Approved 2-4-91
Date

MINUTES OF THE House COMMITTEE ON Judiciary.

The meeting was called to order by Representative John M. Solbach at
Chairperson

3:30 ~~a.m.~~/p.m. on January 23, 1991 in room 313-S of the Capitol.

All members were present except:

Representatives Douville, Gregory, O'Neal and Snowbarger who were excused.

Committee staff present:

Jerry Donaldson, Legislative Research Department
Jill Wolters, Office of Revisor of Statutes
Gloria Leonhard, Secretary to the Committee

Conferees appearing before the committee: (See Page 2 of 2)

The Chairman called the meeting to order.

Revisor's Staff reviewed HB 2003 and distributed a packet of miscellaneous background materials (Attachment # 1. Staff noted that a community vote was not taken on the private prison issue by Atwood; that Washington had a city-wide vote; that Horton had a town meeting.

Richard D. Mills, Westridge Group of Associates, a consulting and development company, appeared as an opponent to HB 2003 and distributed written testimony (Attachment #2), which supports the concept of constructing private prisons for State economic development. Mr. Mills compared crime rates of counties with correctional facilities to counties without such facilities and noted growth of need for such facilities and new jobs which would be provided. Mr. Mills said that he supports the concept of building the private prisons but leaving security to the Department of Corrections; that his company can idemnify the State of Kansas against lawsuits; that financing would be by bonds; that facilities would be built purposely to habilitate; that inmates would be brought in from other states (under certain criteria). Committee discussion followed. The Chairman stated further hearing of HB 2003 will be conducted. Mr. Mills noted a study from Washington State on this issue is available.

Research Staff distributed (Attachment #3) and (Attachment #4), in connection with HB 2003 for further clarification.

The Chairman called for consideration of bill requests.

Lance Burr appeared and requested that the legislature cooperate with the Indian tribes in requesting Congress to repeal 18 U.S.C.A. Section 3243 conferring concurrent state criminal jurisdiction over Indian reservations and to provide funding of Indian police forces and court systems if jointly requested by the four tribes. Mr. Burr distributed a packet of materials, (Attachment #5).

Rep. Scott made a conceptual motion that the proposed legislation be introduced. Rep. Sebelius seconded the motion. The motion carried.

Bob Fry appeared for the Kansas Trial Lawyers Association and requested four bills as follows:

1. A bill addressing comparative negligence; which would eliminate the present 50% requirement and allow recovery based upon actual assessed negligence.

Rep. Sebelius moved the proposed legislation be introduced. Rep. Everhart seconded the motion.

The Chairman asked that Rep. Sebelius consider amending her motion after all proposals were requested by the conferee. Rep. Sebelius agreed.

2. A bill regarding equalizing the cap for wrongful death damages at $250,000.00 as currently a cap of $150,000.00 appears in one portion of the law and $250,000.00 appears in another portion.

3. A bill regarding pre-judgment interest providing for a mechanism of establishing interest on a claim based on the date when the claim or suit was filed and recovery of interest on the damages.

4. A bill regarding attorneys fees for subrogated claims in cases where SRS is involved with a client who has recovered damages after they have received benefits from SRS. This legislation would establish a requirement.

Rep. Sebelius amended her original motion with the consent of her second to include proposals 2, 3, and 4. The motion carried.

Paul Shelby, Office of Judicial Administration, appeared and requested six proposals. (Attachment # 6).

Rep. Smith moved the proposed legislation be introduced. Rep. Lawrence seconded the motion. The motion carried.

Orville Voth appeared for the Silver Haired Legislature Committee on Taxation-A and distributed (Attachment #7) proposed legislation.

Rep. Smith moved the proposed legislation be introduced. Rep. Sebelius seconded the motion. The motion carried.

Ron Smith appeared for the Kansas Bar Association and distributed (Attachment # 8) which sets out requests for four bills in connection with three proposals.

Rep. Scott moved that all of the K.B.A. requested legislation be introduced. Rep. Everhart seconded the motion. The motion carried.

The committee adjourned at 4:30 p.m. The next meeting of the committee is scheduled for Thursday, January 24, 1991 at 3:30 p.m. in room 313-S.

Conferees appearing before the committee:

Richard D. Mills, Westridge Group of Associates, HB 2003
Lance Burr, Bill Request
Bob Fry, Kansas Trial Lawyers, Bill Requests (4)
Paul Shelby, Office of Judicial Administration, Bill Requests (6)
Orville Voth, Silver Haired Legislature, Bill Request
Ron Smith, Kansas Bar Association, Bill Requests (4)

GUEST LIST

COMMITTEE: JUDICIARY (HOUSE) DATE: 1/23/91

NAME (PLEASE PRINT)	ADDRESS	COMPANY/ORGANIZATION
Orville Voth	2212 Westdale Rd	Silver Haired Legis.
Paul Shelby	Topeka	OJA
Cathy Gronniet	Topeka	Court Services
KEITH R LANDIS	TOPEKA	CHRISTIAN SCIENCE COMMITTEE ON PUBLICATION FOR KANSAS
Kay Farley	Topeka	Office of Judicial Admin
JEFF DEGRAFFENREID	TOPEKA	Kansas Peace Officers
Richard Mills	Topeka	Westridge Group
Carol McNeely	Topeka	Westridge Group

11/16/90
#1
Pvt. Prisons

STATE OF KANSAS

OFFICE OF THE ATTORNEY GENERAL

2ND FLOOR, KANSAS JUDICIAL CENTER, TOPEKA 66612-1597

ROBERT T. STEPHAN
ATTORNEY GENERAL

November 13, 1990

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The Honorable Wint Winter, Jr.
Chairman
Special Committee on Judiciary
Kansas State Senate
State Capitol
Topeka, Kansas 66612

Dear Senator Winter:

Attorney General Stephan has asked me to reply to the Special Committee on Judiciary's inquiries regarding Proposal No. 12--Regional Prison Authorities and Private Prisons. Please note that this is not an official Attorney General Opinion provided pursuant to K.S.A. 75-704. If such an opinion is required, please advise me.

In considering my responses to your questions, please remember that the area of private prison management is a new field of law. It is this lack of judicial guidance which makes questions regarding the potential legal liabilities difficult to answer. Please also note that no specific prison plan is currently before the state for consideration. The specifics of such a plan would be very important in rendering a complete legal opinion.

QUESTIONS

1. To what extent may cities and counties delegate to private security personnel the ability to use deadly force in the maintenance of prison security? As a part of this question, to what extent may sheriffs or chiefs of police deputize private persons engaged in prison management?

HJUD
1/23/91
ATTACHMENT 1

ANSWER:

A city or county can not grant to a person who is not law enforcement officer the right to use deadly force in furtherance of prison security. Such a private person would have no more right than any other citizen to protect themselves property, or make arrests. See K.S.A. 21-3211, K.S.A. 21-3213, K.S.A. 21-3216.

A county sheriff or city acting pursuant to state statute could deputize or appoint persons, thus empowering them as law enforcement officers, to maintain prison security. This assumes that such people meet the various statutory requirements for appointment as city police officers or deputy sheriffs. See K.S.A. 13-527, K.S.A. 1989 Supp. 14-2101, K.S.A. 1989 Supp. 14-205, K.S.A. 1989 Supp. 15-204, K.S.A. 19-804, K.S.A. 19-805, K.S.A. 19-1810, and K.S.A. 1989 Supp. 74-5616.

The statutory definition of "law enforcement officer" does include, ". . .any person who by virtue of office or public employment is vested by law. . .with a duty to maintain or assert custody or supervision over persons accused or convicted of crime and includes court services officers, parole officers, and directors, security personnel and keepers of correctional institutions, jails or other institutions for the detention of persons accused or convicted or crime. . ." K.S.A. 22-2202(13). The deputized or appointed person would have authority only within his or her respective jurisdiction, see K.S.A. 22-2401(a).

Under current law a sheriff or city could not simply appoint a person to work as a prison guard and then surrender all supervisory authority over that person. If a sheriff or city were to deputize or appoint persons to act within the county or city in order to help maintain security at the prison, that the sheriff or city would be at least partially responsible for the actions of such persons.

The liability for state law torts, i.e. battery, assault, etc., would be applied both under the common law doctrine of <u>respondeat superior</u> as well as the Kansas Tort Claims Act. K.S.A. 75-6103. Liability under the federal civil rights laws would be applied under a theory of negligent training and supervision. Any prison plan would need to provide for the complete defense and

indemnification of any state, county or local government involved in any manner with the prison.

2. To what extent would taxpayers of local units of government which had formed regional prison authorities be liable for damages of prisoners and others for tort claim and civil rights, e.g., Section 1983 violation claims? Enclosed is a suggested revision S.B. 588 which should be used as a basis for responding to this question.

ANSWER:

The proposed substitute for S.B. 588 allows for the creation of regional prison authorities which could be viewed as a separate entity, thus allowing them to absorb potential liability. Whether or not such an entity would be effective is difficult to ascertain at this time.

It should be noted that there will undoubtedly be scores, if not hundreds, of lawsuits filed annually if a large new prison is brought into the state of Kansas. Normally, in 42 U.S.C. § 1983 litigation individuals are sued. It is at that time the government's option is whether or not to provide a defense and/or indemnification of such individuals. See K.S.A. 75-6116. Undoubtedly the regional planning authority would have responsibility for defending any indemnified prison personnel who were sued so long as certain statutory requirements were met. Whether or not this indemnifies county taxpayers is difficult to ascertain. The court might well envision regional planning authority as nothing more than a strawman which should not prevent full recovery by the inmate for damages suffered.

At this time the only safe answer to this question is that in order to protect the taxpayers of a particular county in which the prison is located, the regional authority should charge such rates as to build a defense fund to handle the many cases that will be filed against it and/or its employees. In addition some sort of surety fund or insurance would have to be provided in order to assure funds were available for a defense and indemnification.

3. Can a private prison be constructed and operate in Kansas with out-of-state inmates assuming the moratorium on such prisons contained in 1990 S.B. 748 is not extended beyond July 1, 1991?

ANSWER:

Current Kansas law, 1990 S.B. 748 (1990 Kan. Sess. L. Chp. 309 § 84) prohibits private entities from constructing prisons. This prohibition expires July 1, 1991. After that date, the only restrictions on the construction of private prisons would be found in local zoning ordinances.

As to the operation of such a prison, a private person may not confine another without the sanction of law. See Munsell v. Ideal Food Services, 208 Kan. 909 (1972); U.S. Const. amd. V. This legal sanction could come from either the federal or Kansas branches of government. It is unlikely that a local government could sanction the operation of a large prison housing out of state inmate without legislative authorization. See Attorney General Opinion No. 89-139, as well as K.S.A. 19-805(a) limitations of deputy sheriffs.

4. Put another way, if the Legislature desires to prohibit the operation of private prisons in Kansas, is legislation needed? Would some exception for private prisons operating under contract with the federal government be needed?

ANSWER:

If the Legislature desires to prohibit the operation of private prisons, it would be best for it to specifically enact legislation codifying such a prohibition. Without legislation, a legal void would exist. Such a void would be filled by courts. I would suggest that by allowing the prohibition against private prisons to lapse the legislature would signal to courts that it no longer objects to such activities.

As to prohibiting private prisons which operate under the authority of the federal government, the Supremacy Clause of the United States Constitution, U.S. Con. art. VI, would prohibit the State of Kansas from interfering with the exercise of the federal government's authority.

5. What would be the state tax exempt status, i.e., property and sales tax, of the following: (a) a private prison built with industrial revenue bonds; (b) a regional prison authority where the management of the prison has been contracted out to a private entity?

ANSWER:

Private prison built with IRB's.

K.S.A. 79-201a Second provides in part:

> The following described property, to the extent herein specified, shall be exempt from all property or ad valorem taxes levied under the laws of the state of Kansas:
>
> . . . .
>
> Any property constructed or purchased with the proceeds of any revenue bonds authorized by K.S.A. 13-1238 to 13-1245, inclusive, 19-2776, 19-3815a and 19-3815b, and amendments thereto, issued on or after July 1, 1963, shall be exempt from taxation only for a period of 10 calendar years after the calendar year in which the bonds were issued. . . . Any property constructed or purchased wholly with the proceeds of revenue bonds issued on or after July 1, 1981, under the authority of K.S.A. 12-1740 to 12-1749, inclusive, and amendments thereto, shall be exempt from taxation to the extent of the value of that portion of the property financed by the revenue bonds and only for a period of 10 calendar years after the calendar year in which the bonds were issued. The exemption of that portion of the property constructed or purchased with the proceeds of revenue bonds shall terminate upon the failure to pay all taxes levied on that portion of the property which is not exempt and the entire property shall be subject to sale in the manner prescribed by K.S.A. 79-2301 et seq., and amendments

> thereto. Property purchased, constructed, reconstructed, equipped, maintained or repaired with the proceeds of industrial revenue bonds issued under the authority of K.S.A. 12-1740 et seq., and amendments thereto, which is located in a redevelopment project area established under the authority of K.S.A. 12-1770 et seq. shall not be exempt from taxation.

Thus, absent contrary provisions in any proposed legislation, if the IRB's are authorized and issued under any of the quoted conditions, the prison would be exempted from real property tax with the stated limitations. (We are assuming the IRB's have not as yet been issued. There are other provisions of K.S.A. 79-201a Second covering revenue bonds issued prior to 1981 and prior to 1963.) See, State, ex rel., Tomasic v. City of Kansas City, 237 Kan. 572 (1985).

K.S.A. 79-3606, the statute which delineates sales tax exemptions, provides in part:

> The following shall be exempt from the tax imposed by this act:
>
> [A]ll sales of tangible personal property or services purchased by a contractor for the purpose of constructing, equipping, reconstructing, maintaining, repairing, enlarging, furnishing or remodeling facilities for any political subdivision of the state, the total cost of which is paid from funds of such political subdivision and which would be exempt from taxation under the provisions of this act if purchased directly by such political subdivision. . . . As used in this subsection, K.S.A. 12-3418 and 79-3640, and amendments thereto, "funds of a political subdivision" shall mean general tax revenues, the proceeds of any bonds and gifts or grants-in-aid. Gifts shall not mean funds used for the purpose of constructing, equipping, reconstructing, repairing, enlarging,

> furnishing or remodeling facilities which are to be leased to the donor. . . .

Sales of tangible personal property or service purchased directly by a political subdivision of the state and used exclusively for political subdivision purposes are exempt from sales tax except when "such political subdivision is engaged or proposes to engage in the business of furnishing gas, water, electricity or heat to others and such items of personal property or service are used or proposed to be used in such business." In Attorney General Opinion No. 80-31 we opined that the department of revenue's practice of granting sales tax exemption certificates to industrial revenue bond projects was supported by the foregoing statutory provisions. However, there must be a finding that the property or services are to be used exclusively for political subdivision purposes.

Regional prison authority.

The provisions of proposed substitute for S.B. 588 seem to indicate that a regional prison authority created thereunder will be an entity separate and apart from the municipalities of which it is comprised, and that the authority will itself be a political subdivision of the state. K.S.A. 79-201a provides in part:

> The following described property, to the extent herein specified, shall be exempt from all property or ad valorem taxes levied under the laws of the state of Kansas:
>
> . . . .
>
> Second. All property used exclusively by the state or any municipality or political subdivision of the state. All property owned, being acquired pursuant to a lease-purchase agreement or operated by the state or any municipality or political subdivision of the state which is used or is to be used for any governmental or proprietary function and for which bonds may be issued or taxes levied to finance the same, shall be considered to be "used exclusively"

> by the state, municipality or political subdivision for the purposes of this section. All property leased, other than property being acquired pursuant to a lease-purchase agreement, to the state or any municipality or political subdivision of the state by any private entity shall not be considered to be used exclusively by the state or any municipality or political subdivision of the state. . . .

Contracting with a private entity for management of the prison would not appear to affect the authority's exempt status under this provision as long as the property is being used by the authority for any governmental or proprietary purpose and if bonds may be issued or taxes levied to finance the operation. However, if the authority were to lease the property to a private entity to operate a prison thereon, exempt status might be lost. See, Saline Airport Authority v. Board of Tax Appeals, 13 Kan.App.2d 80, 84 (1988). Further, if the prison facility is owned by a private entity and leased to the authority, it would not be exempt unless the property is being purchased by the authority pursuant to a lease-purchase agreement. (We not that section 13 of proposed substitute for S.B. 588 specifically removes regional prison authorities from any exempt status unless voters approve such an exemption.)

Pursuant to K.S.A 79-3606, sales of goods or services purchased directly by a political subdivision or by a contractor for the purpose of constructing a facility for the political subdivision are exempt from sales tax if such goods and services are used exclusively for political subdivision purposes except those listed in paragraph (2) of subsection (b) of that statute. If the regional prison authority is itself a political subdivision and if constructing and operating a prison is a purpose of the authority, it appears that it would be entitled to a sales sale exemption for such purposes.

It should be noted that the legislature may specifically exempt either a private prison built with IRB's or a regional prison authority which contracts out management of the prison as long as the exemption crafted meets the constitutional requirements set forth by the Kansas Supreme Court. See, State, ex rel., Tomasic v. City of Kansas City, 237 Kan. 572, 579-582 (1985).

conversely, the legislature may choose to subject either or both to taxation.

6. What would the federal income tax status be of municipal bonds issued to finance either a private prison or a regional prison authority prison with the management of the facility in private bonds?

ANSWER:

I respectfully suggest this question be addressed to the IRS or the municipalities' bond counsel as they have the expertise in this area.

Sincerely,

OFFICE OF THE ATTORNEY GENERAL
ROBERT T. STEPHAN

John W. Campbell
Deputy Attorney General
Chief, Litigation Division

JWC/mb

U.S. Department of Justice
Office of Justice Programs
National Institute of Justice

National Institute of Justice / Research in Action

James K. Stewart, Director

Reprinted from NIJ Reports No. 216 September/October 1989

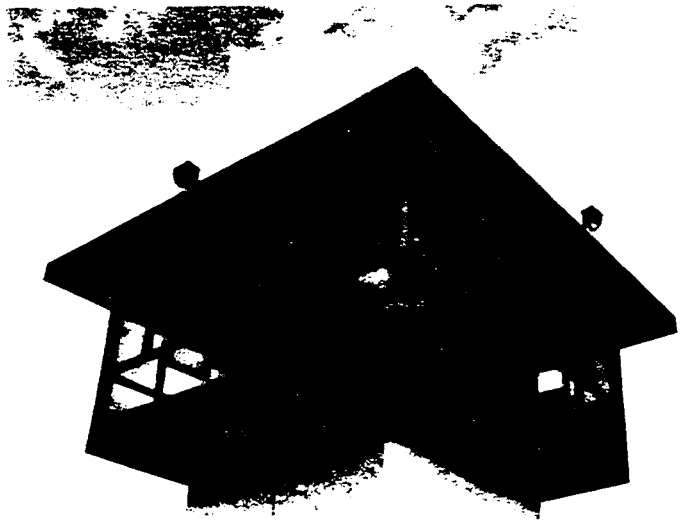
Comparing Costs of Public and Private Prisons: A Case Study

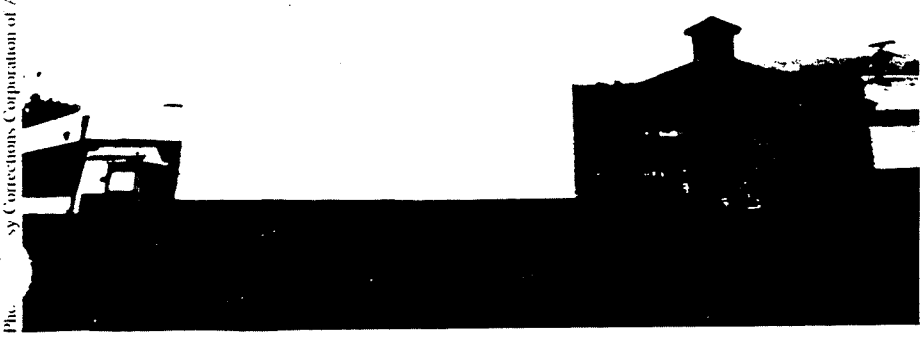
by Charles H. Logan, Ph.D., and Bill W. McGriff, C.P.A.

What are the total governmental costs of imprisonment? Would these costs be lower or higher if prisons were run by private companies under contract? Many jurisdictions today are asking the second question without a requisite understanding of how to answer the first.

This article illustrates how one jurisdiction, Hamilton County, Tennessee, calculated answers to both questions. Hamilton County found that contracting out prison management generated annual savings of at least 4 to 8 percent—and more likely in the range of 5 to 15 percent—compared to the estimated cost of direct county management.

This is believed to be the first published study comparing the actual costs of public and private operation of a prison facility. Results in different corrections systems may vary. However, other jurisdictions may be able to profit from—and improve upon—this approach to analyzing correctional costs. The methodology used overcomes the major difficulty in comparing correctional expenditures—the problem of hidden costs.





Photos courtesy Corrections Corporation of America

Hidden costs of corrections

Generally, reports of government correctional costs are taken from a single budget, either that of a facility

Charles H. Logan is Associate Professor of Sociology at the University of Connecticut. Bill W. McGriff is County Auditor for Hamilton County, Tennessee.

This report is part of a larger work to be published as Charles H. Logan, *Private Prisons: Cons and Pros* (New York: Oxford University Press, forthcoming 1990). The research was supported by the Visiting Fellowship Program of the National Institute of Justice.

or of the agency in charge of the facility. While correctional budgets vary, it is fair to say that no official budget shows all of the direct and indirect costs of corrections.

Costs that do not appear in a budget can be referred to, for convenience, as "hidden costs." This does not imply that they are deliberately concealed, only that they are not easily discernible. Most of these costs come from the budgets of other agencies, or from a general fund, where they may not be identified specifically as expenditures on corrections. Even a rough inventory (see box) shows how extensive the hidden costs of corrections can be.

Costs omitted from correctional budgets can amount to one-third the value of those that are included. A 1985 survey of State correctional officials asked, first, for reports of *agency* costs and, second, for estimates of *total* costs of correctional confinement and care, taking into account expenditures by other agencies.[1] The 42 States responding reported an average estimated total cost that was 13.5 percent higher than the average reported agency cost. That, however, was for operating costs only; if construction and financing had been included, total costs would have exceeded reported agency costs by an even greater margin.

Citing studies from New York State, New York City, and Canada, in which total costs were estimated at 30 to 44 percent above normally reported agency costs, the researchers concluded that true total costs are likely to be 20 to 35 percent higher than reported agency costs. It is reasonable to assume that real costs are typically 35 percent higher. When agencies or facilities do not pay pensions and fringe benefits out of their own budgets, that omission alone will call for a 25 to 30 percent inflation factor.

Correctional officials may find it difficult to identify and estimate correctional costs that are paid from another agency's budget. A county auditor, however, is in a good position to do so. That fact forms the basis of the analysis that follows.

Some Hidden Costs of Corrections

- **Capital costs:** land purchases, construction, major equipment, depreciation or amortization.
- **Finance costs:** service and interest on bonds.
- **Opportunity costs:** taxes or rent forgone from alternative uses of land or buildings.
- **Employment (fringe) benefits:** insurance, longevity bonuses, retirement contributions, unfunded pension payouts.
- **Unemployment and workers' compensation costs.**
- **External administrative overhead:** prorated share of the expenses of centralized executive offices (governor, mayor, etc.) or administrative offices (e.g., personnel services, central purchasing, data processing, general services administration).
- **External oversight costs:** inspections, program monitoring, administrative or judicial reviews and appeals of decisions, auditing and other comptroller services.
- **Legal service costs**, including public funds for inmate plaintiffs and defendants as well as for defense of the government.
- **General liability costs:** successful legal claims, punitive damages, fines, court costs, premiums for general liability insurance or costs of administering a self-insurance plan.
- **Property insurance costs:** premiums or self-insurance costs for fire, theft, and casualty protection (or risk cost of uninsured losses).
- **Staff training costs** (when provided or subsidized by another agency).
- **Transportation costs:** transportation services, vehicles, vehicle maintenance, fuel, parts, related costs (when provided by other departments).
- **Food costs** (when other government agencies provide surplus food or subsidies).
- **Interagency personnel costs** (when personnel are borrowed from other agencies for routine purposes or emergencies).
- **Treatment or program costs** (when other agencies provide hospitalization, medical and mental health care, education, job training, recreation, counseling, or other treatment programs and services).

Hamilton County Penal Farm: a cost comparison

On October 15, 1984, Corrections Corporation of America (CCA) assumed management of the Hamilton County Penal Farm. This 350-bed minimum-to-medium-security county prison located near Chattanooga holds convicted county misdemeanants, State felons, and some pretrial detainees under the county's jurisdiction.

The cost of the contract is renegotiated by CCA and the county every year. For that purpose, Bill McGriff, the county auditor (and one of the authors of this report), prepares an annual analysis estimating what the total cost would be if the county were to run the

prison directly and comparing that to the estimated total cost of continuing to operate the facility under contract. The costs estimated for fiscal year 1986–87, given direct county operation, are itemized in table 1.

Costs under county management

The first nine items in table 1 appeared as line items in the Penal Farm budget when it was under county operation. Actual expenditures in these categories are available for fiscal year 1983–84, the last year in which the county itself ran the prison. To project from these 1983–84 expenditures what it would cost the county to take back the prison in later years, McGriff made four assumptions:

1. Staffing would be the same as the contractor's, with certain adjustments.

2. Prison employee salaries would have increased in the interim by the same amount as the salaries of other county employees.

3. Nonsalary expenses would have increased at a rate equal to inflation as measured by the Consumer Price Index (CPI), and where appropriate, a rate equal to the increase in the prisoner population.

4. The county would have incurred no extraordinary expenses, such as a lawsuit settlement beyond the level of insurance coverage.

The assumptions were designed to be conservative—to underestimate costs to the county if it had retained or resumed management of the prison.

For example, the assumption that county staffing would be the same as that of the contractor is realistic for purposes of pricing a *resumption* of control. However, it could well underestimate what the staff size might have grown to under *continued* county management because one of the goals of contracting is to achieve greater staffing efficiency.

Assumption 2 had to be modified in fiscal year 1986–87 because a county wage study indicated that prison employees, among others, had been especially underpaid by the county. If the county took back the prison, it would have to pay salaries responsive to the wage study, whether higher or lower than the contractor's. Furthermore, the personnel department indicated that since corrections officers at the prison must be certified and trained in the same manner as the sheriff's jail officers, they should be paid accordingly. Jail officer trainees with 6 months' experience were paid at grade 8, while the entry level for prison officers prior to the contract was at grade 4.

Table 1.

Hamilton County Penal Farm—Estimated Total Cost if Operated by County, Fiscal Year 1986–87

1.	Salaries and wages	$1,239,380
2.	Fringe benefits	320,491
3.	Food and kitchen supplies	404,966
4.	Medicine and personal care	28,694
5.	Utilities	198,587
6.	Consumable maintenance supplies	56,532
7.	Uniforms	61,237
8.	Equipment	45,506
9.	Other operating expenses	108,045
	Subtotal: Operating budget items	**$2,463,438**
10.	Maintenance and garbage collection	70,195
11.	Insurance	41,885
12.	Clerk of workhouse records	16,238
13.	County hospital care	238,886
14.	Depreciation on pre-contractor construction	57,500
15.	Interest on pre-contractor construction	74,878
16.	Amortized purchase of contractor addition	152,000
17.	Other direct costs[a]	204,888
18.	Other indirect costs[b]	93,833
	Total cost for year	**$3,413,741**
	Prisoner days (avg. pop.: 364)	**132,788**
	Cost per prisoner day	**$ 25.71**

[a] Other direct costs: personnel, accounting, financial management, data processing, purchasing, county physician, human services administrator.

[b] Other indirect costs: county commission, county executive, county auditor, county attorney, finance administrator.

1-12

On the other hand, the county had a policy of not upgrading a position more than two grades in one year, which might or might not have applied to the prison officers because they had already been out of the county system for a year. The fiscal year 1986–87 analysis assumed an upgrade of only two grades if the county took back the prison, leaving the prison officers, at grade 6, about 13 percent below the novice jail officers at grade 8. This is a significant underestimate, since it is reasonable to suppose that corrections officers returning to the county payroll (especially those with experience) would be paid no less than entry level jail officers. It should be noted that underestimation of salaries also implies underestimation of fringe benefits. Together, these two categories constitute close to half of total costs.

Assumption 3, because it uses the CPI, probably underestimates inflation in other county costs. Since World War II, the cost of services provided by government has tended to rise substantially faster than the CPI,[2] and correctional costs have recently been rising even faster than other government costs.

Assumption 4, that no extraordinary (i.e., unforeseeable or incalculable) expenses would occur, is a necessary one. However, because such expenses are bound to occur sooner or later, the assumption has the effect of underestimating the potential costs of county management. Without a contract, all such costs would fall on the county. Under private management, the contractor serves as a buffer by shouldering some of the risk of uninsured losses or unexpected cost increases, unless the contract can be renegotiated.

Cost items 10 through 18 in table 1 would not appear in the Penal Farm budget under county administration; rather they would be charged to other budgets, as the following examples show.

- Maintenance and garbage removal at the prison. These were previously provided by the county out of other budgets.
- Liability and property insurance McGriff estimated what it would cost the county to obtain liability and property insurance for the prison by using a portion of the total cost of insuring the sheriff's department, which includes a jail.[3]
- The salary of the workhouse records clerk, who keeps records on time served by prisoners. The salary for this position is separate from the Penal Farm's budget.
- Hospital care for all prisoners. This is paid by the county from funds set aside for indigents.
- Depreciation and interest costs. These are calculated for all construction at the prison prior to the contract.

Item 16 reflects the $1.6 million in renovations and additions invested by the contractor in its first year of operating the prison. If the contract were terminated, the county would have to reimburse the contractor. The estimated cost of this reimbursement assumed a bond rate of 7 percent and a depreciation period of 40 years.

Other direct costs include activities of central offices that routinely perform services for all county agencies: personnel, accounting, financial management, data processing, and purchasing. Under county management, the prison required these services although they were not paid for out of the prison budget. The salary of the county physician, who worked part time for the county, is an example of a direct cost as are the salaries of the human services administrator, whose division includes the prison, and her secretary.

Other indirect costs are those incurred by certain county officials at the executive level. These officials and their staffs must spend some portion of their time dealing with matters pertaining to the prison.

Prorating formulas

For other costs, both direct and indirect, conservative prorating formulas were used to calculate what proportions of various other budgets to attribute to the prison. The Personnel Department costs, for example, were attributed to the Penal Farm in the same proportion as prison employees were to total county employees. However, personnel turnover is much greater in corrections than it is in other areas of county employment. The county personnel director confirmed that the assumption of equal effort per worker underestimates the time his department would spend dealing with prison employees.

The county physician attended prisoners at the jail as well as at the prison, so his salary and fringe benefits were attributed to the Penal Farm in the same proportion as Penal Farm inmates to the total inmate population (prison plus jail).

The salary and fringe benefits of the human services administrator and her secretary were prorated based on the Penal Farm's portion of the county's total human services obligations.

All other direct and indirect costs were prorated based on total Penal Farm obligations as a percentage of the county's total General Fund obligations. This formula assumes that the ratio of external costs to internal costs was no greater at the Penal Farm than in the average county operation.

Again, such an assumption may well underestimate actual costs. For example, auditing and purchasing for the prison are more difficult than for other county operations and thus are underestimated by the prorating technique. As a case in point, the county had to go through a formal bidding process every week for prison

kitchen supplies. After the contractor took over all prison purchasing, the county was able to eliminate two buyer positions.

It is safe to assume that when it was under direct county administration, the Penal Farm caused more headaches per dollar of internal spending and required more time from some county executives than did the average county operation. The county attorney, for example, probably spent more time on prison matters than on many other county matters prior to contracting. County commissioners everywhere cite the county jail or prison as a disproportionate source of problems, particularly when they are uninsured against personal liability in the case of lawsuits. Thus, the proportional attribution of part of the time and budgets of county executives to prison matters was probably on the low side.

Table 1, then, shows a modestly estimated total cost of $3,413,741 for fiscal year 1986–87, if the prison were under direct county management. Note that the total cost shown at the bottom of table 1 is 38.6 percent higher than the subtotal, which includes only prison budget line items. As noted earlier in the discussion of hidden costs, we suggested adding 35 percent to most prison budgets to reflect estimated indirect costs. If Hamilton County had charged fringe benefits to a general budget, as many other jurisdictions do, the total would have been 74 percent higher than the subtotal.

At an estimated total cost per prisoner day of $25.71 for fiscal year 1986–87, Hamilton County would have been very frugal. A 1986 survey showed a reported cost of $30.26 per prisoner day for 10 jails in the East South Central region (Alabama, Kentucky, Mississippi, Tennessee).[4] In 1983–1984, the reported cost per prisoner day across all of Tennessee's State adult confinement facilities was $30.17.[5] Even though this figure includes capital as well as operating expenditures, it is probably not as inclusive as the Hamilton County estimate, and the period it covers is 3 years earlier.

Clearly, then, Hamilton County's estimated costs for county management of the Penal Farm were low relative to those of other government-run facilities in the same region. Therefore, this facility provides a fairly severe test of a private contractor's ability to lower costs to government of operating a prison.

Costs under contracting

After estimating costs under county management, total prison and related costs to Hamilton County under contractual management can be calculated fairly clearly, simply, and thoroughly. The fee per prisoner day is fixed by contract and the number of prisoners, while not always predictable, is known precisely for any past or current period. To these per diem payments, however, three other sets of costs must be added:

1. The salary of the superintendent (who monitors the contract and makes all release and gain time decisions) and that of his secretary.

2. Certain other costs that the county continues to pay directly: the salary of the clerk of workhouse records, county hospital care for prisoners, and depreciation and interest on construction prior to the contractor coming on board (items 12–15 in table 1).

3. Other indirect costs (item 18 in table 1). The prison continues to require some attention by county executives, but only a small fraction of the time they devoted to prison matters under county operation; this fraction is estimated generously as one-quarter.

These costs, which could be called the "hidden costs" of contracting, are offset by what might be referred to as a "hidden rebate" from contracting. Every year, the contractor pays about $64,000 back into the community in local sales, property, and business taxes that would not otherwise have been collected.

Comparison of costs

Table 2 shows the total costs to Hamilton County for each of the first 3 fiscal years, when the prison was managed by the contractor. These are compared to the total costs (as estimated by the methods described for table 1) that would have been incurred under county management.

Fiscal year 1985–86 was the first full fiscal year under the contract. The contractor's fee that year was $21 per prisoner day. The higher per diem figure of $24.10 shown in the table is based on total county costs under the contract—including hidden costs—not just the fee paid to the contractor.[6] In fiscal year 1986–87, the fee was raised to $22, where it remained the following year.

Table 2 shows savings to the county of *at least* 3.8 percent the first year, 3.0 percent the second year, and 8.1 percent the third year. The savings dipped a little when the contractor first raised its fee; however, they increased considerably the following year, when the contractor held (or was held) to the same fee while the county's own cost basis increased.

Because of the conservative nature of the county cost estimates, the savings are *certainly more than* those identified in table 2. For example, consider the effects of assumption 2 (regarding county salaries) on the figures for fiscal year 1986–87, where savings were lowest. Even if average pay of prison officers had been estimated as *equal* to that of novice jail officers, rather than two grades lower, this would still have underestimated county costs. However, it would have

added $148,676 to the estimated county costs, and the estimated savings for that year would have been 7 percent rather than 3 percent. This adjustment would not affect the estimate for fiscal year 1985–86 (see earlier discussion of assumption 2), but the $148,676 increase in county salaries would continue during fiscal year 1987–88, so the estimated savings for that year would be 12 percent rather than 8 percent.

There still remain several other downward biases in the county cost estimates and therefore in the estimated savings. These include the underestimation of governmental inflation, the assumption of no unforeseen expenses, and the conservative prorating techniques for other direct costs and other indirect costs. Only the direction of these biases is known; it is too difficult to estimate their magnitude. However, based on a subjective allowance for their existence, a reasonable yet still cautious estimate of real savings over the 3-year period would range from 5 to 15 percent per year.

Comparing the costs of public and private prisons: an overview

Two methodological problems in particular make it hard to compare the costs of public and private prisons. One, as already discussed in detail, is the problem of hidden costs, which vary in size and source depending on the type of prison administration. The other is the "apples and oranges" problem. The facilities and programs being compared are not sufficiently alike in other respects to make a straight dollar comparison fair.

The study summarized here reduces the magnitude of both problems by comparing the total cost of a privately operated county prison with the estimated total cost (projected from prior expenditures) to the county if it operated that same facility itself.

The words "total" and "same" must be immediately qualified, however. Although it is fairly thorough, this study undoubtedly does not capture all costs, and the prison, as administered by the contractor, is different in important respects from what it would have been if the county had continued to operate it directly.

In estimating correctional costs, the only certainty is that there will be errors, generally errors of omission. In this study, however, those errors actually strengthen the findings. When reliable figures could not be obtained, the study either omitted costs or used assumptions that erred on the low side. Thus, we have confidence in the *direction* if not the absolute size of the findings. It is clear that Hamilton County saves money by operating its prison under a private contract.

In response to the "apples and oranges" problem, the Hamilton County Commission, in deciding to renew the contract, considered some costs and benefits that were not quantifiable. For example, the contractor carries $5 million in liability insurance. In the event of a successful lawsuit, an indemnification clause in the contract could save the county (and perhaps the commissioners personally) a considerable but unpredictable amount of money. The added staff training, new inmate classification system, computer records management, and other improvements introduced by the contractor would also have cost the county money not included in the auditor's calculations.

In addition, commission members said the contractor provided better management and more professional training than previously existed and spared county officials many of the daily hassles involved in running a prison. Grand jury reports were all positive after the contract began, thus eliminating the time and expense required of the county to correct the sorts of problems criticized by earlier grand juries.

Two benefits in particular make the contractor-operated facility not truly comparable to the county-run operation: new physical improvements and

Table 2.

Hamilton County Penal Farm Costs: Estimated Cost of County Operation vs. Contractor Operation—Fiscal Years 1985 Through 1987

	1985–1986	1986–1987	1987–1988
County operation (per diem)	$2,853,513 ($25.05)	$3,413,741 ($25.71)	$3,642,464 ($27.49)
Contractor (per diem)	$2,746,073 ($24.10)	$3,312,428 ($24.95)	$3,346,300 ($25.25)
Savings (as percent)	$ 107,440 (3.8)	$ 101,313 (3.0)	$ 296,164 (8.1)
Prisoner days (avg. pop.)	113,928 (312)	132,788 (364)	132,514 (363)

the added service gained by splitting the superintendent functions from the warden function.

The county benefited from $1.6 million in new construction handled by the contractor. The cost for this is factored into both sides of the analysis. However, if the county had bid the construction itself (i.e., had there been no contract), the cost almost certainly would have been higher. Inmate housing constructed by the county in 1981, for example, cost approximately $65 per square foot. The contractor's cost to construct inmate housing in 1985 was $48.62 per square foot. Thus, for the price assumed on both sides, the county would not have been able to add as much housing without the contract.

In addition to the new construction, the contractor invested capital and labor in repair and preventive maintenance of every aspect of the physical plant, including plumbing, heating, and electrical systems, which it received in a deteriorated state. This cost was included in the contractor's fee, but the analysis does not estimate the cost of such extra repairs and maintenance under county administration.

The contract added human as well as physical capital. Under the contract, the county has two full-time managers (each with a secretary) performing three functions: warden, superintendent, and monitor. Without the contract, the county would have only one person (with one secretary) to perform as both warden and superintendent, and it would have no monitor. It should be emphasized that monitoring is not just an added cost; it is an added benefit as well. The monitor adds a new element of independent review of disciplinary and other decisions, which protects due process, and an onsite supervisor and regulator to ensure the quality of operation.

The county has also gained expertise. The warden under the county had no prior correctional background, while the warden under the contract is a man with considerable experience in corrections. The county on its own would have been unlikely to attract comparable candidates for that position. Moreover, the Hamilton County facility now has behind it the experience and expertise of the contractor's top corporate officers, who oversee the operation of over a dozen such facilities around the country.

As this study shows, the prison operation that Hamilton County has under private contract is not the same as it would have had otherwise. By contracting for its prison management, the county has apparently received more and better prison services for less money." **NIJ**

Notes

1. George Camp and Camille Camp. *The Real Cost of Corrections: A Research Report* (South Salem, New York: Criminal Justice Institute, 1985).

2. William D. Berry and David Lowery, "The Growing Cost of Government: A Test of Two Explanations," *Social Science Quarterly* 65 (1984): 735–749.

3. Under private operation, the contractor carries heavy insurance and indemnifies the county against potential costs of litigation and legal damages.

4. *Corrections Compendium*, November 1986. This source did not indicate whether the $30.26 per prison day included capital costs.

5. U.S. Department of Justice, *1984 Census of State Adult Correctional Facilities* (Washington, D.C.: Bureau of Justice Statistics, August 1987), tables 18 and 31 (combining data).

6. Actual payments to the contractor are lower, on an average, than the basic per diem fee, because a lower fee is charged for offenders convicted of drunk driving.

7. Another aspect of the methodology understates the savings in percentage terms, though not in dollar amounts. Certain costs (items 12–15 in table 1) are continuing, noncontracted county costs. They are paid by the county directly and would be the same whether the prison was contracted or not. These costs are included in table 1 (and therefore in table 2) to show as complete an accounting of the county's total correctional costs as possible. In table 2, these costs were included on both sides of the comparison, but they might just as well have been subtracted from both sides. Had that been done, the dollar differences between contracting and direct county operation, shown in table 2, would have been the same in all 3 years. However, the percentage savings under contracting would have been 4.3 percent, 3.3 percent, and 9.1 percent, instead of 3.8 percent, 3.0 percent, and 8.1 percent. When this effect and the salary adjustment effect are combined, the new figures on savings for the 3 years are 4.3 percent, 7.9 percent, and 13.1 percent.

8. For a detailed discussion and evaluation of operational changes at the prison, see Samuel Jan Brakel, "Prison Management, Private Enterprise Style: The Inmates' Evaluation," *New England Journal on Criminal and Civil Confinement* 14 (Summer 1988): 175–244. For further reading on costs, see Douglas C. McDonald, "The Cost of Corrections: In Search of the Bottom Line," *Research in Corrections* vol. 2, no. 1 (Boulder, Colorado: National Institute of Corrections, National Information Center, 1989).

The Assistant Attorney General, Office of Justice Programs, coordinates the activities of the following program Offices and Bureaus: National Institute of Justice, Bureau of Justice Statistics, Bureau of Justice Assistance, Office of Juvenile Justice and Delinquency Prevention, and Office for Victims of Crime.

