judged by entering its prisons" [F. Dostoevsky, The House of the Dead 76 (C. Garnett trans. 1957)] -- would have thought about private incarceration.

Just as the inmate should perhaps be obliged to know -- day by day and minute by minute -- that he is in the custody of the state or county, perhaps too the state or county should be obliged to know -- also day by day and minute by minute -- that it is its brother's keeper, even with all of its flaws. To expect any less of the criminal-justice system may simply be misguided.

Conclusion

To conclude, it should be emphasized that the urgency of the need to correct the problems of corrections should not interfere with the caution that should accompany a decision to delegate to private companies one of government's most fundamental responsibilities.

We should not be misled by the brash claims of people who are currently running private facilities -- such as the claim by one private-facility operator who is reported to have said: "I offer to forfeit all of my contracts if the recidivism rate goes above 40 percent." [N.Y. Times, Feb. 11, 1985, at B6.] Nor should we be fooled by the "halo effect" -- that the first few major experiments will be temporarily attractive because the private administrators, being observed very closely, will be under great pressure to perform -- even to the extent, as The Wall Street Journal has reported [Wall St. J., Dec. 1, 1988], that the private companies may initially keep prices artificially low at the expense of their own profit. Finally, we should be wary that the purported benefits of prison privatization may thwart consideration of the broader problems of criminal justice.

In the words of a Princeton University professor: "We are most likely to improve our country's prisons and jails if we approach them not as a private enterprise to be administered in the pursuit of profit, but as a public trust to be administered on behalf of the community and in the name of civility and justice. The choice is between the uncertain promises of privatization and the unfulfilled duty to govern." [J. DiIulio, What's Wrong with Private Prisons, 92 Public Interest 66 (1988) (emphasis added).]

In short, and quite clearly, the private sector is in this for the money. By their very nature, private-incarceration companies are more interested in doing well than in doing good. Crime is a growth industry, and they want their share of it. In more than one respect, however, crime should not pay!

Understandably, because of legal difficulties in Kansas and elsewhere, state and local governments are considering dumping their prison and jail problems onto a private entrepreneur who promises to make the problems go away. Like you, I wish that the question were so simple. Transforming prison or jail management from the public to the private sector can only add to the scope of the problems, however, for the private contractor must make a profit if the operation is to survive. Perhaps the best that the concept of privatization can offer, therefore, is to provide an incentive to the government to perform its incarceration function better.

After having studied the issues surrounding private incarceration for many years, I conclude that the concept is clearly unwise and arguably even unconstitutional. The issues -- including policy, legal, and symbolic issues -- are enormously complex. One well-considered position would be to bar private prisons and jails altogether. At the least, however, I believe that the Kansas Legislature should require a great deal of further study over time, such as by monitoring the experiences of those states that have allowed some degree of privatization. Senate Bill No. 588 takes a cautious approach, allowing the Legislature to review the myriad issues before accepting privatization as a "quick fix" for difficult problems.

Thank you very much for your attention. Again, I regret that I was unable to appear to testify in person. Should you have any questions, however, please feel free to let me know.

Respectfully submitted,

Ira P. Robbins

Ira P. Robbins

STATEMENT ON PRIVATE PRISONS
(SENATE BILL NO. 588)
PRESENTED TO
MEMBERS OF THE FEDERAL AND STATE AFFAIRS COMMITTEE
OF THE KANSAS SENATE

February 14, 1990
Mark Ohlde

I am a resident of Washington County. There, the City of Washington would like to build a privately-operated maximum security prison. Their decision was apparently made nine days after being approached with the idea by Westridge Associates of Topeka. No public meetings were held. The public was kept completely in the dark until it was announced last March that the city would sponsor a 45 million dollar prison facility with construction beginning in October, 1989. Since then, repeated requests for an open informational meeting have been ignored. A request for a county-wide referendum on the matter was denied.