NCJ 119964

A ple of Articles on Privat isons

1. "Pros, Cons of Private Prisons"-Penn. Law Journal-Reporter Apr. 1. 1985
2. "Profiting from Prisons"-The State Aug. 11, 1985
3. Justice at a Price-Forbes March 12, 1984
4. Private Prisons Opposed-Memphis Com. Appeal Feb. 25, 1986
5. Inmates Shipped Out After Riot- USA Today May 30, 1986
6. "The Failure of Privatization"-National Review July 18, 1986
7. Community Punishment-Raleigh News and Observer Dec. 4, 1985
8. Incarceration Inc: The Downside of Private Prisons-The Nation June 15, 1985
9. Partners in Crime-Forbes Feb. 11, 1985
10. The Big House, A Great Place to Shelter Taxes-Washington Post Apr. 7, 1985
11. Privatization May Foster Corruption-The State Nov. 9, 1985
12. Public Service, Private Profits-Time Feb. 10, 1986
13. Crime Pays-Transcript from CBS News, 60 Minutes June 30, 1985 Vol. XVII
14. Private Jails Bankrupt, Prisoners Bused Out- March 19, 1986
15. "National Sheriff's Association Opposes Privatization of Jails, Detention Facilities-Crime Control Digest Apr. 1, 1985
16. "Financing: Privatization From a Banker's Perspective"-Privatization Review 1
17. Privatizing War-Washington Post March 26, 1985
18. Making Crime Pay-Barrister Winter 1986
19. For Rent, Tiny Room, No View-USA Today Nov. 18, 1985

U.S. Department of Justice
National Institute of Justice

National Institute of Justice / Research in Brief

March 1985

Corrections and the Private Sector

Joan Mullen

The debate

Few proposals in the field of corrections have stimulated as sharply divided opinions as the prospect of contracting with the private sector for the management of prison and jail facilities. While the National Sheriffs' Association has expressed its disapproval and opposition to the concept of proprietary jail facilities, the executive director of the American Correctional Association has suggested that "We ought to give business a try."[1]

1. Kevin Krajick, "Prisons for Profit: The Private Alternative," *State Legislatures*, April 1984, pp. 9-14.

Both deep reservations and high expectations have also come from the research community. Recognizing the flexibility and economic capabilities that reside in the private sector, some foresee the chance to introduce efficiency and innovation to a field laboring under the burden of outmoded facilities, rising staff costs, declining resources, increasing executive and judicial demands for improved services, and public calls for more prisoners at half the price. Others fear that the profit motive will interfere with professional corrections practice and question whether any part of the administration of justice is an appropriate market for economic enterprise.

The available research

Far more testing and evaluation are required before the ideological debate that surrounds these issues can be waged in more practical terms. Although the adult corrections field has a long history of contracting with private organizations for secondary community corrections placements, the concept of contracting for primary facilities is relatively new and has yet to be tested on any significant scale. For the most part, information on the benefits and hazards of privately operated adult facilities must be inferred from the experience of correctional agencies in contracting for

From the Director

Crowding and the escalating costs of American prisons and jails are among the factors prompting public officials and the private sector to experiment with new alliances in the field of corrections. Corrections departments have long relied on private vendors to furnish specific institutional services or to operate aftercare facilities and programs. But they now are turning to the private sector for help in financing new construction and in managing primary confinement facilities.

Some of the controversial issues of such arrangements—quality, accountability, security, and cost—have been hotly debated and widely reported in the news media, including *Newsweek*, *The Wall Street Journal*, and *Cable News Network*. Only fragments of experience, however, have been documented, and no comprehensive discussion of the issues has been available.

To respond to this clear need and to inform the debate, the National Institute of Justice, as the research arm of the U.S. Department of Justice, reviewed the extent of private-sector involvement in the corrections field. A special *Issues and Practices* report was commissioned to identify major trends in the privatization movement through the quick assembly of literature, expert opinion, and assessment of field practices. Corrections departments in all 50 States were contacted as well as many private vendors involved in correctional operations or construction financing.

Because data collection was completed in less than 6 weeks, the information developed is neither exhaustive nor detailed. The objective, however, was not to conduct an extended research project but to provide decisionmakers with timely information and to lay the foundation for future experimentation and evaluation.

This *Research in Brief* summarizes some of the significant findings of *The Privatization of Corrections* and outlines the issues surrounding the new proposals for private financing, construction, and operation of prisons and jails. It also reviews other important background work sponsored by the National Institute of Corrections. The views and conclusions presented are, of course, those of the author and do not necessarily represent the official view of the National Institute of Justice. They do, however, provide a foundation for further inquiry into the private sector's potential for contributing to corrections management.

James K. Stewart
Director
National Institute of Justice

ecific institutional services and aftercare programs. Additional insight can be drawn from related fields of human service (such as health care) as well as the juvenile corrections field, where deinstitutionalization initiatives have prompted the development of a broader array of privately managed programs and facilities. Two recent reports have addressed this experience in the course of reviewing current developments in the movement toward proprietary adult facilities.

The National Institute of Corrections study

One study, conducted by the Criminal Justice Institute for the National Institute of Corrections, focused on the extent to which the private sector is involved in providing services to juvenile and adult corrections agencies.[2] In this survey, contracting was found most frequently in juvenile rather than adult agencies and was typically used to provide health services, educational and vocational training, aftercare services (including halfway house placements), and staff training. Generally, privately provided services were reported to be more cost effective than those that public corrections agencies could provide. Respondents particularly favored medical service contracts, noting improvements in both the quality of service and staff. Overall, the perceived advantages of service contracting outweighed the disadvantages, although the two most common problems mentioned by respondents were monitoring the performance of providers, followed closely by poor quality of service. Contracting agencies stressed the importance of clearly defining contractor roles and responsibilities, thoroughly checking prospective vendors' competence, and establishing careful contract monitoring and evaluation systems.

While the majority of respondents indicated plans for expanding their use of contracts for specific services, far more uncertainty was attached to the prospect of contracting for the management of entire facilities. Only 22 percent of the responding agencies suggested that facility management contracts might be considered; about 75 percent would not consider such an arrangement and roughly 4 percent were unsure.

2. Camille G. Camp and George M. Camp, *Private Sector Involvement in Prison Services and Operations*, Criminal Justice Institute for the National Institute of Corrections, Washington, D.C., February 1984.

The National Institute of Justice study

A second inquiry, conducted by Abt Associates for the National Institute of Justice, provides an overview of several aspects of the emerging trend toward greater private-sector involvement in corrections.[3] Three areas are discussed: (1) the participation of private industry in prison work programs, (2) the use of private-sector alternatives for financing the construction of prison and jail facilities, and (3) the involvement of private organizations in actual facility management and operations.

In many respects, the first area may hold the greatest promise for introducing new models of corrections practice. The aggressive participation of private industry in organizing institutions as places of work might go far toward achieving Chief Justice Burger's vision of prisons as "factories with walls." To date, however, the private sector's involvement in prison work programs has been relatively modest. Thus, while activity in this area is discussed in the full report, this summary focuses on private financing arrangements and facility management contracting—the two areas that lead the current privatization debate.

3. Joan Mullen, Kent Chabotar, and Deborah Carrow, *The Privatization of Corrections*, Abt Associates for the National Institute of Justice, Washington, D.C., May 1984.

Private financing alternatives for construction

Faced with continually escalating prison and jail populations, it is hardly surprising to find State and local governments searching for alternatives to the traditional ways of meeting the needs for prisoner housing. At the State level alone, more than 77,000 beds have been added over the past 5 years. And, as Table 1 indicates, States reported plans to expend more than $5 billion over the next 10 years to increase their prison capacities by another 104,688 beds.

Recognizing the new market opportunities presented by these expansion plans, the private sector has become increasingly active in marketing financing packages for prison and jail construction. Traditionally, governments have financed prison and jail

TABLE 1
State prison expansion plans
(for the 10-year period beginning Jan. 1984)

Region[1]	Number of beds			Estimated cost[2] (in millions)		
	Funded	Proposed	Total	Funded	Proposed	Total
Northeast	15,590	933	16,523	969.4	22.5	991.9
North Central	22,288	4,099	26,387	871.95	151.94	1,023.89
South	15,272	9,742	25,014	385.7	403.5	789.2
West	10,975	25,789	36,764	665	1,561.7	2,226.7
Total U.S.	64,125	40,563	104,688	2,892.05	2,139.64	5,031.69

Source: As estimated by respondents to a telephone survey of State departments of correction administered in Jan./Feb. 1984 and displayed by State in The Privatization of Corrections.

Notes: 1. Northeast (ME, NH, VT, MA, RI, CT, NY, NJ, PA); North Central (OH, IN, IL, MI, WI, MN, IA, MO, ND, SD, NB, KS); South (DE, MD, DC, VA, WV, NC, SC, GA, FL, KY, TN, AL, MS, AR, LA, OK, TX); West (MT, ID, WY, CO, NM, AZ, UT, NV, WA, OR, CA, AK, HI).

2. Estimated costs not provided for 5,206 beds (900 in the Northeast, 770 in North Central, 1,574 in South, and 1,962 in West). Note that estimates are for *capital expenditures only*, exclusive of operating costs.

co ion with current oper rev , and general obligation s. By paying cash rather than borrowing, the use of current revenues (the "pay-as-you-go approach") avoids interest charges and long-term liabilities. It is, however, difficult to implement when construction costs escalate and cash reserves are insufficient. With general obligation bonds, governments can raise large amounts of investment capital at competitive interest rates because their "full faith and credit" is pledged to repay the debt. The problem is that general obligation bonds are subject to debt limits and voter approval which, in an era of economic uncertainty and taxpayer revolts, are often insurmountable obstacles.

For these reasons, some governments are turning to the private sector for access to a variety of lease financing alternatives. Most widely discussed are lease contracts, in the form of lease/purchase agreements, which are used to purchase a facility over time, much like an installment sale. Depending on the length and type of lease, prevailing interest rates, and other factors, leasing may be less expensive than bond financing, but the most significant advantage is the ability to evade debt limits by insisting on an annually renewable lease subject to nonappropriation. Private investors underwrite lease arrangements because they gain tax advantages, a steady cash flow from periodic lease payments, and the opportunity to transfer some of the risks of ownership to the lessee (for instance, buying insurance against accidental damage or loss). As a result, the costs may be competitive with bond financing.

Stimulated by the successful development of office buildings, port facilities, school buildings, and telecommunications systems, lease/purchase financing is relatively new to corrections. A legal entity, such as a joint powers authority or nonprofit corporation, finances the project "on behalf of" the government through the sale of revenue bonds or certificates of participation (which split the lease into $5,000 pieces), both of which are backed by the lease payments. Promoted by investment bankers and brokerage houses, lease/purchase arrangements are being seriously considered in a growing number of States:

- In early 1984, enabling legislation had been introduced in Arizona and Missouri and had passed in Illinois, States where lease/purchase was under active consideration.
- California, Kentucky, and Minnesota had or were then evaluating proposals for lease/purchase financing of State facilities.
- While Ohio was the only State that had acquired beds through lease/purchase, some of the major sponsors of lease/purchase agreements (Merrill Lynch Capital Markets, E.F. Hutton, and Lehman Brothers Kuhn Loeb) reported significant activity at the local level: a $30.2 million jail and sheriff's facility in Colorado, a $50 million jail project in Philadelphia, a $5 million jail project in Rutherford County, Tennessee, and a project in Los Angeles County for a jail and criminal justice training center.

The most controversial aspect of lease/purchase financing is its use to circumvent the debt ceilings and referenda requirements of general obligation bonds. Because no voter approval is required, lease/purchase agreements undeniably reduce citizen participation in corrections policy. Arguably, however, the public often expresses inconsistent preferences, simultaneously demanding stiffer penalties but refusing to authorize funds for prisoner housing. All too often public officials are left with no clear directions for developing realistic corrections policy.

Private facility ownership and operations

Confinement service contracts are another way of expanding corrections capacity—without assuming ownership of the required facilities. In these arrangements, vendors are responsible for locating a suitable site, leasing or constructing an appropriate building, and providing all the staff and services necessary to operate the facility. Much like the business of running a full-service hotel, room rates are established based on capital investments, operating costs, and expected occupancy, and the government is often charged by the day for each (unwilling) guest. Table 2 highlights some of the major developments in this area. Since the Abt assessment focused on contacting Federal and State adult corrections agencies, information c contracts for the confinement of juveniles and offenders under local jurisdiction is necessarily limited but nonetheless instructive.

Federal experience

The most active new market for confinement service contracting has clearly emerged at the Federal level in response to growing demands for housing illegal alien populations. Three Federal agencies have elected to develop contracted facilities to accommodate these demands:

1. The Immigration and Naturalization Service, which is responsible for the apprehension and confinement of immigration law violators pending deportation;
2. The U.S. Marshals Service, responsible for the custody of alien material witnesses—essentially, smuggled aliens held to testify against their smugglers; and
3. The Federal Bureau of Prisons, which has jurisdiction over sentenced aliens—generally violators who have reentered the country following deportation.

These facilities focus on providing short-term confinement space for aliens who may be held only a matter of days; security and treatment requirements are minimal. Beginning in mid-1984, the Bureau of Prisons also contracted for operation of a 60-bed facility for offenders sentenced under the Federal Youth Corrections Act.

State adult experience

Although the publicity that has surrounded Federal facility management contracts has led many to infer the emergence of a national trend toward "prisons for profit," little change was found in the contracting practices of State adult corrections agencies. Although new corporate providers had entered the field more aggressively than ever before, their most immediate prospects appeared to be confined to contracts for community-based facilities. Any contract resulting from the Kentucky Corrections Cabinet's RFP for minimum security housing for 200 sentenced felons (Table 2) reportedly will be administered by the Community Corrections Division. The population pressures that have required States to respond fairly rapidly to the need for larger facility networks may

TABLE 2
Facility management contracting activity in early 1984[1]

Federal Contracts	State Corrections Contracts	Local Jail Contracts
Immigration & Naturalization Service • 4 facility contracts for aliens awaiting deportation were operating (in San Diego, Los Angeles, Houston, Denver), providing a total capacity of 625 beds. • 3 facility contracts were nearing award (in Las Vegas, Phoenix, San Francisco), providing another 225 beds. • 2 additional facility contracts offering a total of 270 beds were planned in the near term (Laredo and El Paso, Texas). **U.S. Marshals Service** • 2 small (30-bed) facilities operated under contract in California. • Plans to open a larger (100- to 150-bed) contracted facility in Los Angeles for alien material witnesses. **Federal Bureau of Prisons** • Plans to operate a 400- to 600-bed contracted facility for sentenced aliens in Southwest region. (Project delayed due to siting difficulties.) • A 60-bed facility in La Honda, California, operated under contract for offenders under the Federal Youth Corrections Act.	**Secondary Adult Facilities** • 28 States reported the use of privately operated prerelease, work-release, or halfway house facilities. Largest private facility networks found in California, Massachusetts, Michigan, New York, Ohio, Texas, and Washington. **Primary Adult Facilities** • No contracts reported for the confinement of mainstream adult populations; most private proposals still focused on community corrections facilities. • Two interstate facilities for protective-custody prisoners planned by private contractor. **Juvenile Facilities** • A 1982/83 survey of private juvenile facilities found 1,877 privately operated residential programs holding a total of 31,390 juveniles, 10,712 of whom were held for delinquency. Only 47 institutions were classified as strict security and 426 as medium security.[2] • Departing from the small, less secure settings characteristic of contracted juvenile facilities, a private contractor operates the Okeechobee (FL) Training School for 400 to 500 serious juvenile offenders.	**Local Jail Contracts** • Legislation enabling private jail operations was pending in Colorado and had passed in New Mexico and Texas. • While the National Sheriffs' Association registered formal opposition to privately operated jail facilities, corporate providers reported significant interest and a number of pending proposals for jail operations in the Southern and Western regions. • In Hamilton County, Tennessee, a private contract took over the operations of a local workhouse holding 300 males and females awaiting trial or serving sentences up to 6 years in length. **Shared Facilities** • One private organization in Texas is planning to construct and operate a facility that would serve local detention needs as well as the needs of Federal agencies responsible for confining illegal aliens. • Other proposals have called for the development of regional jail facilities that would serve multicounty detention needs.

1. Reported in phone contacts made in January-February 1984 with additional followup later in 1984.

2. Unpublished tables from *Children in Custody: Advance Report on the 1982/83 Census of Private Facilities*, U.S. Department of Justice, Office of Juvenile Justice and Delinquency Prevention, Washington, D.C.

simply be prompting a shift in the characteristics of providers—from smaller voluntary groups to firms with stronger organizational capabilities. Whether this apparent trend will lead to contracts for the management of more secure adult facilities remains unclear, particularly in view of the hesitance expressed by the majority of respondents to the NIC survey.

Juvenile facility contracting

In the juvenile field, where so-called primary facilities often resemble secondary adult facilities in their community treatment emphasis, facility management contracts have been far more prevalent. The largest of these efforts, and the one most analogous to adult facility operations, is the Okeechobee Juvenile Training Facility operated in Florida by the Eckerd Foundation, the nonprofit arm of a major U.S. drug manufacturer. Awarded in the fall of 1982, the contract called for Eckerd to take over the operations of an existing facility serving between 400 and 450 committed delinquents. Currently the subject of an evaluation by the American Correctional Association, the Eckerd experience is certain to offer valuable lessons to contracting agencies in both juvenile and adult corrections.

Local jail contracting

In many respects, the smaller fiscal and management capabilities at the local level provide a climate that may be most conducive to the development of private facilities. As Table 2 indicates, one contractor has taken over operation of a local workhouse. Both opposition and interest at the local level run high—particularly in arrangements that will permit the costs of jail construction and management to be shared across jurisdictions. In order to proceed with the construction of a local jail in Texas, one private contractor had sought Federal guarantees for the use of a portion of the space to detain aliens; the balance of the facility would serve moderate-risk county prisoners. Another contractor was aggressively marketing regional jail facilities that would be shared by two to four counties. (Notably, the only primary adult facility under negotiation at the State level was also based on the concept of interjurisdictional operations. A number of States had reportedly expressed interest in the plans of one private contractor for two institutions that would specialize in protective custody prisoners drawn from the populations of a number of State prisons.)

In short, while the market for confinement service contracting at the State and local levels is clearly in its nascent stages, interest is sufficiently high to warrant a careful examination

o[illegible]sues that may attend r-
th[illegible]pansion of the private s[illegible]s
role in correctional management.

The issues

In the politically charged environment of corrections, the concept of privately managed facilities raises a host of questions that range from relatively simple matters of legal feasibility to more complex issues of political philosophy. Figure 1 outlines the key issues to be considered in planning the development of proprietary institutions.

Political issues. The political issues identified in the Abt report cover both conceptual and strategic considerations.

1. *Conceptual.* In a facility entirely operated by the private sector, a range of management functions involving the classification and control of inmates (including the use of deadly force) might be delegated to a private contractor. Quite apart from any legal constraints on the delegation of these functions, some observers have questioned the fundamental propriety of such a shift. There are those who will argue that some functions (including the administration of justice) are the *raison d'etre* of government and cannot nor should be delegated. With equal vigor, others will argue that there is a legitimate and necessary role for private enterprise in corrections management, and the level of individual decisions that may be required to manage the flow of inmates through a facility hardly constitutes an abrogation of the broader role of government in forming system policy. In the final analysis, the issue is grounds for lively ideological debate that calls for a careful definition of the appropriate role of private providers and the limits to be placed on contracted functions.

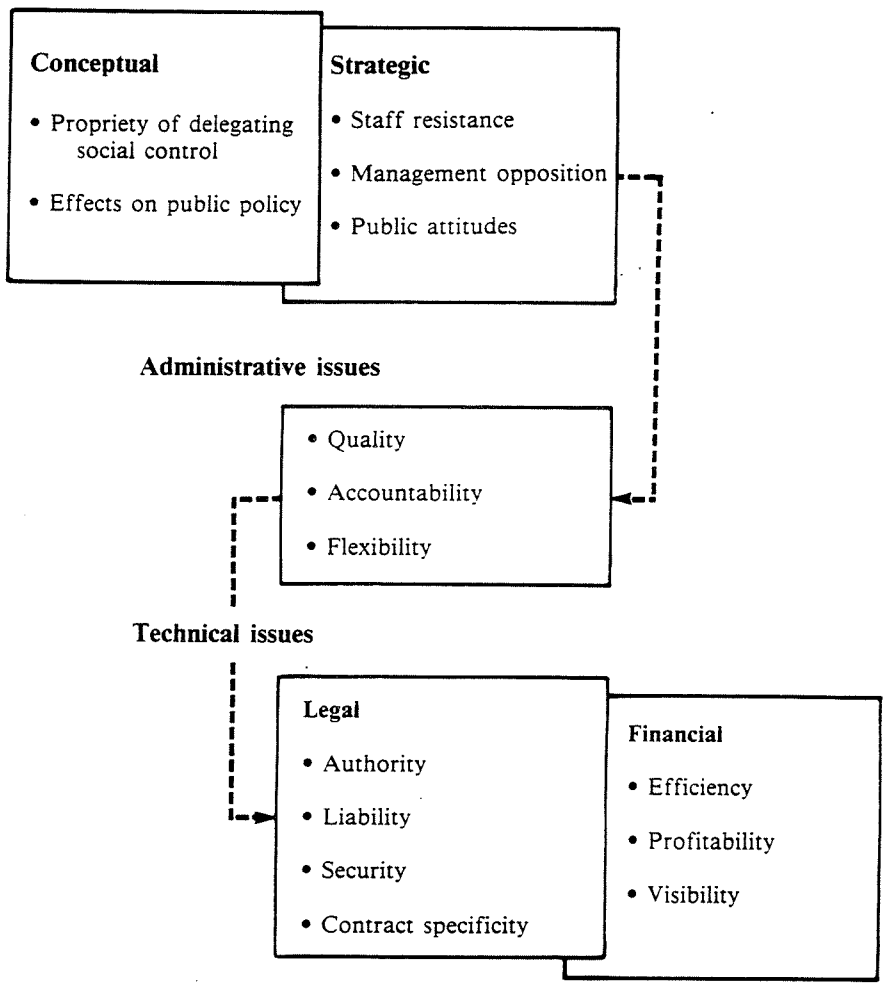
Another level of conceptual issues relates to the general concern that privatization may have unintended effects on public policy:

- Will private providers use their political power to lobby for the development or continuation of programs that may not be in the public interest? Or, will the corrections field, which typically operates without political advantage, benefit from the new lobbying skills of private providers?
- Just as the critics of commercializ[illegible] hospital facilities fear that a larger share of the burden for providing nonreimbursable public services may be placed on public hospitals, will private facilities "skim off the cream of the crop," leaving the public correctional system with the most troublesome inmate management problems? Or, can contracting agencies develop a conscious policy of distributing contract ventures across populations of differing security and service needs?
- Will the economic motives of business conflict with the objectives of providing decent conditions of confinement? Or, will public agencies develop sufficient proficiency in contract specification and monitoring to resolve this concern?
- Will contractors be susceptible to the "Hilton Inn mentality," refe[illegible] to the pressure to maintain high oc[illegible]cupancy rates even in the absence of demonstrated need? Will the availability of a network of private facilities result in a "widened net of social control" as so often happened with the expansion of community corrections programs? Can payment provisions and careful admission, transfer, and release policies minimize these dangers?

Although no answers are now available, anticipating these issues may assist in controlling any unintended consequences.

2. *Strategic.* In the category of strategic issues, at least three sources of opposition to privately operated facilities can be anticipated. First, public employees may resist the loss of public-sector employment opportu-

FIGURE 1
Issues in facility management contracting



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s. Whether or not there is formal on opposition, some resentment from public employees as well as strained relations between public and private corrections staff may be inevitable—particularly if private providers take over an existing public facility. The Okeechobee facility in Florida faced a good deal of opposition and staff turnover, leading most participants to agree that the time requirements for the takeover were extremely unrealistic.

General public attitudes may also constrain the development of private facilities. Fear about the security of private facilities may join traditional public reluctance to host a corrections facility in the community. In this context, private providers face substantial risk since they have no access to the override powers of government in coping with problems of community resistance.

Finally, corrections management may not be uniformly supportive of private operations that may threaten a loss of agency control. As the NIC survey has noted, "loss of turf" may, in fact, be more of an inhibitor to expanding the role of the private sector than the actual loss of employment for State workers. In short, contracting ventures are certain to require planning carefully precontract and startup activities, thoroughly calculating and communicating the anticipated benefits to the State, and actively lobbying to diffuse these sources of opposition.

Administrative issues. Issues of quality, accountability, and flexibility dominate discussions of the managerial consequences of privatization.

1. *Quality.* Because the private provider is under competitive pressure to perform and is free of civil service restrictions and the cumbersome administrative procedures commonly associated with government operations, many contend that the quality of privately provided services is likely to be superior—at least in the short run. Whether there will be sufficient market pressure to sustain improvements over the long term remains uncertain. Adequate monitoring systems, frequent onsite inspection programs, and judicious rebidding and renewal procedures are the key tools available to ensure continued performance, and need to be carefully designed at the outset.

. *Accountability.* As respondents to ne NIC survey have suggested, the difficulties and the importance of the monitoring function cannot be overestimated. The potential loss of control over agency operations was a major reservation expressed by respondents in considering the liabilities of contracting. Addressing the issue of "who's in charge" requires clearly defining roles and responsibilities in the contract document and continuing efforts to communicate and review performance expectations. While quality control is inherently more difficult when the government is dealing with an independent provider and can exert only indirect control, corrections departments remain accountable for contracted services and will be faced with the need to adapt their supervisory practices in order to create an effective public-private alliance.

3. *Flexibility.* Most observers would agree that contracting offers public agencies the ability to respond to immediate needs with greater flexibility and speed than is typically possible under government operation. In times of severe crowding, this capability is particularly compelling. The possible cost may, however, be constraints on the government's ability to change course over the long term. Transferring facility operations from one contractor to another can be a logistically difficult matter. Contracting also means reducing the public sector's own facility management capabilities, making it more difficult to revert to public management or limiting the personnel pool available to meet future corrections management needs. Finally, fewer publicly operated facilities may mean fewer opportunities to shift staff or inmates among facilities for purposes of staff training or population management.

No one of these issues poses an insurmountable barrier. Many, in fact, become irrelevant if population pressures ease, for the option to terminate contracted facilities is then readily available. All, however, need to be considered in planning the types of facilities and contract arrangements best suited to the circumstances in a given correctional jurisdiction.

issues. Turning to mor al matters, at least fo l iss require careful consideration in the course of planning the development of proprietary facilities:

1. *Authority.* The first issue to be considered is whether States and counties have specific statutory authority to contract with private firms. Even where service contracting is authorized, legislative amendments may be required to permit contracts for primary facility operations. Specific language may also be needed to open contracting to for-profit organizations.

2. *Liability.* While correctional agencies may understandably wish to delegate both the authority and responsibility for facility operations, there is no legal principle to support the premise that public agencies and officials will be able to avoid or diminish their liability merely because services have been delegated to a private vendor. In this context, it becomes crucial to ensure that contractors observe appropriate staff selection and training standards.

3. *Security.* While there appear to be no legal barriers to the delegation of security functions, the issue is central to the debate on the appropriate roles of the State and its private providers. A variety of questions needs to be addressed in defining the proper role of the private sector in corrections management. Should positions that may call for the use of restraining or deadly force (e.g., perimeter security) be retained by the State? What role should the State play in internal disciplinary proceedings? Once again, if the decision is to contract these functions, staff training and supervisory requirements must be carefully specified. In addition to frequent review and inspection by contracting agencies, written client complaint procedures, client access to mechanisms for monitoring abuse, and periodic client surveys have been suggested as useful techniques to ensure the accountability of private providers.[4]

4. J. Michael Keating, Jr., *Public Ends and Private Means: Accountability Among Private Providers of Public Social Services*, National Institute for Dispute Resolution, N.Y., February 1984.

4. *Contract specificity.* Perhaps most important contracting issue is the development of appropriate standards of performance to govern the operations of private facilities. Without explicit standards, the goals of profit maximization may well conflict with the State's interest in maintaining safe, secure, humane facilities. The standards of the Commission on Accreditation for Corrections will provide a useful reference in drafting this aspect of the solicitation and subsequent contract.

Financial issues. Last, but among the foremost issues of technical concern, are questions regarding the efficiency, profitability, and cost visibility of private facilities.

1. *Efficiency.* The relative costs of public vs. private management are a highly controversial aspect of the privatization debate. Advocates suggest that private vendors can operate equivalent facilities at lower cost due largely to the staffing efficiency that may be realized in the absence of civil service regulation, lower private-sector pension and benefits costs, and greater market incentives to increase productivity. Critics fear that the costs of private management will escalate once vendors become established, and point also to the costs of monitoring private providers as a potentially large hidden cost of management contracting.

Comparisons are difficult since public and private institutions may differ and the true costs of public facilities are often hard to isolate. The privately operated juvenile facilities described in the Abt report involved costs ranging from roughly $30 per day at Okeechobee in Florida to $110 per day at the Weaversville facility in Pennsylvania. The INS facilities for illegal aliens operate on average rates of $23 to $28 per day. It is difficult to determine, however, whether any of these facilities are less costly than public institutions, since figures for comparable public facilities are not generally available. Even where adequate data exist, strict cost comparisons may be confounded by the fact that the public corrections function is frequently underfunded. In this situation, higher costs may be a precondition for operating private institutions in accord with minimum professional standards.

Despite the difficulties, rigorous assessments of the cost issue are clearly needed. In fact, respondents to the NIC survey emphasized the importance of conducting a thorough cost-benefit analysis prior to contracting.

2. *Profitability.* The question of whether private providers should profit from providing a public service is an issue of both conceptual and financial concern. Some are offended by the concept of corrections as a business enterprise and fear that profit may be taken at the expense of sound corrections practice. Others point to the equivalent financial motivation of nonprofit organizations, the small and highly regulated opportunities for accruing profit, and the management and fiscal advantages of for-profit status. In the final analysis, choosing a private provider is no more or less than a decision to hire additional staff and is best made by evaluating the provider's history of performance, staff competence, and correctional philosophy, rather than its organizational classification.

3. *Visibility.* One of the advantages typically ascribed to contracting in public-sector areas is its ability to reveal the true costs of the public service. Corrections is no exception. The dollars required to serve particular numbers of clients under specified conditions will be clearly visible and more difficult to avoid through crowding and substandard conditions. While this may be a feature welcomed by correctional administrators, it remains unclear whether legislators and their voters will be prepared to accept the real costs of confinement practices that meet professional standards.

The next steps

Private-sector participation in the adult corrections field clearly raises many complex issues of policy and law not encountered in other fields of human service. As such, it provides a particularly critical test of the limits of privatization—a test that warrants the most systematic planning, implementation, and evaluation efforts. The Abt report identifies at least five circumstances under which careful experimentation with privately managed facilities may prove fruitful:

1. *Rapid mobilization.* Given the widely acknowledged ability of the private sector to move more rapidly to bring additional facilities and manpower on-line, combined with the uncertainty that surrounds future population trends, contracting may be useful at the State level to avoid permanent facility expansion but still accommodate near-term population shifts.

2. *Experimentation.* An agency can test new models of institutional corrections practice without making a permanent commitment or laboring under the constraints to innovation typically present in traditional corrections bureaucracies.

3. *Decentralization.* Greater geographic and programmatic diversity may be possible by calling on local contractors rather than trying to provide the same community-oriented services under the direct control of a centralized agency.

4. *Specialization.* The flexibility of private contractors to satisfy unique demands suggests that contracting for the confinement of offenders with special needs may offer significant relief to general-purpose institutions as well as more opportunities for the successful treatment of the "special management" inmate.

5. *Regionalization.* Finally, the private sector is not typically bound by the jurisdictional politics that might otherwise impede efforts to develop shared facilities among States or counties within a State.

As this list implies, the major challenge is not simply to turn "business as usual" over to the private sector, but to develop true private-sector alternatives to traditional public-sector corrections practices. As one former corrections official has asked, "Are they just going to run an outmoded system more efficiently or are they going to bring some real improvements and new ideas?" If the latter can be achieved, the emerging interest of the private sector in corrections management can only be welcomed.

SUMMARY

Submitted to: The National Institute of Justice
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Washington, D.C.

ISSUES IN CONTRACTING FOR THE PRIVATE OPERATION OF PRISONS AND JAILS

The Council of State Governments

THE URBAN INSTITUTE

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This project was supported by Grant No. 85-IJ-CX-0068 awarded to The Council of State Governments by The National Institute of Justice, U.S. Department of Justice. Points of view or opinions stated in this document are those of the authors and do not necessarily represent the official position or policies of the U.S. Department of Justice.

February 2, 1987

ACKNOWLEDGMENTS

The authors are indebted to the many state and local officials who contributed their time, thoughts, and perspectives throughout the course of the study. Special thanks are due to Doug Sapp and Cheryl Roberts of the Corrections Cabinet in the State of Kentucky for graciously consenting to let us use their experiences as a case study, and, for carefully reading and commenting on earlier drafts of this report. We also wish to thank the many representatives of private firms who provided information for the report. They are full partners in new partnerships with government, and demonstrated a noteworthy willingness to share their experiences with us.

We appreciate the support and interest of many individuals at the National Institute of Justice, and their reviewers, who offered advice during the study. Ms. Voncile B. Gowdy, our project monitor, was a valuable resource through-out our work.

While the report is very much the product of all members of the research team, we acknowledge the following primary authors: Chapter II: Trends in State Contracting by Keon Chi; Chapter III: Legal Issues by Edward Feigenbauem; Chapter IV: Policy and Program Issues by Robert Levinson; and Chapters V & VI: Contracting, Monitoring and Evaluation by Harry Hatry. Joan Allen's hard work in preparing extensive reviews of the literature and providing issue-specific references is also gratefully acknowledged. Team members each reviewed and commented upon all sections, making valuable contributions to each from their own perspectives.

The reader is invited to use this work as a preliminary analysis, a place to begin, and to learn from of other's experiences. Each issue could be the subject of in-depth research, and is not intended to be an exhaustive treatment of the subject. We thank the states and local government officials who will read this report, learn from it, and become the future innovators.

ISSUES IN CONTRACTING FOR THE PRIVATE OPERATION OF PRISONS AND JAILS

I. ARGUMENTS FOR AND AGAINST

Debate over contracting for the operation of correctional facilities has been heating up at all levels of government during the past two years. Legislative hearings have been held in state capitals as well as in the U.S. Congress.1/ National organizations of state officials have sponsored conferences on contracting for corrections.2/ National organizations of lawyers and criminal justice planners have also expressed their concern, while government employee unions announced their opposition to the contracting trend being boosted by private firms.3/

State officials have heard testimony from private vendors about the advantages of contracting for the operation of correctional facilities: cost savings, flexibility, quick facilitation, better management, and the like. Bills have been introduced into legislatures in several states to allow contracting, but states have tended to be extremely cautious in making their decisions. Bills in some states have been tabled or defeated; at least one state, Pennsylvania, placed a moratorium on contracting for private prison operations for one year.

The American Bar Association also called for a moratorium on contracting for prisons and jails until the legal issues were resolved. These were issues that arose when a state delegated "to private companies one of government's most basic responsibilities, controlling the lives and living conditions of those whose freedom has been taken in the name of the government and the people." The American Civil Liberties Union (ACLU), while not taking a clear position on the contracting issue, raised a pertinent question: "Do we wish to establish a system whereby those interested in profit margins are given an incentive to influence and control public policy with respect to crucial criminal justice issues?" ACLU also raised a series of questions about the possibility of violations of prisoners' civil liberties by private entities.

Footnotes

1. U.S. Congress, House Committee on the Judiciary, Concerning Privatization of Corrections: Hearings before a Subcommittee on Courts, Civil Liberties and the Administration of Justice, November 13, 1985.

U.S. Congress, House Committee on the Judiciary, Concerning Privatization of Correstions: Hearings before a Subcommittee on the Federal Prison System, March 18, 1986.

2. The National Conference of State Legislatures, "Privatization of Prisons," Conference, San Francisco, Calirfornia, August 5-9, 1985.

The Council of State Governments, "Contracting for Services," Conference, Atlanta, Georgia, April 24,25, 1986.

3. Martin Tolchin, "Experts Forsee Adverse Effects From Private Control of Prisons," New York Times, September 17, 1986.

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In February 1985, the National Governors' Association (NGA) gave a limited endorsement to contracting for prison operations. NGA's policy statement said, "States may wish to explore the option of contracting out the operation of prisons or other correctional programs. Private enterprise would be expected to run prisons in an approach similar to the way it now operates hospitals, drug and alcohol treatment programs, or job-training programs for government." The statement also said, "States should approach this option with great care and forethought. The private sector must not be viewed as any easy means for dealing with the difficult problem of prison crowding."

Reasons for Contracting

Reasons for considering contracting may be grouped under six subheadings: cost-savings, rapid mobilization, capital expenditures, flexibility, management and political considerations.

Cost Savings:

- Private contractors may be able to construct new facilities or rent space less expensively than government, or may happen to have inexpensive space available that can later be used for another purpose.

- Fewer levels of management may allow private companies to provide a comparable level of correctional services at lower costs.

- Private purchasing procedures and negotiations may save money while avoiding rigid government procurement procedures. More short-term purchasing may be possible in the private sector than in the public sector.

- Private firms can bring economies of scale to the operation and private firms with contracts for multiple facilities can amortize expenditures.

Rapid Mobilization:

- Private contractors may be able to make facilities available more quickly by raising private capital.

- Private firms with existing facilities may be able to relieve overcrowding faster than government could build a new facility.

Capital Expenditures:

- It may not be necessary for government to increase its capital budget if a private firm builds a correctional facility.

- State government can avoid large amounts of capital expenditures by letting private firms build and run its correctional facilities.

Flexibility:

- Private prisons may have increased flexibility to deal with changes in the size of the prison population and special needs prisoners.

- By contracting with a number of jurisdictions, private firms may be able to achieve greater specialization than a single government.

- Private firms may deal more easily with a temporary increase in inmates without long-term commitment of facility space and/or more staff.

Management:

- A fresh infusion of ideas and energy from private firms may bring some positive changes in the corrections field.

- Private firms may have more efficient management systems than government because they are in competition, which government is not.

- Private entrepreneurs may be more creative in employee management, hiring and promotion procedures, thus reducing employee turnover rate and increasing morale.

- Private firms are free to innovate and use the latest technology and management techniques as is any profit-motivated service industry.

- Private firms can design a facility to hire fewer highly motivated and highly trained people at a greater wage than the public sector may be able to.

- Private firms may provide better programs for counseling and training.

Political Considerations:

- State agencies can justify contracting as a new alternative to prison overcrowding.

- Contracting may involve the private sector in sharing responsibility for corrections problems.

Arguments Against Contracting

Reasons for not considering contracting may be grouped under five subheadings: philosophical/legal, higher costs, lack of accountability, management and political considerations.

Philosophical/Legal Questions:

- o Profit-motivated employees may lose perspective on the mission of public agency in the interest of expediency.
- o The contractor's first loyalty may be to his firm, and this may conflict with the goal of the public good.
- o Government incentives to pursue alternatives to incarceration may be weakened if new institutions are more quickly and easily available through the private sector.
- o A firm's self-interest may encourage further or extended incarceration.
- o Private industry can lobby for tougher law enforcement and longer prison sentences to keep institutions at maximum occupancy.
- o The government has remanded individuals to the prison-system and private firms should not be given responsibility to carry out their punishment.

Higher Costs:

- o Privately contracted prisons may cost more because of the necessity of government contract administration and monitoring.
- o Private firms may lower employee wage and benefit levels.
- o Private firms may "buy-in" or "lowball" a bid to get their first contract and then greatly increase their costs in future years.
- o There might be hidden costs in contracts.
- o It may be in the interest of the contractor to keep prisons full if contracts are on a per diem basis.
- o Contractors may incarcerate prisoners longer than they need to in order to collect per diem fees, thus costing taxpayers more.
- o In the absence of true competition among qualified private firms, contracted prisons may cost more.

Lack of Accountability:

- o Contracting for prison operation and management may decrease public input into the delivery of correctional services.
- o Corrections is one of a small number of public services which may best be managed by the public sector, because it involves the legally sanctioned exercise of coercion by some citizens over others.

- Private firms may be less accountable to the public than government because of the profit motive, lack of legal mandate to provide service, and reduced public input.

Management and Services:

- Privately-managed prisons may compromise correctional standards.

- Prisoners in privately-managed facilities may be denied as much human contact as they now receive because there might not be as many correctional officers under private management.

- There is the possibility of bankruptcy in a private firm.

- The public may be more worried about safety and security if a prison is privately managed.

- Private firms may skim the market and then leave the more difficult prisoners for the publicly-run institutions.

- Private firms can reduce or eliminate unprofitable services even though they may still be needed, but not legally protected.

Political Considerations:

- Contracting proposals may face inevitable resistance from many interest groups, including employee organizations.

- Contracting proposals can be an unpopular issue in election campaigns.

- Potential opposition from the community may be severe.

RECOMMENDATIONS

State policymakers should consider the issues of cost, management, timeliness, and accountability before making a decision about contracting with a private firm to manage and operate a correctional facility. A careful analysis of the advantages and disadvantages, opportunities for input from all sectors, and an assessment of past relationships with contracting will all lead to a better final decision.

II. THE COUNCIL OF STATE GOVERNMENTS/URBAN INSTITUTE STUDY

This study presents an analysis of the policy and program implications of one of the more controversial applications of the private contracting method to public services: contracting with the private sector for the operation and management of correctional facilities. The authors have examined the experiences to date of state and local governments that have chosen the contracting option, and provide suggestions for other public officials to aid their consideration of contracting option.

No attempt was made to evaluate the merits of various contractors, nor does the report prescribe a method which all public entities should follow. Nor did this study attempt to conduct a cost-effectiveness analysis of these early efforts, since very few data are available.

The presentation allows readers to distinguish the various aspects of the contracting decision, learn from the experiences of other public entities, and clarify the issues in their own situation. Recommendations are provided when the authors found agreement among experiences of government officials, strong advantages or disadvantages of a certain approach, or clear-cut legal precedents.

A research team composed of staff of the Council of State Governments, the Urban Institute, and a consultant experienced in criminal justice matters conducted this review of the issues. The Council of State Governments is a policy research and information agency of the 50 state governments whose team members brought experience in contract management, program design, legal research, and privatization analysis. The Urban Institute is a Washington-based policy research organization whose team members brought experience in local government privatization research, evaluation research, and contract analysis.

The research methodology involved an extensive review of the literature, including both scholarly research and the popular press. We also reviewed studies on contracting correctional services from 22 states. Documents, such as contracts, requests for proposals (RFPs), and inspection reports provided much information about the initial contracting efforts. A final source of data for the study was interviews conducted with corrections agency personnel, contractor personnel, purchasing officials, legislators and legislative staff. The interviews were conducted both in-person and by telephone and provided the anecdotal data used by the research team in preparing this report.

States and local governments have considerable experience in contracting with private firms for various correctional services such as training, medical care or even halfway-house operation. However, state and local experience in contracting for the entire operation and management of a secure adult institution is quite limited.

Documents on contracting correctional services were available from twenty-two states: Alabama, Alaska, Arizona, California, Connecticut, Florida, Illinois, Iowa, Kentucky, Maryland, Massachusetts, Michigan, Minnesota, Missouri, New Mexico, Oklahoma, Oregon, Pennsylvania, South Carolina, Tennessee, Virginia, Wisconsin.

We also examined experiences in contracting adult, and some juvenile, secure facilities in both state and local government. These included a State of Kentucky minimum security institution for adult males; Florida, Massachusetts, Pennsylvania and Shelby County, Tennessee, facilities for severely delinquent youth; an adult facility in Dade County, Florida (not secure); the Bay County, Florida jail; a Ramsey County, Minnesota facility for adult females; and a workhouse in Hamilton County, Tennessee. Both government officials and private vendor staff were contacted. Corporate officials in each of four private, for-profit companies managing corrections facilities were interviewed:

- o Corrections Corporation of America
- o U.S. Corrections Corporation
- o RCA Services, Inc.
- o National Corrections Management, Inc.