In their zeal for economic development, local officials have seemed unable to distinguish a state or federal facility with certain undeniable benefits from its look-alike private equivalent which could have disasterous consequences for the area. Washington and Horton promoters attempted to slip a private prison into Kansas before any state public policy on the matter had been formulated. Promoters now know that a cozy relationship with the state is needed before financiers will take their projects seriously.

I would like to ask a very basic question. Why would the state want private prisons within its borders? Both private prison initiatives intend to import prisoners from out of state to fill their cells. The result will be a nightmare for the Department of Corrections and the Kansas Legislature for years to come. Who will pay the costs incurred in prosecuting and defending crimes committed within the prison walls? Who will pay for the additional prison time sentenced by Kansas judges? Who pays to round up escaped prisoners and to control a prison riot? If the Secretary of Corrections serves to oversee the private prisons, will that not make the state a party to all sorts of lawsuits involving liability and civil rights issues? Most certainly welfare costs will increase due to influx of prisoner's families and also if prisoners themselves choose to be released in Kansas.

If prisoner's rights groups are successful in stopping interstate prison shipments, where will that leave the private prisons? You can be assured that representatives of these prisons will be camped outside your doors demanding allocations of Kansas prisoners in order to stay in business.

There are multiple serious legal and constitutional concerns swirling around the private prison concept. These are effectively discussed in Ira Robbins, ABA-sponsored treatise on the matter and summarized in his letter submitted to you.

The criminal justice system of England, 200 years ago, banished prisoners to remote Australia. The French had their Devil's Island. Washington DC apparently now hopes to solve its prison surplus by shipments to rural Kansas. We hope you in the legislature will take thoughtful and careful consideration in dealing with this issue. I'll end with a quote from a Barons article on private incarceration: "The brokers, architects, builders, and banks...will make out like bandits." Unfortunately the local communities and the state as a whole will be stuck with the consequences.

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Att. 4

STATEMENT ON PRIVATE PRISONS
(SENATE BILL NO. 588)
PRESENTED TO
MEMBERS OF THE FEDERAL AND STATE AFFAIRS COMMITTEE
OF THE KANSAS SENATE

February 14, 1990
Vicki Meyer

Washington County is a rural county and has never been heavily populated. Most citizens of Washington County live there because they like it there. A decision was made to live in a community where neighbors know neighbors, where worries of a large community are not present.

I am a mother of 3 and a farmer's wife. Our livelihood is dependent upon the land where we live. It is because of that-I want to tell you how urgent this issue is for me and my family. My husband and I cannot just pick up our belongings and start over in another small community. If the prison does not turn out as expected, many can opt to pick up and move. We cannot move our land. We are stuck 5 miles from a 750-bed prison 3 miles as the escapees run! I would be able to see it out my living room window!

But looking at the prison is not my biggest concern. I want my children and grandchildren to grow up in a secure neighborhood. I don't want to have to worry about them when they want to ride their bikes down the road. I don't want to wonder if they are OK every time they go down to the steam in our pasture. Washington County is a gentle and rather naive community, what will happen when criminals and their family are brought there? I worry about the influx of drugs. I feel privileged to live in a community where there is so little worry about drugs. I'm not saying my children will never be exposed to drugs, but I do know they are not as commonplace as in urban areas.

I know Washington County is not a crime free perfect community, but why increase dramatically the crime rate as will almost certainly happen if a prison is built?

The prison that Washington proposes to building sa 750 bed <u>private prison</u>. It will not be a state prison under direct state control, thus I worry about trying to cut cost over the years. I worry about those evenings home alone with my children while dad is out working in the field until midnight. I'll worry about walking into my house alone. I'll worry about my children when we want to go out for supper and we leave them with a high-school sitter. I'll worry when my children approach the baby sitting years and are the ones responsible for other children. My worries are many.

I know that the leaders of the City of Washington have deceived us in the past and this concerns me also. They have done everything possible to such their prison through without any voice from the citizens of the County who are going to be greatly affected by the prison.