THE ISSUES

An initial list of issues was established by the research team and refined during the course of the project. The decision areas addressed in detail in the report is provided below.

Prison Privatization: The Legal Issues in Contracting for State Correctional Facilities

Legal Issues (Chapter III)

#1 What are the legal issues in contracting?

#2 What liability protection will a government agency and contractor need?

#3 How should the responsibility and authority for security be divided between the contracting agency and private operator?

#4 What provision is there for protecting inmates' rights, including mechanisms for inmates to appeal decisions affecting them?

Policy and Program Issues Before Deciding to Contract (Chapter IV)

#5 What specific pre-analysis should a state undertake prior to the contract decision? (e.g. cost analysis, legal issues analysis.)

#6 What are the reasons for considering or not considering contracting prison operation with private enterprise, particularly with for-profit firms?

#7 How should publicity regarding a change to private operations be handled? (e.g. agency, media, public.)

#8 Should contracting be done for a) existing facilities; b) a new institution, replacing an existing facility; and/or c) new institution not replacing an existing facility?

#9 What level of offender should be assigned to the contracted facility? What are the differences in attempting to contract minimum versus medium versus maximum security facilities? Are there different considerations for contracting facilities for specific populations? (i.e. service vs. geography, protective custody, mentally ill, women, deathrow, mothers, and children.)

#10 How many inmates should the contractor be expected to house? What provisions should be made for fluctuations in that number? What control does the contractor actually have over the number of inmates? Should minimum and/or maximums be established in the contract?

#11 How will inmates be selected? Will the private organization be able to refuse certain inmates? (e.g. AIDS victims, psychologically disturbed offenders.)

#12 What authority and responsibility should a private contractor have for discipline and for affecting the release date of inmates? What will be the relationship of these decisions to the State Board of Parole?

Requests for Proposals and Contract Issues (Chapter V)

#13 Should contracting be competitive or non-competitive? Are there enough suppliers to provide real competition? What are the relative merits of for-profit and non-profit organizations as prison operators?

#14 What criteria should be used to evaluate private proposals? (e.g. percentages for cost and quality of service.)

#15 How should the contract price be established and on what basis? (e.g. single fixed-price, fixed unit-price award, cost plus.) What should be excluded in the contract price? (e.g. unit costs, provisions for price increases or decreases, extent of government control for total costs annually, performance and incentive contracting.)

#16 What provisions should be made to reduce service interruption? (e.g. problems with transition periods, defaults by contractors, work stoppages, fallback provisions.) Should there be provisions to protect the private contractor? (e.g. government obligations.)

#17 What standards should be required in RFPs and contracts?

#18 What should be the duration of the contract and provisions for renewal?

#19 What provisions are needed for monitoring in the RFP and the contract?

#20 What provisions should be made to address concerns of public correctional agency employees? (e.g. disposition of laid-off public employees after private takeover.)

Contract Monitoring and Evaluation (Chapter VI)

#21 How and to what extent should contractor performance be monitored?

#22 What results can be expected from contracting? (e.g. cost, service effectiveness and quality, work stoppages, illegal activity, timing of the alleviation of overcrowding, effects on other prisons in system.)

#23 How should government evaluate the results of contracting?

The resulting examination of the many decisions faced by public officials provides sound guidance without prescribing any single answer to the question: Should we contract? However, the research resulted in many recommendations on policy and procedure that are based on the experiences of government officials, and has been reviewed and commended by many.

III. RECENT STATE EXPERIENCES WITH PRIVATELY-OPERATED CORRECTIONAL FACILITIES

To date, state experiences in contracting for private management of adult inmates in secure facilities are very limited. Private firms managed juvenile facilities in at least 12 states: Florida, Massachusetts, Michigan, New Mexico, New Jersey, Oklahoma, Pennsylvania, Rhode Island, Tennessee, Texas, Utah, and Washington. Two states, Florida and Kentucky, recently contracted with for-profit private firms for the operation and management of minimum security correctional facilities for adult inmates. Illinois and Wisconsin used not-for-profit organizations to manage community adult correctional centers. In Alaska, a restitution center is operated by a private firm, while California uses private beds to alleviate prison overcrowding. The Tennessee Department of Corrections a request-for-proposal (RFP) for a medium security prison for adult inmates, but receiving no responsive proposals, is, as of this writing, considering a revision and reissue of the RFP.

Florida

In Florida (in October 1985) a private firm, National Corrections Management, Inc., assumed the operation of the Beckham Hall Community Correctional Center, a minimum security work release facility under direct state jurisdiction. Since Beckham Hall operates a non-supervised work release program, it is not secure. The Center with a capacity of 158 adult inmates is currently housed in facilities leased under a use permit from Dade County for $1 per year. The term of the contract is for a three-year period; the rate of payment for the first year of the contract is $20.81 per inmate, per day. The Beckham Hall contract was a result of Florida's attempts to find new alternatives in dealing with prison overcrowding. The Florida Department of Corrections is currently evaluating the performance record of the privately-run correctional facility.

Kentucky

In October 1985 Kentucky awarded a contract for an adult facility to a private firm, Bannum Enterprises, Inc. Under this proposal, the private firm was expected to convert an existing facility, International Harvester Administration Complex in Louisville, to a 200-bed minimum security prison. However, the site was not available for use as a prison. In December a contingency contract was signed with another private firm, U.S. Corrections Corporation, for a private prison at another site. This contract became effective in January, 1986, and the private firm now operates the 200-bed facility known as Marion Adjustment Center in Marion County. The state's Cabinet contracted out the facility as a result of the recommendations of the Governor's Task Force on Prison Options. Kentucky's Corrections Cabinet is monitoring private management of the minimum security correctional facility.

The Florida and Kentucky examples offer considerable information on decisions state policymakers need to make before contracting out management of secure, adult correctional facilities for state prisoners. However, a careful review of the examples raises the question: How different are these two examples from privately-run halfway houses and various types of community correctional or work release centers in many other states?

Kentucky's Marion Adjustment Center has a number of similarities with privately operated halfway houses in the state. Inmates in the Center serve a longer term, which is three years or under, compared to that of one year or less in halfway houses. The Center has tighter restrictions and a self-contained correctional programs. Inmates remain on the grounds. Marion Adjustment Center is located in a rural county with no perimeter fence, while all the halfway houses are located in urban areas in the state. Kentucky's Corrections Cabinet places the Center on a continuum between privately-run halfway houses and other minimum security prisons in the state.

Illinois

Illinois was one of the first states to use private organizations to operate community correctional centers for felons, as well as for parolees. The state's Department of Corrections has been involved in contractual arrangements with not-for-profit organizations since 1975. The state currently has five contractual correctional community centers and ten state-operate correctional centers. The privately-run correctional centers must abide by the same rules and regulations, directives and procedures required of the state operated facilities. In fiscal 1986 the state appropriated $3.5 million for contracts to provide housing and services to 252 inmates. In 1983 the Governor's Task Force on Prison Overcrowding recommended that the state "consider the private sector for correctional facilities and services where fiscally cost-effective and administratively feasible. Such contracting shall include community center placements, as well as prison facilities and services."

Wisconsin

Despite legislation passed in the 1986 legislative session allowing the state corrections agency to contract for operation of community correctional centers by private firms, Wisconsin's only privately-run facility was closed in January 1986 for budgetary reasons. For eight years, Baker House Pre-Release Center in Milwaukee (capacity of 26 beds) housed adult state inmates. One of the 15 state minimum security facilities, Baker House was operated by a non-profit corporation, the Wisconsin Correctional Services. The private correctional facility had placed heavy emphasis on work release, job training, and extensive counseling services.

Alaska

Contracting with private firms has received considerable review in Alaska. In 1985, legislation was passed authorizing the state Department of Corrections to contract for adult correctional restitution center services. In November the department contracted with a private agency for the operation of a 75-bed correctional restitution center in Anchorage. Alaska plans to expand this to other areas of the state. The purpose of the center is "to provide certain nonviolent offenders with rehabilitation through community services and employment - while protecting the community through partial incarceration of the offender, and to create a means to provide restitution to victims of crimes."

California

The California Department of Corrections has used, on a limited basis, privately-operated correctional programs to house selected state inmates to alleviate prison overcrowding. In fiscal 1986 the Corrections Department was budgeted for 1,700 private beds. By December 1985 the department had 1,000 beds under contract and had issued requests for proposals for an additional 734 private beds for three programs: private re-entry work furlough, private community treatment, and private return-to-custody.

Tennessee

The Tennessee Department of Corrections issued a request for proposal to operate a medium security prison. A new state law allows the state corrections department to contract with a private firm to manage the state-built medium security 180-bed work camp in Carter County. Under the law, the private firm is required to operate the facility at a cost of 5 percent less than the probable cost to the state of providing the same services. The cost of monitoring the contract is to be added to the vendor's price for determining the cost of private operation.

In a November 1985 special session, Tennessee Governor Lamar Alexander proposed to let a private company build and operate a state prison. The legislature also considered a proposal by the Corrections Corporation of America for the "franchise" to operate Tennessee's entire prison system for up to 99 years. Neither proposal passed before the special session recessed. The session of the 1986 legislature passed the private prison contracting act in April, and the governor signed the bill into law in May 1986. The enabling law, however, is applicable only to the Carter County facility.

IV. MAJOR CONCLUSIONS

Liability

It is evident that private prison contractors will not be able to escape liability under Section 1983 of the Civil Rights Act, and that the contracting government entity will be unable to protect itself from suits resulting from the wrongful acts of the operator it selects, but it may reduce its exposure.

Type and Size of Facility

States that have decided to use private contractors would avoid a series of problems if they limit contracting to additional minimum security beds. "Special needs" prisons also seem relatively well-suited to the contracting option.

Contracts should set maximum and minimum inmate population levels and specify the consequences if these are exceeded. A tiered price structure stating per diem costs for vacant as well as occupied beds is advisable. Finally, the contract should establish a mechanism for resolving disputes.

Contracting

Thus far, most state and local government agencies have not used fully competitive procedures when contracting for the operation of correctional facilities. This lack of competition does not appear to have been a major obstacle to obtaining good service, costs or quality. Over the long run, however, it is not the best contracting practice and could lead to major problems. The one state-level secure adult institution contract, the Kentucky's Marion Adjustment Center did involve fully competitive contracting.

At present, few vendors are experienced in operating secure correctional institutions. And there are few government agencies with experience in contracting for the operation of these facilities. Efforts thus far should be characterized as "experimental."

Monitoring and Evaluation

The state's method for monitoring the contract should be specifically stated and should, for larger (e.g., 150-inmate or more) institutions, include an on-site staff member. Costs to house this individual should be agreed to and documented in the contract.

All the contract efforts we examined were weak when detailing provisions for monitoring vendor performance. This applied both to provisions in the contracts (where little was said) and to the agency's subsequent monitoring procedures (which were not well-formulated). Formal performance criteria were usually vague while procedures for conducting the monitoring were limited. Standards included in the contracts dealt with process, but paid little attention to specifying outcomes.

We found only one systematic, in-depth evaluation of any of these contracting efforts. This was an evaluation of the State of Florida's Okeechobee school for severely delinquent male youth, funded by the federal government. Nor did we find plans for in-depth assessments of the contract effort in any of the other jurisdictions studied. However, on occasion there were plans, especially at the state level, for periodic reviews of the contractor's performance. The State of Tennessee's Legislature, as part of its May 1986 authorization of a trial contract effort for a medium-security facility, is requiring that an evaluation of comparative costs and service quality be done after the first two years. Evaluation is a prerequisite to renewing the contract for an additional two years. These examples are all primarily experimental efforts ; there is little past experience to go by anywhere in the country. Since the number of private firms available to undertake these efforts were few, some new organizations were formed to bid on and operate the secure correctional facilities.

Impacts

While based on limited information, our observations indicate that initial contract operations have been reasonably successful--at least in the opinion of the government officials. It is not, however, clear that they have been successful from the perspective of profitability for the private firms. Vendor organizations appear to have made major efforts to do the job correctly.

In only one case, the Okeechobee School for Boys in Florida, was there evidence that major problems existed early in the effort. Even there, a follow-up visit indicated that many, if not most, of the problems had been corrected. A county workhouse that changed from public to private management initially had substantial staff turnover problems (Hamilton County, Tennessee), but this apparently did not result in major reductions in service quality. This special effort to do a good job is probably due to the private organizations finding themselves in the national limelight, and their desire to expand the market.

Avoiding Future Problems

Although a lack of full competitive bidding and careful monitoring of performance may be understandable for the initial trials, second phase efforts will require more attention to establishing: (a) more credible competitions and (b) comprehensive, formal monitoring requirements and procedures. This applies to future contracts for current providers as well as new private efforts.

Government agencies need greater assurance -- for themselves, for elected officials, and for the public -- that contracting activities will be administered in a fully appropriate, cost-effective and accountable manner. A strengthened contracting process should not be offensive to the private organizations themselves. Most of the officials of these firms supported full monitoring of their work.

V. RECOMMENDATIONS

Contract Goals

1. Before contracting, states should undertake a systematic, detailed pre-analysis to determine if, and under what conditions, contracting is likely to be helpful to the corrections system. This analysis should include an examination of whether statutory authority exists, of current state prison costs, crowding, performance, legal issues involved, availability of suppliers, ways to reduce the likelihood and consequences of contractor defaults, and the attitudes of various interest groups. (Issue #5)

2. If a governments' goal in contracting is to obtain new beds quickly, the private sector offers an attractive alternative. However, if the government seeks a more economical operation, the minimal evidence available to date suggests that contracting does not necessarily save a significant amount of money. (Issues #6 and #22)

Protection of Inmates/States

3. Careful attention must be devoted to ensure that each contractual component provides adequate protection of the inmate's rights and protects the state from unjust liability claims. (Issues #2 & #4)

4. The government can reduce but not eliminate, its vulnerability to lawsuits when contracting by specifying in the contract that the government be indemnified against any damage award and for the cost of litigation. (Issue #1)

5. The government should consider requiring that a significant performance bond be posted or a trust fund established in order to indemnify it in the event of contractor financial, or other, problems. The agency should, however, determine whether the protection is worth the cost of the bond. (Issue #16)

Contracting Process

6. Governments should use a competitive bidding process if they decide to contract. This will avoid accusations of cronyism, fraud, and the like. To maximize the number of bidders, the government can:

- o Advertise in major state newspapers and national correctional journals;
- o Develop and maintain a list of potential bidders;
- o Permit both in-state and out-of-state private non-profit and for-profit organizations to bid. (Issue #13)

7. Governments should include information about the bid evaluation process in the RFP. Suggested evaluation criteria include, but are not limited to:

- o Firm's experience and past success in similar undertakings;
- o Staff qualifications;
- o Proposed programs;
- o Firm's financial condition and references;
- o Cost.

(Issue #14)

8. A method for resolving any contractual differences that may emerge should be agreed to and be specified in the contract before activation of the facility (Issue #10)

Contract Provisions

9. The requests-for-proposals and subsequent contracts should explicitly specify: (a) who is responsible for what expenditures and (b) what levels of performance are expected (including: compliance with minimum standards as to policies, procedures, and practices; results on such performance indicators as maximum numbers of various "extraordinary occurrences;" and compliance with fire, safety, medical, health, and sanitation standards). The RFPs and contracts should also identify sanctions or penalties that will apply for inadequate performance. (Issues #15 & #19)

10. A tiered fee, or variable cost structure that is fair for both parties should be built into the contract so that there will be no future misunderstandings regarding cost for vacant beds and/or additional inmates beyond the specified ceiling (Issue #15)

11. Rebidding of prison contracts should occur approximately every three years. State laws and regulations should be checked before including this specification, since they may suggest a different maximum contract length. (Issue #18)

12. Governments should include special provisions in their contracts to require that the contractor provide advance notice of the end of a union contract period, the onset of labor difficulties or major worker grievances that could result in a work stoppage or slowdown. (Issues #1 and #16)

New & Existing Facilities

13. Contracting for new or retrofitted institutions entails many fewer problems (such as personnel problems) than turning over an existing facility to a private firm, and thus should be given preference in a government's initial contracting efforts.
(Issue #8)

14. Governments contracting to replace existing facilities should take steps to ameliorate personnel problems including:

- o Require contractor to give employment preference to displaced staff;
- o Provide transfer, retraining, and outplacement services to employees not choosing to work for the contractor;
- o Carefully calculate, and make provisions for, disposition of benefits (especially retirement and vacation/sick leave accrual). (Issue #20)

15. Governments establishing a new contracted facility should develop a public relations plan. Good public relation are crucial for community education. The government should fully inform community leaders and should also keep correctional employees fully informed of any contracting deliberations. The media should be made aware of the contracting initiative at an early stage. Once awarded the contract, the private firm should use community resources for operating the facility, whenever possible by, for instance, hiring local people and buying supplies and services locally. (Issue #7)

Selection of Inmates

16. Both the RFP and subsequent contract should be explicit in describing the type and level of offender for which the state is seeking a private contractor and the major architectural features the public agency deems necessary to confirm the prisoners appropriately. The contract should be based on the state's current inmate classification policy and its operational definitions of the privileges and level of supervision to be accorded the type of inmates at the proposed contracted-for custody level. (Issue #9)

17. States should contractually obligate the private vendor to accept all prisoners in certain specifically-designed categories (e.g., minimum security) for the duration of the contract period up to the agreed maximum number of inmates to be incarcerated at any given time (provided for in the contract). This would protect the state against the prospect of selective acceptance. (Issue #10)

18. Selection of inmates for placement in a private facility, and decisions about their movement, is the government's responsibility. The bases for these selections should be written into the contract. Criteria should be mutually agreed upon to avoid future misunderstandings. (Issues #10 & 11)

19. The contract should include a provision that permits the state to make the decisions about inmate reassignment or reclassification in the event that contractual capacity is reached. (Issue #10)

20. Both a minimum and maximum prisoner population level should be stated in the contract in order to facilitate planning and cost estimates.

21. States contracting for large institutions should specify in the RFP and the contract that the selected private vendor can use unit management, that is, can subdivide the the total number of beds into a number of smaller semi-autonomous units. (Issue #15)

Level of Authority

22. Government officials must ensure that disciplinary hearings conducted by the contractor following legally required practices when discipline problems occur. A private firm should adopt the policies and procedures utilized by the unit of government. Significant disciplinary actions should be formally approved. The state should consider permanently stationing one or more of its own staff members at large (e.g., 150 inmates or more) private facilities--or at least provide for frequent visits.. This individual's responsibilities would include participation in all disciplinary hearings concerning major rule infractions, the definition of these having been spelled out in written policy statements. (Issue #12)

23. Private companies given authority over inmates--authority that otherwise would have been that of the governmental entity if the contract did not exist-- should closely adhere to the same type of procedures that the government agency would have normally used. Where possible, private contractor discretionary actions involving inmate rights and discipline should be made in the form of a recommendation to the appropriate government agency or official for ratification. (Issues #3 & #4)

24. In the event of an escape attempt, private prison employees should use reasonable and appropriate restraint in the absence of any other specific statutory or case law. Once an inmate has left the facility's property (unless the private prison employees are in hot pursuit or have been deputized), law enforcement officials should become responsible for the ultimate capture and return of the escapee. (Issue #3)

25. Although individual practices may differ in regard to the degree of involvement of the public correctional agency with release decisions, insofar as the private sector is concerned, its contribution to this process should be limited to a presentation of the facts pertaining to the inmate's level of adjustment during the period of confinement in the private facility. Public officials should make the decision. (Issue #12)

Monitoring

26. The state should plan (before the RFP is issued) and implement (after contract award) an effective system for continuous contract monitoring. This should include:

(a) regular timely reports (showing tabulations and analyses of extraordinary occurrences and other significant performance indicators and the results of on-site inspections)

(b) regular on-site inspections, (at least monthly and preferably weekly) using pre-specified checklists, rating categories, and guidelines on how to complete the ratings

(c) periodic documented fire, safety, health and medical, and sanitation inspections

(d) provision for regular interviews with samples of inmates to obtain feedback on such performance elements as treatment of prisoners, amount of internal security, drug use, and helpfulness and adequacy of educational, work, and recreational programs

(e) annual in-depth, on-site inspections by a team of experts, covering the various procedures used and the results of periodic reports on the facility's quality of services based on pre-contract specified outcomes/results indicators

(f) explicit provision for prompt review by government officials of the written findings from each of the above procedures with prompt written feedback to the contractor, and identification of what needs to be corrected and by when (and subsequent follow-up to determine level of compliance)

(g) provision for supplying information obtained from the monitoring process by the time contract renewals and rebidding are scheduled--so this material can be used effectively.

The same monitoring procedures should be applied to publicly operated and contractor operated facilities. Governments with comparable facilities can then use the resulting information as a basis for comparisons--and thus, obtain a better perspective on the relative performance of the contractor. (Issue #21)

27. From a state, local and national perspective, it is highly desirable to obtain systematic, comprehensive evaluations of the costs and effectiveness of contracting secured correctional facilities. A government should require that a comprehensive evaluation be made, (within three years of contract award, of the degree of success of its contracting effort. Where possible as compared to its publicly operated facilities. Other than the philosophical issues, most of the debate over prison contracting can be greatly enlightened by empirical field evidence concerning its elements. It is a great waste of resources if innovative trials of prison contracting are undertaken without including appropriate evaluations from which states and local governments, and society, can learn: Does contracting work, and under what conditions? (Issue #23)

ABSTRACT

Issues in Contracting for the Private Operation of Prisons and Jails by Judith C. (Sardo) Hackett, Harry Hatry, Robert Levinson, Joan Allen, Keon Chi and Edward Feigenbaum. (Council of State Governments, Lexington, Ky., 1986)

Prison and jail overcrowding is a priority state legislative agenda item. There has been an increasing interest in the potential of reducing the cost of government and the size of the public payroll through the use of private contracts for the operation of state and local correctional institutions. The authors provide practical recommendations to public officials for their consideration before and after choosing the contracting option.

This research discusses a variety of trends in contracting for state correctional facilities and provides the reader with experiences of other public entities that have made a contracting decision. It also clarifies important issues that have developed in the privatization effort.

The major issue areas involve the legal aspects of contracting, policy and program planning, request-for-proposals and contract agreements, and contract monitoring and evaluation methods.

The study will be a valuable tool to public officials in the decision-making process of contracting, as well as in the planning, implementation and evaluation efforts. Recommendations are provided where there is agreement among the experiences of government officials, where there are strong advantages or disadvantages to certain approaches or where legal precedents have been set.

PRIVATELY-OPERATED PRISONS

Legal Issues

Report to the

Members of the

COLORADO GENERAL ASSEMBLY

Prepared by the
Colorado Legislative Council Staff

January, 1987

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LORADO GENERAL ASSEMBL

LEGISLATIVE COUNCIL

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January 26, 1987

To Members of the Fifty-fifth Colorado General Assembly:

This research report was originally prepared for Representative Bonnie Allison, Chairman of the Capital Development Committee, for her information and for use by the Advisory Committee to the Capital Development Committee in formulating recommendations on the merits of possibly contracting with private parties for the operation of correctional facilities. The purpose of this printing is to make this information available to all the members of the General Assembly and other interested persons.

Privately-operated prisons, whether one supports or opposes the concept, are a dramatic departure from past practices and historic views that incarceration is the exclusive prerogative of the state. Because of budgetary constraints and the need to build additional prison and jail facilities in the immediate future, the use of private organizations for the development, funding, construction and operation of such facilities is being considered and has received the cautious support of various people in our state. Turning over the actual management and operations of correctional facilities to private parties raises a host of ethical, political, financial, legal and other public policy concerns that are only just beginning to receive the careful consideration they require. This report represents an attempt to identify and discuss some of the general legal principles and issues that may need to be considered when exploring the issue of privately-operated prisons.

One of the functions of the Legislative Council, pursuant to Section 2-3-303, C.R.S., is to consider important issues of

public policy and questions of statewide interest and to prepare for presentation to the members such reports as may be required.

Earl Thaxton, Principal Analyst, Legislative Council Staff, had primary responsibility for preparation of this report.

Respectfully submitted,

/s/ David F. Morrissey
Director

DFM/pn

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THIS IS NOT A LEGAL OPINION

LEGAL ISSUES INVOLVED IN CONTRACTING FOR THE OPERATION OF A PRIVATE PRISON

INTRODUCTION

Purpose of Report

The purpose of this report is to attempt to identify and discuss some of the general legal principles and issues Colorado legislators should consider when deciding whether or not to endorse privately-operated prisons. In this regard, the staff has examined the relevant Colorado constitutional and statutory provisions, various studies on the subject, legislation from other states, and applicable case law. It must be emphasized that this report is not intended to be an exhaustive treatment of the many legal questions involved in contracting for the operation of a private prison. The concept of a government entity contracting with a private prison is such a new, and as yet largely untried, idea that there has been very little litigation of many of the issues raised by privatization of corrections. Also, while legislation authorizing private prisons has been considered by several states, only three states (Massachusetts, New Mexico, and Tennessee) have actually enacted laws specifically authorizing privately-operated state correctional facilities. In addition, the states of Colorado, Florida, New Mexico, and Texas have enacted legislation authorizing local governments to contract with private entities for the operation of local jails. These statutes, as well as pending legislation in Pennsylvania and an Arizona bill which was vetoed, are referred to throughout this report when relevant. 1/ These statutes are available in the Legislative Council office.

Scope of Report

Private sector involvement in state and local correctional systems is extensive and long standing. 2/ Contracting for specific services or contracting for the housing and treatment of specified offenders in community corrections facilities and half-way houses has occurred gradually and has engendered little controversy. In contrast, however, contracting for the entire construction, operation, and management of an entire correctional facility may be very controversial and draw a great deal of attention. For purposes of this report, "privatization" refers to contracting for total operational responsibility for a primary adult confinement facility, and does not refer to contracting for specific services or for operation of non-secure facilities such as community corrections

facilities. A primary confinement facility is a "first" placement facility for sentenced adult offenders as opposed to "secondary" facilities such as pre-release centers or community corrections facilities. Thus, the term "private prison" refers to a full-custody primary confinement adult correctional facility which is owned and operated by a non-governmental (profit or non-profit) organization.

Limitations of Report

This report does not discuss the many ethical, political, economic and financial issues which surround the privatization of corrections idea.

LEGAL AUTHORITY TO CONTRACT

The first legal issue to be considered is whether the state has authority to contract with a private prison. Is such a contract specifically authorized by statute? Is such a contract explicitly or implicitly prohibited or merely excluded by omission? Could the absence of a specific prohibition be interpreted as permitting such contracts? Would the absence of specific enabling legislation prohibit such contracts? To what degree may the state contract for the provision of a governmental function?

Constitutional and Statutory Provisions

Article VIII, Section 1, of the Colorado Constitution provides that:

> Educational, reformatory and penal institutions, and those for the benefit of insane, blind, deaf, and mute, and such other institutions as the public good may require, shall be established and supported by the state, in such manner as may be prescribed by law. (emphasis added.)

The General Assembly has provided for the establishment of a correctional system in Title 17 of the Colorado Revised Statutes. Of particular relevance is Section 17-1-103, C.R.S., wherein the Executive Director of the Department of Corrections is "... to manage, supervise, and control the penal, correctional, and reformatory institutions operated and supported by the state...". (emphasis added.) Furtnermore, Section 17-1-104, C.R.S., provides that "the department shall manage, supervise, and control each correctional facility supported by the state." (emphasis added.) "Correctional facility" is defined in Section 17-1-102, C.R.S., to mean "... any facility under the supervision of the department in which persons are or may be lawfully held in custody as a result of conviction of a crime." (emphasis added.)

Thus, pursuant to the mandate of Article VIII, Section 1 of the Colorado Constitution, the General Assembly has insured that the supervision and control of the state's prison system remain in the hands of the state. The above-mentioned constitutional and statutory provisions appear to expressly prohibit the state from abdicating such supervision and control.

While the constitutional provision clearly requires the state to establish and support correctional facilities, it does not prohibit the state from employing another entity, such as a private corporation, to assist it in administering the correctional facilities under its control. Nowhere in the constitutional or statutory provisions is there an explicit prohibition upon the state from seeking assistance from another entity in carrying out the details of running the state's correctional system. To the contrary, as will be explained, the General Assembly has authorized and contemplated such assistance.

For example, Section 16-11-301, C.R.S., provides that imprisonment of an adult offender "... shall be served by confinement in an appropriate facility as determined by the executive director of the department of corrections. In such cases, the court will sentence the offender to the custody of the executive director ...". (emphasis added.) Furthermore, Section 16-11-308, C.R.S., provides that when any person is sentenced to any correctional facility, "that person shall be deemed to be in the custody of the executive director of the department of corrections...". The executive director is further "... authorized to transfer said person to any state institution or treatment facility under the jurisdiction of or approved by the department of corrections if he deems it to be in the best interests of said person and the public." (emphasis added.) Pursuant to Section 17-1-112, C.R.S., the General Assembly has concluded that county jails may be used for the confinement and maintenance of any person who is sentenced to a term of imprisonment in a correctional facility. The statute authorizes the department to reimburse any such county in an amount of $16 per day to maintain a state prisoner in a jail of the county. Thus, prisoners may be placed in the custody of a county prison facility.

Under the Community Corrections Act (Article 27 of Title 17, C.R.S.), a "community correctional facility" is defined to mean a community-based facility which is operated either by a unit of local government, the department, a private nonprofit agency or organization, or any corporation, association, or labor organization which provides residential accommodations for offenders. The act further provides that the Executive Director of the Department of Corrections may enter into a contract with nongovernmental community corrections facilities and transfer offenders to such facilities. Through an amendment to the act adopted in 1986, the Division of Criminal Justice in the Department of Public Safety was authorized to administer and execute all contracts with units of local government, corrections boards, and nongovernmental agencies for the provision of community correctional facilities.

In addition, pursuant to Section 17-27.5-101, C.R.S., the Executive Director may contract with nongovernmental agencies to operate nonresidential intensive supervision programs in a community as a supplement to placement of selected offenders in community corrections facilities contracted for by the Department.

Under Section 17-24-119, C.R.S., the Division of Correctional Industries "... is authorized to contract with any corporation, association, labor organization, or private nonprofit organization or with any federal or state agency for the purpose of training or employing offenders who have been committed to the department of corrections or who have been assigned to the community correctional program."

In order to avoid any doubts as to the authority of Las Animas and Huerfano counties to enter into a contract with a private contractor for the operation of a jail for the incarceration of city, county, state and federal prisoners, the General Assembly enacted Senate Bill 114 in 1986. The bill specifically authorizes the two counties to enter into the necessary contracts with a private contractor for the operation of such jail (see Section 17-26-130, C.R.S.).

While there are several restrictions on the types of inmates who may participate in community corrections programs and work-release programs (the exclusion of prisoners convicted of certain crimes), the department's use of private providers in these programs provides a clear precedent for private sector involvement in the care and custody of inmates under the department's control. The above-mentioned statutes, and current practice of the department, appears to lend support to the proposition that the department may contract with private providers for the custody of offenders. A statutory exception to this authority, however, is found in Section 17-25-101, C.R.S., which provides for the operation of minimum security facilities. A "minimum security facility" is defined to mean "a facility which has at least one physical barrier between offenders and freedom and is designed and operated to protect the public from least security risk offenders and is operated by the department for adult felony offenders committed to the custody of ... the department ..., but does not include any community correctional facility ... Such facility shall have a less restrictive setting then the correctional facilities at Canon City and the correctional facilities at Buena Vista and more restrictive setting than a community correctional facility ...". (Emphasis added.) This provision appears to limit the use of minimum security facilities to only those facilities operated by the department. Another exception is found in Section 17-21-101, C.R.S., which provides that all females sentenced to the custody of the executive director shall serve their sentences in the women's correctional institution in Canon City which is established as the state correctional institution for women.

One other possible constitutional objection which might be raised to the proposition of the state contracting with a private prison is that public funds would be used for the benefit of a private corporation, or to further a private purpose, in violation of Article V, Section 34 of the Colorado Constitution. The section provides:

> No appropriation shall be made for charitable, industrial, educational or benevolent purposes to any person, corporation or community not under the absolute control of the state, nor to any denominational or sectarian institution or association.

However, as will be noted later, the administration of the corrections system constitutes an unmistakeable public purpose. Appropriations made to private persons are not violative of this section if such appropriations are for a public purpose. See Bedford v. White, 106 Colo. 439, 106 P.2d 469 (1940). Furthermore, it is fundamental that "... a fair exchange by the state of value for value does not offend the prohibition as to a loan, pledge or gift of state credit." 81A C.J.S., States, Sec. 210. It appears that so long as the state receives adequate consideration for any public funds expended, such would not contravene Article V, Section 34, as long as the private prison operator remains under the control of the state.

Summary. Neither the constitution nor the statutes expressly limit the authority of the state to place offenders in a privately-operated correctional facility, except for Section 17-25-101, C.R.S., and Section 17-21-101, C.R.S., which appears to limit placement of offenders in "minimum security facilities" or institutions for women which are operated by the state only. It would appear, therefore, that private prisons would be permitted provided they were subject to control and supervision of the Department of Corrections. The validity of any specific contract may depend upon the powers delegated to the private prison and the degree of control the state maintains over it, as will be discussed later in this report.

In order to remove any possible question as to the authority of the state to enter into such contracts, it may be prudent to enact express statutory authorization. If the General Assembly is to endorse the concept of privatization of corrections, perhaps consideration should be given to providing for specific statutory authority. Specific statutory authority may remove any doubt as to the power of the state to enter into contracts with private prisons.

Delegation of Authority -- Maintenance of State Supervision and Control

Through the above described statutes, the General Assembly requires that the state maintain general supervision and control over

its correctional facilities and the offenders therein. As noted above, there appears to be no prohibition on correctional officials from contracting with other entities to place offenders in their custody, so long as the state maintains ultimate control over them. Even assuming that enabling legislation is enacted to specifically authorize such contracts, a question still remains as to whether the delegation of authority to a private prison is excessive under basic constitutional limitations.

Article V, Section 35, Colorado Constitution, provides:

> The general assembly shall not delegate to any special commission, private corporation or association, any power to make, supervise or interfere with any municipal improvement, money, property or effects, whether held in trust or otherwise, or to levy taxes or perform any municipal function whatever.

The design and purpose of this section is to prohibit the delegation to private corporations of the exercise of powers strictly governmental in nature. In re House, 23 Colo. 87, 46 P. 117 (1886). Numerous cases hold that governmental and legislative powers cannot be delegated or contracted, even with statutory authorization. See McQuillin, Sec. 29.07.

The general constitutional principle is that:

> (t)he State's power to contract is subject to the further limitation that a state cannot by contract divest itself of the essential attributes of sovereignty and its governmental powers. 81 C.J.S., States, Sec. 155.

In essence, no governmental agency can by contract or otherwise suspend its governmental functions. The operation of the state's correctional system is obviously a governmental function. Such governmental functions include being responsible for the rules and regulations governing the operation of the facility, inspection of the facility, maintaining order in the facilities, and providing security. Security in the broad sense generally is the essence of the correctional function (keeping offenders isolated from the community by the use of force). However, this constitutional principle is not absolute in all circumstances. Many functions of correctional facility operations have been contracted to private entities. For example, drug and alcohol treatment, religious activities, work release, and correctional industries programs have been contracted to private providers. In addition, many support services have been contracted out without any particular question or controversy, e.g., food and medical services. Even with security, the use of private resources is not uncommon (private inmate transport services have been used in the extradition area). California law permits the sheriff to hire private security guards to supervise prisoners held in hospitals (California Penal Code, Sec. 404). Also, some sort of administrative

functions appear to be amenable to contracting, e.g., clerical services, training, data collection, etc.

Many cases may be cited which have upheld the practice of a state contracting with private entities to assist in the operation and maintenance of correctional facilities for delinquent children and youthful criminals. 3/ In addition, other jurisdictions have concluded that governmental entities which have the legal responsibility for the supervision and management of institutions performing governmental functions possess the authority to contract with other entities to assist in the performance of their duties. Op. Atty. Gen. of Pa., December 31, 1984, Op. Atty. Gen. of S.C., August 8, 1985, Op. Atty. Gen. of Tenn., June 20, 1984, and Op. Atty. Gen. of N.M., November 29, 1983.

The contracting of governmental functions to private providers have been upheld in various court decisions. Although the care of the medically indigent is traditionally seen as a governmental function, the Alaska Supreme Court in 1963 approved a contract between the City of Ketchikan and a church organization for the operation of a public hospital. The court noted that the hospital did not lose its public purpose since the contract required care to be provided to all. While the contract allowed the religious order to adopt rules for internal operation (challenged as an illegal delegation of power), the court held that the power to lease the hospital for operation implies the power to delegate internal operational matters, since it would be impractical to do otherwise. Lien v. City of Ketchikan, 383 P.2d 721 (1963).

A similar result has been reached by the Pennsylvania Supreme Court in Robinson v. City of Philadelphia, 161 A.2d 1 (1960). A contract between the city and two private universities to run the hospital was challenged. The City Charter provided for the Department of Public Health to have general supervision over all city hospitals and for the board of trustees of the hospital to direct and control its management. The Pennsylvania Constitution said that cities could not delegate to private corporations any power which would interfere with municipal improvement or property or which would allow the performance of any municipal function (similar to the Colorado Constitutional provision, Article V, Section 35). Despite these limitations, the contract was approved by the court.

The court concluded that such a contract was within the authority of the City and that it did not unlawfully delegate the duties and responsibilities of the City with regard to the management and control of the hospital. The contract left the Board with the power to set standards for the hospital's operation and provided that the executive director of the hospital (a public employee) would still have supervisory power. Because the operation had to satisfy the Board, the court felt that the powers and responsibilities of the public agencies had not been unlawfully delegated.

The principle that seems to emerge from the Lien and Robinson cases is that if the state retains enough of a supervisory or rule setting power or the ability to assure itself of satisfactory operation, a contract with a private provider which involves a governmental function may be approved. As stated in 60 Am. Jur. 2d, Penal and Correctional Institutions, Sec. 22:

> Many correctional institutions are not of a strictly public character, but are private institutions ... It has been held that such an institution is an agent of the State because it exercises one of the functions of government which the state may exercise, and which it may delegate to ... institutions created under its laws.

Summary. Regardless of the question of whether specific statutory authority is necessary to enter into a contract with a private prison, a contract which delegates too much of the state's supervisory authority over the correctional facility may be held void. It seems that certain correctional functions, if contracted out, would compromise the state's ability to exercise control over the facility. These would include, at a minimum, the exclusive power over the admission decision and the release decision and decisions which affect the date of release, e.g., granting or denial of good time, etc.

It seems clear that the state cannot simply "turn over" to a private corporation the operation of a correctional facility without ample guidelines for such operation. The state would have to be assured that constitutional requirements regarding the custody of offenders were met, adequate measures to avoid escapes were taken, and that security measures are appropriate. Any contract would have to be carefully drafted to insure that the state and its officials do not unlawfully delegate the state's constitutional and statutory responsibility to "supervise and control" the correctional facilities within the corrections system.

The validity of any specific contract may depend upon the particular duties delegated to the private corporation and the degree of control which the state maintains over it. Important policy considerations underlie the legal questions involved. Discussed in a later part of this report are some of the items which ought to be considered for inclusion in any enabling legislation, or the contract, in order to ensure that the state maintains appropriate supervision and control.

LIABILITY OF CONTRACTORS AND CONTRACTING AGENCIES

Liability for Unconstitutional Conditions and Practices

A second legal issue to be considered is what, if any, impact the privatization of corrections will have upon governmental liability for unconstitutional conditions of confinement and inmate care. To what extent does contracting transfer the government's liability to the private vendor? By contracting with a private prison, can government officials evade liability under suits brought pursuant to Section 1983 of the Federal Civil Rights Act?

The consensus among individuals who have examined this issue seems to be that there is no legal principle to support the premise that the state will be able to diminish its liability merely because operations have been contracted to a private entity. The conclusion reached in several studies is that governments will not be able to eliminate or reduce its liability to inmates by delegating to private entities the operation of correctional facilities. 4/

The Federal Civil Rights Act can be applied to private parties, such as private prisons, if it can be shown that the private party acts "under color of state law." Where the power delegated to a private party, such as the operation of a correctional facility, is one "traditionally reserved to the state" or traditionally the exclusive prerogative of the state, the acts of the private party are seen as "state action" for liability purposes. Whether private prison operators will fall within the category of "state actors" would be examined in light of the various tests for state action which have been articulated by the Supreme Court. The three principle tests most likely to be applied to the private prison are: (1) the "public function" test; (2) the "nexus" test; and (3) the "state compulsion" test.

The "public function" test. The question of "state action" in the private prison context was addressed in Medina v. O'Neill, 589 F. Supp. 1028 (1984). The Medina decision is significant because it demonstrates how liability can flow back from the private provider to the contracting government agency. In Medina, 26 Columbian stowaways were discovered on board a ship docking in the Port of Houston. Generally, stowaways are detained on board the vessel for immediate transfer outside the United States. In this instance, however, the large number of stowaways and the lack of any suitable detention facilities on board caused employees of the Immigration and Naturalization Services (INS) to place 16 of the aliens in the custody of Danner, Inc., a private security firm which provided, among other services, temporary detention services for aliens. The aliens were placed in a 12- by 20-foot cell that was designed to hold six persons. After two days of confinement, the aliens attempted to escape, whereupon the Danner guards accidently killed one alien and wounded another.

The plaintiff's alleged that the failure of the INS to oversee their detention resulted in their being subjected to conditions of confinement that amounted to cruel punishment and thus violated their due process rights. The federal defendants argued that since the plaintiffs at all times remained in the custody of the carrier and its agent, the problems stemming from the plaintiff's detention arose from purely private acts. Therefore, they argued, there was no state action upon which to assert a constitutional claim. The plaintiffs agrued that the INS had a duty to oversee their detention and that the defendant's failure to do so constituted state action.

The court concluded that regardless of who had custody of the stowaways, state action existed on the part of all the defendants. State action existed on the part of the federal defendants because: (1) the INS is an executive agency; (2) the named individuals were its agents; and (3) the agents ordered the stowaways' detention. Also, the actions of the carrier and the private security firm in making provisions to detain and actually detaining the stowaways constituted state action. The court observed that the "public function" concept was pertinent to the case. That concept provides that state action exists when the state delegates to private parties a power "traditionally exclusively reserved to the State." The court found that detention is traditionally the exclusive prerogative of the state. The actions of all the defendants were state action within the purview of the public functions doctrine. Accordingly, the court found that the plaintiffs' constitutional right to due process were deprived when the INS ordered their detention but failed to assure they were detained in a facility in compliance with due process dictates.

Medina's implication for governments which contract with private firms for the operation of correctional facilities seems clear. Since private prisons would be operating under contract with a governmental agency and subject to the agency's approval, inspection, licensure and monitoring, a scheme which establishes a stronger nexus than that found in Medina, most commentators have observed that both private prison operators and contracting governments will be subject to Section 1983 liability. 5/

In a more recent case, the U.S. Court of Appeals for the 11th Circuit addressed the issue of whether a private entity responsible for providing medical care to inmates for a county jail could be held liable under Section 1983 of the Federal Civil Rights Act for deliberate indifferences to serious medical needs. In the decision, the Court stated that if the actions of the medical defendants resulted in a deprivation of the plaintiff's constitutional rights, they would be subject to liability pursuant to 42 U.S.C., Section 1983. Although the employees of the private medical provider were not strictly speaking public employees, state action was clearly present. Where a function which is traditionally the exclusive prerogative of the state (or here, county) is performed by a private entity, state action is present. (See Acata v. Prison Health Services, Inc., 769 F.2d 700 (1985)).

The Nexus Test. The nexus test turns on whether there is a sufficiently close nexus between the state and the challenged conduct of the regulated entity so that the action of the latter may be fairly treated as that of the state itself. Several studies have cited Milonas v. Williams, 691 F.2d 931 (10th Cir. 1982), as a good example of the probable consequences of applying the close nexus test to private prisons. 6/ The plantiffs were students of a school for youths with behavioral problems who were placed at the school by the juvenile courts. The plaintiffs alleged that the school administrators, acting under color of state law, subjected them to cruel and unusual punishment and denied them due process of law. Also named as defendants were various agencies, officers, and employees of the State of Utah. The court found state action because: (1) many members of the class were sent to the school involuntarily by juvenile courts and other state agencies; (2) detailed contracts were drawn up by the school administrators and agreed to by local school districts that placed boys at the school; (3) there was significant state funding of tuition; and (4) there was extensive state regulation of the educational programs at the school. The court concluded that these facts demonstrate that there was a sufficiently close nexus between the state's sending boys to the school and the conduct of school authorities so as to support a claim under Section 1983.

Would the application of the close nexus test to private prisons yield the same result? There are several similarities between the facts in Milonas and the factors likely to be considered by the courts in the context of private prisons. These include: (1) the involuntary nature of the confinement; (2) the detailed nature of the contract between the state and the private prison; (3) the level of government funding; and (4) the extent of state regulation of policies and programs. It appears likely that the courts will find state action under such circumstances.

The state compulsion test. The final test under which the actions of private prison operators may be susceptible to a finding of improper state action in violation of Section 1983 is the state compulsion test. In considering this test, the issue is whether the state has a clear duty to provide the service in question. Authorities cite Lombard v. Eunice Kennedy Shriver Center, 556 F. Supp. 677 (1983), as an illustration of how the courts are likely to analyze litigation involving the action of private prison operators. 7/ The question presented in Lombard was whether the private Shriver Center in its provision of medical services to the plaintiff, a mentally retarded person, constituted state action for the purposes of the 14th Amendment, and whether Shriver acted under color of state law for the purposes of Section 1983. The Court answered in the affirmative stating that "(t)he critical factor in our decision is the duty of the state to provide adequate medical services to those whose personal freedom is restricted because they reside in state institutions." The Court reasoned that "(b)ecause the state bore an affirmative obligation to provide adequate medical care to the plaintiff, because the state delegated that function to the Shriver

Center, and because Shriver voluntarily assumed that obligation by contract, Shriver must be considered to have acted under color of law, and its acts and omissions must be considered actions of the state. For if Shriver were not held so responsible, the state could avoid its constitutional obligations simply be delegating governmental functions to private entities."

Summary. In light of the courts' decisions discussed above, it appears likely that private prison operators will be subject to suit under Section 1983. Private prison operators would be cloaked with enough attributes of the state to expose the provider to potential liability under Section 1983 and any such liability would, in many circumstances, extend beyond the provider to the government agency ultimately responsible for providing for the care and custody of offenders.

State Liability Under the "Colorado Governmental Immunity Act"

Under the "Colorado Governmental Immunity Act" (Article 10 of Title 24, C.R.S.), a public entity shall not assert sovereign immunity as a defense in an action for damages for injuries resulting from: (1) the operation of any correctional facility, as defined in Section 17-1-102, C.R.S., or jail by such public entity; or (2) a dangerous condition of any public jail maintained by a public entity (Section 24-10-106 (1) (b) and (e), C.R.S.). "Operation" means the act or omission of a public entity or public employee in the exercise and performance of the powers, duties, and functions vested in them by law with respect to the purposes of any public hospital, jail, or public water, gas, sanitation, power, or swimming facility. "Dangerous condition" means a physical condition of a facility or the use thereof which constitutes an unreasonable risk to the health or safety of the public, which is known to exist or which in the exercise of reasonable care should have been known to exist and which condition is proximately caused by the negligent act or omission of the public entity in constructing or maintaining such facility. A dangerous condition shall not exist solely because the design of any facility is inadequate (Section 24-10-103 (1) and (3), C.R.S.). "Public employee" is defined to mean an officer, employee, servant, or authorized volunteer of the public entity, whether or not compensated, elected, or appointed, but does not include an independent contractor or any person who is sentenced to participate in any type of useful public service (Section 24-10-103 (4), C.R.S.).

The Governmental Immunity Act sets a limit on the amount that may be recovered from a public entity or public employee. The maximum amount that may be recovered under the act is: (1) $150,000 for an injury to one person in any single occurrence; and (2) $400,000 for an injury to two or more persons in any single occurrence (Section 24-10-114, C.R.S.).

Under the act, the state or a public employee could be liable f r damages for injuries resulting from the operation of a correctional facility. "Correctional facility" is defined in Section 17-1-102, C.R.S., as "any facility under the supervision of the department in which persons are or may be lawfully held in custody as a result of conviction of a crime." (Emphasis added.) In the context of the state contracting for the operation of a private prison, and given the provisions of the Governmental Immunity Act, several questions are presented for consideration.

Would a private prison be considered a "correctional facility" under the supervision of the Department of Corrections? As will be discussed later in this report, either through the enactment of specific legislation, detailed contract provisions, compliance with rules and regulations of the Department regarding disciplinary actions, transfers, security policies, approval of sentence credits, work programs, etc., the private prison could be regarded as being under the "supervision" of the Department. The question presented is whether or not being under the "supervision" of the Department would make the private prison a "public entity" (an agency or instrumentality of the state organized pursuant to law)? If a private prison could be considered a "correctional facility", then the prison operators would fall under the provisions of the Governmental Immunity Act and be subject to the provisions thereof.

Would the employees of the private prison be considered "public employees" for purposes of the Governmental Immunity Act? As will be discussed later in this report, it may be necessary to grant the employees of a private prison the powers of a "peace officer" as defined in Section 18-1-901, C.R.S. Any officer, guard, or supervisory employee within the Department of Corrections, including parole officers, are currently defined as "Peace Officer, level II", and have the authority to enforce all the laws of the state of Colorado while acting within the scope of his authority and in the performance of his duties. In order to provide employees of a private prison with the authority to enforce the rules of the facility, it may be necessary to include them in the definition of "peace officer". The question presented is whether or not providing that such employees are "peace officers" will in turn mean that such "peace officers" are "public employees" pursuant to the Governmental Immunity Act and be subject to the provisions thereof.

Would the operator of a private prison be considered an "independent contractor"? The Governmental Immunity Act excludes an "independent contractor" from the definition of "public employee". Could the operator of a private prison be considered as an "independent contractor"? If so, the operator would not be subject to the act and would be liable for the negligent acts of its employees without the limitations of the act.

Approaches adopted in other states. The several states which have addressed this issue (whether a private prison should or should

not be subject to the governmental immunity of the state) have differed in their approach. For example, the New Mexico statute authorizing counties to contract with private entities for the operation of local jails provides that jailers (employees of the private contractor), while in the scope of law enforcement duties, shall be deemed public employees for purposes of the Tort Claims Act. The private contractor has to provide the coverage for any liability of the jailer. On the other hand, the proposed Pennsylvania law specifically provides that the sovereign immunity of the state shall not apply to the private contractor. The law specifically provides that neither the contractor nor the insuror of the contractor may plead the defense of sovereign immunity in any action arising out of the performance of the contract. A bill which was adopted by the Arizona legislature, but subsequently vetoed by the Governor, provided that a correctional employee (including an employee of a private prison under contract with the Department of Corrections) would have qualified immunity. The bill provided that unless a correctional employee acting within the scope of his employment intends to cause injury or is grossly negligent, neither a correctional employee nor a correctional institution (including a private prison) shall be liable for: (1) an injury caused by an escaping or escaped prisoner; or (2) an injury caused by a prisoner to any other prisoner.

Insurance coverage for potential liability. As observed above, there is a potential that liability, both in civil rights litigation and in some tort litigation, will attach both at the corporate level and also at the government level. In these cases, perhaps the state can be shielded from at least the monetary aspects of liability and the direct costs of litigation, by requiring the private prison operator to defend all cases which arise from the contract operation and to hold the state harmless for those cases in which monetary liability is found and in which attorney's fees are awarded. A concomitant to the hold-harmless clause would be a requirement that the private prison operator carry sufficient insurance to absorb damages or attorney's fees. Thus, even while the state might be found liable along with the private prison operator, a hold-harmless and insurance requirement in the statutes, and in the contract, should protect the state from having to actually expend any funds directly to satisfy the court's award or for costs of defense.

The New Mexico statutes provides that all agreements with private prison operators must be approved in writing, prior to their becoming effective, by the Risk Management Division of the General Services Department. The approval is contingent upon:

1) the operator's assumption of all liability caused by or arising out of all aspects of the provision and operation of the prison; and

2) that the liability insurance covering the operator and its employees, officers, jailers and agents is sufficient to cover all liability caused by or arising out of all aspects of the provision and operation of the prison.

The Tennessee law requires the contractor to provide an adequate plan of insurance, specifically including insurance for civil rights claims, as determined by an independent risk management/actuarial firm with demonstrated experience in public liability of state governments. In determining the adequacy of the plan, such firm shall determine whether:

1) the insurance is adequate to protect the state from any and all actions by a third party against the contractor or the state as a result of the contract;

2) the insurance is adequate to protect the state against any and all claims arising as a result of any occurrence during the term of the contract; that is, the insurance is adequate on an occurrence basis, not a claims-made basis;

3) the insurance is adequate to assure the contractor's ability to fulfill its contract with the state in all respects, and to assure that the contractor is not limited in this ability because of financial liability which results from judgments; and

4) the insurance is adequate to satisfy such other requirements specified by the independent risk management/actuarial firm.

Failure to maintain an adequate plan of insurance shall constitute a breach of the contract and the contract shall be subject to termination for default.

Pending legislation in Pennsylvania provides that contract approval by the Attorney General shall be conditioned upon the following:

1) the private contractor's assumption of liability caused by or arising out of all aspects of the ownership or operation of the private correctional facility or the provision of security services, including, but not limited to, escape or other emergency situations, legal fees and damage awards, involving the private contractor and the contracting government body; and

2) liability insurance covering the private contractor and its officers, employees, and agents in an amount sufficient to cover liability caused by or arising out of the ownership or operation of a private correctional facility or the provision of security services.

The Colorado General Assembly enacted Senate Bill 114 in 1986. The bill authorizes Huerfano and Las Animas counties to enter into a contract with a private contractor for the operation of a jail on a pilot project basis. Before such a contract may be approved, the contract shall require "the private contractor to purchase liability insurance in an amount sufficient to protect such contractor and his officers, employees, and agents from any liability caused by or

arising out of any aspects of the jail construction and operation" and shall "require the private contractor to purchase liability insurance in the amounts specified in section 24-10-114 (1), C.R.S., ($150,000 and $400,000) to protect the state and Las Animas and Huerfano counties and their officers, employees, and agents from any liability caused by or arising out of any aspects of the jail construction and operation."

Summary and options for the General Assembly. Colorado has waived governmental immunity as a defense in actions for damages for injuries resulting from the "operation" of any correctional facility. The public entity is liable for the payment of judgments against any of its public employees where the claim against the public employee arises out of injuries sustained from an act or omission of such employee occurring during the performance of his duties and within the scope of his employment. The Governmental Immunity Act establishes limitations on the monetary liability of the public entity (section 24-10-114, C.R.S.).

The state may have several options in dealing with the potential liability of private prison operators:

(1) The statutes could be amended to provide that employees of a private prison are to be considered "public employees", while acting within the scope of their employment, for purposes of the Governmental Immunity Act. In addition, the definition of "correctional facility" perhaps could be amended to provide that any private prison under the supervision of the Department of Corrections is to be considered a "correctional facility" for purposes of the Governmental Immunity Act. The private prison and the employees thereof would then be subject to the waiver provisions of the law and the applicable limitations.

(2) The state could specifically provide that the sovereign immunity of the state shall not apply to the private contractor or his employees, and that neither the contractor nor the insuror of the contractor may plead the defense of sovereign immunity in any action arising out of the performance of the contract. Thus, the private contractor could not avail himself of the limitations contained in the Governmental Immunity Act and would be subject to liability for the acts and omissions of his employees under the ordinary rules of negligence and the determination of damages.

(3) Whichever option above is chosen, the state would probably want to make sure that the private prison operator has adequate insurance to protect themselves and the state in the event of a suit or claim for compensation. The statute should probably require the private prison operator to agree to indemnify, defend, and hold harmless the state, its officers, agents, and employees from:

-- any claims or losses for services rendered by the contractor to any person or firm while performing or supplying services, materials, or supplies in connection with the performance of the contract;

-- any claims or losses to any person or firm injured or property damages resulting from the erroneous, negligent, willful, malicious, or criminal acts or omissions of the contractor, its officers, agents, or employees in the performance of the contract;

-- any claims or losses to any person or firm injured or property damages resulting from any violations by the contractor, its officers, agents, or employees, of the terms, conditions and requirements of the contract or resulting from the management and operation of the facility in a manner not authorized by the contract; and

-- any claims or losses to any person or firm injured or property damages resulting from any violations by the contractor of the constitutions, statutes, or regulations of the state and the United States, including, but not limited to labor laws, minimum wage laws, and Section 1983 of the Federal Civil Rights Act.

SECURITY AND DISCIPLINARY CONSIDERATIONS

Security Considerations

Authority to use force. The subject of this part of the report is the issue of private correctional officers use of force, including deadly force, in maintaining order in a private prison. The issue to be considered is whether private correctional officers might need additional statutory authority to use physical force in maintaining order within a private prison, or whether existing laws are sufficient in this regard.

Every citizen possesses certain common law and statutory powers of arrest, self defense, and may use appropriate physical force in making arrests and in preventing escapes. For example, Section 16-3-201, C.R.S., provides:

> A person who is not a peace officer may arrest another person when any crime has been or is being committed by the arrested person in the presence of the person making the arrest.

In addition, Section 16-3-202 (2) and (3), C.R.S., provides:

(2) A person commanded to assist a peace officer has the same authority to arrest as the officer who commands his assistance.

(3) A person commanded to assist a peace officer in making an arrest shall not be civilly or criminally liable for any reasonable conduct in aid of the officer or for any acts expressly directed by the officer.

Section 18-1-707 (7), C.R.S., provides:

A private person acting on his own account is justified in using reasonable and appropriate physical force upon another person when and to the extent that he reasonably believes it necessary to effect an arrest, or to prevent the escape from custody of an arrested person who has committed an offense in his presence; but he is justified in using deadly physical force for the purpose only when he reasonably believes it necessary to defend himself or a third person from what he reasonably believes to be the use or imminent use of deadly physical force.

Under Section 18-1-704, C.R.S., a person is "... justified in using physical force upon another person in order to defend himself or a third person from what he reasonably believes to be the use or imminent use of unlawful physical force by that other person, and he may use a degree of force which he reasonably believes to be necessary for that purpose." The section further provides that deadly physical force may be used, but only if a person reasonably believes a lesser degree of force is inadequate and:

"(a) The actor has reasonable ground to believe, and does believe, that he or another person is in imminent danger of being killed or of receiving great bodily injury; or

(b) The other person is using or reasonably appears to use physical force against an occupant of a dwelling or business establishment while committing or attempting to commit burglary as defined in sections 18-4-202 to 18-4-204; or

(c) The other person is committing or reasonably appears about to commit kidnapping ..., robbery ..., sexual assault ..., or assault ...".

Peace officers are possessed with additional authority, such as those contained in Section 18-1-707, C.R.S. They may use reasonable and necessary physical force upon another person when and to the extent that they reasonably believe it necessary:

"(a) To effect an arrest or to prevent the escape from custody of an arrested person unless he knows that the arrest is unauthorized; or

(b) To defend himself or a third person from what he reasonably believes to be the use or imminent use of physical force while effecting or attempting to effect such an arrest or while preventing or attempting to prevent such an escape."

Peace officers may use deadly physical force upon another person for a purpose specified above only when they reasonably believe that it is necessary:

"(a) To defend himself or a third person from what he reasonably believes to be the use or imminent use of deadly physical force; or

(b) To effect an arrest, or to prevent the escape from custody, of a person whom he reasonably believes:

(I) Has committed or attempted to commit a felony involving the use or threatened use of a deadly weapon; or

(II) Is attempting to escape by the use of a deadly weapon; or

(III) Otherwise indicates ... that he is likely to endanger human life or to inflict serious bodily injury to another unless apprehended without delay." Section 18-1-707 (2), C.R.S.

A guard or peace officer employed in a detention facility, pursuant to Section 18-1-707 (8), C.R.S., is justified:

"(a) In using deadly physical force when he reasonably believes it necessary to prevent the escape of a prisoner convicted of, charged with, or held for a felony, on confined under maximum security rules of any detention facility ...

(b) In using reasonable and appropriate physical force, but not deadly physical force, in all other circumstances when and to the extent that he reasonably believes it necessary to prevent what he reasonably believes to be the escape of a prisoner from a detention facility."

A "detention facility", as used in the above subsection, is defined to mean "any place maintained for the confinement, pursuant to law, of persons charged with or convicted of an offense, held pursuant

to the "Colorado Children's Code", held for extradition, or otherwise confined pursuant to an order of a court." (Emphasis added.)

Pursuant to Section 17-20-122, C.R.S., if an offender sentenced to a correction facility "... resists the authority of any officer or refuses to obey his lawful commands, it is the duty of such officer immediately to enforce obedience by the use of such weapons or other aid as may be effectual. If in so doing, any convict thus resisting is wounded or killed by such officer or his assistants, they are justified and shall be held guiltless; but such officer shall not be excused for using greater force than the emergency of the case demands." In addition, Section 18-1-703 (1) (b), C.R.S., provides that:

> "A superintendent or other authorized official of a jail, prison, or correctional institution may, in order to maintain order and discipline, use reasonable and appropriate physical force when and to the extent that he reasonably believes it necessary to maintain order and discipline, but he may use deadly physical force only when he reasonably believes it necessary to prevent death or serious bodily injury."

Under the above circumstance, the use of physical force upon another person is justifiable and not criminal.

Approaches in other states. The New Mexico statute, for example, authorizes counties to contract with private entities for the operation of local jails and designates the private provider's employees as peace officers within the confines of the jail and out of the institution while transporting prisoners or while in pursuit of any escapee. The pending Pennsylvania legislation provides that security personnel employed by private contractors shall be deemed peace officers. Arizona Senate Bill 1094, which was vetoed by the Governor, defined a "correctional employee" to include an officer, employee, or servant who is authorized to perform any act or service on behalf of a correctional institution. "Correctional institution" is defined to include an institution that contracts with the Department of Corrections. The Florida statute defines "correctional officer" to mean any person who is appointed or employed by the state or by any private entity which has contracted with the state.

Summary. Adult correctional facilities are characterized by strict security measures, including armed guards, and the capability for lockdowns and other measures for inmate control. In the context of private prisons, the requirement that private prison correctional officers possess the authority to enforce orders and maintain discipline raises a potential concern for the state and the private prison operator. Can the state delegate its authority to use force if necessary to maintain order in private prisons? As noted above, all citizens possess certain powers of arrest and may use force to prevent escapes. Nevertheless, private prison correctional officers, who

probably will be expected to perform a role similar to their public correctional officer counterparts, may need powers and authority greater than those granted to citizens generally. Consideration should be given, therefore, to amending the statutes to specifically vest private prison correctional employees with all, or at least some, of the powers and authority of public correctional officers while in the performance of their duties.

Discipline Considerations

Authority to discipline. The issue discussed herein is whether private prison operators and their employees should be involved in decisions regarding the assignment, transfer and release of offenders in their custody. Correctional officers make numerous decisions affecting the length and conditions of an offender's confinement. For example, Colorado provides for so-called good time reductions in sentence, and earned time reductions, for offenders who do not commit institutional infractions (Article 22.5 of Title 17, C.R.S.). Such reductions can substantially reduce the length of time an offender actually serves. Disciplinary infractions and the resulting deductions of good time can also influence an offender's eligibility for pre-release and parole opportunities.

Many of the disciplinary offenses that may result in major or minor sanctions leave little room for arbitrary or subjective enforcement, such as escape or attempt to escape, possession or manufacture of weapons, fighting with or assaulting another person, etc. Other offenses may permit some degree of discretion in the enforcement of sanctions, such as unexcused absence, willful failure to perform, or refusal to accept a work program assignment, disobeying an order, failure to abide by institutional rules, and conduct which interferes with the security or orderly management of the facility. The detection and reporting of disciplinary offenses is primarily the responsibility of correctional officers. This use of discretion, and the resulting deprivation of liberty, is an exercise of the state's power over its citizens. It has been suggested that any decisions which affect the date of release, e.g., granting or denial of good time, is a governmental function and cannot be delegated. 8/

The state may have several options for minimizing private prison involvement in disciplinary matters. The most restrictive approach would be to prohibit any private prison employee participation in disciplinary matters. This would require the presence of a state employee monitoring staff at the private facility with the authority to make disciplinary decisions. A question arises, however, as to whether a small staff of state employees could always be present when disciplinary matters occur. In many instances, when a disciplinary infraction occurs, the only witnesses will be the private prison employee, the accused, and perhaps, other inmates. Under such circumstances, it may be almost impossible to completely eliminate private prison employee involvement in disciplinary matters. Any such

public employee monitoring staff should have to be able to rely upon their private counterpart's competence and veracity.

Another problem with prohibiting private prison employee participation in disciplinary matters is such a policy's potential effect on their ability to keep and maintain order. Inmates awareness of correctional officers' influence over disciplinary decisions plays a large role in enabling such officers to maintain control of the facility and, short of using force, compel prisoner compliance with institutional rules. If private prison correctional officers are precluded from imposing disciplinary rules with appropriate sanctions, they are likely to encounter problems in dealing with offenders. Thus, completely prohibiting private prison employee participation in disciplinary matters may neither be feasible nor desirable.

Approaches in other states. The New Mexico statute explicitly prohibits a private contractor from awarding or rescinding good time credits. Since the county sheriff, by law, makes all decisions concerning awards or forfeitures of good time, contractors are accountable to that official for disciplinary violations and good behavior. Under this statute, it appears that the sheriff's reliance upon the private contractor for the information upon which he bases his decision permits private prison operators a great deal of discretion in the process.

The Tennessee statute goes further in excluding private prison operators from participating in disciplinary and custodial decisions. Specifically, the statute states that no contract for correctional services shall authorize, allow, or imply a delegation of the authority or responsibility of the state to a prison contractor for any of the following:

(1) Developing and implementing procedures for calculating inmate release and parole eligibility dates;

(2) Developing and implementing procedures for calculating and awarding sentence credits;

(3) Approving inmates for furlough and work release;

(4) Approving the type of work inmates may perform, and the wages or sentence credits which may be given to inmates engaging in such work; and

(5) Granting, denying, or revoking sentence credits; placing inmates under less restrictive custody or more restrictive custody; or taking any disciplinary actions.

Under the Tennessee statute, the contractor may develop written policies relating to the custody, care and control of inmates, provided that such policies are not inconsistent with the

above-mentioned policies and that such policies are reviewed and approved by the state. Thus, only the state (through a designated monitor) can make decisions which affect the length of an offender's sentence or the level of custody required or the type of assignment while confined.

Summary. The extent to which private prison employees should be involved in disciplinary decisions should be set forth in any enabling legislation. It appears that such employees may be able to enforce disciplinary sanctions if there is adequate state supervision and control over such decisions. Perhaps a balance can be struck between permitting private prison employees sufficient authority to maintain control of the private facility and guaranteeing that the state does not unconstitutionally delegate its authority to protect inmates' rights and control the institutions under its supervision. Enabling legislation could provide that regulations be developed to limit, as far as possible, private prison employee discretion in regulating prisoner conduct. Such a statute could provide for a monitoring system whereby representatives of the state could review and approve or disapprove any disciplinary measures recommended by the private prison, review and approve or disapprove any recommendations for change in program assignment or level of custody, etc. In addition, a disciplinary board could be established to hear and decide disciplinary matters, made up in whole or in part, of public employees. Finally, an appeal process could be established for offenders who feel they have been treated unfairly or illegally by a private prison employee.

Qualification and Training Requirements of Private Prison Employees

Because private prison employees will inevitably be involved in decisions affecting the lives and legal status of offenders, it may be important that they meet the same qualifications and training requirements as public correctional employees. By regulation, the Department of Corrections requires minimum qualifications and training requirements of its employees. Without statutory specification, it may be unclear whether employees of a privately-operated correctional facility would be subject to the same requirements as those imposed on public correctional employees. Therefore, it may be prudent to include in any enabling legislation a requirement that private prison employees maintain the same qualifications as public employees. This requirement could be met by requiring private operator compliance with the relevant standards for public employees.

SPECIFIC STATUTORY OR CONTRACT PROVISIONS

In addition to the issues already covered, discussed below are several subjects which should be considered for inclusion in any enabling legislation to authorize the state to contract with a private prison. These subjects are considered important to assure that the state retain adequate control and supervision over private prisons in order to avoid an unconstitutional delegation of government authority. These controls are deemed necessary to provide for public safety and inmate care, to meet the standards of correctional services approved for correctional accreditation, and to comply with court-imposed standards.

Number and Type of Private Prisons

How many and what type of facilities are to be authorized ought to be set forth in statute. Given the lack of precedents and the controversial nature of private prison proposals, the state may wish to proceed with caution and limit the project to a minimum security facility of a designated capacity (100, 250, or 500). Consideration should also be given to only authorizing a pilot project. The state's choice concerning the type of institutions operated as private prisons will largely determine what types of offenders are incarcerated in private prisons.

Type of Offenders

The types of inmates who will be eligible for placement in a private prison may need to be established in statute. The state should also consider whether special categories of offenders (e.g., violent offenders, sexual offenders, aged, etc.) should be placed in private prisons. For example, the Texas statute stipulates that only "low-risk" county inmates may be placed in privately-operated facilities. Tennessee's private prison law provides that any inmate placed in the custody of the state's department of corrections shall be eligible for placement in a private prison. Yet, the legislation restricts private management to a medium security facility. This restriction ensures that only the relatively small number of offenders who quality for, and are assigned to, the specific medium security facility would be confined in a privately-operated institution.

Minimum and Maximum Occupancy Levels

The state may want to set minimum and maximum occupancy levels for a private prison. The former provides some minimum guarantee to the private prison operating on a per diem basis. The latter provides the state assurance that a certain amount of capacity will be available and also protects the contractor from the liabilities of overcrowding.

Contractor Selection and Contract Approval

Should there be some expression of legislative priorities in establishing contract procedures? Should contractors be selected primarily on the basis of cost or should experience, financial stability, innovative programs or other qualifications be given greater weight? At the very least, provision should be made to ensure reasonable financial stability of the private prison. Consideration could also be given to ensuring appropriate backgrounds for owners, administrators, and employees of the private prison. Perhaps the enabling legislation could require that standards be established specifying minimum education, experience and training required of private prison administrators and employees.

The Tennessee statute provides that in order to be considered for a contract, a bidder must demonstrate that he has: (1) the qualifications, operation and management experience and experienced personnel necessary to carry out the terms of the contract; (2) the ability to comply with applicable correctional standards and specific court orders; and (3) a demonstrated history of successful operation and management of other correctional facilities.

In regard to contract approval, both New Mexico and Tennessee included various contract approval and review procedures in their statutes. New Mexico's statute mandates that the Attorney General select, authorize and approve the pilot projects permitted by law. In addition, no contract shall be effective until it has been approved by the Local Government Division of the Department of Finance and Administration. Finally, all private jail contracts must be approved by the Risk Management Division of the General Services Department.

The Tennessee statute set forth a fairly extensive system of checks and balances in the awarding of private prison contracts. Any contract must be approved by the State Building Commission, the Attorney General, and the Commissioner of Corrections. In addition, such contract must be reviewed by the Select Oversight Committee on Corrections, the Fiscal Review Committee, and the House and Senate State and Local Government Committees.

Duration of the Contract

Any enabling legislation probably should establish the duration or term of the contract. The state would most likely favor a short-term contract in order to preserve its flexibility in changing contractors and to renegotiate contracts to reflect changing needs. Private prison operators would most likely prefer long-term contracts which guarantees them a steady stream of revenue.

The Tennessee statute stipulated that the initial operating contract shall have a term of three years and may include an option to renew for an additional two years. This provision recognizes that the

contractor will need at least three years to demonstrate his ability and provide sufficient information for comparisons to public institutions. The New Mexico statute also prohibits agreements with private jail operators that exceed three years.

Payment Provisions

Should any enabling legislation set forth the payment arrangement or should this provision be determined in the contract negotiation process? Should any statute at least provide that payment will be made on a per diem basis or an annual contract basis? Any payment provision should at least guarantee that the state will not be liable for cost overruns.

Standards of Performance

To protect both parties to the contract, specific standards of performance should be established. Should the performance criteria to which the contractor will be held be specifically set forth in the enabling statute? Should these performance standards be left to regulation and the contract provisions? As a way of minimizing liability exposure, and minimizing disputes regarding performance expectations, the statute or regulations and the contract should require adherence to at least some set of recognized national standards. The standards of the American Correctional Association Commission on Accreditation may be a useful point of reference.

Monitoring and Reporting Provisions

Any enabling statute should probably provide a procedure to hold the private prison operator accountable for meeting their contract obligations. Some type of mechanism for state regulation and monitorship may need to be established. The statute could designate a specific state agency as responsible for administering the monitor program and define the basic structure and requirements of the program. The designated agency should probably be required to develop implementing regulations. In addition, it might be desirable to require that a representative or representatives of the monitoring state agency be on the premises of the private prison at all times. The statute could include requirements for periodic inspection, determinations that minimum standards are being met, sanctions to be imposed if the private prison operator does not abide by the specified regulations and requirements, etc. Perhaps the law should also specify that the monitoring program representatives have access to the facility and to the records of the operator. The enabling statute could also provide for periodic reports to the appropriate public bodies and require that these reports be made available to the public. Such periodic reports could include items such as numbers of employees and inmates, prison capacity, financial data, costs, source of revenue, inmate disturbances and escapes, etc.

Termination

Any enabling statute should probably make provision for termination of the contract in appropriate situations. The New Mexico and Tennessee statutes include termination clauses. The New Mexico statute requires that all agreements with private contractors provide for termination, for cause, by the government upon 90 days notice to the contractor. Termination is allowed for at least the following reasons: (1) failure of the contractor to meet the minimum standards and conditions of incarceration agreed to in the contract; and (2) failure to meet other contract provisions when such failure seriously affects the operation of the jail.

Tennessee's law makes contract approval contingent upon the private operator agreeing that the state can, by giving 90-day notice, cancel the contract without penalty at any time after the first year.

Consideration should be given to balancing the state's need to cancel a contract on short notice and the contractor's desire for some assurance of a long-time relationship.

Service Disruption or Failure of the Operator

Consideration should be given to providing in statute for the intervention of appropriate state agencies in the event of a specific occurrence at private prisons. What is to happen if the private prison fails and goes into bankruptcy because of unexpected costs, lawsuits or inefficient management? What happens if the only provider available decided to get out of the prison operation business and does not negotiate for the renewal of the contract, or delivers such poor service that the state decides to cancel the contract? If the corporate failure is abrupt, how will the state provide the necessary services? Where will the staff come from? What if the private prison operator owns the facility?

It appears that some provision must be made for the state to assume control of the private prison in the event of bankruptcy or other failure. For a short period of time, state patrol officers and public correctional officers could assume control of the facility. The temporary measure could not be used indefinitely. The Tennessee statute requires that a plan be developed and certified by the Governor which demonstrates the method by which the state would resume control of the private prison upon contract termination and failure.

In the event of an emergency at a private prison, such as a riot, the statute probably should indicate who will be responsible for costs associated with any necessary intervention to quell the riot and should require private prison operators to develop contingency plans for dealing with such emergencies.

Relations with Other Law Enforcement Agencies and Elements of the Criminal Justice System

Perhaps provision should be made in state law requiring the cooperation of the private prisons with appropriate elements of the criminal justice system. In the case of escapes or riots, can the private prison cooperate with local law enforcement agencies even though they are not a party to the contract? Provision should be made to require private prisons to maintain all records necessary for parole authorities, sentencing courts, community corrections programs, etc.

Inmate Rights and Grievance Procedures

Perhaps provision should be made in statute that private prisons be required to abide by some formal procedure to hear and attend to inmate grievances, which procedure could be developed as part of the regulations governing private prisons. The regulations should also provide for such matters as prisoner visitation privileges, religious privileges, health, nutrition requirements, recreation and education requirements, etc.

For further information,
please contact Earl Thaxton, 866-3521.

FOOTNOTES

1/ Act of January 10, 1986, chapter 799, 1985 Mass. Acts 1323; Act of April 3, 1985, chapter 149, 1985 N.M. Acts 794 (codified as 33-1-17, N.M. Stat. (1986 Supp.)); Act of April 17, 1986, chapter 932, 1986 Tenn. Acts 12 (codified as 41-24-101, et. seq., Tenn. Code Ann.; Act of March 2, 1984, chapter 22 1984 N.M. Acts 114 (codified as 33-3-26 N.M. Stat. (1986 Supp.); Act of August 29, 1983, chapter 898, 1983 Texas Acts 5007 (codified as Vernon's Ann. Revised Civil Stat. of Texas, Art. 5115d; Act of April 26, 1986, chapter 132, 1986 Colo. Acts 759 (codified as 17-26-130 et. seq., Colo. Rev. Stat. (1986 Rep. Vol.); Act of July 1, 1986, chapter 86-183, 1986 Florida Acts 1295 (codified as 951.062 Florida Stat.; S.B. 1094, Arizona 37th Legislature (1985); and H.B. 307, Pennsylvania General Assembly (1985).

2/ U.S. Department of Justice, National Institute of Justice, The Privatization of Corrections, February 1985, p. 2; U.S. Department of Justice, National Institute of Corrections, Private Sector Involvement in Prison Services and Operations, February 1984, p. 7.

3/ Supra note 2, at 62

4/ Contracting for Correctional Services: Some Legal Considerations, by William C. Collins, Attorney at Law, P.O. Box 2316, Olympia, WA 98507 (Nov. 1985), p. 11; Privatization of Corrections: Defining the Issues, by Ira P. Robbins, Federal Bar News & Journal, May-June, p. 196; Seeking Profit In Punishment: The Private Management of Correctional Institutions, by Michael Keating, Jr.; Prisons For Profit, Legislative Research Council, Commonwealth of Massachusetts, July 31, 1986, p. 87.

5/ Supra note 4

6/ Supra note 4

7/ Supra note 4

8/ Supra note 4

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STATE OF KANSAS

DEPARTMENT OF CORRECTIONS
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Mike Hayden
Governor

Steven J. Davies, Ph.D.
Secretary

Date: September 20, 1990

To: Special Committee on Judiciary

From: Steven J. Davies, Ph.D.
Secretary of Corrections

Subject: Proposal No. 12-- Regional Prisons

Last session House Bill 2835 was considered by the House Committee on Local Government. Testimony on my behalf was presented at Committee hearings on this bill. A number of areas which I thought should be addressed in this bill were brought before the Committee and discussed. During additional consideration of the bill, several other areas of concern were identified and additional recommendations submitted to the Committee and others interested in the regional prison authority and private prison concepts. As a result of the continuing development of this legislation, a proposed substitute bill (Proposed Substitute for Senate Bill No. 588) was drafted late in the session. I do not believe it was actually introduced or discussed in a Committee hearing.

The proposed substitute bill contained most of the provision I had suggested during earlier testimony and discussions on this subject. The specific areas on which I made recommendations are set forth in the my written testimony of August 31,1990. Two of those recommendations appear to have not been included in the substitute bill. They are the following:

- A provision that the entity operating the correctional facility should be required to maintain in effect at all times liability insurance policies regarding all operational aspects of the facility;

- A provision that the entity operating the facility should be required to provide for the indemnification of the state for all legal actions resulting from operation of the facility.

If these provisions are included in the bill, the proposed substitute bill would address all of the areas listed in my August 31st testimony. If these concerns and the role of the Department of Corrections in monitoring these facilities is clearly defined and financed, I would not oppose this legislation. In making that statement I want to emphasize that I have limited my review of the proposed substitute bill to those areas which appear to have operational aspects. I have not reviewed nor taken a position on other provisions of the proposed bill.

In considering the role of the Department of Corrections, I feel I must again point out that the department does not now have the personnel and resources to undertake a signiticant participation in the planning and monitoring of such a facility. The review and approval of plans takes literally thousands of manhours and is a continuing process through the construction of the facility. I do not now have the time, personnel, or resources to undertake this additional task. In the proposed substitute bill there is a provision that the plans for a facility operated by a regional prison authority will be developed in "full consultation with and approval of the secretary of corrections of the state of Kansas." This provision should either be deleted or included with the full recognition that it will require additional staff and resources for the Department of Corrections.

As I have said before, I do not oppose the regional prison authority or private prison concept. I do believe, however, that the state should not venture into this area without taking reasonable and responsible measures to protect the public safety and interest.

SJD:CES/pa

JONATHAN P. SMALL, CHARTERED
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June 21, 1990

Ms. Jerry Donaldson
The Legislative Research Department
Room 545-N, Statehouse
Topeka, KS 66612

Re: Proposal No. 12
Special Committee on Judiciary
1990 Interim Committees

Dear Jerry:

Per our discussion this date please find the special report prepared for the Senate Federal and State Affairs Committee last legislative session addressing the general concepts regarding private prisons authored by Ira P. Robbins. Also professor Robbins' treatise entitled The Legal Dimensions of Private Incarceration is located in the state law library should you have need for a more definitive review of some of the salient issues regarding private prisons in this country.

I'd be happy to help you in any way I can regarding this matter. Please feel at liberty to contact me at your convenience.

Very truly yours,

JONATHAN P. SMALL, CHARTERED

Jonathan P. Small

JPS/js

Enc.
cc: Mark and Nancy Ohlde

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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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** 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.

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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.

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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-

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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

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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?

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- 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

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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

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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).]

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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

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FACTS CONCERNING

NEW ERA CORRECTIONAL FACILITIES

FOR ECONOMIC DEVELOPMENT

Testimony
Senate Interim Judiciary Committee
November 16, 1990

Richard D. Mills
Vice President
Westridge Group of Associates

INTRODUCTION

Corrections/economic development is safer to Kansas communities than almost any other industry and can boast a longer life cycle stability. It can have a lower liability risk than most other industry, and is one industry which can offer jobs and dollars in revenue to the State of Kansas in a comparatively short amount of time.

For almost three years, we have debated the emotionally charged issues regarding the merits of corrections as a means of economic development. Now it's time for the hard facts. Although the field of corrections has been almost impervious to the facts, it is appropriate that we now take a look at the non-emotional side of this issue. A picture that is painted by facts is an altogether different picture than the one that is painted by emotion.

Fear of danger to the community, lawsuits in abundance, and fear of the unknown have all contributed to an erroneous picture that we are in great danger of loosing some freedoms. This is, however, not so.

All that stands in the way of our giving back life to rural communities, increasing the revenue of our state, creating hundreds and possibly thousands of jobs, fighting recession, making a monumental change in the field of corrections, lowering recidivism rates, and prospering in general, is our own prejudice.

ECONOMIC FACTS

The populations in rural counties are dropping dramatically, schools and businesses are closing, towns and small cities are slowly disappearing. The people of Washington, Kansas and Atwood, Kansas are asking for legislative flexibility and support so they may actively continue to stop their own rapid demise.

Fact 1. Washington County Kansas has lost 70% of its population by a drop from more than 20,000 to just over 6,000.

Fact 2. Rawlins County Kansas (Atwood) has lost more than 50% of its population, from a high of 7,362 to slightly more than 3,000.

Fact 3. Most economists are predicting a profound recession ahead. (Some who agree are the U. S. Chamber of Commerce; Donaldson, Lufkin & Jenrette of New York; Lawrence H. Meyer & Associates, St. Louis; Regional Financial Associates, West Chester, PA.)

Fact 4. Rural Kansas communities could be hit the hardest by a recession, as they were in the last recession.

Fact 5. In the United States, Kansas ranks 43rd in personal income growth according to the U.S. Commerce Department. This means that 42 other states out of 50 have higher personal income growth than Kansas.

Fact 6. The U.S. Chamber of Commerce reports that unemployment will worsen significantly before it gets better.

Fact 7. The Economic Policy Institute reports average hourly wages dropped by 10% in the 1980's:

a. Younger workers are absorbing the biggest amount of decline from the average wage decrease.

b. Home ownership by young families has dropped 8% over this past decade.

Fact 8. Rural communities can expect a 6 to 7 million dollar input of revenue in each community within two years and hundreds of jobs through corrections/economic development.

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Fact 9. For the first time in our history, the inmate population will be adding to the economic growth of Kansas.

Fact 10. There are no other industries as readily available to us with the phenomenal need of corrections.

a. Citicorp, General Dynamics, Aetna, Santa Fe, General Motors and other huge corporations are laying off thousands upon thousands of workers.

ISSUES OF LIABILITY

The fear that Kansas will incur a higher degree of liability because of its efforts in corrections/economic development rather than efforts in other traditional development is completely unfounded. The legal liabilities and financial liabilities of our particular development plans are no greater than any other. In fact, they are less.

Fact 1. Financing can be insured by a letter of credit and the physical plant.

a. A letter of credit may be purchased from a bank or insurance company to guarantee repayment of the bond indebtedness.

Fact 2. All projects may be structured to indemnify the State of Kansas and participating communities.

a. Other industry does not offer this protection although the liability is no less.

b. Other industries with statutory requirements do not necessarily indemnify the State (i.e. packing plants, oil and gas, for example)

Fact 3. Government entities that build a library, a school, a jail, or otherwise participates in an economic development project has the same level of liability as a correctional facility.

a. Although a correctional facility may have a higher degree of exposure because inmates tend to file lawsuits so often, we estimate that they win 1% or less of the total suits they file.

b. To our knowledge, since 1983, the largest single financial settlement awarded a Kansas inmate by the courts was $5,000. (The State Claims Committee may have awarded more.)

c. Most financial awards are less than $100.

Fact 4. When the State of Kansas operates a prison of its own, liability settlements are paid out of the general fund, and so are the legal costs of representation.

Fact 5. Policy development can require that all correctional facilities built on the behalf of our client communities for economic development purposes be designed to meet American Correctional Association Standards.

a. This measure can serve to reduce the filing of lawsuits and otherwise lower the liability risk substantially.

b. The amount of lawsuits that inmates win is already under 1% and will probably get lower.

Fact 6. Inmate selection criteria will be developed and followed, and all inmates will be required to sign a contract of participation.

a. This, along with ACA staffing patterns, will also serve to lower the already low liability risks even more.