I also understand Washington County needs an economic boost. I wish planners would pursue something less intrusive, that would not so dramatically alter our lives.

Vicki Meyer

SENATE F&SA
2-14-90
Att. #5

STATEMENT ON PRIVATE PRISONS
(SENATE BILL NO. 588)
PRESENTED TO
MEMBERS OF THE FEDERAL AND STATE AFFAIRS COMMITTEE
OF THE KANSAS SENATE

February 14, 1990

By Alan Peterson

Private prison! In my community we had never heard of such a thing, prior to late March of 1989.

I farm for a living and I live, with my family, on the farm approximately 8 miles from the proposed sight of a private prison. We, and others from the area, have many questions about this proposed venture. Answers to our questions are not forthcoming. Those who promote this venture claim either that they do not know the answers to our questions or that they are not obligated, because of attorney-client relationship, to give answers to our questions.

This is not a satisfactory situation. It appears to those of us concerned about the possible introduction of this.... unknown thing....into our midst that we should have answers to most of our questions. We need public policy, in place, to require not only answers to the questions of those close by such a proposed venture, but also to require that answers be given to the pertinent questions of those state and local government officials who may have to deal with such a proposed venture.

Given the current state-of-affairs in at least two small Kansas communities who are faced, at this very moment, with the situation I have described I feel certain that this committee understands the importance of Senate Bill No. 588. Great effort should be expended in order to see that no further actions are taken by those who would inflict these unregulated private prisons upon us!

It is also imperative that time be given for the sound and reasoned thought necessary to draft and debate passage of legislation to regulate these ventures. Without the time necessary for such reasoning I fear that haphazard poorly prepared legislation, such as House Bill No. 2835, will be the result.

Fortunately.....or unfortunately.....depending on your viewpoint, Kansas appears to be at the forefront of the need for such regulatory legislation. I see this as all the more reason to go slowly and carefully. There is great need for expert counsel in regard to this matter. Others will watch how this is handled in Kansas!

In closing, I feel confident that this committee will see the need for the passage of Senate Bill No. 588. To do less, at this point in time, might very well allow the state of Kansas to become an unregulated dumping ground for the human refuse of this Nation.

Thank you

Alan Peterson

SENATE F&SA
2-14-90
Att. #6

Ladies and Gentlemen;

I am David E. Woods, President of BNEK, the Association for the Betterment of Northeast Kansas. I am representing 600 plus people who openly oppose the construction of the proposed private prison near Horton, Kansas.

The citizens of Kansas deserve the right to defend their property and this state from the worst contaminations existing in major cities in this country today. Groups such as HKI presently have the power to build a private prison - and yes the members will profit - while the spin-off of drugs and AIDS as well as other detriments will be neatly left up to the communities to deal with as best they can. Their rapid unregulated growth potential lets them absorb the immediate gain while the surrounding communities bear the burden.
We have been told repeatedly, that this would be just like any other business bringing money and employment to the area, but in what other business would close neighbors have to live in constant fear of rape, murder, theft and hostage situations by an escapee?

There are so many facets of private prisons that have not been adequately dealt with - so many unanswered questions by HKI who continues to pursue this project, bulldozing ahead without regard to the individuals most harshly affected and openly protesting it's construction.

What short-cuts will HKI take if competition stiffens?

Will crimes committed in Kansas by prisoners (whether inside the walls or outside) become the financial and legal responsibility of this state?

Will our judicial system be overloaded with the influx of drug and drug related crimes?

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Att. #7

This bill will protect Kansas counties from higher taxes through bond issues - to build a private prison that may not be operational if the ACLU passes laws that prohibit transporting prisoners to other states.

This bill will stop border disputes on the location of this prison before they happen, such as exists now. The proposed site sits on the southern boundry of Brown Co. - ¼ of a mile from Jackson Co. and ½ mile from Atchison Co.