Fact 7. These "New Era" correctional facilities will adopt a "pro-social" training program which should lower the filing of lawsuits even more.

a. The National Center on Institutions and Alternatives reports that "positive reinforcements outweigh pushing sanctions in successful rehabilitation programs by a 3 to 1 ratio." (APA, 1990)

MYTH OF DANGER

Up to this point, the opposing sentiments toward corrections/ economic development have been built upon an unsubstantiated fear of danger.

It has been argued vehemently that we should weigh heavily the danger that correctional facilities pose to our rural communities before we build and operate them for economic development purposes. There are, however, absolutely no facts available to prove that secure correctional facilities or prisons pose any more of a threat to communities in this state than that of other typical forms of Kansas industry. Actually, the facts show just the opposite as being true.

Fact 1. In Kansas, the crime rate of each county clearly indicates a safety factor to be considered. According to the Kansas Bureau of Investigations' "Crime in Kansas" annual reports, 1985-1989, the safety factor is much more attractive in counties with correctional facilities than it is in comparable counties without correctional facilities.*

Fact 2. It is safer to live in Leavenworth County with its more than 5,000 inmates than it is to live in counties that have cities populated by 20,000 or more. (See appendix for exact comparisons.)*

Fact 3. Corrections/economic development is a safer industry than the collective industries in all counties with cities populated by 20,000 people or more and all counties with a total population of 35,000 people or more.

a. Counties with cities populated by 20,000 or more have a 31.16% higher average crime rate than Leavenworth County (1985-1989).

Fact 4. It is estimated by our firm that the federal and state prison industry is the largest employer in Leavenworth County.

Fact 5. Reno County has at least three employers that employ more people than the State prison industry.

a. Reno County still has a 23% lower crime rate than 75% of all counties that have cities populated by 20,000 people or more. (1989)

Fact 6. Because the KBI's statistics clearly show that counties in Kansas with correctional facilities have a lower crime rate than all other comparable counties, we must assume that correctional facilities are safer than other types of traditional industry.

***All crime statistics were taken from the KBI's "Crime in Kansas" annual reports, 1985-1989.**

Privately run jails show poor return in profit, quality

By Christy Hoppe
Austin Bureau of The Dallas Morning News

AUSTIN — Before the state threatened to shut the whole thing down, the Ron Carr Detention Center meant jobs, cash and answered prayers for impoverished Zavala County.

In 1988, the South Texas county agreed to help private investors seeking to build a new 225-bed jail for the county. Zavala County then leased the facility to Detention Services Inc. for about $400,000 annually.

DSI intended to make its money by renting space to nearby county jails and immigration facilities, which were overflowing with low-security, non-violent inmates.

The plan, which is being followed by 10 other counties, has made Texas a new frontier for an enterprise that places government's responsibilities in the hands of profit-minded companies.

"I think (Texas) is out there where no man has gone before," said Ed Meacham of the U.S. Justice Department's National Institute of Corrections.

But in the uncharted territory of private prisons, Zavala County has become a prime example of what can go wrong — in security, in officer training and in putting profit first.

As the industry of making crime pay grows in Texas, so do concerns about the private operation of jails:

■ There aren't enough minimum-security inmates to go around, even though seven privately run facilities under construction are geared for low-risk prisoners. Companies already managing jails in the state had to turn to out-of-state and federal prisoners to fill their beds.

■ Oversight could fall between the cracks, as it did in Zavala County, where significant deficiencies went undiscovered for a year.

■ Some criminal justice experts question the merits of using county-issued bonds to build many of the jails — creating long-term debt for what even the operators call a "risky" business.

■ The state criminal justice board has threatened to cancel the contracts at four privately run state facilities after a state audit cited shortcomings in education, job training and other rehabilitation programs for the inmates.

Operators of the facilities say the problems reflect small stumbling blocks that occur in any new industry.

"When the audit was given, we were C-minus or D, and we're A students," said Pat Cannan, director of corporate relations for Wackenhut Corrections, which operates two state-owned prisons. "Those facilities have been open only a year. We feel our progress has been good and satisfactory."

By the end of the year, at least 14 detention facilities in Texas — owned by federal, state and county governments — will be operated by private, for-profit companies.

The four state-owned jails are believed to be the first such privately operated projects in the country. Bexar, Reeves and Zavala counties own three jails run by detention firms. Seven new facilities, which will be financed by bonds issued by the counties, will be opened by fall.

The operators said they hope to learn from Zavala County, where the sweet hope of success has turned sour.

It was three months after the center opened before operators found a sufficient number of inmates.

PRIVATE PRISONS, PUBLIC PROBLEMS

"Those (private prisons) have a long-term payout (on bonds). And it's a very hazardous path they're taking."

— Charles Terrell

PRIVATE PRISONS

City, County	Private Operator	Size	Type of security
County-private ventures on line for end of year			
Groesbeck, Limestone	Detention Services Inc.	500	minimum
Lufkin, Angelina	Pricorp.	500	minimum/medium
San Saba, San Saba	Pricorp.	500	minimum/medium
Fort Stockton, Pecos	Pricorp.	500	minimum/medium
Cotulla, La Salle	Pricorp.	500	minimum/medium
Marlin, Falls	Pricorp.	500	minimum/medium
Tulia, Swisher	Pricorp.	500	minimum/medium
State-private ventures in operation			
Kyle, Hays	Wackenhut	500	minimum
Bridgeport, Wise	Wackenhut	500	minimum
Venus, Johnson	Corrections Corp.	500	minimum
Cleveland, Liberty	Corrections Corp.	500	minimum
County-private ventures in operation			
Crystal City, Zavala	Detentions Service Inc.	225	minimum
San Antonio, Bexar	Wackenhut	619	minimum
Pecos, Reeves	Corrections Corp.	500	minimum

SOURCE: Texas Jail Standards Commission and the Texas Department of Criminal Justice.

"We went to people w[illegible] had overcrowded conditions [illegible]as, and they were not interes[illegible] said DSI vice president Phil Packer.

Many counties were concerned about costs, and most were not having problems with minimum-security prisoners, he said. Finally, the center contracted with the prison system in Washington, D.C., which sent 224 inmates in February 1989.

In May 1989, a riot erupted involving more than 200 inmates. Four months later, a jailer was arrested by immigration officials on charges of bringing back two inmates from a bordello in Piedras Negras, Mexico.

By December, an inspection by the Texas Commission on Jail Standards found that more than half the prisoners were "high-risk inmates" — including murderers and rapists with life sentences — who should have been in a more secure prison.

In March, the commission issued a new order: Get rid of those inmates or close the jail.

Mr. Packer said the previous definition of low risk was "not dangerous and not likely to escape," and never referred to the inmate's crime.

But because "the jail commission disagreed with the rendering of how that classification was being carried out," a new system was established that more specifically defines low-risk inmates, he said.

Almost 100 inmates were returned to Washington. Among them were inmates whose records from Washington indicate that they had been convicted of violent crimes, had prior disciplinary problems, had been involved in assaults on other inmates and had been held in medium-level detention units.

These problems, coupled with big contract disputes that led to a lawsuit, have DSI and Zavala County officials saying that their agreement will end in September and that the facility's future is in question.

Other private facilities have fared better in Texas, but each has had problems.

'A hazardous path'

Because 39,000 inmates are crammed into overburdened county jails, prison space is some of the most precious real estate in Texas.

Oversight for most of the state's jails is the job of the jail standards commission, which has three inspectors. It has not had a staff increase since 1976.

The commission annually inspects more than 250 county jails and is responsible for the private facilities being built in cooperation with counties.

"Our experience (with private facilities) is not that in-depth yet," said Jack Crump, executive director of the jail commission. "As privatization has gotten more interest, we're reviewing those things closer."

Mr. Crump said that growth in the prison industry is straining his small staff. The Zavala jail had been open almost a year before the jail commission discovered the type of inmates housed there.

And privatization in Texas probably will increase, Mr. Crump said, as small towns crippled by recession fight to open prisons.

Some counties are expanding their jails beyond their needs, hoping to lease some of the space for profit.

Other counties are issuing tax-free bonds to build the jails that are being turned over to private companies to operate.

As the market becomes more competitive, some people fear that these jails won't find enough prisoners to fill them, and that the bonds won't be paid.

"It can be a very dangerous thing for them," said Charles Terrell, chairman of the Texas Department of Criminal Justice board, which oversees the state prison system.

Charles Terrell . . . prisons official worries that private jails care more about money than rehabilitation.

Terrell said that as the federal and state governments continue building their own penitentiaries to catch up with the incarceration boom, within 10 years they may not need to farm out their prisoners.

"Those (private prisons) have a long-term payout (on bonds). And it's a very hazardous path they're taking," he said.

"What worries me is the good ol' boy who talks the sheriff into a bond program, and they build these things," Mr. Terrell said. "They're just worried about covering their expenses, making some money and not about (rehabilitation) programs. And when they don't meet their expenses, then you're going to get into treatment that is intolerable."

Seven private jails — one by DSI and six by Pricorp. — are being built on speculation with county-backed bonds in Texas. The companies have not determined where they will get their prisoners.

"They can come from anywhere in Texas . . . and federal prisoners.

CCA recently has tied "good time" credit for inmates with their enrollment in the programs, which will give incentive to inmates seeking to be released prison earlier, she said.

Of the Wackenhut facilities, Kyle has been doing well, according to the audits, but critical problems have been reported at Bridgeport.

The deficiencies included "numerous instances" in which non-commissioned officers were carrying firearms; staff shortages left many positions unstaffed; there was a lack of bilingual instructors although more than 100 prisoners speak only Spanish; and many of the educational programs lacked curriculum, structure, testing and records.

The monitor also said that Bridgeport officials falsified records that showed inmates had attended and completed job-training classes.

"We're hard at work right now trying to correct those things," said Mr. Cannan of Wackenhut, which is based in Florida and operates nine private prisons in six states. He said the facilities will be brought up to standards.

Unlike Pricorp. and DSI, Wackenhut contracts only with entities that have prisoners to place in a facility, said Mr. Cannan.

"We have not seen the wisdom in building 'spec' jails. We're a publicly held company, and we don't see the advantage of taking that kind of risk," he said.

"This is not a busin ere a corporation will come in ake a killing right away," Mr. Canman said.

He said Wackenhut makes about 1.5 percent profit annually from its prison operations.

In Texas, Wackenhut also operates Bexar County's Central Texas Parole Violators facility, which houses as many as 619 prisoners, including state offenders who have violated conditions of parole and about 150 federal prisoners.

The county opened the facility to the state "as a favor, in a way," to ease its overcrowding crisis, said Bexar County Judge Tom Vickers. It is run as a break-even proposition by the county which hired Wackenhut said Laws McCullough, a spokesman for Tennessee-based Pricorp., which operates prisons in three other states and pre-parole facilities in Sweetwater and Houston.

The largest portion of each facility will be dedicated to minimum-security prisoners — many of whom the counties can place on probation, Mr. McCullough said.

"We're going after a pretty small market, but we believe there's a need out there. It's risky," he said.

If the facilities can't be filled and there is a cash-flow shortage, then bondholders face some dangers, he said, adding: "Pricorp. is just the operator. That's not our problem."

Deficiencies cited

Texas is fertile ground for private prison firms, said Mr. McCullough.

"There is a labor supply, there's a demand for prison space — the state needs 14,000 beds — and combine that with an attitude that people want to get something done," he said.

The companies, depending on what services are offered, can expect to charge between $30 and $50 per inmate per day.

Mr. Packer said that DSI, which is opening another facility in Groesbeck, in east-central Texas, has learned lessons from its first operation — Zavala.

"It's a completely different contract, different group of people and different scenario," he said of Groesbeck.

Though the Groesbeck Jail also will be seeking minimum-security prisoners, Mr. Packer said that "there's only about 400,000 prisoners available in the U.S. I think there's enough" to fill the private jails.

Mr. Terrell said the criminal justice board has no intention of farming out state prisoners to any new facilities — especially because the board already has criticized its four facilities.

In May, the board, citing noncompliance, threatened to cancel its contract with Wackenhut Corrections Corp. and Corrections Corp. of America, which each operate two of the facilities.

The facilities, designed to hold 500 minimum-security prisoners and prepare them for release with job training and educational programs, failed to meet programming standards, according to recent audits by state monitors.

CCA operates the questioned facilities in Venus and Cleveland, and Wackenhut runs facilities at Bridgeport and Kyle.

Audits this year showed that of the approximately 560 prisoners in Venus, only 136 were receiving seven hours daily of job or educational classes. The remainder had assignments that filled -- at most — four hours a day.

In Cleveland, 221 were receiving part-time education or work, and 30 inmates were not enrolled in any program.

"I think we're doing a credible job," said CCA program development director Larrie Shanblum, citing the latest state inspection reports.

They showed that CCA met state standards in health care, security and housing.

"We said we'd do it, and I feel confident we will," she said.

Mario Alberto Salinas-Trevino, who is at large, is suspected of directing one of the largest drug-smuggling and money-laundering rings between Texas and Mexico. Authorities seized $10 million from him when he was arrested last year.

Mr. Canman said that federal authorities are investigating and that Wackenhut has adopted some procedural changes since the escape.

The other county-owned and private-operated facility is in Reeves County, where reality has not lived up to expectations.

The facility in Pecos houses as many as 500 federal prisoners. It was opened in 1986 and was built with $6 million from bonds issued by the county.

The sheriff's office ran the center and promises that the extra facility could bring $1 million in yearly profit as well as create jobs. But after two years, the county had problems keeping the jail full enough to retire the bond debt.

The bond payout had to be extended two years, and there were political arguments over how it was being run and staffed.

In 1988, Reeves County turned the facility over to CCA, hoping that with professional management, the county could start to meet some of its promises.

"Profit? There is none," said Sheriff's Deputy Jack Brewer, who monitors the jail for the county. "All the money goes into the operational fund (of the jail) There's been not one dime for the general fund."

Reeves County pays CCA $435,000 a year to manage the facility. The county also pays all salaries and costs associated with the jail.

"It has been a real headache," said Deputy Brewer. "The only services we see is that we're paying them to write a check on our account. It's the most ridiculous thing I've ever seen."

CCA information officer Peggy Wilson said the management fee is fair. She said the jail was losing money, and the county hired CCA to correct the situation and get the facility up to federal prison standards.

"Now that everything is working smoothly, it's like being punished to do the good job you were hired to do," Ms Wilson said.

Deputy Brewer, however, questions the need and the expense.

"Personally, if we had it to do all over again, I think we could convince the elected officials that private management doesn't work," he said. "They cost too damn much."

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PRIVATE PRISONS, PUBLIC PROBLEMS

Private jails show poor return in profit, quality

By Christy Hoppe
Austin Bureau of The Dallas Morning News

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PRIVATE PRISONS, PUBLIC PROBLEMS

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"I think (Texas) is out there where no man has gone before," said Ed Meacham of the U.S. Justice Department's National Institute of Corrections.

But in the uncharted territory of private prisons, Zavala County has become a prime example of what can go wrong — in security, in officer training and in putting profit first.

As the industry of making crime pay grows in Texas, so do concerns about the private operation of jails:

■ There aren't enough minimum-security inmates to go around, even though seven privately run facilities under construction are geared for low-risk prisoners. Companies already managing jails in the state had to turn to out-of-state and federal prisoners to fill their beds.

■ Oversight could fall between the cracks, as it did in Zavala County, where significant deficiencies went undiscovered for a year.

■ Some criminal justice experts question the merits of using county-issued bonds to build many of the jails — creating long-term debt for what even the operators call a "risky" business.

■ The state criminal justice board has threatened to cancel the contracts at four privately run state facilities after a state audit cited shortcomings in education, job training and other rehabilitation programs for the inmates.

Operators of the facilities say the problems reflect small stumbling blocks that occur in any new industry.

"When the audit was given, we were C-minus or D, and we're A students," said Pat Cannan, director of

> "Those (private prisons) have a long-term payout (on bonds). And it's a very hazardous path they're taking."
> — Charles Terrell, Texas Department of Criminal Justice board

corporate relations for Wackenhut Corrections, which operates two state-owned prisons. "Those facilities have been open only a year. We feel our progress has been good and satisfactory."

By the end of the year, at least 14 detention facilities in Texas — owned by federal, state and county governments — will be operated by private, for-profit companies.

The four state-owned jails are believed to be the first such privately operated projects in the country. Bexar, Reeves and Zavala counties own three jails run by detention firms. Seven new facilities, which will be financed by bonds issued by the counties, will be opened by fall.

The operators said they hope to learn from Zavala County, where the sweet hope of success has turned sour.

It was three months after the center opened before operators found a sufficient number of inmates.

"We went to people who had overcrowded conditions in Texas, and they were not interested," said DSI vice president Phil Packer.

Many counties were concerned about costs, and most were not having problems with minimum-security prisoners, he said. Finally, the center contracted with the prison system in Washington, D.C., which sent 224 inmates in February 1989.

In May 1989, a riot erupted involving more than 200 inmates. Four months later, a jailer was arrested by immigration officials on charges of bringing back two inmates from a bordello in Piedras Negras, Mexico.

By December, an inspection by the Texas Commission on Jail Standards found that more than half the prisoners were "high-risk inmates" — including murderers and rapists with life sentences — who should have been in a more secure prison.

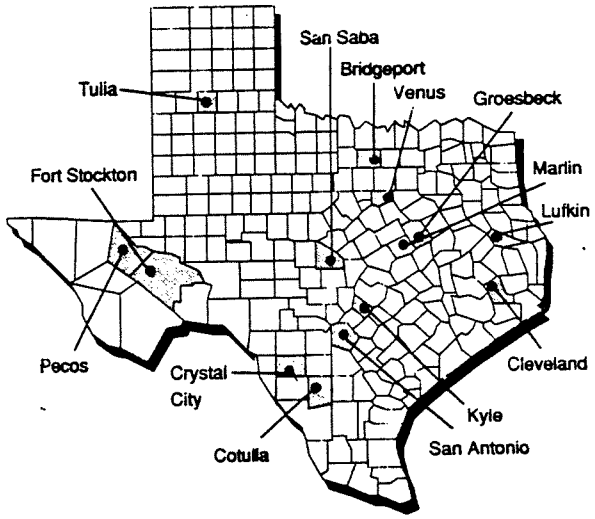
The Dallas Morning News: Irwin Thompson

Inmates attend a computer class Friday at a detention center in Venus, Texas. Auditors said most inmates don't receive the training required in the operator's contract.

PRIVATE PRISONS

City, County	Private Operator	Size	Type of security
County-private ventures on line for end of year			
Groesbeck, Limestone	Detention Services Inc.	500	minimum
Lufkin, Angelina	Pricorp.	500	minimum/medium
San Saba, San Saba	Pricorp.	500	minimum/medium
Fort Stockton, Pecos	Pricorp.	500	minimum/medium
Cotulla, La Salle	Pricorp.	500	minimum/medium
Marlin, Falls	Pricorp.	500	minimum/medium
Tulia, Swisher	Pricorp.	500	minimum/medium
State-private ventures in operation			
Kyle, Hays	Wackenhut	500	minimum
Bridgeport, Wise	Wackenhut	500	minimum
Venus, Johnson	Corrections Corp.	500	minimum
Cleveland, Liberty	Corrections Corp.	500	minimum
County-private ventures in operation			
Crystal City, Zavala	Detentions Service Inc.	225	minimum
San Antonio, Bexar	Wackenhut	619	minimum
Pecos, Reeves	Corrections Corp.	500	minimum

SOURCE: Texas Jail Standards Commission and the Texas Department of Criminal Justice.



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...arch, the commission issued a new order: Get rid of those inmates or close the jail.

Mr. Packer said the previous definition of low risk was "not dangerous and not likely to escape," and never referred to the inmate's crime.

But because "the jail commission disagreed with the rendering of how that classification was being carried out," a new system was established that more specifically defines low-risk inmates, he said.

Almost 100 inmates were returned to Washington. Among them were inmates whose records from Washington indicate that they had been convicted of violent crimes, had prior disciplinary problems, had been involved in assaults on other inmates and had been held in medium-level detention units.

These problems, coupled with big contract disputes that led to a lawsuit, have DSI and Zavala County officials saying that their agreement will end in September and that the facility's future is in question.

Other private facilities have fared better in Texas, but each has had problems.

'A hazardous path'

Because 39,000 inmates are crammed into overburdened county jails, prison space is some of the most precious real estate in Texas.

Oversight for most of the state's jails is the job of the jail standards commission, which has three inspectors. It has not had a staff increase since 1976.

The commission annually inspects more than 250 county jails and is responsible for the private facilities being built in cooperation with counties.

"Our experience (with private facilities) is not that in-depth yet," said Jack Crump, executive director of the jail commission. "As privatization has gotten more interest, we're reviewing those things closer."

Mr. Crump said that growth in the prison industry is straining his small staff. The Zavala jail had been open almost a year before the jail commission discovered the type of inmates housed there.

And privatization in Texas probably will increase, Mr. Crump said, as small towns crippled by recession fight to open prisons.

Some counties are expanding their jails beyond their needs, hoping to lease some of the space for profit.

Other counties are issuing tax-free bonds to build the jails that are being turned over to private companies to operate.

As the market becomes more competitive, some people fear that these jails won't find enough prisoners to fill them, and that the bonds won't be paid.

"It can be a very dangerous thing for them," said Charles Terrell, chairman of the Texas Department of Criminal Justice board, which oversees the state prison system.

Charles Terrell ... prisons official worries that private jails care more about money than rehabilitation.

Mr. Terrell said that as the federal and state governments continue building their own penitentiaries to catch up with the incarceration boom, within 10 years they may not need to farm out their prisoners.

"Those (private prisons) have a long-term payout (on bonds). And it's a very hazardous path they're taking," he said.

"What worries me is the good ol' boy who talks the sheriff into a bond program, and they build these things," Mr. Terrell said. "They're just worried about covering their expenses, making some money and not about (rehabilitation) programs. And when they don't meet their expenses, then you're going to get into treatment that is intolerable."

Seven private jails — one by DSI and six by Pricorp. — are being built on speculation with county-backed bonds in Texas. The companies have not determined where they will get their prisoners.

"They can come from anywhere in Texas ... and federal prisoners," said Laws McCullough, a spokesman for Tennessee-based Pricorp., which operates prisons in three other states and pre-parole facilities in Sweetwater and Houston.

The largest portion of each facility will be dedicated to minimum-security prisoners — many of whom the counties can place on probation, Mr. McCullough said.

"We're going after a pretty small market, but we believe there's a need out there. It's risky," he said.

If the facilities can't be filled and there is a cash-flow shortage, then bondholders face some dangers, he said, adding: "Pricorp. is just the operator. That's not our problem."

Deficiencies cited

Texas is fertile ground for private prison firms, said Mr. McCullough.

"There is a labor supply, there's a demand for prison space — the state needs 14,000 beds — and combine that with an attitude that people want to get something done," he said.

The companies, depending on what services are offered, can expect to charge between $30 and $50 per inmate per day.

Laurie Shanblum ... "I think we're doing a credible job," private jail corporation official says.

Mr. Packer said that DSI, which is opening another facility in Groesbeck, in east-central Texas, has learned lessons from its first operation — Zavala.

"It's a completely different contract, different group of people and different scenario," he said of Groesbeck.

Though the Groesbeck Jail also will be seeking minimum-security prisoners, Mr. Packer said that "there's only about 400,000 prisoners available in the U.S. I think there's enough" to fill the private jails.

Mr. Terrell said the criminal justice board has no intention of farming out state prisoners to any new facilities — especially because the board already has criticized its four facilities.

In May, the board, citing noncompliance, threatened to cancel its contract with Wackenhut Corrections Corp. and Corrections Corp. of America, which each operate two of the facilities.

The facilities, designed to hold 500 minimum-security prisoners and prepare them for release with job training and educational programs, failed to meet programming standards, according to recent audits by state monitors.

CCA operates the questioned facilities in Venus and Cleveland, and Wackenhut runs facilities at Bridgeport and Kyle.

Audits this year showed that of the approximately 500 prisoners in Venus, only 136 were receiving seven hours daily of job or educational classes. The remainder had assignments that filled — at most — four hours a day.

In Cleveland, 221 were receiving part-time education or work, and 30 inmates were not enrolled in any program.

"I think we're doing a credible job," said CCA program development director Laurie Shanblum, citing the latest state inspection reports.

They showed that CCA met state standards in health care, security and housing.

"We said we'd do it, and I feel confident we will," she said.

CCA recently has been "good time" credit for inmates with their enrollment in the programs, which will give incentive to inmates seeking to be released prison earlier, she said.

Of the Wackenhut facilities, Kyle has been doing well, according to the audits, but critical problems have been reported at Bridgeport.

The deficiencies included "numerous instances" in which noncommissioned officers were carrying firearms; staff shortages left many positions unstaffed; there was a lack of bilingual instructors although more than 100 prisoners speak only Spanish; and many of the educational programs lacked curriculum, structure, testing and records.

The monitor also said that Bridgeport officials falsified records that showed inmates had attended and completed job-training classes.

"We're hard at work right now trying to correct those things," said Mr. Cannan of Wackenhut, which is based in Florida and operates nine private prisons in six states. He said the facilities will be brought up to standards.

Unlike Pricorp. and DSI, Wackenhut contracts only with entities that have prisoners to place in a facility, said Mr. Cannan.

"We have not seen the wisdom in building 'spec' jails. We're a publicly held company, and we don't see the advantage of taking that kind of risk," he said.

"This is not a business where a corporation will come in and make a killing right away," Mr. Cannan said.

He said Wackenhut makes about 1.5 percent profit annually from its prison operations.

In Texas, Wackenhut also operates Bexar County's Central Texas Parole Violators facility, which houses as many as 619 prisoners, including state offenders who have violated conditions of parole and about 150 federal prisoners.

The county opened the facility to the state "as a favor, in a way," to ease its overcrowding crisis, said Bexar County Judge Tom Vickers. It is run as a break-even proposition by the county, which hired Wackenhut to operate it.

State and federal inspectors said the facility is well run, but in March, a federal drug kingpin escaped after using a smuggled gun to overpower guards.

Mario Alberto Salinas-Trevino, who is at large, is suspected of directing one of the largest drug-smuggling and money-laundering rings between Texas and Mexico. Authorities seized $10 million from him when he was arrested last year.

Mr. Cannan said that federal authorities are investigating and that Wackenhut has adopted some procedural changes since the escape.

The other county-owned and private-operated facility is in Reeves County, where reality has not lived up to expectations.

The facility in Pecos houses as many as 500 federal prisoners. It was opened in 1986 and was built with $6 million from bonds issued by the county.

The sheriff's office ran the center amid promises that the extra facility could bring $1 million in yearly profit as well as create jobs. But after two years, the county had problems keeping the jail full enough to retire the bond debt.

The bond payout had to be extended two years, and there were political arguments over how it was being run and staffed.

In 1988, Reeves County turned the facility over to CCA, hoping that with professional management, the county could start to meet some of its promises.

"Profit? There is none," said Sheriff's Deputy Jack Brewer, who monitors the jail for the county. "All the money goes into the operational fund (of the jail). There's been not one dime for the general fund."

Reeves County pays CCA $435,000 a year to manage the facility. The county also pays all salaries and costs associated with the jail.

"It has been a real headache," said Deputy Brewer. "The only services we see is that we're paying them to write a check on our account. It's the most ridiculous thing I've ever seen."

CCA information officer Peggy Wilson said the management fee is fair. She said the jail was losing money, and the county hired CCA to correct the situation and get the facility up to federal prison standards.

"Now that everything is working smoothly, it's like being punished to do the good job you were hired to do," Ms Wilson said.

Deputy Brewer, however, questions the need and the expense.

"Personally, if we had it to do all over again, I think we could convince the elected officials that private management doesn't work," he said. "They cost too damn much."

The Dallas Morning News: Irwin Thompson

Inmates at the prison operated in Venus by Corrections Corp. of America wait during a head count.

Privatization 1990

Published by the Reason Foundation
2716 Ocean Park Blvd., Suite 1062
Santa Monica, CA 90405

Written By

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Robert W. Poole, Jr.

Lynn Scarlett

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Production Editor

Eric K. Gill

Jails and Prisons

Nineteen eighty-nine saw continued growth in private corrections in the United States. At the local level, in Diboll, Texas, Angelina County contracted out the management of the local jail to Pricor Inc. of Murfreesboro, Tennessee. Pricor also operates the Tuscaloosa Detention Center in Alabama. In Florida, Wackenhut Corrections Corporation was tapped by Monroe County to manage and operate the entire county corrections system. Wackenhut operates detention facilities in a total of five U.S. states. The Monroe County contract provided that Wackenhut would assume operational responsibility for the existing 200-bed Key West jail, a related substation at a different location, and a 50-bed modular jail on the drawing boards. Wackenhut will also have first option to operate a new 500-bed jail to be built in two years.

At the state level, in August 1989, Texas contracted out the management of the newly opened Bridgeport Pre-Release Center to Wackenhut. The Bridgeport facility is similar to another Wackenhut-operated state facility in Kyle, Texas. Late in 1989, Louisiana selected Corrections Corporation of American (CCA) to manage and operate the state prison in Winn Parish. This will be the first completely medium-security prison in the United States to be placed under private management (although New Mexico let a contract in 1988, also to CCA, for the construction and eventual operation of a women's prison that will house minimum-, medium-, and maximum-security prisoners). CCA operates correctional facilities in several states, including its Bay County, Florida facility—which received accreditation from the American Correctional Association (ACA) in December 1988 with a score of 99.4 percent. In fact, all of CCA's 11 correctional facilities are ACA-accredited, compared to only about 5 percent of prisons and jails nationally.

Several other U.S. jurisdictions were seriously considering prison contracting in 1989, including the state of Wyoming (Joint Appropriations Committee of the state legislature) and Montgomery County, Tennessee. Florida even passed legislation in 1989 authorizing the privatization of a *maximum-security* facility, although bidders are seeking amendments to reduce the 10-percent mandated-savings requirement to 5 percent. Aurora, Colorado, considered privatizing its city jail, but rejected the idea when the city council deemed that bids from private contractors were too high.

Significant proposals for prison privatization were made in several states. In Mississippi, the state auditor urged the House Penitentiary subcommittee to privatize part of the state's prison system. In Arizona, however, Governor Rose Mofford vetoed for the second year in a row a bill to permit private corrections management.

WILLIAM M. BRYANT, D.V.M.
REPRESENTATIVE, SIXTY-THIRD DISTRICT
WASHINGTON, REPUBLIC AND
NORTHERN RILEY COUNTIES
RURAL ROUTE 2
WASHINGTON, KANSAS 66968

FACTS CONCERNING

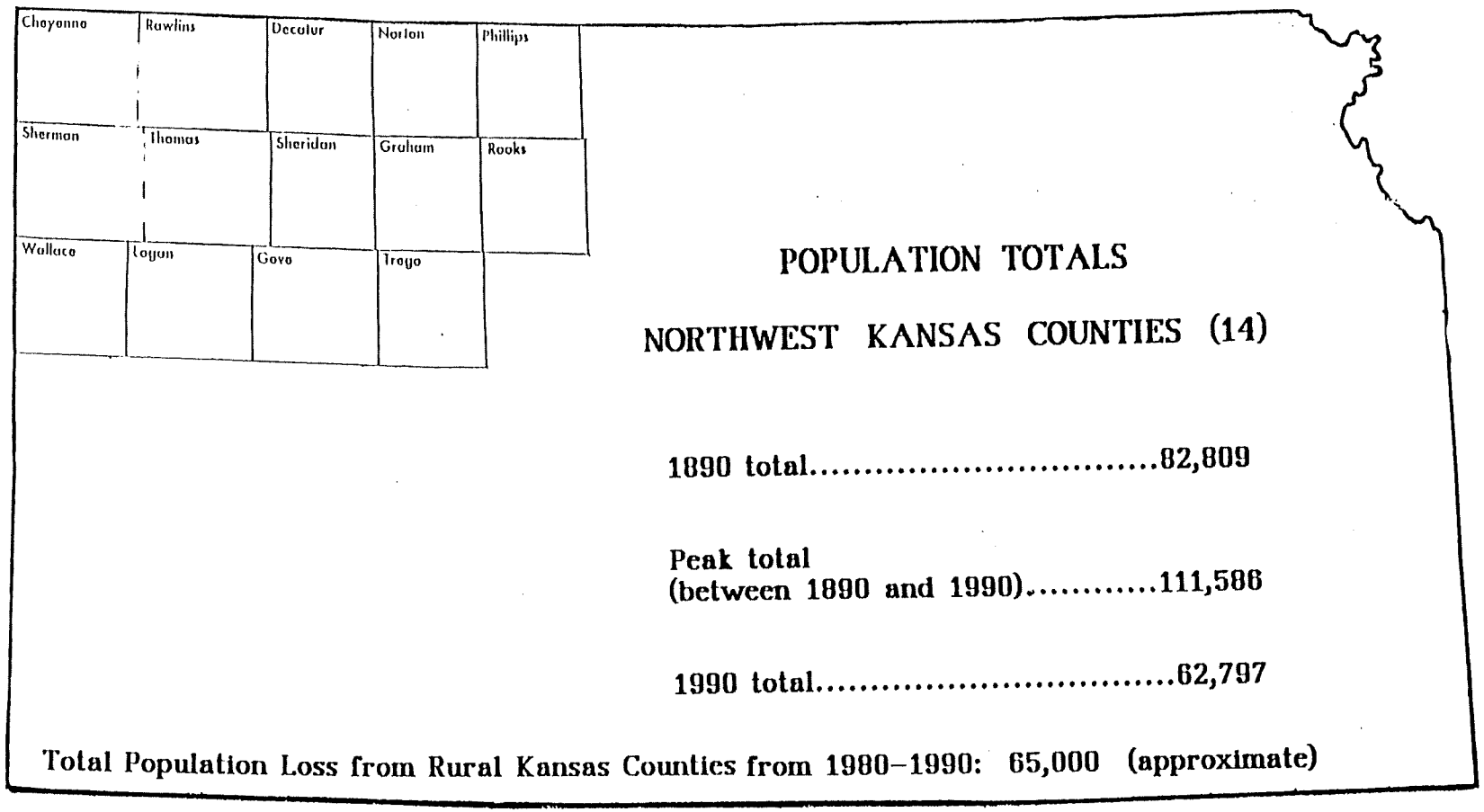
NEW ERA CORRECTIONAL FACILITIES

FOR ECONOMIC DEVELOPMENT

Testimony
House Judiciary Committee
January 23, 1991

Richard D. Mills
Vice President
Westridge Group of Associates

HJUD
1/23/91
ATTACHMENT 2



POPULATION TOTALS

NORTHWEST KANSAS COUNTIES (14)

1890 total.....82,809

Peak total (between 1890 and 1990).....111,586

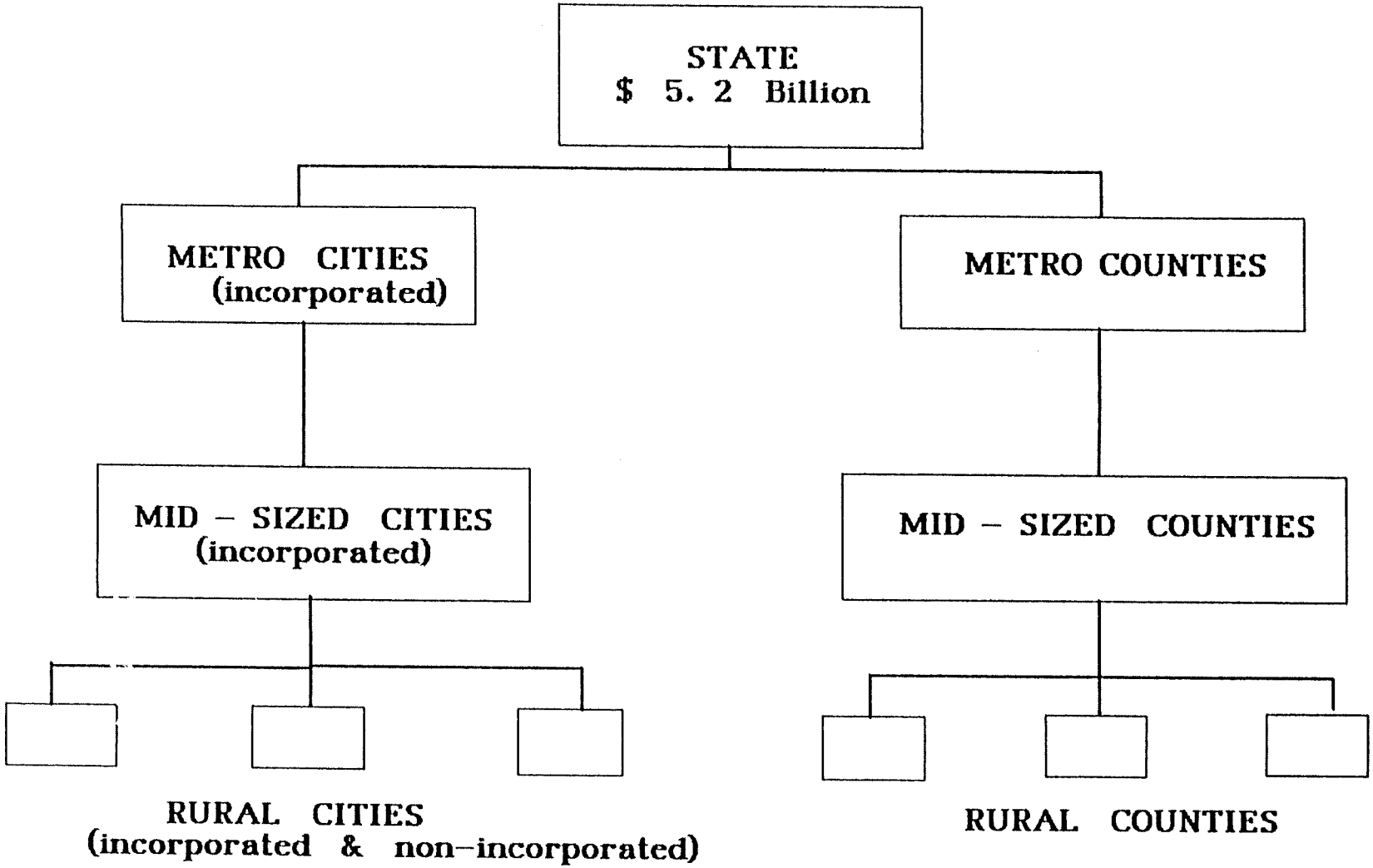
1990 total.....62,797

Total Population Loss from Rural Kansas Counties from 1980–1990: 65,000 (approximate)

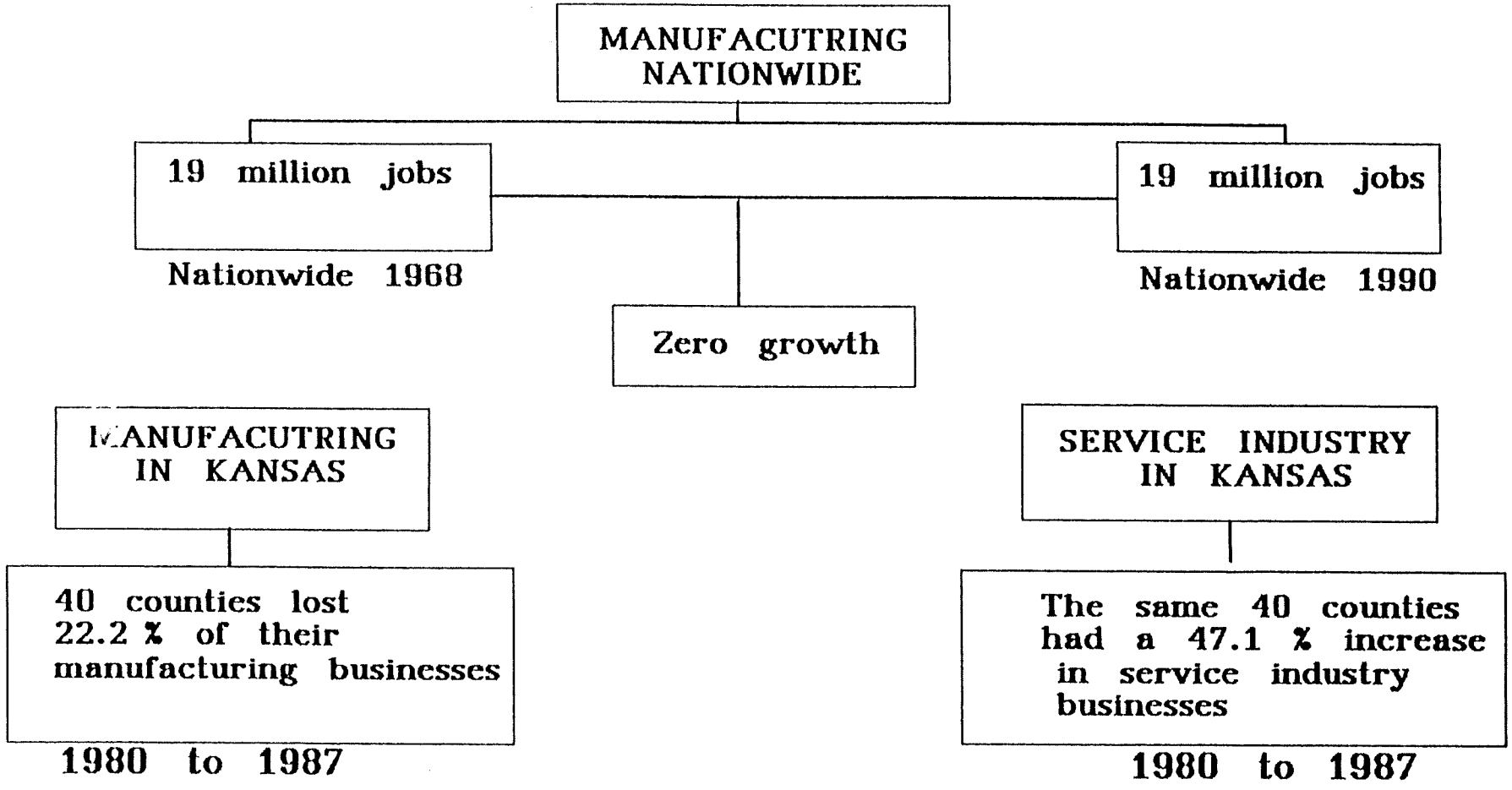
POPULATIONS:

Rawlins County	Washington County
1890....6,756	1890....22,895 (peak)
1930....7,362 (peak)	
1990....3,396	1990.....7,068
Population decrease: 54%	Population decrease: 69%

CORPORATE MODEL



TRADITIONAL ECONOMIC DEVELOPMENT



*No counties showed an overall loss in service industry businesses.

EXAMPLES OF COUNTIES WHO LOST MANUFACTURING 1980–1987

Lost Manufacturing Businesses		Service Industry Gain
KEARNY	75% loss	57.1% gain
OSBORNE	35% loss	41.9% gain
OTTAWA	50% loss	17.2% gain
THOMAS	30% loss	27.7% gain

THE FIVE (5) FASTEST GROWING BUSINESS CATEGORIES IN KANSAS 1980–1986

	Employment 1980	1986	%Increase
1. Miscellaneous Personal Services	327	1,149	251.38 %
2. Mortgage Bankers & Brokers	265	693	161.51 %
3. Elementary & Secondary Schools	2,368	5,877	148.18 %
4. Personnel Supply Services	556	1,310	135.61 %
5. Local & Suburban Transportation	273	562	105.86 %

** ALL FIVE ARE SERVICE INDUSTRY DERIVATIVES.

CORRECTIONS/ ECONOMIC DEVELOPMENT
LEAVENWORTH COUNTY AS A MODEL

LEAVENWORTH COUNTY:

1. Has more than 5,000 inmate beds.
2. Has had corrections facilities for 200 years.
3. Has had a population growth of 72% between 1890–1990.
4. Has a lower crime rate than any county with a city populated by 20,000 or more.
5. Has a lower crime rate than any county with a total population of 35,000 or more (Leavenworth County Population for 1990-- 66,202).
6. Is safer to live in than counties that have grown through more traditional development.
7. Has experienced a significant increase in its economic base.
8. Had an increase of 151 new businesses between 1986–1987.
9. Had a total increase of 726 new jobs between 1980 and 1987.
10. Grew by 12,000 people between 1980 and 1990.
11. Meets all the requirements of ideal economic growth.

CORRECTIONS/ ECONOMIC DEVELOPMENT OPPORTUNITIES AS A SERVICE INDUSTRY

1. Twenty states have reported to the Westridge Group of Associates that they will need approximately 65,000 beds by mid-1991.

2. The U. S. Justice statistics report that our country's inmate population grew at 1,500 per week during 1989 and during the first six months of 1990.

3. Our country's inmate population more than doubled from 1980 to 1990 (350,000 to 750,000 approximately).

4. Private correctional facilities have existed in most states for many years.

5. We will be creating approximately 150 new jobs in each community the first year and approximately 690 new jobs total within five years.

> **The Institute for Economic and Business Research estimates a multiple growth factor of 4.6 for each 100 new manufacturing or industry jobs in the average Kansas County. 1982.**

6. Corrections/Economic Development is safer to communities than more traditional economic development.

7. Liability issues are very minimal in actuality.

8. Financing is not risky to the state or local communities.

9. For the first time in this country's history, we will build correctional facilities deliberately to habilitate instead of administering simplistic and ineffective punishment.

10. Inmates will be required to work and/or attend intensive responsibility programs.

11. Working inmates will be required to participate in their own cost of care, spousal and child support and victim's restitution.

Kansas spends more than one half a billion dollars annually on our criminal justice system with virtually no return on our money. It is a closed system.

12. The United States has more inmates behind bars than any other country in the world (one million daily including counties and cities).

a. **In the U. S. 426 of every 100,000 people are incarcerated.**

b. **South Africa is second with 333 of every 100,000.**

c. **The Soviet Union is third with 268 out of 100,000.**

Testimony sources:

KANSAS STATISICAL ABSTRACT
U. S. Census Bureau,
CRIME IN KANSAS, KBI, 1985–89,
"The Impact of 100 New Manufacturing Jobs on an Average County in Kansas (model and results developed by Professor James Heins, University of Illinois, prepared for the Kansas Cavalry and the Kansas Department of Commerce 1982, KDED)
POWER SHIFT, Alvin Toffler, 1989

Creative Enterprises, Inc.

Providing Real-World Inmate Work Opportunities

January, 1991

SUMMARY DATA - INMATE WORK PROGRAMS

	Zephyr Products Inc.	Heatron Inc.
Model	Production Workers 100% Inmate	Production Workers 50% Inmate/50% Non-Inmate
Date of Purchase	November 1978	June 1981
Move to Leavenworth, KS	Dec. 3, 1979	Jan. 7, 1985
Type of Manufacturing	Sheet Metal Fabrication	Fabrication of Electricl Heating Elements
Market Area	Greater Kansas City	National
State/Federal Subsidies	None	None
Private Investment		
In Company	$519,000	$ 50,000
In Facility	$500,000	$400,000
Total Inmate Employees	188	100
Current Inmate Employees	16	25
Taxes Paid by Inmate Employees* (From their wages)	$279,710	$118,230
Room & Board* ($35/week per Inmate Employee) (Paid to State)	$410,811	$137,525
Victims Compensation* Paid by Inmate Employees (Since July 1, 1986)	$ 22,255	$ 26,278
Total Paid by Inmate Employees* (From gross wages)	$712,777	$282,033

*Through December 1990

411 N.4th, Leavenworth, Kansas 66048 • 913-651-7949

Capital-Journal Sat. Jan 5, 91

Inmate numbers in America top all other nations

By the Associated Press

WASHINGTON — With more than 1 million people behind bars, the United States imprisons a bigger share of its population than any other nation, a private group said Friday.

The high U.S. incarceration rate results from a high crime rate and increasingly harsh public attitudes toward dealing with lawbreakers, said the report by the Sentencing Project, a nonprofit research organization that promotes sentencing reforms and alternatives.

More than 1 million Americans are in jail or prison, either awaiting trial or serving time, the report said. It said that 426 of every 100,000 U.S. residents are incarcerated, at an annual cost of $16 billion. For black American men, the rate is 3,109 per 100,000.

South Africa has the world's second-highest imprisonment rate, with 333 people imprisoned per 100,000 residents, the report said. Its incarceration rate for black males is 729 per 100,000.

The Soviet Union ranks third in overall incarceration with 268 per 100,000 residents.

Incarceration rates in Europe generally range from 35 to 120 per 100,000 residents and in Asian countries from 21 to 140 per 100,000, the report said.

Marc Mauer, assistant director of The Sentencing Project, who wrote the report, said it shows that "the same policies that have helped make us a world leader in incarceration have clearly failed to make us a safer nation."

"We need a fundamental change of direction, toward proven programs and policies that work to reduce both imprisonment and crime," Mauer said.

The U.S. incarceration rate jumped ahead of South Africa's and the Soviet Union's over the past decade as states and the federal government adopted mandatory minimum sentences, tightened parole eligibility criteria and otherwise relied more on imprisonment and less on alternatives, the report said.

It acknowledged that the U.S. crime rate is higher than in many countries. The nation's murder rate is at least seven times higher than in most European countries. There were six times as many robberies and three times as many rapes in the United States as in West Germany.

The report noted that the overall U.S. crime rate has fallen 3.5 percent since 1980, while the nation's prison population doubled.

Crime Rate Comparison Data
(county with correctional facilities to counties without)

1989

County	Population	Year	Crime Rate per 1,000
LEAVENWORTH	66,966	1989	37.1

Compared to other Kansas Counties with the following criteria:

* a population not exceeding 180,000
* does not have a state or federal correctional facility
* has a city with a population of at least 20,000

WITH A HIGHER CRIME RATE:

County	Population	Year	Crime Rate per 1,000	Percentage Above 37.1 %
Wyandotte	173,942	1989	105.7	68.6
Douglas	77,036	1989	63.5	26.4
Riley	63,311	1989	39.5	2.4
Saline	50,351	1989	48.3	11.2
Lyon	35,044	1989	58.5	21.4
Finney	31,117	1989	88.3	51.2
Geary	29,405	1989	75.6	38.5
Ford	26,082	1989	71.1	34.0
Average	62,786	1989	68.8	* 31.7

WITH A LOWER CRIME RATE: NONE

*(NOTE: 100% of the above counties have an average crime rate that is 31.7% higher than Leavenworth County)

==========

Other Kansas Counties with higher crime rates:				Higher %
Montgomery	41,187	1989	49.8	12.7
Crawford	37,360	1989	51.6	14.5
Seward	18,630	1989	84.1	47.0
Pratt	10,272	1989	39.0	1.9
Sherman	6,848	1989	50.7	13.6
Kearny	4,028	1989	42.7	5.6 (above 37.1%)

STATE OF KANSAS

OFFICE OF THE ATTORNEY GENERAL

2ND FLOOR, KANSAS JUDICIAL CENTER, TOPEKA 66612-1597

ROBERT T. STEPHAN
ATTORNEY GENERAL

MAIN PHONE: (913) 296-2215
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November 20, 1989

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 may 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

H JUD
1/23/91
ATTACHMENT 3

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

PRELIMINARY MINUTES

SPECIAL COMMITTEE ON JUDICIARY

August 30-31, 1990
Room 514-S -- Statehouse

Members Present

Senator Wint Winter, Jr., Chairman
Representative Mike O'Neal, Vice-Chairman
Senator Phil Martin
Senator Bill Morris
Senator Lana Oleen
Senator Marge Petty
Senator Jack Steineger
Representative Aldie Ensminger
Representative George Gomez
Representative Clyde Graeber
Representative Gilbert Gregory
Representative Kenneth King
Representative Barbara Lawrence
Representative Kathleen Sebelius
Representative John Solbach
Representative Frank Weimer

Staff Present

Jerry Donaldson, Kansas Legislative Research Department
Mike Heim, Kansas Legislative Research Department
Gordon Self, Revisor of Statutes Office
Jill Wolters, Revisor of Statutes Office

Others Present

Attorney General Robert T. Stephan
Steven J. Davies, Secretary of Corrections
Mike Boyer, Supervisor, Kansas Bureau of Investigation
Steve Starr, Deputy Director, Kansas Bureau of Investigation
Al Haverkamp, Information Resources Manager, Kansas Bureau of Investigation
Terry Showalter, Court Services Officer, Kansas City, Kansas
Doug Bowman, Coordinator, Children and Youth Advisory Committee
Dick Patterson, Vice-Principal, Topeka High School
Jean Shepherd, District Court Judge, Lawrence
Jim Clark, Kansas County and District Attorneys Association

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ATTACHMENT 4

Jean Schmidt, Assistant Shawnee County District Attorney
Senator Nancy Parrish
Senator Dick Bond
Representative Joan Wagnon
Nancy Perry, United Way
Sarah Mays, Court Services Officer, Topeka
Ann Hebberger, League of Women Voters
Sister Therese Bangert, Kansas Council on Crime and Delinquency
Charles Simmons, Chief Counsel, Department of Corrections
Elizabeth Taylor, Horton, Inc.
Jeff Teter, Horton, Inc.
Representative Joan Adam
Representative Artie Lucas
Flop Fuller, Director, Hamilton County Corrections, Chattanooga, Tennessee
Jonathan P. Small, Attorney
Mark Ohldie, Concerned Citizens for Sound Economic Progress, Washington County
Arthur Yaussi, Kansas Private Prison Research Committee, Hiawatha
David Woods, Betterment of Northeast Kansas, Horton
Representative Bill Bryant
Patricia Henshall, Office of Judicial Administrator
Myrtle Reenes, Horton, Inc., Horton
Betty Heim, Horton, Inc., Horton
Bernadine Wright, Horton, Inc., Horton
W. O. Nelson, Horton, Inc., Horton
Eleanor Nelson, Horton, Inc., Horton
Ethelyn Pults, Horton, Inc., Horton
Doyal Schroeder, Horton, Inc., Horton
Goldie Steinbrink, Horton, Inc., Horton
Hazel Meerpohl, Horton, Inc., Horton
Peggy Acoya, Horton, Inc., Horton
Betty L. Nioce, Horton, Inc., Horton
Gale W. Ingwerson, Chamber of Commerce, Horton
Galen Weiland
Kay S. Stevens, Horton, Inc., Horton
Otho L. Stevens, Horton, Inc., Horton
David Ross, Horton, Inc., Horton
Elva Kurtz, Chamber of Commerce, Horton
Dallas Kurtz, Chamber of Commerce, Horton
Harold Molt, Betterment of Northeast Kansas, Horton
Frances Molt, Betterment of Northeast Kansas, Horton
Marian Yaussi, Kansas Private Prison Research Committee, Hiawatha
Randall Meyer, Citizens for Sound Economic Progress, Washington
Debbie Strong, Horton
Nancy Ohlde, Citizens for Sound Economic Progress, Palmer
Kathleen Wenger, Betterment of Northeast Kansas, Horton
Hilda Thornton, Betterment of Northeast Kansas, Horton
Kenneth Thornton, Betterment of Northeast Kansas, Horton
Homer Saxton, Betterment of Northeast Kansas, Horton
Teresa Machicaw, American Civil Liberties Union
Marvin E. Shube, Whiting
Shirley Hosford, Horton
Greg Bieser, Hiawatha

Ed Wright, Horton
Larry Thornton, Betterment of Northeast Kansas, Whiting
Hurshel Fulk, Betterment of Northeast Kansas, Hiawatha
Wade Edwards, Horton
Donna B. Edwards, Horton
Tom Jones, Horton, Inc., Horton
Tim Ross, Horton, Inc., Horton
Jules Langdon, Horton
Janice Langdon, Horton
Robert A. Becker, Horton
George R. Jeffery, Horton
George E. Jeffery, Horton
Nellie O. Jeffery, Horton

August 30, 1990
Morning Session

The meeting was called to order by the Chairman, Senator Wint Winter, Jr., at 10:00 a.m. He announced the Committee would hear testimony on Proposal No. 16 -- Juvenile Offenders.

Proposal No. 16 -- Juvenile Offenders

Distributed to the Committee were copies of a memorandum from Jerry Ann Donaldson, Legislative Research Department, in regard to a master planning commission for juvenile affairs (see Attachment I); copies of S.B. 521 (see Attachment II); and copies of H.B. 2667 (see Attachment III).

Attorney General Robert T. Stephan testified the Legislature should seriously consider setting up a juvenile study commission for the purpose of a studied approach to the problems that juveniles face today and to arrive at long-term solutions to the problems. He encouraged the Committee to develop legislation that would set up a commission for juvenile affairs.

In answer to a Committee question, Attorney General Stephan replied there should be a complete intensive study of the juvenile justice system. He recommended the study should be done on a full-time basis and should have adequate funding. The Commission's report would be submitted to the Legislature containing their findings and recommendations. The study should cover juvenile offenders as well as those in need of care.

Steven J. Davies, Secretary of Corrections and Chairman of the Criminal Justice Coordinating Council, informed the Committee the Criminal Justice Coordinating Council met July 20, 1990 and voted to continue to support the creation of a master planning commission on juvenile affairs (see Attachment IV). He said the coordinating council believes there should be an in-depth study of the juvenile justice system and people from the fields of education, health care, and social services should be involved in the study.

The Chairman requested Secretary Davies supply the Committee with statistics indicating which prisoners had been in juvenile centers and had been abused children, foster home children, abandoned children, etc.

The Committee meeting was adjourned until 9:00 a.m., Friday, August 31, 1990.

August 31, 1990
Morning Session

The Committee meeting was called to order by the Chairman, Senator Wint Winter, Jr., at 9:00 a.m.

Proposal No. 12 -- Regional Prison Authority -- Private Prisons

Mike Heim, Legislative Research Department, informed the Committee the charge to the Committee is to review the need for a law authorizing cities and counties to individually or jointly create regional prison authorities for the construction, operation, and management of prisons and review the need for, and feasibility of, authorizing private prisons and jail facilities to be constructed and operated in Kansas. He reviewed a memorandum on Proposal No. 12 (see Attachment XIV). A copy of 1990 H.B. 2835 and a letter from Attorney General Robert T. Stephan to Representative Robert H. Miller containing questions and answers concerning private prisons were attached to the memorandum. He explained several bills were introduced during the 1990 Legislative Session. H.B. 2835 would have permitted the creation of regional prison authorities by cities or counties individually or jointly. S.B. 588 originally would have prohibited cities and counties from authorizing, constructing, owning, or operating any type of correctional facility for placement or confinement of inmates from other states or from federal agencies until the Legislature provided a public policy for those activities. The Senate Committee on Federal and State Affairs amended S.B. 588 as a substitute bill. The substitute bill would have prohibited cities, counties, and private entities from establishing, constructing, or operating any correctional facility, unless authorized by statute, until the Legislature has reviewed and provided a public policy regarding such entities. Correctional facilities would be defined as any facility for the placement, detention, or confinement of adult or juvenile offenders other than a facility constructed for or leased by the federal government. S.B. 748 was enacted by the Legislature in 1990. The bill deals with existing correctional facilities and name changes thereto but includes a one-year moratorium on prison construction by cities, counties, or private entities. The provision expires on July 1, 1991.

Charles Simmons, Chief Counsel, Department of Corrections, testified on behalf of Secretary of Corrections Steven J. Davies (see Attachment XV). Mr. Simmons reported that Secretary Davies does not oppose the private prison concept. The safety and well being of the citizens of Kansas must be a primary responsibility in the development and implementation of correctional facilities and programs. Reasonable measures to provide assurances that the facilities are being operated in a responsible and professional manner should be included in the guidelines for privately or municipally operated facilities. Also, the protection of the general public from the risk of liability resulting from the operation of privately or municipally operated correctional facilities should be a primary consideration in the development of a public policy in this area. In addition, measures to allow the state to recover expenses resulting from oversight activities and other involvements in privately or municipally operated correctional facilities should be considered.

In answer to Committee questions, Mr. Simmons stated there are other states that have minimum security private prisons. Private medium and maximum security prison facilities is a new area. A medium security prison might require a $25,000,000 bond. The Secretary would be opposed

to private maximum security facilities due to limited staffing and financing in the Department of Corrections. The Department of Corrections would be involved in reviewing the plans, overseeing construction, and monitoring the operation of the facilities. After July 1, 1991, the restriction would be lifted and private prisons could be built in Kansas.

Elizabeth Taylor, Horton, Inc., informed the Committee Horton, Inc., is a group of businessmen and community leaders who support a prison facility being built in Horton. She explained this would be a regional prison authority, or a municipal facility. She said Horton, Inc. was ready to build their facility in November of 1989 when the Attorney General issued his opinion. She said the balloon to H.B. 2835 (see Attachment XVI) contains amendments developed at meetings of Horton, Inc., the Attorney General's office, and the Department of Corrections. Other amendments have been proposed that are not in the balloon. Horton, Inc. estimated it would cost $55 to $65 a day per inmate.

Jeff Teter, Horton, Inc., informed the Committee they are requesting that cities, counties, or combinations thereof be allowed to create regional prison authorities and that such authorities be allowed to supply services on contract to cities, counties, or states requiring additional space. Such an authority would be allowed to finance, own, and operate a correctional facility for the social services benefit of the State of Kansas and for the economic benefit of the local area (see Attachment XVII).

In response to Committee questions, Mr. Teter said if the prison population in Kansas declined the Horton facility could take prisoners from other states. If the prison was no longer financially viable, the buildings and facilities would revert to the private investors that purchased the bonds. A large number of states have expressed interest in using such a facility. He also replied Horton, Inc., wanted the overflow of Kansas inmates and they have discussed this with the Department of Corrections.

A Committee member asked if there had been any discussion with private financing building the facility. Ms. Taylor responded that when the moratorium passes a private developer has expressed some interest in building a prison in Kansas.

A Committee member asked who would determine what kinds of prisoners would be accepted. Mr. Teter responded the Regional Authority would act as a governing board and would hire corrections professionals to operate the facility. The professionals would be charged with defining the inmate profile and would be responsible for reviewing the files of inmates proposed to be sent to the facility. Prisoners could also be returned where they were sent from if they caused too much trouble.

Ms. Taylor stated Horton, Inc., wants the cooperation of the State of Kansas. Other states would not be interested in contracting with the prison if the State of Kansas did not contract with the prison.

Representative Joan Adam informed the Committee through reapportionment her district includes four townships in Jackson County that are adjacent to the City of Horton in Brown County. If the prison is built, some of the citizens of Jackson County have fears about their safety. They are concerned that the families of maximum security prisoners will follow them to the area, bringing pressure on schools, housing, and other community services. They are also worried that their taxes will increase to cover these costs and others related to law enforcement and prison security. She also said some of the citizens are for the facility and see the possibility of jobs and economic development. She stated issues of accountability and liability should be resolved before

allowing private prisons to be built in the State of Kansas. She was also concerned that a fair manner of referendum be included in any private prison bill (see Attachment XVIII).

In answer to a question from the Committee, Representative Adam said she was concerned that the adjoining local communities would not have any control over the operation of the prison.

Representative Lucas testified the Kansas Legislature should establish a state policy to address the construction of community-based prisons and also to consider these facilities as viable alternatives to further state-funded prison construction to relieve the prison needs of Kansas in the years ahead (see Attachment XIX). He said he introduced H.B. 2554 in 1989 that stipulated Department of Corrections' prisoners would be housed in state, city, or county facilities before going out of state. The bill did not pass but the provision was incorporated in the Department of Corrections' budget.

Copies of proposed Sub. for S.B. 588 were distributed to the Committee (see Attachment XX). Also distributed were copies of an article from the *National Institute of Justice* regarding corrections in the private sector (see Attachment XXI); an article from the *Council of State Governments* dealing with privatization of prisons (see Attachment XXII); and information from the Criminal Justice Institute (see Attachment XXIII).

The Committee recessed for lunch.

Afternoon Session

Representative Lucas, in response to a Committee question, said the Department of Corrections and the Attorney General's recommended amendments are included in proposed Sub. for S.B. 588. He also replied the bill would be needed whether the State of Kansas contracted for space or not and if the bill addressed only private prisons.

Representative Lucas stressed the Legislature should address the issues of liability, financial responsibility, overcrowded prisons, bankruptcy of private prisons, use of deadly force, and local control.

Staff distributed copies of an outline of privatization in Texas (see Attachment XXIV); a *Report to the Members of the Colorado General Assembly* (see Attachment XXV); and copies of a *National Institute of Justice* article "Comparing Costs of Public and Private Prisons: A Case Study" (see Attachment XXVI).

Flop Fuller, Director, Hamilton County Corrections, Chattanooga, Tennessee, testified by speaker phone from Chattanooga, Tennessee. In March of 1984, the Hamilton County Commission agreed to a feasibility study by Corrections Corporation of America (CCA), a Tennessee corporation. In September of 1984, the County Commission signed a contract with CCA to build a private prison. Since that time, CCA has contracted with the State of Louisiana, the State of Texas, Panama City, Bay County Florida, Albuquerque, and a federal facility in Leavenworth. The contract with CCA is renewed annually. The cost per day per inmate is now $22.66. The facility houses minimum to medium inmates, both male and female.

In response to questions from the Committee, Mr. Fuller said at the present time the Hamilton County penal farm is not ACA accredited, however, they are certified by the Tennessee Corrections Institute. The original facility belonged to Hamilton County. CCA added dormitories and a new kitchen at a cost of $1,500,000, which they privately financed. The CCA pays taxes on the facility. All prisoners are from Hamilton County and they are misdemeanants and felons. They have no out-of-state prisoners. The inmates are under his control, not the CCA. Ultimate liability lies with the County Commission, the county, and Corrections Corporation. There is a $5,000,000 liability escrow account which has to be replenished as soon as any money is taken out. The County pays for the medical care at the hospital through indigent care. CCA pays for medicine and nursing at the facility.

Jonathan P. Small, Attorney, testified on behalf of Washington County Citizens for Sound Economic Progress who oppose private prisons, especially any contemplated to be built and operated in Washington County, Kansas. He said if the State of Kansas is to seriously consider permitting private prisons to operate as a municipal industry, there are a lot of questions that need answers first (see Attachment XXVII). He distributed copies of a newspaper article from *The Dallas Morning News* entitled "Private Jails Show Poor Return in Profit, Quality" (see Attachment XXVIII). He also distributed copies of the February 14, 1990, testimony of Ira P. Robbins to the Federal and State Affairs Committee of the Kansas Senate (see Attachment XXIX).

Mark Ohldie, Concerned Citizens for Sound Economic Progress, Washington, County, explained his testimony was covered by Charles Simmons of the Department of Corrections and Representative Joan Adam. He stated the taxpayers could pay dearly for the private prisons if the Legislature failed to thoroughly check all of the issues.

Arthur Yaussi, Kansas Private Prison Research Committee, distributed a packet of information on private prisons and copies of newspaper articles (see Attachment XXX). He said they have been asking the same questions for three years in Brown County that have been asked here today and they have not received any answers.

David Woods, Betterment of Northeast Kansas, testified he represents hundreds of people who openly oppose the construction of the proposed private prison near Horton. He said Kansas needs protection from entrepreneurs who are ready to turn Kansas' assets into private prisons for private profit (see Attachment XXXI).

Representative Bill Bryant recommended the Committee consider working with the proposed Sub. S.B. 588. He questioned whether it would be legal for a city to operate a facility in the county. Under Section 4 of the bill, he suggested adding training for prison officials under ACA standards. He distributed copies of an article from *Reason Foundation* entitled "Privatization," regarding private prisons (see Attachment XXXII). He suggested the Committee request more input and obtain answers to the questions that have been raised.

The Chairman suggested the Department of Corrections appear and present a letter to the Committee the next time the Committee meets on Proposal No. 12 setting forth their opinions on the bill drafts that have been presented to the Committee; request the Attorney General prepare a more formal response to the questions in the March 14, 1990, letter to Representative Robert H. Miller; request an Attorney General's opinion about the extent to which there is ultimate liability on taxpayers in the governmental unit involved for the operation of the facility, including 1983 claims. Other questions for the Attorney General are: After the moratorium is lifted, can a privately financed prison operate in Kansas with out-of-state inmates? Does the Legislature need to pass a law regarding this question?

A Committee member requested the Secretary of Corrections be invited to personally answer questions that have been proposed on Proposal No. 12.

Other questions from the Committee are: Is there insurance or bonding available that would completely exempt the state from any liability? Are state taxes, local property taxes, insurance, and bonding included in the cost per day per inmate? What is the tax-exempt status if a private corporation has a purchase option? What impact is there on a tax-exempt status by accepting out-of-state prisoners? An interpretation of the concept of a regional authority was requested, how responsible they are to a local government, who has authority, and what kinds of controls are there?

The Chairman announced on September 20 it is tentatively scheduled the Committee will receive updates on Proposal No. 12 -- Regional Prisons. Committee discussion will also be held. On September 21, the Committee will receive another report from the Sentencing Commission and discuss Proposal No. 13 -- Kansas Sentencing Commission. The Committee may also discuss Proposal No. 16 -- Juvenile Offenders. The tentative schedule for October is a hearing and discussion on Proposal No. 15 -- Child Support and Child Custody. At the November meeting, it is tentatively scheduled to hear Proposal No. 42 -- Child Sex Offenders.

The Committee meeting was adjourned.

Prepared by Jerry Ann Donaldson

Approved by Committee on:

_____

(date)

90-758/jad

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ATTACHMENT 5

STATE OF KANSAS

PROCLAMATION
BY THE
GOVERNOR

TO THE PEOPLE OF KANSAS, GREETINGS:

WHEREAS, the Kickapoo Tribe of Indians of the Kickapoo Reservation in Kansas is a tribe of original people of the United States, and

WHEREAS, the Kickapoo Tribe of Indians of the Kickapoo Reservation in Kansas has made Treaties with the U.S. Federal Government and continue to recognize the unique and continuing government to government relationship with the U. S. Federal government, and

WHEREAS, the Kickapoo Tribe of Indians of the Kickapoo Reservation in Kansas was established in The Treaty with the Kickapoo 1832 before Kansas became the State of Kansas, and

WHEREAS, the Kickapoo Tribe of Indians of the Kickapoo Reservation in Kansas enjoys its sovereign state and sovereign rights as a federally recognized Indian Tribe in the State of Kansas.

NOW, THEREFORE, I, MIKE HAYDEN, GOVERNOR OF THE STATE OF KANSAS, do hereby proclaim July 17, July 18th and July 19th of 1987 as

KICKAPOO ANNUAL POW-WOW WEEK-END

in Kansas

DONE At the Capitol in Topeka
Under the Great Seal of
the State this 9th day
of July, A. D., 1987.

BY THE GOVERNOR: Mike Hayden

Bill Graves
Secretary of State

Assistant Secretary of State

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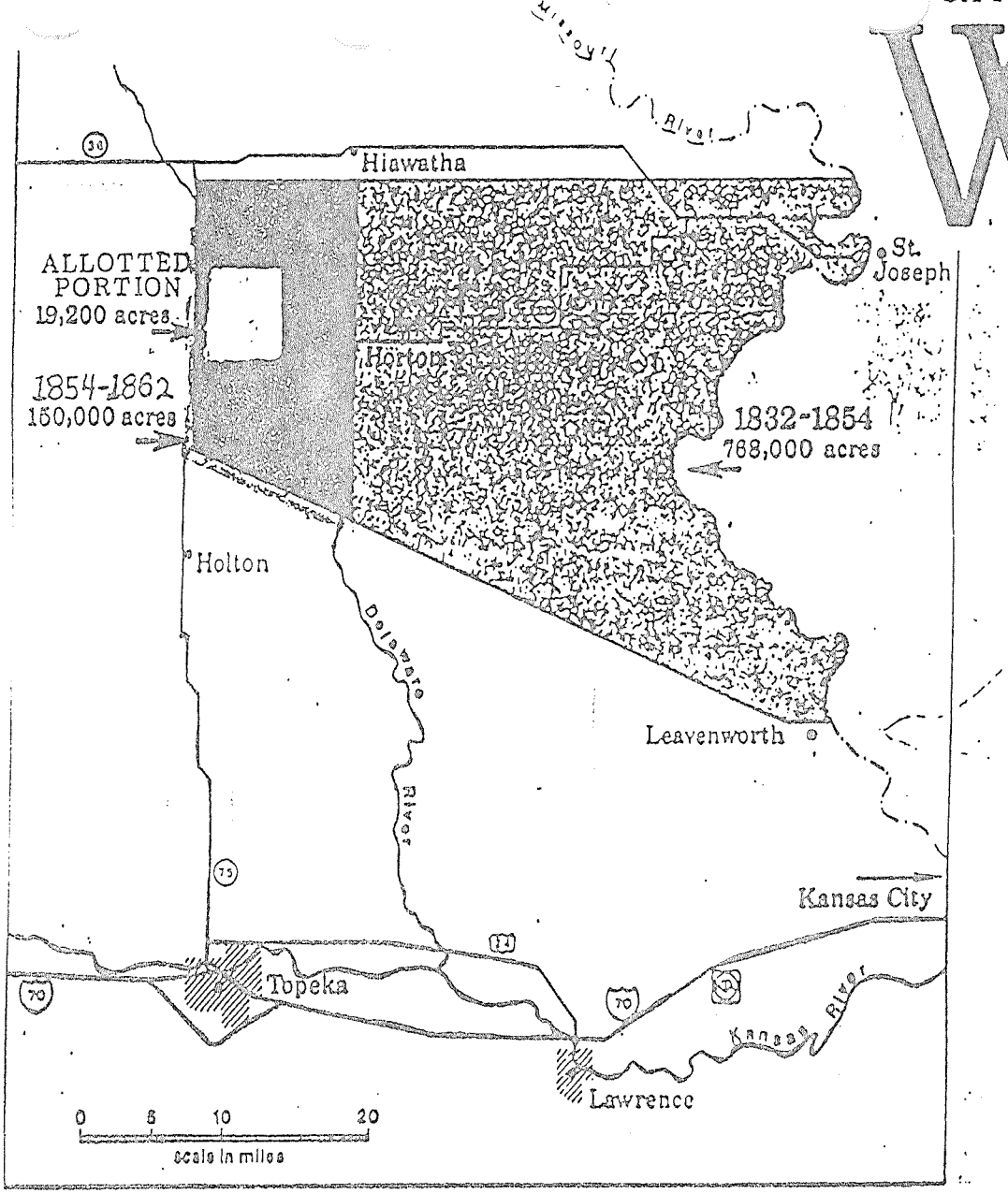

Figure 4. Kickapoo reservations in Kansas from 1832 to the present.

When treaties lack explicit reservations for such uses, judicial interpretation of the treaty or agreement is necessary. The Indians retain any rights not specifically ceded to the United States according to the established guidelines for the judicial interpretation of treaties or agreements between Indian tribes and the federal government.[21] Thus, such general language as "to be held as Indian lands are held" reserves the Indians' and Indian tribes' rights to hunt, fish, trap, and gather plant foods and shellfish; in short, to pursue their accustomed subsistence activities.[22]

delegates from the several other territories of the [illegible] States to the said house of representatives, but the delegate first elected shall hold his seat only during the term of the congress to which he shall be elected. The first election shall be held at such time and places, and be conducted in such manner, as the governor shall appoint and direct; and at all subsequent elections the times, places and manner of holding the elections shall be prescribed by law. The person having the greatest number of votes shall be declared by the governor to be duly elected, and a certificate thereof shall be given accordingly. That the constitution and all laws of the United States which are not locally inapplicable shall have the same force and effect within the said territory of Kansas as elsewhere within the United States, except the eighth section of the act preparatory to the admission of Missouri into the Union, approved March sixth, eighteen hundred and twenty, which, being inconsistent with the principle of nonintervention by congress with slavery in the states and territories, as recognized by the legislation of eighteen hundred and fifty, commonly called the compromise measures, is hereby declared inoperative and void; it being the true intent and meaning of this act not to legislate slavery into any territory or state nor to exclude it therefrom, but to leave the people thereof perfectly free to form and regulate their domestic institutions in their own way, subject only to the constitution of the United States: *Provided:* That nothing herein contained shall be construed to revive or put in force any law or regulation which may have existed prior to the act of sixth of March, eighteen hundred and twenty, either protecting, establishing, prohibiting, or abolishing slavery. [Act May 30, 1854, § 32, 10 Stat. 289.]

§ 33. Public buildings. That there shall hereafter be appropriated, as has been customary in the territorial governments, a sufficient amount, to be expended under the direction of the said governor of the territory of Kansas, not exceeding the sums heretofore appropriated for similar objects, for the erection of suitable buildings at the seat of government, and for the purchase of a library, to be kept at the seat of government for the use of the governor, legislative assembly, judges of the supreme court, secretary, marshal, and attorney of said territory, and such other persons, and under such regulations as shall be prescribed by law. [Act May 30, 1854, § 33, 10 Stat. 289.]

§ 34. Lands. That when the lands in the said territory shall be surveyed under the direction of the government of the United States, preparatory to bringing the same into market, sections numbered sixteen and thirty-six in each township in said territory shall be, and the same are hereby, reserved for the purpose of being applied to schools in said territory and in the states and territories hereafter to be erected out of the same. [Act May 30, 1854, § 34, 10 Stat. 289.]

CASE ANNOTATIONS

1. Section amounts to grant of lands for use of schools. The State v. Stringfellow, 2 K. 263.

§ 35. Judicial districts. That until otherwise provided by law, the governor of said territory may define the judicial districts of said territory, and assign the judges who may be appointed for said territory to the several districts; and also appoint the times and places for holding courts in the several counties or subdivisions in each of said judicial districts by proclamation, to be issued by him; but the legislative assembly, at their first or any subsequent session, may organize, alter, or modify such judicial districts, and assign the judges, and alter the times and places of holding the courts as to them shall seem proper and convenient. [Act May 30, 1854, § 35, 10 Stat. 289.]

§ 36. Bonds of officers. That all officers to be appointed by the president, by and with the advice and consent of the senate, for the territory of Kansas, who, by virtue of the provisions of any law now existing, or which may be enacted during the present congress, are required to give security for moneys that may be entrusted with them for disbursement, shall give such security at such time and place, and in such manner, as the secretary of the treasury may prescribe. [Act May 30, 1854, § 36, 10 Stat. 290.]

§ 37. Indians. That all treaties, laws, and other engagements made by the government of the United States with the Indian tribes inhabiting the territories embraced within this act shall be faithfully and rigidly observed, notwithstanding anything contained in this act; and that the existing agencies and superintendencies of said Indians be continued with the same powers and duties which are now prescribed by law, except that the president of the United States may, at his discretion, change the location of the office of superintendent. [Act May 30, 1854, § 37, 10 Stat. 290.]

An Act for the Admission of Kansas Into the Union

PREAMBLE

WHEREAS, The people of the territory of Kansas, by their representatives in convention assembled, at Wyandotte, in said territory, on the twenty-ninth day of July, one thousand eight hundred and fifty-nine, did form for themselves a constitution and state government, republican in form, which was ratified and adopted by the people, at an election held for that purpose, on Tuesday, the fourth day of October, one thousand eight hundred and fifty-nine, and the said convention has, in their name and behalf, asked the congress of the United States to admit the said territory into the union as a state, on an equal footing with the other states; therefore,

Be it enacted by the senate and house of representatives of the United States of America in congress assembled:

§ 1. Admission; boundaries; Indian title. That the state of Kansas shall be, and is hereby declared to be, one of the United States of America, and admitted into the union on an equal footing with the original states in all respects whatever. And the said state shall consist of all the territory included within the following boundaries, to wit: Beginning at a point on the western boundary of the state of Missouri, where the thirty-seventh parallel of north latitude crosses the same; thence west on said parallel to the twenty-fifth meridian of longitude west from Washington; thence north on said meridian to the fortieth parallel of latitude; thence east on said parallel to the western boundary of the state of Missouri; thence south with the western boundary of said state to the place of beginning: *Provided,* That nothing contained in the said constitution respecting the boundary of said state shall be construed to impair the rights of person or property now pertaining to the Indians of said territory, so long as such rights shall remain unextinguished by treaty between the United States and such Indians, or to include any territory which, by treaty with such Indian tribe, is not, without the consent of such tribe, to be included within the territorial limits or jurisdiction of any state or territory; but all such territory shall be excepted out of the boundaries, and constitute no part of the state of Kansas, until said tribe shall signify their assent to the president of the United States to be included within said state, or to affect the authority of the government of the United States to make any regulation respecting such Indians, their lands, property, or other rights, by treaty, law, or otherwise, which it would have been competent to make if this act had never passed. [Act Jan. 29, 1861, ch. 20, § 1, 12 Stat. 126.]

CASE ANNOTATIONS

1. Section considered in determining control of Ft. Leavenworth military reservation. Clay v. The State, 4 K. 49.

2. Taxation of Indian lands by state government, recognizing Indian tribe. Blue-Jacket v. The Commissioners of Johnson County, 3 K. 299. Reversed: The Kansas Indians, 72 U. S. 737, 18 L. Ed. 667.

3. Kansas accepted admission on condition that Indian rights remain unimpaired. Parker v. Winsor, 5 K. 362, 367.

4. Taxation; Indian lands; primary disposal of soil; federal laws govern. Douglas Co. v. Union Pac. Ry. Co., 5 K. 615, 624.

5. Taxation of lands granted to railroad company considered. Kansas Pacific Rly. Co. v. Culp, 9 K. 38, 47. Reversed: Railway Co. v. Prescott, 83 U. S. 603, 21 L. Ed. 373.

6. Indian lands, when taxable and alienable, considered; government patents. Comm'rs of Franklin Co. v. Pennock, 18 K. 579. Affirmed: Pennock v. Commissioners, 103 U. S. 44, 26 L. Ed. 367.

7. Indian lands held under patents not exempt from state taxation. Pennock v. Commissioners, 103 U. S. 44, 26 L. Ed. 367. Affirming: Comm'rs of Franklin Co. v. Pennock, 18 K. 579.

8. Discussed; residents on lands ceded to United States may not vote at precincts established prior to cession. (Dissenting opinion.) Herken v. Glynn, 151 K. 855, 870, 101 P. 2d 946.

9. United States may recover taxes illegally collected from Indian ward. Board of Comm'rs v. United States, 100 F. 2d 929, 935.

§ 2. Representative. That until the next general apportionment of representatives, the state of Kansas shall be entitled to one representative in the house of representatives of the United States. [Act Jan. 29, 1861, ch. 20, § 2, 12 Stat. 127.]

delegates from the several other territories of the United States to the said house of representatives, but the delegate first elected shall hold his seat only during the term of the congress to which he shall be elected. The first election shall be held at such time and places, and be conducted in such manner, as the governor shall appoint and direct; and at all subsequent elections the times, places and manner of holding the elections shall be prescribed by law. The person having the greatest number of votes shall be declared by the governor to be duly elected, and a certificate thereof shall be given accordingly. That the constitution and all laws of the United States which are not locally inapplicable shall have the same force and effect within the said territory of Kansas as elsewhere within the United States, except the eighth section of the act preparatory to the admission of Missouri into the union, approved March sixth, eighteen hundred and twenty, which, being inconsistent with the principle of nonintervention by congress with slavery in the states and territories, as recognized by the legislation of eighteen hundred and fifty, commonly called the compromise measures, is hereby declared inoperative and void; it being the true intent and meaning of this act not to legislate slavery into any territory or state nor to exclude it therefrom, but to leave the people thereof perfectly free to form and regulate their domestic institutions in their own way, subject only to the constitution of the United States: *Provided:* That nothing herein contained shall be construed to revive or put in force any law or regulation which may have existed prior to the act of sixth of March, eighteen hundred and twenty, either protecting, establishing, prohibiting, or abolishing slavery. [Act May 30, 1854, § 32, 10 Stat. 289.]

§ 33. Public buildings. That there shall hereafter be appropriated, as has been customary for the territorial governments, a sufficient amount, to be expended under the direction of the said governor of the territory of Kansas, not exceeding the sums heretofore appropriated for similar objects, for the erection of suitable buildings at the seat of government, and for the purchase of a library, to be kept at the seat of government for the use of the governor, legislative assembly, judges of the supreme court, secretary, marshal, and attorney of said territory, and such other persons, and under such regulations as shall be prescribed by law. [Act May 30, 1854, § 33, 10 Stat. 289.]

§ 34. Lands. That when the lands in the said territory shall be surveyed under the direction of the government of the United States, preparatory to bringing the same into market, sections numbered sixteen and thirty-six in each township in said territory shall be, and the same are hereby, reserved for the purpose of being applied to schools in said territory and in the states and territories hereafter to be erected out of the same. [Act May 30, 1854, § 34, 10 Stat. 289.]

CASE ANNOTATIONS

1. Section amounts to grant of lands for use of schools. The State v. Stringfellow, 2 K. 263.

§ 35. Judicial districts. That until otherwise provided by law, the governor of said territory may define the judicial districts of said territory, and assign the judges who may be appointed for said territory to the several districts; and also appoint the times and places for holding courts in the several counties or subdivisions in each of said judicial districts by proclamation, to be issued by him; but the legislative assembly, at their first or any subsequent session, may organize, alter, or modify such judicial districts, and assign the judges, and alter the times and places of holding the courts as to them shall seem proper and convenient. [Act May 30, 1854, § 35, 10 Stat. 289.]

§ 36. Bonds of officers. That all officers to be appointed by the president, by and with the advice and consent of the senate, for the territory of Kansas, who, by virtue of the provisions of any law now existing, or which may be enacted during the present congress, are required to give security for moneys that may be entrusted with them for disbursement, shall give such security at such time and place, and in such manner, as the secretary of the treasury may prescribe. [Act May 30, 1854, § 36, 10 Stat. 290.]

§ 37. Indians. That all treaties, laws, and other engagements made by the government of the United States with the Indian tribes inhabiting the territories embraced within this act shall be faithfully and rigidly observed, notwithstanding anything contained in this act; and that the existing agencies and superintendencies of said Indians be continued with the same powers and duties which are now prescribed by law, except that the president of the United States may, at his discretion, change the location of the office of superintendent. [Act May 30, 1854, § 37, 10 Stat. 290.]