This bill will protect the rights of farmers and land owners from cities and counties taking their land through eminent domain and using island annexation, which they have done, as a convenient way to keep the prison away from the original city.

This bill is logical, nonpolitical, brief and easily understood. We feel it is long overdue!

Thank You.

David E Woods

David E. Woods

President, BNEK

Testimony of J. Jeffrey Teter
Before the
Kansas State Senate
Federal and State Affairs Committee

February 14, 1990

Mr. Chairman and members of the committee, I am Jeff Teter, President of Horton Kansas, Inc., a not-for-profit corporation of volunteers originally formed over two years ago as a focal point for the Horton City Commission, the Horton Chamber of Commerce and the Horton Industrial Development Commission. Our original goal was to create employment and improve the economy of northeast Kansas by having Horton selected as the site for the new state correctional facility. As you know, in December of 1988, the Governor selected El Dorado as that site and, in fact, the ground was broken just a few days ago for construction of that facility.

During the last two legislative sessions we have heard former Secretary of Corrections Endell espouse the need for two new correctional facilities because of the ever expanding population in the State of Kansas system. Again, this year, Secretary of Corrections Davies has spoken about projections predicting the need for more than nine-thousand additional beds in the next five to ten years. Nationally, thirty-nine states are currently under Federal court order to reduce overcrowding in one or more of their institutions. In fact, nationwide there are over 100,000 more beds needed than current facilities are designed to accomodate.

After the selection of El Dorado as the state's site, HKI investigated the idea of constructing a correctional facility with space available to Kansas on a lease basis for handling the additional needs of the state. In order to assure financial viability, we also have proposed making space in our facility available to other states and to the Federal government. The needs and willingness of these other agencies to utilize our facility was verified through a study done by Criminal Justice Institute of New York and again by the accounting firm of Touche-Ross.

During the course of developing this project, we have maintained constant dialogue with Secretary Davies. We have solicited and welcomed the help that he and other members of the Kansas Department of Corrections have provided. We have also kept the Governor's office apprised of our project and have met with the Governor and Secretary of Administration Smith to discuss our proposals.

Throughout our discussions regarding this project, we have realized that our long-term success is only assured through the assistance and cooperation of the State and its agencies. Therefore, we speak in favor of the intent of SB-588. The utmost priority in our proposal is public safety, followed by the economic development of the rural five county area of northeast Kansas. Our discussions with the Department of Corrections to date have covered a variety of areas including design, security, policy development, and coordination for emergency preparedness. The input of Secretary Davies has been invaluable to our project and we look forward to continuing this dialogue to successful completion of our project.

We have introduced legislation in the House of Representatives (HB-2835) which will allow the creation of a regional prison authority and we believe that this bill will answer the concerns expressed in SB-588. This bill provides the authority the ability to construct and operate a correctional facility, provides that any county within a ten mile radius of the facility will be allowed to vote on any bond issue (over $1 million) associated with the facility and, most important, provides that the Kansas Department of Corrections will have oversight authority of the facility.

Additionally, we anticipate that the State of Kansas or any other agency utilizing our facility will require that American Corrections Association standards be in place and that ACA accreditation be completed and maintained annually. Finally, our architect, HNTB of Kansas City, has already been working with the State Fire Marshal and other agencies, as needed, for construction of this facility.

We appreciate the concerns brought forward by this bill. Through discussions with the Attorney General and the Department of Corrections, we believe that we have adequately addressed the issues and are offering those as amendments to HB-2835 when that bill is heard before committee. Therefore, we would ask the committee to table or reject SB-588.

League
of Kansas
Municipalities

Municipal
Legislative
Testimony

An Instrumentality of its Member Kansas Cities. 112 West Seventh Street, Topeka, Kansas 66603 Area 913-354-9565

TO: Senate Committee on Federal and State Affairs
FROM: Jim Kaup, League General Counsel
RE: **SB 588; Prohibiting City-Owned and Operated Prisons**
DATE: February 14, 1990

By action of the League's State Legislative Committee on February 9, we appear in opposition to SB 588 as anti-Home Rule legislation.