5-5

ORGANIC ACT

An Act to Organize the Territory of Kansas

§ 19. Creation of territorial government. That all that part of the territory of the United States included within the following limits, except such portions thereof as are hereinafter expressly exempted from the operations of this act, to wit, beginning at a point on the western boundary of the state of Missouri, where the thirty-seventh parallel of north latitude crosses the same; thence west on said parallel to the eastern boundary of New Mexico; thence north on said boundary to latitude thirty-eight; thence following said boundary westward to the east boundary of the territory of Utah, on the summit of the Rocky Mountains; thence northward on said summit to the fortieth parallel of latitude; thence east on said parallel to the western boundary of the state of Missouri; thence south with the western boundary of said state to the place of beginning, be, and the same is hereby, created into a temporary government by the name of the territory of Kansas; and when admitted as a state or states, the said territory, or any portion of the same shall be received into the union with or without slavery, as their constitution may prescribe at the time of their admission: *Provided,* That nothing in this act contained shall be construed to inhibit the government of the United States from dividing said territory into two or more territories, in such manner and at such times as congress shall deem convenient and proper, or from attaching any portion of said territory to any other state or territory of the United States: *Provided further,* That nothing in this act contained shall be construed to impair the rights of person or property now pertaining to the Indians in said territory, so long as such rights shall remain unextinguished by treaty between the United States and such Indians, or to include any territory which, by treaty with an Indian tribe, is not, without the consent of said tribe, to be included within the territorial limits or jurisdiction of any state or territory; but all such territory shall be excepted out of the boundaries, and constitute no part of the territory of Kansas, until said tribe shall signify their assent to the president of the United States to be included within the said territory of Kansas, or to affect the authority of the government of the United States to make any regulation respecting such Indians, their lands, property, or other rights, by treaty, law, or otherwise, which it would have been competent to the government to make if this act had never passed. [Act May 30, 1854, ch. 59, § 19, 10 Stat. 283.]

CASE ANNOTATIONS

1. Legislative power vested in governor and legislative assembly. Elliott v. Lochnane and others, 1 K. 126, 136.
2. Object of act. The State v. Stringfellow, 2 K. 263.
3. State accepted admission on condition that Indian rights remain unimpaired. Parker v. Winsor, 5 K. 362, 367; *In re* Nowgezhuck, 69 K. 410, 413, 76 P. 877.

§ 20. Governor of territory. That the executive power and authority in and over said territory of Kansas shall be invested in a governor, who shall hold his office for four years, and until his successor shall be appointed and qualified, unless sooner removed by the president of the United States. The governor shall reside within said territory, and shall be commander in chief of the militia thereof. He may grant pardons and respites for offenses against the laws of said territory, and reprieves for offenses against the laws of the United States, until the decision of the president can be made known thereon; he shall commission all officers who shall be appointed to office under the laws of said territory, and shall take care that the laws be faithfully executed. [Act May 30, 1854, ch. 59, § 20, 10 Stat. 284.]

§ 21. Secretary of territory. That there shall be a secretary of said territory, who shall reside therein, and hold his office for five years, unless sooner removed by the president of the United States; he shall record and preserve all the laws and proceedings of the legislative assembly hereinafter constituted, and all the acts and proceedings of the governor in his executive department; he shall transmit one copy of the laws and journals of the legislative assembly within thirty days after the end of each session, and one copy of the executive proceedings and official cor-

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March 10, 1989

Mr. Ed C. Rolfs
Secretary of Revenue
Kansas Department of Revenue
Robert B. Docking State Office Bldg.
Topeka, Kansas 66625-0001

Re: Taxation of Cigarette Sales Within Potawatomi Nation Boundaries

Dear Ed:

During the past few months we have been talking with your able-assistant, Ms. Melanie Caro, attorney for the Kansas Department of Revenue, Division of Taxation. She has been considerate and courteous to us as we have made our legal presentations to her concerning the State of Kansas' efforts to tax the sale of cigarettes within the Potawatomi Nation boundaries.

As a way of introduction to the jurisdictional issues with which we are dealing, let me direct your interest back to the earlier decisions in which Chief Justice Marshall defined the basic relationship of Indian Tribes to the Federal and State governments in the early cases of Cherokee Nation v. Georgia, 30 U.S. 1 (1831) and Worcester v. Georgia 31 U.S. 5515 (1832). Justice Marshall characterized the Indians' legal status as that of: "domestic dependent nations." In Cherokee Nation v. Georgia the Cherokees were defined as a "unique nation." In the Worcester case the Court held that the Cherokee Nation was: "a distinct community occupying its own territory with boundaries accurately described in which the laws of Georgia can have no force." It has been an undisputed principle that Indian reservations are separate from the States in which they are located. According to Justice Marshall, the Indian tribe is a sovereign entity, "a distinct independent political community."

Felix Cohen, who has long been considered the premier expert on sovereignty law as it involves Indian nations, provides a short but extremely informative assessment of tribal government in the attached document which was reproduced from a publication by the Institute for Development of Indian Law. In his introduction in that article, he defines where Indian sovereignty had its origin and why it continues to exist:

> "Many people look on Indian reservations as internment camps in which Indians were confined and then forgotten by European conquerors. Others see the reservations as sanctuaries where a threatened species of wildlife/mankind is protected for future generations to behold. Others view the reservations as temporary holding pens where atavitic Indians are allowed to live out fantasies of a long-dead lifestyle until such time as they can be willingly or unwillingly brought into the mainstream of American life.
>
> In truth, Indian reservations are the land base for tribes of people, who have exercised self-government from time immemorial and who refuse to surrender their right to self government. Indian reservations are the homelands of Indian tribes, and Indian tribes are legal "dependent sovereign" nations within the United States."

For the past 15 years I have been honored to represent all four of the Indian Nations surrounded by the State of Kansas. It is with deep regret that I must inform you that during these years I have observed a concerted and relentless effort by the State of Kansas to further impoverish the Indian people. Please do not misunderstand me. There are many public officials representing subdivisions of the State of Kansas that have mistakenly thought that their actions were in the best interest of the Indian people of these nations. Often times, at first glance, it appeared that they may have been right. However, the undisputed long-term effect of the policies of the State of Kansas over the last 130 years has been a steady decrease in the standard of living enjoyed by Indian members of these nations. As early as 1886 the United States Supreme Court recognized the effect of policies and attitudes reflected by the official representatives of the states. In the United States v. Kagama, 118 U.S. 375, 6 S.Ct. 1109, the Court analyzed the Major Crimes Act and offered the following opinion:

> "These Indian Tribes are the wards of the Nation. They are communities dependent on the United States...dependent for their political rights. They owe no allegiance to the States, and receive from them no protection. Because of the local ill feeling, the people of the States where they are found are often their deadliest enemies. From their very weakness and helplessness, so largely due to the

> course of dealing with the Federal Government with them and the treaties in which it has been promised, there arises the duty of protection, and with it the power. This has always been recognized by the Executive and by Congress whenever the question has arisen." At page 384.

And,

> "The power of the General Government over these remnants of a race once powerful, now weak and diminished in numbers, is necessary to their protection, as well as to the safety of those among whom they dwell. It must exist in that Government, because it never has existed anywhere else, because the theater of its exercise is within the geographical limits of the United States, because it has never been denied, and because it alone can enforce its laws on all the Tribes." At page 385.

The subject matter with which we are involved here today, again forces the Indian Nations into another historic battle for their legal rights. In many ways, the actions taken by the State of Kansas in 1989 are more significant and far reaching than actions taken in the late 1800's by Kansas officials. There is strong pro-Indian sentiment throughout Kansas and the United States as we enter the year 1989. I submit that this is the proper time to reevaluate the relationship between the State of Kansas and the four Indian Nations. Many would like to see the poverty and deprivation that has haunted the reservations cease. However, that will not be done until the Indian people are allowed to exercise their rights to self-government which is a traditional American doctrine. Felix Cohen stated it much more eloquently than I can:

> "Self-government is not a new or radical idea. Rather, it is one of the oldest staple ingredients of the American way of life. Indians in this country enjoyed self-government long before European immigrants who came to these shores did. It took the white colonists north of the Rio Grande about 170 years to rid themselves of the traditional pattern of the divine right of kings...and to substitute the less efficient but more satisfying Indian pattern of self-government...."

It has been the unwavering contention of all Four Indian Nations located within the boundaries of the State of Kansas

that the State of Kansas has never possessed the authority or power to tax any activities or property within national boundaries. Notwithstanding that fact, the State of Kansas has continued to illegally force Indian merchants to remit sales tax and cigarette tax on the sale of cigarettes within Potawatomi Nation boundaries. This matter is not only important to my client, Roger Kaul, an enrolled Potawatomi Indian person, but is also critical to the Four Nations which are federally recognized by treaties with the United States Government, and which happen to be surrounded by the State of Kansas. As you know, all of the Indian Nations were here prior to the State of Kansas becoming a state in the Union.

As we explained to Melanie in our recent meeting with her, Roger Kaul is an enrolled Potawatomi Indian person and lives on the Potawatomi Reservation and has his business enterprises within the boundaries of the Potawatomi Nation, which is surrounded by the State of Kansas. As we pointed out to Melanie during our conference with her, all Four Nations have been actively engaged in governing themselves prior to Kansas becoming a state in 1861. Enclosed is a copy of "An Act for the Admission of Kansas into the Union." Section 1 of the Preamble is entitled: "Admission: Boundaries: Indian Title." The first part of Section 1 deals with the boundaries of Kansas and I call your attention to the latter part of the paragraph where it states as follows:

> "Provided, that nothing contained in the said Constitution respecting the boundary of said state shall be construed to impair the rights of person or property now pertaining to the Indians of said territory, so long as such rights shall remain unextinguished by treaty between the United States and such Indians, or to include any territory, which, by treaty with such Indian tribe, is not, without the consent of such tribe, to be included within the territorial limits or jurisdiction of any state or territory; but all such territory shall be excepted out of the boundaries and constitute no part of the State of Kansas, until said tribe shall signify their assent to the President of the United States to be included within said state...."

The rights belonging to the Potawatomi Nation have not been extinguished by treaty nor has the tribe consented to be included in the State of Kansas. There has been no dispute

that on all civil matters, the Potawatomi Nation has full sovereign powers which are equal to or perhaps greater than the State of Kansas. As you know, the State of Kansas does not have national status and the Potawatomi Nation does.

Enclosed is a copy of the 1846 Treaty between the Government of the United States and the Potawatomi Nation. I call your attention to paragraph three which states as follows:

> "Now, therefore, the United States and the said Indians do hereby agree that said people shall hereafter be known as a Nation, to be called the Pottowautomie Nation;"

Further, I call your attention to the bottom page and the final paragraph entitled, "Article One."

> "It is solemnly agreed that the peace and friendship which so happily exists between the people of the United States and the Potawatomi Indian shall continue forever; the said tribes of Indians giving assurance, hereby, of fidelity and friendship to the government and people of the United States; and the United States giving, at the same time, promise of all care and parental protection."

On page two of the 1846 Treaty with the Potawatomi Nation, down about the middle of the page, it states as follows:

> "The United States agree to grant to the said United Tribes of Indians possession and title to a tract or parcel of land containing 576,000 acres being 30 miles square... as their land and home forever;"

Nowhere in any cases in the United States has any judge ruled that the rights of the Potawatomi Nation have been extinguished. The only intrusion upon the jurisdiction of the Potawatomi Nation occurred in 1940 with the passage of 18 U.S.C.A. 3243, which purportedly granted concurrent jurisdiction over criminal offenses to the State of Kansas. This matter is currently being litigated in the case of Emery L. Negonsott vs. Harold Samuels and the Attorney General, State of Kansas, Case Number 88-2666, in the United States Court of Appeals for the Tenth Circuit. The Indian Nations of Kansas have consistently said that their Nations did not consent to this grant of authority to the State of Kansas.

Notwithstanding, there has never been any cases that have concluded that the Potawatomi Nation has lost civil jurisdiction over any of their affairs. Quite the contrary. We have even had a State Court rule that the State of Kansas has no power to regulate the civil affairs of the Potawatomi Nation. In the case of The Board of County Commissioners of Jackson County, Kansas, vs. Roger Kaul, Case Number 87-C84, which is enclosed, the Honorable Tracy D. Klinginsmith, Judge of the District Court of Jackson County, Kansas, made a thorough review of the cases dealing with civil jurisdiction and concluded as follows:

> "Only as recently as 1940 has the State of Kansas been authorized to exercise jurisdiction over criminal matters within Indian reservation boundaries (18 U.S.A.C. 3243). However, this Court is not aware of any legislation passed that would grant any Court of this State the jurisdiction to regulate the civil affairs of the citizens of the Potawatomi Nation."

The Court, after hearing arguments and reviewing lengthy briefs, concluded as follows:

> "As heretofore stated, the Supreme Court (of the United States) has long recognized the "inherent attributes of sovereignty in Indian tribes." Iowa Mut. Ins. Co. v. LaPlante, Supra. Zoning, being an appropriate exercise of police power, is an inherent attribute of sovereignty. Notwithstanding the failure of a tribe to affirmatively act in matters of zoning, it seems to me that federal case law clearly prohibits infringement of a tribe's inherent right to do so. IT IS THEREFORE ORDERED that the petition filed herein by the Board of County Commissioners for injunctive relief be and the same is hereby dismissed."

I am also enclosing a State decision rendered on February 12, 1987, after a protracted series of arguments and briefs being filed. The case is Murphy Tractor and Equipment Company vs. Prairie Band of Potawatomi Indians, Case Number 86-CV-809. The opinion was rendered by the Honorable E. Newton Vickers and is short but to the point. It is as follows:

> "Gentlemen: Please be advised that the Court has considered the defendant's Motion to Dismiss as well as response thereto and am of the opinion that said motion

should be and hereby is sustained. The Court specifically ruling that it has no jurisdiction over the Prairie Band Potawatomi Nation."

For your information I am also enclosing a copy of a decision rendered by our local United States District Court and specifically by the Honorable Richard D. Rogers. The case is Ron Johnson vs. Kickapoo Board of Education of Kickapoo Nation School and Kickapoo Tribe in Kansas, Case Number 85-4483-R. I cite this case and others to show you that our local jurisdictions within the State of Kansas, be they state or federal, have consistently ruled that the Indian Nations enjoy sovereign immunity from suit and enjoy the right to function as sovereign powers. In this particular case the judge ruled that the plaintiff did not exhaust tribal remedies because he never made any request to argue his case before the Kickapoo Nation Tribal Court. Judge Rogers ruled that an aggrieved party must first seek a remedy through Tribal Court before filing an action in Federal District Court. This has been the case even though the Four Nations surrounded by Kansas do not have formal court systems in place. However, the Tribal Councils may function as a court and the federal case law substantiates that in every instance.

There is obviously some concern by the Department of Revenue that the Bureau of Indian Affairs makes certain determinations concerning the Indian Nations that are surrounded by the State of Kansas. Frankly, the most important law with regard to recognition of Indian Nations is Treaty Law. The treaty still stands as the number one legal document governing the interaction between the United States government and the Indian Nations. The states have no jurisdiction or any connection with the Indian Nations unless the federal government has taken action to confer such jurisdiction upon the states. I am enclosing a statement from Peggy Acoya, Superintendent of the Bureau of Indian Affairs of the Horton Agency in Horton, Kansas. Some of the history related in her memorandum or statement may be of interest to you and will further explain the unique relationship between the United States government and Indian Nations. In particular, I call your attention to the last page of this statement and more specifically, to paragraph number ten which further clarifies the fact that no legislation has been passed by the United States government to confer any civil jurisdiction over the

Four Nations surrounded by Kansas to the State of Kansas. Please note the last sentence of paragraph 10 of her statement which she underlined and which states as follows: "The Kansas act did not confer civil jurisdiction."

I have read nearly every case there is that has been decided concerning a state's attempt to impose taxes on the sale of cigarettes to non-Indians or non-member Indians. I know that your attorneys, and especially Melanie Caro, are also familiar with these cases. The three leading cases would be the Moe, Colville and the Chemehuevi cases. However, let me point out that as far as I know, in none of these cases did we have a situation where the State Constitution clearly states that all Indian territory shall be excepted out of the boundaries and constitute no part of the State of Kansas. Some of the jurisdictions that have been saying that the state may tax cigarette sales to non-Indians come from states that purportedly have been given the opportunity by the United States Government to assume civil jurisdiction over Indian people. That is not the case with regard to the State of Kansas and we call that to your attention as an important exception to the factual situations in Moe, Colville and Chemehuevi.

Also, some states have recognized that it is better for the Indian Nations and the members of those nations to pull themselves up by their own bootstraps by engaging in business activities many of which call for the selling of products to non-Indian people. Those states feel that if the Indian populace are given the opportunity to become financially well off, the state's burden to provide services for the Indian people would be lessened. I maintain and respectfully submit to you that it would be in the best interest of the State of Kansas to allow Indian people that reside on federally recognized Indian Nations to be able to sell not only cigarettes, but all products to non-Indians and collect a tax on those sales. Indeed, the State has not made any viable argument that it has a right to collect taxes on the sale of groceries to persons that come upon the reservation to buy groceries or other consumer products. For years the Kickapoo Nation has been selling gasoline, groceries and other consumer products to Indian and non-Indians alike and the State has never made a convincing argument that it is entitled to force the Kickapoo Nation to collect tax and remit it to the State of Kansas on those sales.

As a hypothetical, let us say that a person from the Country of France flies to K.C.I. airport, rents a car and drives across Kansas to the Potawatomi Nation Reservation. There this French citizen buys a few cartons of cigarettes, gets in his car, drives back to the State of Missouri and subsequently flies back to France. Under that fact situation, why would the State of Kansas be entitled to collect on that sale when this person is not a citizen of the State of Kansas? Likewise, does the State of Kansas require the State of Nebraska or other surrounding states to charge sales tax to Kansas consumers and then force those states to remit that sales tax to Kansas? Of course not.

The only reason that the State of Kansas has been able to force the Indian Nations to pay taxes to it is because Indian individuals and the Indian Nations have not been financially able to fight the actions by the subdivisions of the State of Kansas. In those cases where they have been financially able to defend themselves, they have won all of the cases. I have already enclosed some of those cases for your perusal. Another case that your attorneys are familiar with is the case of Prairie Band of Potawatomi Indians, et al., Plaintiffs, vs. Raymond Jackman, et al., Defendants, Civil case number 78-4197. For years and years the County of Jackson, Kansas, illegally charged Indian people personal property tax on personal property which was located within the reservation boundaries of the Potawatomi Nation. Likewise for many years, the Potawatomi people tried to negotiate this matter with the representatives of the State of Kansas but received no cooperation whatsoever. Finally a lawsuit had to be filed and I am enclosing copies of the findings of fact and conclusions of law which were agreed to by the plaintiffs and defendants and the final judgment of the Court issued by Judge Richard D. Rogers of the United States District Court for the District of Kansas. I enclose this only to show that once again the local courts have found that the State of Kansas does not have jurisdiction to tax products or activities within the boundaries of the Potawatomi Nation.

Melanie Caro of your office was kind enough to supply me with a State memorandum concerning the State's policy of trying to charge cigarette sales tax on the sale of cigarettes made within reservation boundaries. I would respectfully submit the following and would ask you to give it your serious

consideration. The first paragraph in the memorandum states as follows:

> "1. The sales must take place upon land which is recognized as a reservation by the Bureau of Indian Affairs."

As you can see from the memorandum prepared by Peggy Acoya, all Four Nations are recognized by the Bureau of Indian Affairs. However, we do not feel that the Bureau of Indian Affairs has to recognize any Indian Nation if that Nation has a treaty with the United States government and that treaty has not been extinguished nor has the Indian Nation been extinguished. Specifically, the Potawatomi Nation has treaties with the United States government and their civil jurisdiction has not been extinguished. The next provision of paragraph one provides:

> "The land must be owned by the Indian tribe or by the U.S. government in trust for the Indian tribe."

Once again, the jurisdiction of the Potawatomi Nation covers all land located within reservation boundaries and it makes no difference whether all the land is owned by the Indian tribe or the U.S. government. As a matter of fact, 99% of the land could be owned by non-Indian people, but the reservation boundaries would still be in full force and the Indian Nation still has full jurisdiction over all activities that take place within the reservation boundaries except criminal actions. The last sentence in paragraph one is as follows:

> "The land must be under the control of an Indian tribe recognized by the Bureau of Indian Affairs."

As mentioned above, this is already taken care of.

With regard to the second paragraph of the State memorandum, it provides as follows:

> "2. The sales must be made by the tribe itself or by a retailer approved by the tribe under regulations or ordinances adopted by the tribal government pursuant to its constitution."

Again, we respectfully submit to you that it makes no difference whether or not the tribal government has any ordinances concerning the sale of cigarettes on the reservation. The point is, that if you do not have jurisdiction you cannot create jurisdiction. The State of Kansas does not have civil jurisdiction on the reservation and the State of Kansas cannot tell the Potawatomi Nation whether or not it should have ordinances adopted. As a matter of fact, the tribe has such ordinances, but again, that is irrelevant. I call your attention to page five of Judge Klinginsmith's opinion starting with the last sentence on that page:

> "Notwithstanding the failure of a tribe to affirmatively act in matters of zoning, it seems to me that federal case law clearly prohibits infringement of a tribe's inherent right to do so."

The argument that you are making in your memorandum was the same argument made by Jackson County, a subdivision of the State of Kansas. That argument was rejected by the Court and for that reason I respectfully submit that this guideline is unauthorized. Then the memorandum continues as follows:

> "The person or persons actually operating the retail business do not have to be a member of that tribe or even an Indian."

We think what you state is true, but we do not think that the State of Kansas has the right to define what persons may or may not do business within reservation boundaries.

Your last paragraph states as follows:

> "3. The sales must be made only to members of the same tribe as the one which controls the reservation and regulates the retailer. Sales made to non-Indians or members of other Indian tribes are not exempt from Kansas cigarette tax."

Again, we submit to you that the State does not have jurisdiction to tell the Potawatomi Nation to whom they can or cannot sell cigarettes so long as the sale takes place within reservation boundaries. Likewise, it is our belief that the State does not have the jurisdiction to tell the Potawatomi

Nation whether or not it may sell groceries, gasoline or other consumer items to non-Indians if they make the purchase within reservation boundaries.

I would also like to call to your attention the fact that the Nations, and specifically the Potawatomi Nation, has the right to conduct Bingo within reservation boundaries. The State has made no valid claim that it has a right to tax the Bingo operations within reservation boundaries even though many non-Indians play Bingo on the reservation. Indeed, a lot of the participants at Potawatomi Bingo are from the State of Nebraska. We maintain that the State of Kansas does not have a right to tax any activities within reservation boundaries, be it Bingo, food sales, gasoline sales or cigarette sales.

I would like to propose something new. Instead of continuing the bickering and uncertainty that has existed for years, would you be so kind as to meet with me and my client and possibly representatives of the four federally recognized Nations in an effort to resolve these problems without further litigation? If it were possible for me to take you and the Governor and the Attorney General of Kansas along with the leadership of both houses to the Indian Nations so that you could see what is going on first-hand, I believe that you would agree with me that it is time that the State discontinues any and all efforts to tax and regulate the activities that occur within reservation boundaries. It is important that we provide jobs and tax revenue to these Nations so that they can pursue their right to self-determination that state and federal officials support. It is the firm policy of the United States government to allow Indian people their right to self-determination and their right to govern themselves and the activities within their reservation boundaries. It may be true that some non-Indian merchants may lose some revenue when Kansas citizens cross the national boundary line onto Indian country. However, I know in the long run, that the State will benefit far more by allowing its citizens to purchase goods and services on the reservation without making an attempt to have the Nations collect taxes and remit them to the State of Kansas. In talking with the Tribal Council members of the Potawatomi Nation and the Kickapoo Nation, I find that unemployment has reached as high as over 80% on the reservations. This is a golden opportunity for the State of

Kansas to cooperate with the Indian Nations to support their efforts for self-determination and to honor the provisions of the Constitution of the State of Kansas.

Sincerely,

Lance W. Burr
Attorney at Law

LWB:klh
Enc.

cc: Ms. Melanie Caro
Attorney at Law
Kansas Department of Revenue
Division of Taxation

Mr. Mark A. Burghart
General Council
Department of Revenue

Ms. Cleo G. Murphy
Chief of Business Tax Bureau

Mr. Mark E. Wettig
Assistant Secretary of
Department of Revenue

Mr. Al LeDoux
State Capitol Building

Mr. Roger Kaul

EXHIBIT

KANSAS DEPARTMENT OF REVENUE
Office of the Secretary
Robert B. Docking State Office Building
Topeka, Kansas 66612-1588

June 23, 1989

Mr. Lance Burr
Attorney at Law
16 E. Thirteenth Street
Lawrence, Kansas 66044

Dear Lance,

Pursuant to our meeting of June 23, 1989, this letter sets forth the Kansas Department of Revenue's policy on the jurisdictional question regarding the Prairie Band Potawatami Nation, the Sac & Fox Nation, the Kickapoo Nation and the Iowa Nation of Kansas and Nebraska. Presently, it is the Department of Revenue's position that the State of Kansas does not have civil jurisdiction over "federally recognized Indian Reservations" located within the boundaries of the state of Kansas. Due to the fact that the above mentioned Indian Nations are located within the boundaries of federally recognized Indian Reservations, the Kansas Department of Revenue can not require these Indian Nations to collect and remit excise taxes to the State of Kansas.

Specifically, the Potawatami, Sac & Fox, Kickapoo, and Iowa Nations are not required to collect state sales tax, motor fuel tax, or cigarette tax at their respective smokeshops as long as the smokeshops are located within the boundaries of these federally recognized Indian reservations.

If you have any further questions, please contact Melanie Caro at (913) 296-2381 or Cleo Murphy in the Business Tax Bureau at (913) 296-2461.

Sincerely,

Mark A. Burghart
General Counsel
Legal Services Bureau
Kansas Department of Revenue

United States Department of the Interior

BUREAU OF INDIAN AFFAIRS
WASHINGTON, D.C. 20245

TAKE PRIDE IN AMERICA

IN REPLY REFER TO:

Tribal Government Services - JS
BCCO 4420

JAN 09 1991

Kickapoo Tribal Office
RECEIVED
JAN 14 1991
BIA

Steve Cadue, Tribal Chairman
Kickapoo Tribe in Kansas
RR. 1 Box 157A
Horton, Kansas 66439

Dear Mr. Cadue:

Your letter of November 19, 1990, concerning the Kickapoo Tribal Court proposal has been referred to our office for response. We apologize for the delay in our response.

The proposal seeking funds to establish the court system has been reviewed and funding will be provided to the tribe. As you are already aware, the tribe has been notified of this decision and directed to contact the Anadarko Area Office for further instruction.

Thank you for your patience and interest.

Sincerely,

Acting Carol A. Dacon

Director, Office of Tribal Services

5-21

UNITED STATES GOVERNMENT

memorandum

DATE: MAR 0 7 1980

REPLY TO ATTN OF: ACTING Area Director, Anadarko Area Office
Attn: Tribal Government Services

SUBJECT: Kickapoo Tribe in Kansas - Provisional Tribal Civil Court

TO: Superintendent, Horton Agency

Regarding the Kickapoo Tribe in Kansas resolutions Nos. KT90-18 and KT90-19 on the subject tribal court, this is to advise you that we have reviewed these documents and find that the tribe has acted pursuant to its constitutional authority as set out in Article V, Section 1(j), Powers. It is recognized that the tribe has under its sovereign authority the power to establish civil courts necessary to protect the rights and property of its members and other persons within its jurisdiction. Further, the tribe has provided for the constitutional exercise of this authority as noted above. Criminal jurisdiction presently lies in the State of Kansas pursuant to the Kansas Act, 18 USCA 3243.

We hereby approve 25 CFR 11.23 as modified, in accordance with Article V Section 1(j), as the interim tribal law governing civil matters within the tribal court. The tribe is advised that its action in adopting this part of the Code of Federal Regulations in effect adopts the civil laws of the State of Kansas as the applicable tribal law in the absence of pertinent Federal law or regulation and of existing tribal customs.

In the future, pleadings, information, or requests concerning children identified with the Kickapoo Tribe in Kansas submitted under the Indian Child Welfare Act will be transmitted to the tribal court. We will also refer parties to the court as appropriate when they contact us on matters that should be within the court's purview.

It is understood that the tribe intends to more fully develop the court and applicable rules of procedure as well as its own codes and ordinances in the future. We have previously offered technical assistance in this matter and look forward to working with the tribe on its court system. Pursuant to the tribal constitution, Article V, Section 4, we are submitting the subject resolutions to the Deputy to the Assistant Secretary-Indian Affairs (Tribal Services) for review. You may provide the tribe with a copy of this memorandum for its information.

R.W. Callon Jr

5-22

R E S O L U T I O N

WHEREAS, the Kickapoo Tribe of the Kickapoo Reservation in Kansas is organized in accordance with the provisions of the Indian Reorganization Act of June 18, 1934, (48 Statute 984), and

WHEREAS, the Kickapoo Tribal Council is empowered to its Constitution and By-laws to act upon matters benefitting the Kickapoo Tribe, and

WHEREAS, the Kickapoo Tribe has a need for a provisional tribal civil court, and

WHEREAS, Public Law 95-608, Section 4, November 8, 1978, 92 Statute3069, allows a tribe to administer a court, and

WHEREAS, Article V - Powers of the Tribal Council, Section 1(j), states: "To govern the conduct of Indians on the reservation; and to provide for the maintenance of law and order and the administration of justice by establishing appropriate courts on the reservation and defining their duties and powers. All codes and ordinances enacted by the Tribal Council pursuant to this authority shall be subject to the approval of the Secretary of the Interior.", and

WHEREAS, 25 CFR 11.23 shall apply except that reference to the Court of Indian Offenses shall mean the tribal court of the Kickapoo Tribe in Kansas until the Tribe enacts its own code, and

WHEREAS, the Kickapoo Tribal Council in a special meeting on November 7, 1989 authorized and established a civil court retro to June 1, 1989, and

NOW, THEREFORE BE IT RESOLVED, the Kickapoo Tribe in Kansas has a tribal civil court, and

BE IT FURTHER RESOLVED, the Bureau of Indian Affairs notify appropriate State and Federal officials of the Kickapoo tribal civil court of the Kickapoo Tribe in Kansas.

C E R T I F I C A T I O N

The foregoing tribal resolution was adopted by the Kickapoo Tribal Council in a special session called for and by the Kickapoo Tribal Chairman held on this 22nd day of February, 1990, at which 5 members of the Tribal Council were present, constituting the required quorum, with 4 voting for, 0 against, 0 abstaining, with the Chairman not voting.

Fred Thomas

Fred Thomas, Tribal Chairman
Kickapoo Tribal Council

ATTEST: Frank Wahwassuck

Frank Wahwassuck, Secretary
Kickapoo Tribal Council

Resolution No. KT90-19

R E S O L U T I O N

WHEREAS, the Kickapoo Tribe of the Kickapoo Reservation in Kansas is organized in accordance with the provisions of the Indian Reorganization Act of June 18, 1934, (48 Statute 984), and

WHEREAS, the Kickapoo Tribal Council is empowered to its Constitution and By-Laws to act upon matters benefitting the Kickapoo Tribe, and

WHEREAS, the Kickapoo Tribe in Kansas has a provisional tribal civil court, and

WHEREAS, there is a need for authorization for the Kickapoo Tribal Council to perform the duties and conduct court proceedings, and sign any and all court documents, and

WHEREAS, that any elected council member is authorized to sign any court documents, and

NOW, THEREFORE BE IT RESOLVED, the Kickapoo Tribal Council shall be authorized to act and perform the duties of judges of the Kickapoo tribal civil court, and

BE IT FURTHER RESOLVED, when court is in session, the presiding judge shall be selected from the members of the Kickapoo Tribal Council, and

BE IT FURTHER RESOLVED, the Bureau of Indian Affairs notify appropriate State and Federal officials of the Kickapoo tribal civil court of the Kickapoo Tribe in Kansas.

C E R T I F I C A T I O N

The foregoing tribal resolution was adopted by the Kickapoo Tribal Council in a special session called for and by the Kickapoo Tribal Chairman held on this 22nd day of February, 1990, at which 5 members of the Tribal Council were present, constituting the required quorum, with 4 voting for, 0 against, 0 abstaining, with the Chairman not voting.

Fred Thomas

Fred Thomas, Tribal Chairman
Kickapoo Tribal Council

ATTEST:

Frank Wahwassuck, Secretary
Kickapoo Tribal Council

April 9, 1986

Ms. Julia Langan
Superintendent
Bureau of Indian Affairs
Horton Agency
Horton, KS 66439

Dear Ms. Langan:

We, the undersigned Chairpersons of the Potowatomie Nation, Kickapoo Nation, Iowa Nation, and Sac and Fox Nation surrounded by Kansas, Missouri, and Nebraska Territories or states, do hereby request that your office arrange and provide immediate funding to develop and finalize the drafting of tribal codes and procedures for all Four Nations represented herein and for funding to research and develop a procedure to effectuate retrocession.

We make this urgent request in view of the recent Kansas Supreme Court Decision of State of Kansas vs. Nioce and Negonsott, Case Numbers 58,328 and 58,530 which we hold to be invalid and in conflict with the inherit sovereign powers granted by treaties with the United States Government to the Four Nations herein.

We also submit this urgent request for funding because of the Federal Government's policy of reducing funding to Indian Nations. In order to survive, these Four Nations must take positive action to maintain criminal and civil jurisdiction within our boundaries and to further strengthen and perfect the functions of tribal government, including the implementation of tribal codes and procedures.

We feel that the sum of $45,000 would be needed to accomplish the objectives set forth above.

Due to the urgency of these matters, we must have an immediate reply.

Sincerely,

George Wahquahboshkuk
Chairman, Potowatomie Nation

Fred Thomas, Chairman
Kickapoo Nation

Leon Campbell
Chairman, Iowa Nation

Sophia Shuckahosee
Chairperson, Sac and Fox Nation

5-25

SAC & FOX TRIBE OF MISSOURI

Reserve, Kansas 66434 (913) 742-7471

SAC AND FOX TRIBE OF MISSOURI
Tribal Council

Resolution No. R-26-88

WHEREAS, The Sac and Fox Tribe of Missouri is organized in accordance with the Reorganization Act of June 19, 1934 (48 Stat. 984) and has a constitution as approved by the Secretary of the Interior on March 2, 1937, with the new tribal constitution approved by the Commissioner of Indian Affairs September 15, 1980 pursuant to the above statute, and

WHEREAS, The Sac and Fox Tribal Council has been given full authority by the Tribe to act in all matters of business for the Tribe, and

WHEREAS, The Sac and Fox Tribal Council met in session on November 22, 1988, and

WHEREAS, We, hereby proclaim this Proclamation to reinforce the wishes and desires of the Sac and Fox Tribe of Missouri members, that the sovereignty of the Sac and Fox Tribe of Missouri be respected, acknowledged by the signing of Treaties as Nations with the United States Federal Government., and be restored the jurisdiction, (which was taken by the Act of June, 1940) in asking for Special Congressional Legislation to rescind the Act of June, 1940 and amendments, hereto, and

WHEREAS, By witnessing the signing of the Proclamation on August 25, 1988, the Governor of the State of Kansas, Governor Mike Hayden, the Secretary of the State, Secretary Bill Graves, we ask the State of Kansas to introduce Special Legislation to rescind the Act of June, 1940, and amendments thereto.

SAC & FOX TRIBE OF MISSOURI

Reserve, Kansas 66434 (913) 742-7471

SAC AND FOX TRIBE OF MISSOURI
Tribal Council

Resolution No. R-26-88

NOW, THEREFORE BE IT RESOLVED, That the United States and the State Governments recognize this resolution of Proclamation by the people of the Sac and Fox Tribe of Missouri.

CERTIFICATION

The foregoing resolution was duly adopted this 22nd day of November, 1988 in a meeting of the Sac and Fox Tribal Council at which 5 members of the Council were present, constituting a quorum, by a vote of 4 for, 0 against, the Chairperson abstaining.

Nancy E. Kelley

Nancy E. Kelley, Chairperson
Sac and Fox Tribe of Missouri
Tribal Council

Sandra Keo

Sandra Keo, Secretary
Sac and Fox Tribe of Missouri
Tribal Council

RES. NO. K-91-17

KICKAPOO TRIBE IN KANSAS

R E S O L U T I O N

WHEREAS, the Kickapoo Tribe of the Kickapoo Reservation in Kansas is organized in accordance with the provisions of the Indian Reorganization Act of June 18, 1934 (48 Stat. 984), and

WHEREAS, the Kickapoo Tribal Council is empowered, pursuant to its Constitution and By-Laws, to receive and to adminster government monies designated for tribal governments, to negotiate with Federal, State, and local governments, and, subject to the approval of the Secretary of the Interior, to govern the conduct of Indians on the reservation and to provide for the maintenance of law and order and the administration of justice by establishing appropriate courts on the reservation and defining their duties and powers, and

WHEREAS, the powers of an Indian Tribe are those inherent powers which they possessed while enjoying full external and internal sovereignity, except as modified through treaty and statute, and,

WHEREAS, 18 USC 3243 speaks only to matters of criminal jurisdiction and is silent as to civil jurisdiction, and

WHEREAS, acts of Congress which appear to limit the powers of an Indian tribe are not to be extended by doubtful inference (Wheeler-Howard Act 48 Stat. 984, 987; Seufert Bros. Co. v. United States 249 U.S. 194; Chohate v. Trapp 224 U.S. 665; Ex parte Crow Dog 109 U.S. 556; In re Sah Quah 31 Fed. 327) to include other than those restrictions specifically enumerated, and

WHEREAS, the Kickapoo Tribe In Kansas has never agreed to abridge its sovereign control over the civil affairs of its people or to vest jurisdiction in perpetuity to the County of Brown or the State of Kansas, and

WHEREAS, the County of Brown has consistently failed to recognize the inherent power of the Kickapoo Tribe In Kansas to regulate its own internal civil affairs.

NOW THEREFORE BE IT RESOLVED, that the Kickapoo Tribal Council, in the exercise of its constitutional prerogatives, reaffirms its sovereign rights to regulate the civil affairs of its tribal members on the the Kickapoo Reservation.

BE IT FURTHER RESOLVED, that the Kickapoo Tribal Council may exercise its right as a government and landowner to bar from the reservation Brown County authorities who attempt to exercise civil authority over reservation residents (cf. United States v. Mullin 71 Fed. 682; Morris v. Hitchcock 194 U.S. 384) without prior authorization by the Tribal Council.

BE IT FURTHER RESOLVED, that the Kickapoo Tribal Council supports the repeal of 18 U.S.C. 3243 and has consistently sought the support of the Bureau of Indian Affairs in the establishment of a tribal law enforcement and court system to deal with both civil and criminal complaints on the reservation.

BE IT FURTHER RESOLVED, that Steve Cadue, Chairman, and Fred Thomas, Secretary, are authorized to sign this resolution on behalf of the Kickapoo Tribal Council and the Kickapoo People.

C E R T I F I C A T I O N

The foregoing resolution was duly adopted this 15th day of June, 1981, by a vote of 4 for and 0 against by the Tribal Council during a special session at which 5 members were present, constituting a quorum, and the Chairman not voting.

Steve Cadue, Chairman

ATTEST: Fred Thomas
Fred Thomas, Secretary

R E S O L U T I O N

WHEREAS, the Kickapoo Tribe of the Kickapoo Reservation in Kansas is organized with the provision of the Indian Reorganization Act of June 18, 1934 (48 Stat. 984), and

WHEREAS, the Kickapoo Tribe of Indians is a federally recognized Indian Tribe with powers of government deriving from the tribe's inherent and continuing sovereignty and from its Treaties and Acts duly executed and entered into by the Congress of the United States of America, and

WHEREAS, the governing body of the Kickapoo Tribe of Indians of the Kickapoo Reservation in Kansas shall be the Kickapoo Tribal Council as authorized under the Kickapoo Constitution in Article III, Section 2, and

WHEREAS, the United States Congress enacted federal law 18 USCA 3243 granting jurisdiction to the state of Kansas over offenses committed by or against Indians on Indian reservations, and

WHEREAS, 18 USCA 3243 adversely impacts on the tribal government powers of the Kickapoo Tribal self-government and tribal sovereignty, and

WHEREAS, 18 USCA 3243 has caused complex federal-state-tribal-county legal jurisdictional disputes and confusion on Indian Reservations in Kansas, and

WHEREAS, 18 USCA 3243 is a detriment to proper law and order on the Kickapoo Indian Reservation and trust lands, and

WHEREAS, the honorable Governor Mike Hayden, the incumbent Governor of the state of Kansas, is the Chief Officer of the State of Kansas, and

NOW, THEREFORE BE IT RESOLVED, that Governor Mike Hayden is requested to propose legislation to the state legislature of Kansas to recommend repeal of 18 USCA 3243.

C E R T I F I C A T I O N

The foregoing resolution was duly adopted this 12th day of December 1988 by a vote of 6 for, 0 against, and 0 abstaining, in a special session at which 7 members of the Council were present constituting a quorum, and the Chairman not voting.

Fred Thomas

Fred Thomas, Chairman
Kickapoo Tribal Council

ATTEST:

Barbara Simon

Barbara Simon, Secretary
Kickapoo Tribal Council

5-30

PBP 88-1

PRAIRIE BAND OF POTAWATOMI INDIANS
GENERAL COUNCIL

RESOLUTION

WHEREAS, The Prairie Band of Potawatomi Indians is a duly organized Tribe and has a Constitution and By-Laws as approved by the Secretary of the Interior on February 19, 1976, and amended on August 28, 1985, and

WHEREAS, We, the Prairie Band of Potawatomi people see the need to adopt this Resolution to proclaim by Proclamation that the Prairie Band Potawatomi did not voluntarily relinquish criminal or civil jurisdiction on the Prairie Band Potawatomi Reservation, and

WHEREAS, We, hereby proclaim this Proclamation to reinforce the wished and desires of the Prairie Band Potawatomi People, that the sovereignty of the Prairie Band Potawatomi Nation be respected, acknowledged by the signing of Treaties as Nations with the United Stated Federal Goverment, and be restored the jurisdiction, (which was taken by the Act of June, 1940) in asking for Special Congressional Legislation to rescind the Act of June, 1940 and amendments, hereto, and

WHEREAS, By witnessing the signing of the Proclamation on August 25, 1988, the Governor of the State of Kansas, Governor Mike Hayden, the Secretary of the State, Secretary Bill Graves, we ask the State of Kansas to introduce Special Legislation to rescind the Act of June, 1940, and amendments thereto.

NOW, THEREFORE BE IT RESOLVED, that the United States and the State Governments recognize this resolution of Proclamation by the people of the Prairie Band Nation of Indians.

C E R T I F I C A T I O N

General Council of the Prairie Band Potawatomi Nation of Indians met on August 27, 1988 with a legal quorum, Motion made and voted unanimously and passed the adoption of this resolution.

George L. Wahquahboshkuk
GEORGE L. WAHQUAHBOSHKUK, Chairman
Prairie Band Potawatomi Tribal Council

ATTEST:

Grace Pahmahmie Wahwassuck
GRACE PAHMAHMIE WAHWASSUCK, Secretary
Prairie Band Potawatomi Tribal Council

Mary K. Wabnum
NOTARY PUBLIC
State of Kansas
My Appointment Expires
4-1-91

SUBSCRIBED AND SWORN TO BEFORE ME THIS 31 DAY OF AUGUST, 1988.