The League's convention-adopted Statement of Municipal Policy provides:

> We believe the governing of public affairs should be as close to the people as possible and that home rule is essential to vigorous, effective and responsible local government under our representative system. Home rule is crucial to the continued ability of locally elected officials to solve local problems in ways most appropriate to local needs and conditions... The state legislature should avoid intervention in matters of local affairs and government and should act to encourage and promote the exercise of authority and assumption of responsibility by locally elected, locally responsible governing bodies...

The principle behind Kansas Home Rule--the constitutional right of the people of Kansas to take care of their local needs and conditions through their locally-elected city officials--has been discussed before in this Committee in the context of other bills. We would today only remind this Committee that no issue is as important to the cities of Kansas, and the League, than the preservation of Home Rule.

Constitutional Home Rule permits cities to legislate and otherwise take action on matters of local affairs and government, including matters that are also of statewide interest and the subject of state law and regulation so long as such city action is not in conflict with controlling state law.

Today cities can, under their Home Rule powers, lawfully construct, own and operate prisons for confinement of prisoners sent under contractual arrangement with governments outside Kansas--and such has been proposed in at least two cities the League knows of. If SB 588 became law, no city could do so without conflicting with SB 588, thereby making that local act invalid.

SB 588 would set a dangerous anti-Home Rule precedent. It is one thing when the legislature preempts the exercise of Home Rule by enactment of comprehensive, uniformly applicable state law (e.g the general bond law, election laws, zoning and planning enabling law). But it is another matter altogether when the state considers "anticipatory preemption".

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2-14-90
Att. #9

SB 588 provides nothing more than a prohibition against local government action. It gives no substitute state law on the subject of ownership of prisons by local government. As such, SB 588 is totally at odds with the liberal construction requirement and public policy favoring the exercise of Home Rule as set out in the Kansas Constitution.

What is so unique, so compelling, about the subject of correctional facilities that warrants the state doing a preemptive strike against Home Rule? Obviously cities and counties have been in the corrections business since statehood, and, in fact, counties do so under a state mandate!

Cities try to use Home Rule creatively to improve the quality of life for citizens in their communities. Cities propose to construct prisons under their Home Rule powers for reasons of promotion of economic development. That is the "public purpose" which makes the expenditure of public funds, and other public involvement, lawful. In that sense prisons are the same as any manufacturing plant or other business which has been lured to Kansas by local governments anxious to work their way out of a stagnant state economy. Why, now, does the state want to even consider stifling such local activity? Legislation like SB 588 not only dampens local government creativity and initiative, it also has a chilling effect upon the private sector that is the partner of local government in so much of the economic development activity now underway. If the state can decide, by flat, "no more local involvement in prisons", what prevents a similar prohibition against other enterprises? Where, and how, are the lines drawn?

While the League opposes SB 588 as an intrusion upon Constitutional Home Rule, we also call this Committee's attention to some of the practical problems with the bill as introduced: (1) SB 588's prohibition applies to "any type of correctional facility" for "inmates", other than those which fall within K.S.A. 19-1917, 19-1930 and 75-5217. How broadly is this language to be read? Will it ban a city from constructing a holding facility for defendants before the U.S. District Court? (2) SB 588's prohibition would last "until such time as the legislature has reviewed and provided a public policy regarding such activity". The nebulous character of that "sunset" for SB 588 speaks eloquently for itself. We would only note that passage of SB 588, and continued inaction by the legislation to "review and provide a public policy", is in and of itself a "public policy regarding such activity"--i.e. it is a policy against city and county ownership or operation of correctional facilities. SB 588 gives us no assurance that the state would ever lift its "ban".

Being unable to identify any valid public interest served by SB 588, and mindful that it is legislation totally at odds with the principle of Home Rule, the League respectfully requests that favorable action not be taken by this Committee.