Mary K. Wabnum
NOTARY PUBLIC

5-31

RE: PROPOSAL NO. 24 – NATIVE AMERICAN SOVEREIGNTY

Proposal No. 24 called for the Special Committee on Judiciary to determine state jurisdiction over Indian people in Kansas, including issues relating to incidents that occur on tribal land. The study proposal was requested by Representative John Solbach as a result of a constituent request regarding the study.

Background

Status of Indians

The Commerce Clause of the United States Constitution (Article 1, Section 8) grants Congress the power to regulate commerce with Indian tribes. Indians are also mentioned in Article 1, Section 2, and in the 14th Amendment in Section 2, both providing representatives shall be apportioned among the states excluding Indians not taxed.

A major portion of the following discussion is based on a booklet entitled American Indians Today: Answers to Your Questions, published by the Bureau of Indian Affairs (BIA) in 1987.

Citizenship. The U.S. Congress extended American citizenship in 1924 to all Indians born in the territorial limits of the United States. Before that, citizenship had been conferred upon approximately two-thirds of the Indians through treaty agreements, statutes, naturalization proceedings, and by "service in the Armed Forces with an honorable discharge" in World War I.

Taxation and Indians. Indians pay the same taxes as other citizens -- with the following general exceptions: (1) they do not pay federal income taxes on income derived from trust lands held for them by the United States; (2) they do not pay state income tax on income earned on a federal reservation; (3) they do not pay state sales taxes on transactions occurring on a federal reservation; and (4) they do not pay local property taxes on reservation or trust lands.

Voting, Public Office. Indians have the same right to vote and hold public office as other citizens.

Ownership of Land. Indians have the same right to own land as other citizens. Nearly all lands of Indian tribes, however, are held by the United States in trust for those tribes, and there is no general law that permits a tribe to sell its land. Individual Indians also own trust land and, upon the approval of the Secretary of the Interior or his representative, such an individual may sell his land. If an individual Indian wishes to extinguish the trust title to his land and hold title like any other citizen, he can do so only after the Secretary of the Interior or his authorized representative makes a determination that he is capable of managing his own affairs.

If an Indian wishes to buy "non-trust" land and has the money to do so, he may buy it and hold the same type of title to it as would any other citizen.

Indian Reservations. An Indian reservation is an area of land reserved for Indian use. The name comes from the early days when Indian tribes relinquished land through treaties, "reserving" a portion for their own use. Congressional acts, executive orders, and administrative acts have also created reservations. Reservations today, however, may have non-Indian residents and non-Indian landowners.

Indian Tribes. "Tribe" among the North American Indians originally meant a body of persons, bound together by blood ties, who were socially, politically, and religiously organized, and who lived together, occupying a definite territory and speaking a common language or dialect.

The establishment of the reservation system created some new tribal groupings when members of two or three tribes were placed together on one reservation or members of one tribal group spread over two or more reservations.

There are four federally recognized Indian tribes in the northeastern portion of Kansas, primarily located in Brown and Jackson counties and Richardson County, Nebraska. These include the Iowa tribe of Kansas and Nebraska, the Kickapoo tribe in Kansas, the Sac and Fox tribes also in Missouri, and the Prairie Band of Pottawatomie Indians. Each tribe has its own reservation previously set aside by the United States for its use and benefit. Within the overall reservation boundaries, there are 7,639.59 acres of tribally owned land and 21,957.92 acres of allotted lands held in trust or restricted status for individual tribe members. There are approximately 1,741 total tribal members residing within the reservations. The Bureau of Indian

Affairs, Horton Agency, serves these tribes and their members in matters relating to their trust lands, income, and other services mandated by Congress.

Tribal Government. The governing body of the tribe is generally referred to as the tribal council and is made up of councilmen elected by vote of the adult members of the tribe and presided over by the tribal chairman. The tribal council elected in this way has authority to speak and act for the tribe and to represent it in negotiations with federal, state, and local governments.

Tribal governments, in general, define conditions of tribal membership, regulate domestic relations of members, prescribe rules of inheritance for reservation property not in trust status, levy taxes, regulate property under tribal jurisdiction, control conduct of members by tribal ordinances, and administer justice.

Indian Property, Payments from Federal Government. The federal government is a trustee of Indian property, not the guardian of the individual Indian. The Secretary of the Interior is authorized by law, in many instances, to protect the interest of minors and incompetents, but this protection does not confer a guardian-ward relationship.

There is no automatic payment to a person because the person is Indian. The federal government has made and continues to make nonrecurring payments to Indian tribes or individuals as compensation or damages for losses which resulted from treaty violations, for encroachments on Indian lands, or for other wrongs, past or present. Tribes or individuals may receive government checks for income from their land and resources, but only because the assets are held in trust by the Secretary of the Interior and payment for the use of the Indian resources has been collected by the federal government.

Indians and Enforcement of State Laws

Criminal Statutes. The Federal Major Crimes Act was passed in 1885. That statute, now codified at 18 U.S.C.A., Section 1153, provides in pertinent part:

> (a) Any Indian who commits against the person or property of another Indian or other person any of the following offenses, namely, murder, manslaughter, kidnapping,

> maiming, rape, involuntary sodomy, felonious sexual molestation of a minor, carnal knowledge of any female, not his wife, who has not attained the age of sixteen years, assault with intent to commit rape, incest, assault with intent to commit murder, assault with a dangerous weapon, assault resulting in serious bodily injury, arson, burglary, robbery, and a felony under section 661 of this title within the Indian country, shall be subject to the same law and penalties as all other persons committing any of the above offenses, within the exclusive jurisdiction of the United States.

The Federal Major Crimes Act has long been viewed as conferring exclusive federal jurisdiction over the enumerated federal crimes. Historically, a special relationship has existed between the federal government and members of Indian tribes, with the federal government's cession of jurisdictional power to the states over intra- and inter-tribal matters an infrequent occurrence.

Congress has, on occasion, specifically abrogated the exclusive federal jurisdiction over major crimes. For instance, 18 U.S.C.A., Section 1162, provides the states of Alaska, California, Minnesota, Nebraska, Oregon, and Wisconsin have jurisdiction over offenses committed by or against Indians in certain Indian country within those states.

The states of Kansas, Iowa, and North Dakota have been given jurisdictional grants in separate but substantially similar statutes. The statutory provision giving Kansas jurisdiction over offenses committed by or against Indians on Indian reservations is found at 18 U.S.C.A., Section 3243.

> Jurisdiction is conferred on the state of Kansas over offenses committed by or against Indians on Indian reservations, including trust or restricted allotments, within the state of Kansas, to the same extent as its courts have jurisdiction over offenses committed elsewhere within the state in accordance with the laws of the state. This section shall not deprive the courts of the United States of jurisdiction over offenses defined by the laws of the United States committed by or against Indians on Indian reservations.

The Kansas Supreme Court in State v. Mitchell, 231 Kan. 144 (1982), held that Section 3243 did not confer jurisdiction to the state of Kansas over the major crimes listed in Section 1153 noted above. Four years later, in State v. Nioce, 239 Kan 127 (1986), the court reversed itself and held that Kansas has complete but not exclusive jurisdiction over all crimes committed by or against Indians on Indian reservations located in Kansas. The latter court decision was based on a federal district court decision Iowa Tribe of Indians of Kansas and Nebraska v. State of Kansas, No. 83-4304 (D. Kan. 1984), which considered added relevant legislative history to Section 3243 not considered in Mitchell.

Other State Laws and their Application to Indians. A recent state district court decision, Jackson County v. Kaul, No. 87 C 84, May 3, 1988, held county zoning laws did not apply to Indian reservation lands.

A law enacted by the 1988 Legislature (L. 1988 Ch. 483) permits, among other things, the wholesale of cigarettes on Indian reservations without the payment of state cigarette taxes.

The Attorney General has opined in Opinion No. 82-221 that Kansas could not enforce its bingo regulatory scheme on Indian reservations since the state did not criminally prohibit this activity. A similar conclusion was reached in Opinion No. 87-101 regarding pull-tab games since lottery games are no longer criminally prohibited.

Testimony of Conferees

The Committee heard from a number of persons representing Indian groups, including the chairman of the Prairie Band of the Pottawatomie, the Native Americans in Kansas for Sovereignty, the superintendent of the Horton Bureau of Indian Affairs Office, various members of the Kickapoo and the Pottawatomie tribes, a Lawrence attorney who had represented various Indian tribes and groups, a South Dakota attorney representing an individual, and a representative of the Apache tribe. Representatives of other Indian groups also attended the public hearing. The Jackson and Brown County Sheriffs and county attorneys testified, as well as a former assistant Attorney

General. In addition, the Attorney General sent a letter to the Committee.

Representatives of the Indian groups and individuals raised various issues. The Lawrence attorney suggested the state of Kansas and the United States government issue an apology to the Indian nations for treaty and sovereignty violations of the past. He asked that the state request the federal government to repeal of 18 U.S.C.A. Section 3243 and to enforce provisions of the Snyder Act, which would provide funds to set up tribal courts, police forces, and health officials to deal with crimes not covered by the federal Major Crimes Act. The South Dakota attorney suggested that a concurrent resolution be passed by the state Legislature requesting Congress repeal 18 U.S.C.A. Section 3243.

The Chairman of the Prairie Band Pottawatomie said the four tribes of Kansas never consented to state jurisdiction over criminal matters on Indian lands. A representative of the sovereign Kickapoo favored tribes governing themselves. This latter point was affirmed by a member of the Apache tribe.

The BIA official said that as long as section 3243, giving the state of Kansas concurrent criminal jurisdiction was in effect, money could not be made available for the tribes to set up their own court and police force systems.

Law enforcement representatives and the Attorney General in a letter asserted that the state should continue to assert jurisdiction over crimes committed on reservations. Several representatives expressed concern that a vacuum in law enforcement could be created if the state withdrew from law enforcement prior to the time a separate legal system was fully implemented.

Committee Conclusions and Recommendations

The Committee concludes that no recommendation on the issue of state jurisdiction over Indian people should be made at this time. The Committee believes that the state of Kansas has very limited power in this general subject area. The specific request that was made by several persons that 18 U.S.C.A. Section 3243 conferring concurrent state criminal jurisdiction over Indian reservations be

repealed is within the sole power of the United States Congress. Further, funding of Indian police forces and courts is also within the province of Congress.

The Committee does believe that the Legislature should be open to the idea of cooperating with the Indian tribes in requesting Congress to repeal Section 3243 and to provide funding of Indian police forces and court systems at a future time if the four tribes should jointly make this request of the Legislature.

Respectfully submitted,

November 22, 1988

Sen. Robert Frey, Chairman
Special Committee on Judiciary

Rep. Robert Wunsch,
Vice-Chairman
Rep. Joan Adam
Rep. Barbara P. Allen
Rep. Edwin Bideau
Rep. Ben Foster
Rep. Jeff Freeman
Rep. Michael Peterson
Rep. Alex Scott**
Rep. Kathleen Sebelius
Rep. Vincent Snowbarger
Rep. John Solbach*

Sen. Richard Bond
Sen. Paul Feleciano, Jr.
Sen. Jeanne Hoferer
Sen. Audrey Langworthy
Sen. William Mulich

* Ranking Minority Member

** Representative Scott was assigned to the Committee on June 30, 1988.

House Judiciary Committee
Legislative Proposals
January 23, 1991

OFFICE OF JUDICIAL ADMINISTRATION: (Paul Shelby, OJA)
Proposal to update wage garnishment calculations and forms to reflect changes in the federal minimum wage law that will be effective April 1, 1991. From $3.80 to $4.25.

DISTRICT COURT ADMINISTRATORS AND CLERKS OF THE DISTRICT COURT:
(Al Singleton, Administrator, Manhattan) (Clerks Records and Duties) Proposal to amend K.S.A. 59-212 and 60-2601 to update present procedures and to elimate the requirement of duplicate copies.

COURT SERVICES OFFICERS: (Cathy Leonhart, CSO, Topeka)
(Children in Need of Care) Grandparent Notice - Proposal to amend K.S.A. 38-1562 (b) and K.S.A. 38-1584 (b) to change the requirement of restricted mail to certified mail on the Notice of Hearing and to elimate the requirement of additional notices if there has been no response to the first notice.

DISTRICT MAGISTRATE JUDGES: (Paul Shelby, OJA)
(Time Limitations)- Juvenile Offender Code - Proposal to amend K.S.A. 38-1603 allowing the time frame for sex offenses to be commenced within five years which would be the same as it appears in the criminal code (K.S.A. 21-3106).

DISTRICT COURT TRUSTEES: (Kay Farley, OJA)
Workers Compensation - Proposal to amend K.S.A. 44-514 to allow compensation be subject to enforcement of an order for child support.
Another bill that would propose a new law to give access to records of labor unions, assocations, and agencies to assist court trustees, SRS, and private attorneys in identifying obligors' income sources and health insurance information for child support purposes.

HJUD
1/23/91
ATTACHMENT 6

As Amended by House Committee

As Amended by Senate Committee

Session of 1990

SENATE BILL No. 772

By Committee on Ways and Means

3-14

AN ACT concerning civil procedure; relating to garnishment; amending K.S.A. 1989 Supp. 60-718 and repealing the existing section; also amending Form No. 8a in the appendix of forms following K.S.A. 1989 Supp. 61-2605 and repealing the existing form.

Be it enacted by the Legislature of the State of Kansas:

Section 1. K.S.A. 1989 Supp. 60-718 is hereby amended to read as follows: 60-718. (a) Within 10 days after service upon a garnishee of an order of garnishment issued to attach any property, funds, credits or indebtedness belonging to or owing the defendant, other than earnings, the garnishee shall file a verified answer thereto with the clerk of the court, stating the facts with respect to the demands of the order. The answer of the garnishee shall be sufficient if substantially in the following form, but the garnishee's answer shall contain not less than that prescribed in the form:

ANSWER OF GARNISHEE

State of Kansas

County of _____

_____ being first duly sworn, say that on the _____ day of _____, 19____, I was served with an order of garnishment in the above entitled action, that I have not delivered to the defendant _____, any money, personal property, goods, chattels, stocks, rights, credits nor evidence of indebtedness belonging to the defendant, other than earnings, since receiving the order of garnishment, and that the following is a true and correct statement:

(1) (Money or indebtedness due) I hold money or am indebted to the defendant, other than for earnings due and owing defendant, as of the date of this answer, in the following manner and amounts: _____.

(2) (Personal property in possession) I have possession of personal property, goods, chattels, stocks, rights, credits, or effects of the defendant, as of the date of this answer, described and having an estimated value as follows: _____.

(3) (To be answered by garnishee who is an executor or administrator of an estate) I am an _____ (executor or administrator) of the estate

6-2

BILL DRAFT--CLERKS REQUEST

Be it enacted by the Legislature of the State of Kansas:

Section 1. K. S. A. 1990 Supp. 59-212 is hereby amended to read as follows: 59-212. The following shall be kept by the court for proceedings under chapter 59 of the Kansas Statutes Annotated:

(1) An appearance docket, in which shall be listed under the name of the decedent, ward, conservatee, mentally ill person, or other person involved, all documents pertaining thereto and in the order filed, except that separate appearance dockets, not open to public inspection shall be kept for proceedings under the treatment act for mentally ill persons and adoptions. Such list shall show the nature of the document, the date of the filing thereof, shall give a reference to the volume and page of any other book or reference to microfilm in which any record shall have been made of such document, and shall state the charge, if any, therefor.

(2) A suitable general index, in which files pertaining to estates of decedents shall be indexed under the name of the decedent, those pertaining to guardianships under the name of the ward, those pertaining to conservatorships under the name of the conservatee, those pertaining to mentally ill persons under the name of such person, those pertaining to adoption of children under both the name and adopted name of the child. After the name of each file shall be shown the ~~file number, the appearance docket sheet, by~~ case number~~, on which the documents pertaining to such file are listed, and the date of filing of the first document~~.

(3) A suitable index pertaining to wills deposited pursuant to K.S.A. 59-620 and amendments thereto, under the name of the testator.

~~(4) A suitable permanent duplicate copy shall be kept by the district court of: (1) All wills admitted to probate; (2) all elections filed; (3) all letters of appointment issued; (4) all certificates of appointment filed; (5) all bonds filed; (6) all orders, judgments, and decrees; including inheritance tax orders, and (7) such other documents as the court may determine.~~

Section 2. K. S. A. 1990 Supp. 60-2601 is hereby amended to read as follows: 60-2601. (a) *General powers and duties.* In the performance of their duties all clerks of record shall be under the direction of the court.

(b) *Dockets ~~and journals~~.* Subject to the provisions of K.S.A. 60-2601a and amendments thereto, the clerk of the court shall keep the following dockets ~~and journals and such other books~~ or *other* records which may be ordered by the court in the following manner:

(1) *Appearance docket.* The clerk shall keep one or more appearance dockets and shall enter each civil action in the docket. Actions within each appearance docket shall be assigned consecutive file numbers. The file number of each action shall be noted on ~~the page of~~ the docket on which the first entry of the action is made. All papers filed with the clerk, all process issued and returns made and, all appearances, orders, verdicts and judgments shall be noted chronologically ~~in~~ *on* the appearance docket ~~on the page assigned to the action and shall be marked with its file number~~. These notations shall be brief but shall show the nature of each paper filed or writ issued and the substance of each order or judgment of the court and of the returns showing execution of process. ~~The notation of an order or judgment shall show the date the notation is made.~~

(2) *General index.* The general index shall be kept in a form in which names are arranged in alphabetical order. Plaintiffs, petitioners, defendants and respondents shall be listed as well as the case file number.

(c) *Issuance of writs and orders.* All writs and orders for provisional remedies shall be issued by the clerks of the several courts, upon praecipes filed with the clerk, demanding the writs and orders.

(d) *Filing and preservation of papers.* Except as otherwise provided by law, it is the duty of the clerk of each of the courts to file together and carefully preserve in the office of the clerk all papers delivered to the clerk for that purpose, in every action or special proceeding. The clerk shall keep the papers separate in each case, carefully enveloped in a wrapper or folder labeled with the title of the cause. Orders and journal entries requiring the signature of the judge shall have the date and time of day stamped on them by the clerk immediately upon receipt of the signed order or journal entry and the clerk or deputy shall initial the stamp. ~~Journal entries of judgment shall be copied and the copy shall be stored separately from the case file to provide security for the case file.~~ The clerk shall stamp on all other filed papers, the date and time of day of receiving them and initial the stamp. ~~The clerk shall stamp on every order for a provisional remedy and every undertaking given in that order, the date of its return to the office of the clerk and initial the stamp.~~

Section 3. K.S.A. 1990 Supp. 59-212 and 60-2601 are hereby repealed.

Section 4. This act shall take effect and be in force from and after its publication in the statute book.

4061T

BILL DRAFT--CSO REQUEST

Be it enacted by the Legislature of the State of Kansas:

Section 1. K. S. A. 38-1562 is hereby amended to read as follows: 38-1562. (a) At any time after a child has been adjudicated to be a child in need of care and prior to disposition, the judge shall permit any interested parties, and any persons required to be notified pursuant to subsection (b), to be heard as to proposals for appropriate disposition of the case.

(b) Before entering an order placing the child in the custody of a person other than the child's parent, the court shall require notice of the time and place of the hearing to be given to all the child's grandparents at their last known addresses or, if no grandparent is living or if no living grandparent's address is known, to the closest relative of each of the child's parents whose address is known. Such notice shall be given by ~~restricted~~ *certified* mail not less than 10 business days before the hearing and shall state that the person receiving the notice shall have an opportunity to be heard at the hearing. *The notice shall also advise the persons of the provisions of K.S.A. 38-1541.* The provisions of this subsection shall not require additional notice ~~to any person otherwise receiving notice~~ of the hearing pursuant to K.S.A. 38-1536 and amendments thereto.

Section 2. K. S. A. 38-1584 is hereby amended to read as follows: 38-1584. (a) *Purpose of section.* The purpose of this section is to provide stability in the life of a child who must be removed from the home of a parent, to acknowledge that time perception of a child differs from that of an adult and to make the ongoing physical, mental and emotional needs of the child the decisive consideration in proceedings under this section. The primary goal for all children whose parents' parental rights have been terminated is placement in a permanent family setting.

(b) ~~*Notice of dispositional hearing.* After terminating parental rights and before granting custody of the child for adoption proceedings or long-term foster care, the court shall require notice of the time and place of the hearing on custody to be given to all the child's grandparents at their last known addresses or, if no grandparent is living or if no living grandparent's address is known, to the closest relative of each of the child's parents whose address is known. Such notice shall be given by restricted mail not less than 10 business days before the hearing. The provisions of this subsection shall not require additional notice to any person otherwise receiving notice of the hearing pursuant to K.S.A. 38-1536 and amendments thereto.~~

~~(c)~~ *Actions by the court.* (1) *Custody for adoption.* When parental rights have been terminated and it appears that adoption is a viable alternative, the court shall enter one of the following orders:

(A) An order granting custody of the child, for adoption proceedings, to a reputable person of good moral character, the secretary or a corporation organized under the laws of the state of Kansas authorized to care for and surrender children for adoption as provided in K.S.A. 38-112, *et seq.* and amendments thereto. The person, secretary or corporation shall have authority to place the child in a family home, be a party to proceedings and give consent for the legal adoption of the child which shall be the only consent required to authorize the entry of an order or decree of adoption.

(B) An order granting custody of the child to proposed adoptive parents and consenting to the adoption of the child by the proposed adoptive parents.

(2) *Custody for long-term foster care.* When parental rights have been terminated and it does not appear that adoption is a viable alternative, the court shall enter an order granting custody of the child for foster care to a reputable person of good moral character, a youth residential facility, the secretary or a corporation or association willing to receive the child, embracing in its objectives the purpose of caring for or obtaining homes for children.

(3) *Preferences in custody for adoption or long-term foster care.* In making an order under subsection ~~(c)~~*(b)*(1) or (2), the court shall give preference, to the extent that the court finds it is in the best interests of the child, first to granting such custody to a relative of the child and second to granting such custody to a person with whom the child has close emotional ties.

~~(d)~~*(c) Guardian and conservator of child.* The secretary shall be guardian and conservator of any child placed in the secretary's custody, subject to any prior conservatorship.

~~(e)~~*(d) Reports and review of progress.* After parental rights have been terminated and up to the time an adoption has been accomplished, the person or agency awarded custody of the child shall within 60 days submit a written plan for permanent placement which shall include measurable objectives and time schedules and shall thereafter not less frequently than each six months make a written report to the court stating the progress having been made toward finding an adoptive or long-term foster care placement for the child. Upon the receipt of each report the court shall review the contents thereof and determine whether or not a hearing should be held on the subject.

In any case, the court shall notify all interested parties and hear evidence regarding progress toward finding an adoptive home or the acceptability of the long-term foster care plan within 18 months after parental rights have been terminated and every 12 months thereafter. If the court determines that inadequate progress is being made toward finding an adoptive placement or establishing an acceptable long-term foster care plan, the court may rescind its prior orders and make other orders regarding custody and adoption that are appropriate under the circumstances. Reports of a proposed adoptive placement need not contain the identity of the proposed adoptive parents.

~~(E)~~ *(e) Discharge upon adoption.* When the adoption of a child has been accomplished, the court shall enter an order discharging the child from the court's jurisdiction in the pending proceedings.

Section 3. K.S.A. 38-1562 and K.S.A. 1990 Supp. 38-1584 are hereby repealed.

Section 4. This act shall take effect and be in force from and after its publication in the statute book.

4065T

BILL DRAFT--MAGISTRATES REQUEST

Be it enacted by the Legislature of the State of Kansas:

Section 1. K. S. A. 38-1603 is hereby amended to read as follows: 38-1603. (a) Proceedings under this code must be commenced within two years after the act giving rise to the proceedings is committed, except that proceedings involving acts committed by a juvenile which, if committed by an adult, would constitute a violation of K.S.A. 21-3401 or 21-3402, and amendments thereto, may be commenced at any time.

(b) *Except as provided by subsection (a), a proceeding under this code for any of the following acts committed by a juvenile which, if committed by an adult, would constitute a violation of any following statutes must be commenced within five years after its commission if the victim is less than 16 years of age: (1) Indecent liberties with a child as defined in K.S.A. 21-3503 and amendments thereto; (2) aggravated indecent liberties with a child as defined in K.S.A. 21-3504 and amendments thereto; (3) aggravated criminal sodomy as defined in K.S.A. 21-3506 and amendments thereto; (4) enticement of a child as defined in K.S.A. 21-3509 and amendments thereto; (5) indecent solicitation of a child as defined in K.S.A. 21-3510 and amendments thereto; (6) aggravated indecent solicitation of a child as defined in K.S.A. 21-3511 and amendments thereto; (7) sexual exploitation of a child as defined in K.S.A. 21-3516 and amendments thereto;*
or (8) aggravated incest as defined in K.S.A. 21-3603 and amendments thereto.

(c) The period within which the proceedings must be commenced shall not include any period in which:

(1) The accused is absent from the state;

(2) the accused is so concealed within the state that process cannot be served upon the accused; or

(3) the fact of the offense is concealed.

Section 3. K.S.A. 38-1603 is hereby repealed.

Section 4. This act shall take effect and be in force from and after its publication in the statute book.

BILL DRAFT

Be it enacted by the Legislature of the State of Kansas:

Section 1. K.S.A. 44-514. No claim for compensation, or compensation agreed upon, awarded, adjudged, or paid shall be assignable or subject to levy, execution, attachment, garnishment, or any other remedy or procedure for the recovery or collection of a debt, and this exemption cannot be waived~~.~~ *except such claim for compensation, or compensation agreed upon, awarded, adjudged, or paid, shall be subject to enforcement of an order for support as defined in K.S.A. 23-4, 106(e) and amendments thereto.*

Section 2. K.S.A. 44-514 is hereby repealed.

Section 3. This act shall take effect and be in force from and after its publication in the statute book.

BILL DRAFT

Be it enacted by the Legislature of the State of Kansas:

Section 1. It shall be the affirmative duty of any labor union, professional society or association, trade association, or governmental licensing, disciplinary or registering agency which is not a payor under K.S.A. 23-4,106(f) to respond within 10 days to written requests for information presented by a public office as defined in K.S.A. 23-4,106(g) concerning: (1) The full name of an obligor, as defined in K.S.A. 23-4,106(d); (2) the current address of an obligor; (3) the obligor's social security number; (4) the obligor's employer and work location; (5) the obligor's health insurance coverage if provided by the union, society, or association; (6) the obligor's gross income; (7) the obligor's net income; (8) an itemized statement of deductions from the obligor's income; (9) the obligor's pay schedule; (10) the obligor's health insurance coverage; and (11) whether or not income owed to the obligor is being withheld pursuant to this act. Any union, society, association or agency which fails to supply information known to the union, society, association, or governmental agency and which is requested to supply the information as above shall be subject to a civil penalty not exceeding $1,000 and such other equitable relief as the court considers proper.

Section 2. This act shall take effect and be in force from and after its publication in the statute book.

(As Amended by SHL Committee on Taxation-A)

SILVER HAIRED LEGISLATURE BILL NO. 715

By PSA 10

AN ACT relating to property; concerning contract for deed sales; dealing with the duties of the real estate commission; amending ~~K.S.A. 74-4202 and~~ K.S.A. ~~1989~~ 1990 Supp. 58-3062 and repealing the existing ~~sections~~ section.

Be it enacted by the Silver Haired Legislature of the State of Kansas:

New Section 1. (a) Written agreements or contract for deed sales of real estate property shall be governed by the language in the contract or agreement and shall not give the buyer an equitable mortgage or interest on or in the property unless specifically stated in the contract or agreement. Such affidavit of equitable interest shall be signed by both the buyer and seller.

(b) On and after July 1, 1991, if an affidavit of equitable interest filed and recorded ~~legally~~ by the buyer or for the buyer by a broker or title insurance company at the date of sale, such affidavit, unless specifically contemplated in the original contract or agreement, is automatically nullified and void on the date of breach of contract or a default of executory contract by the buyer or buyer's abandonment of property. On this date if the

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affidavit of equitable interest is not void, it becomes an unlawful detainer of the buyer on the property of the seller-owner.

Sec. 2. K.S.A. 1990 Supp. 58-3062 is hereby amended to read as follows: 58-3062. (a) No licensee shall:

(1) Intentionally use advertising that is misleading or inaccurate in any material particular or that in any way misrepresents any property, terms, values, policies or services of the business conducted, or uses the trade name, collective membership mark, service mark or logo of any organization owning such name, mark or logo without being authorized to do so.

(2) Fail to account for and remit any money which comes into the licensee's possession and which belongs to others.

(3) Commingle the money or other property of the licensee's principals with the licensee's own money or property, except that nothing herein shall prohibit a licensee from depositing in a trust account a sum not to exceed $100 to pay expenses for the use and maintenance of such account.

(4) Accept, give or charge any rebate or undisclosed commission or pay a referral fee to a person who is properly licensed as a broker or salesperson in another jurisdiction or who holds a corporate real estate license in another jurisdiction if the licensee knows that the payment of the referral fee will result in the payment of a rebate by the out-of-state licensee.

(5) Represent or attempt to represent a broker without the broker's express knowledge and consent.

(6) Act in a dual capacity of agent and undisclosed

principal in any transaction.

(7) Guarantee or authorize any person to guarantee future profits that may result from the resale of real property.

(8) Place a sign on any property offering it for sale or lease without the written consent of the owner or the owner's authorized agent.

(9) Offer real estate for sale or lease without the knowledge and consent of the owner or the owner's authorized agent or on terms other than those authorized by the owner or the owner's authorized agent.

(10) Induce any party to break any agency agreement or contract of sale or lease.

(11) Solicit a listing or negotiate a sale, exchange or lease of real estate directly with an owner or lessor if the licensee knows that such owner or lessor has, with regard to the property, a written agency agreement granting an exclusive right to sell or lease to another broker.

(12) Solicit an agency agreement or negotiate a sale, exchange or lease of real estate directly with a buyer or lessee if the licensee knows that such buyer or lessee has a written agency agreement granting exclusive representation to another broker.

(13) Fail to obtain a written agency agreement, including a fixed date of expiration, signed by the party to be represented and by the licensee or fail to furnish a copy of the agreement to the principal within a reasonable time.

(14) If the licensee represents the seller or lessor, fail

to disclose to a prospective buyer or lessee that: (A) The licensee is or will be acting as agent of the seller or lessor with the duty to represent the seller's or lessor's interest; (B) the licensee will not be the agent of the prospective buyer or lessee; and (C) information given to the licensee will be disclosed to the seller or lessor. The disclosure shall be made orally or in writing when the licensee agrees to assist the prospective buyer or lessee to locate and inspect property and shall be made in any contract for sale or lease.

(15) If the licensee represents the buyer or lessee, fail to disclose to a prospective seller or seller's agent, or lessor or lessor's agent, that: (A) The licensee is or will be acting as agent of the buyer or lessee with the duty to represent the buyer's or lessee's interest; (B) the licensee will not be the agent of the seller or lessor; and (C) information given to the licensee will be disclosed to the buyer or lessee. The disclosure shall be made orally or in writing no later than the first showing of the property and shall be made in any contract for sale or lease.

(16) If the licensee represents both the buyer and seller or both the lessor and lessee, the licensee shall immediately disclose in writing: (A) That the licensee is acting as agent for both buyer and seller or for both lessor and lessee; and (B) the compensation arrangement. The disclosure shall be signed by both the buyer and the seller or both the lessor and lessee. In addition, the disclosure of the agency relationship between all licensees involved and the principals shall be included in any

contract for sale or lease.

(17) Offer or give prizes, gifts or gratuities which are contingent upon listing, purchasing or leasing real estate.

(18) Enter into a listing agreement on real property in which the broker's commission is based upon the difference between the gross sales price and the net proceeds to the owner.

(19) Fail to see that financial obligations and commitments between the parties to an agreement to sell, exchange or lease real estate are in writing, expressing the exact agreement of the parties or to provide, within a reasonable time, copies thereof to all parties involved.

(20) Procure a signature to a purchase contract which has no definite purchase price, method of payment, description of property or method of determining the closing date.

(21) Engage in fraud or make any substantial misrepresentation.

(22) Represent to any lender, guaranteeing agency or any other interested party, either verbally or through the preparation of false documents, an amount in excess of the true and actual sale price of the real estate or terms differing from those actually agreed upon.

(23) Fail to make known to any purchaser or lessee any interest the licensee has in the real estate the licensee is selling or leasing or to make known to any seller or lessor any interest the licensee will have in the real estate the licensee is purchasing or leasing.

(24) Fail to inform both the buyer, at the time an offer is

made, and the seller, at the time an offer is presented, that certain closing costs must be paid and the approximate amount of such costs.

(25) Fail without just cause to surrender any document or instrument to the rightful owner.

(26) Accept anything other than cash as earnest money unless that fact is communicated to the owner prior to the owner's acceptance of the offer to purchase, and such fact is shown in the purchase agreement.

(27) Fail to deposit any check or cash received as an earnest money deposit within five business days after the purchase agreement is signed by all parties, unless otherwise specifically provided by written agreement of all parties to the purchase agreement.

(28) Fail in response to a request by the commission or the director to produce any document, book or record in the licensee's possession or under the licensee's control that concerns, directly or indirectly, any real estate transaction or the licensee's real estate business.

(29) Fail to submit a written bona fide offer to the licensee's principal when such offer is received prior to the principal's accepting an offer in writing and before the licensee has knowledge of such acceptance.

(30) Refuse to appear or testify under oath at any hearing held by the commission.

(31) Demonstrate incompetency to act as a broker, associate broker or salesperson.

(32) Fail to disclose, or ascertain and disclose, to any person with whom the licensee is dealing, any material information which relates to the property with which the licensee is dealing and which such licensee knew or should have known.

(33) Act as an escrow agent in contract for deed sales.

(b) Failure to comply with any requirement of subsection (a)(13), (14), (15) or (16) or their corollary rules and regulations shall not by itself render any agreement void or voidable nor shall it constitute a defense to any action to enforce such agreement or any action for breach of such agreement.

(c) The commission, by rules and regulations, may provide suggested forms of agency disclosure and agency agreements and such other prohibitions, limitations and conditions relating thereto as the commission may prescribe.

(d) No salesperson or associate broker shall:

(1) Accept a commission or other valuable consideration from anyone other than the salesperson's or associate broker's employing broker or the broker with whom the salesperson or associate broker is associated.

(2) Fail to place, as soon after receipt as practicable, any deposit money or other funds entrusted to the salesperson or associate broker in the custody of the broker whom the salesperson or associate broker represents.

(3) Act as an escrow agent in contract for deed sales.

(e) No broker shall:

(1) Pay a commission or compensation to any person for

performing the services of an associate broker or salesperson unless such person is licensed under this act and employed by or associated with the broker, except that nothing herein shall prohibit the payment of a referral fee to a person who is properly licensed as a broker or salesperson in another jurisdiction.

(2) Fail to deliver to the seller in every real estate transaction, at the time the transaction is closed, a complete, detailed closing statement showing all of the receipts and disbursements handled by the broker for the seller, or fail to deliver to the buyer a complete statement showing all money received in the transaction from such buyer and how and for what the same was disbursed, or fail to retain true copies of such statements in the broker's files, except that the furnishing of such statements to the seller and buyer by an escrow agent shall relieve the broker's responsibility to the seller and the buyer.

(3) Fail to properly supervise the activities of an associated or employed salesperson or associate broker.

(4) Lend the broker's license to a salesperson, or permit a salesperson to operate as a broker.

(5) Fail to provide to the principal a written report every 30 days, along with a final report, itemizing disbursements made by the broker from advance listing fees.

(6) Act as an escrow agent in contract for deed sales.

~~Sec.--3.---K.S.A.--74-4202-is-hereby-amended-to-read-as-follows:~~ ~~74-4202.---(a)-Within-thirty-(30)-~~30~~-days-after-the-appointment-of-the-members-to--be--regularly--appointed--within--any--year,--the~~

commission shall meet in the city of Topeka for the purpose of organizing by selecting from its membership a chairperson and such other officers as the commission may deem necessary and appropriate. A majority of the members of the commission shall constitute a quorum for the exercise of the powers or authority conferred upon it.

(b) The commission shall receive applications for, and issue licenses to, brokers and salespersons, as provided in this act and shall administer the provisions of this act. The commission may do all things necessary and convenient for carrying into effect the provisions of this act and may adopt rules and regulations not inconsistent with it. For the purpose of this act, the commission shall make all necessary investigations, and every licensee shall furnish to the commission such evidence as the licensee may have as to any violation of this act or any rules and regulations adopted hereunder. The commission may enforce any order by an action in the district court of the county where the alleged violator resides or where the violation allegedly occurred.

(c) Each member of the commission shall be paid compensation, subsistence allowances, mileage and other expenses as provided in K.S.A. 75-3223 and amendments thereto.

(d) The commission shall hold meetings and hearings in the city of Topeka or at such places as it shall determine at such times as it may designate and on request of two (2) or more of its members.

(e) The commission shall maintain an office in the city of

~~Topeka, and all files, records and property of the commission shall at all times be and remain therein. All records kept in the office of the commission under authority of this act shall be open to public inspection under such reasonable rules and regulations as the commission may prescribe.~~

~~(f) The commission shall adopt a seal by which it shall attest its proceedings. Copies of all records and papers required by law or the commission to be filed in the office of the commission, when duly certified by the director, assistant director or chairperson of the commission and attested by the seal of the commission, shall be received in evidence in all courts of the state of Kansas equally and with like effect as the originals.~~

~~(g) The commission shall establish and maintain a telephone line to receive reports of problems occurring in real estate transactions and assist those persons having questions involving real estate sales procedures.~~

Sec. 3. K.S.A. ~~74-4202 and K.S.A.~~ 1990 Supp. 58-3062 ~~are~~ is hereby repealed.

Sec. 4. This act shall take effect and be in force from and after its publication in the statute book.

KANSAS BAR ASSOCIATION

January 13, 1991

Hon. John Solbach
Chair, House Judiciary Committee
Statehouse
Topeka, KS 66612

Re: KBA Legislative Package, House Judiciary Committee

Dear John,

Enclosed is a packet of bills the Kansas Bar Association would request be introduced as committee bills through House Judiciary. A quick synopsis plus background material on each issue is enclosed, and copies are enclosed for Committee members. I'll get with you separately to discuss possible hearing dates.

Thank you.

Cordially,

Ron Smith
Legislative Counsel

/enc
cc: House Judiciary Committee

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1200 Harrison • P.O. Box 1037 • Topeka, Kansas 66601-1037 • FAX (913) 234-3813 • Telephone (913) 234-5696

House Judiciary Committee
KBA Bill Requests
1991

1) Amend K.S.A. 17-2707 allowing "qualified person" to be defined as including living wills for purposes of ownership of shares in a professional corporation. This legislation in conjunction with the KSCPAs allows limited transfer ability of professional corporation stock to living trusts. Tim O'Sullivan and Linda Terrill of our Legislative Committee will provide testimony, along with someone from the CPA society.

2. Amend K.S.A. 59-403 of the probate code to allow real property as well as personal property to be set aside for living expenses of the spouse and minor children. This was suggested by the probate section of the KBA, and Nancy Roush or John Kuether will appear on it.

3. two bills that allow judicial districts optional filing fees for funding of Alternative Dispute Resolution mechanisms, and judicial taxation of the cost of ADR concepts to litigation-users of ADR. Art Thompson of our staff, and his ADR committee will provide testimony on the issues.

Proposal #1

17-2707. Professional corporation law; definitions. As used in this act, unless the context clearly indicates that a different meaning is intended, the following words mean:

(a) "Professional corporation," a corporation organized under this act.

(b) "Professional service," the type of personal service rendered by a person duly licensed by this state as a member of any of the following professions, each paragraph constituting one type:

(1) A certified public accountant;
(2) An architect;
(3) An attorney-at-law;
(4) A chiropractor;
(5) A dentist;
(6) An engineer;
(7) An optometrist;
(8) An osteopathic physician or surgeon;
(9) A physician, surgeon or doctor of medicine;

(10) A veterinarian;
(11) A podiatrist;
(12) A pharmacist;
(13) A land surveyor;
(14) A licensed psychologist;
(15) A specialist in clinical social work;
(16) A registered physical therapist;
(17) A landscape architect;
(18) A registered professional nurse.

(c) "Regulating board," the board or state agency which is charged with the licensing and regulation of the practice of the profession which the professional corporation is organized to render.

(d) "Qualified person":

(1) Any natural person licensed to practice the same type of profession which any professional corporation is authorized to practice; ~~or~~

(2) the trustee of a trust which is a qualified trust under subsection (a) of section 401 of the internal revenue code of 1954, as amended, or of a contribution plan which is a qualified employee stock ownership plan under subsection (a) of section 409A of the internal revenue code of 1954, as amended, or

(3) the trustee of a revocable living trust established by a natural person who is licensed to practice the type of profession which any professional corporation is authorized to practice, if the terms of such trust provide that such natural person is the principal beneficiary and sole trustee of such trust and such trust does not continue to hold title to professional corporation stock following such natural person's death for more than a reasonable period of time necessary to dispose of such stock.

Proposal #2

59-103. Allowance to spouse and minor children. When a resident of the state dies, testate or intestate, the surviving spouse shall be allowed, for the benefit of such spouse and the decedent's minor children during the period of their minority, from the personal property of which the decedent was possessed or to which the decedent was entitled at the time of death, the following:

or real

(1) The wearing apparel, family library, pictures, musical instruments, furniture and household goods, utensils and implements used in the home, one automobile, and provisions and fuel on hand necessary for the support of the spouse and minor children for one year.

(2) A reasonable allowance of not less than $1,500 nor more than $25,000 in money or other personal property at its appraised value in full or part payment thereof, with the exact amount of such allowance to be determined and ordered by the court, after taking into account the condition of the estate of the decedent.

The property shall not be liable for the payment of any of decedent's debts or other demands against the decedent's estate, except liens thereon existing at the time of the decedent's death. If there are no minor children, the property shall belong to the spouse; if there are minor children and no spouse, it shall belong to the minor children. The selection shall be made by the spouse, if living, otherwise by the guardian of the minor children. In case any of the decedent's minor children are not living with the surviving spouse, the court may make such division as it deems equitable.

Proposal 3A

Sec 1 ~~Sec. 59~~. K.S.A. 60-2001 is hereby amended to read as follows: 60-2001. (a) *Docket fee.* Except as otherwise provided by law, no case shall be filed or docketed in the district court, whether original or appealed, without payment of a docket fee in the amount of ~~$55~~ *$60* to the clerk of the district court.

(b) *Poverty affidavit in lieu of docket fee.* (1) *Effect.* In any case where a plaintiff by reason of poverty is unable to pay a docket fee, and an affidavit so stating is filed, no fee will be required.

(2) *Form of affidavit.* The affidavit provided for in this subsection shall be in the following form and attached to the petition:

State of Kansas, _____ County.

In the district court of the county: I do solemnly swear that the claim set forth in the petition herein is just, and I do further swear that, by reason of my poverty, I am unable to pay a docket fee.

(c) *Disposition of docket fee.* The docket fee shall be the only costs assessed in each case for services of the clerk of the district court and the sheriff. The docket fee shall be disbursed in accordance with K.S.A. 20-362 and amendments thereto.

(d) *Additional court costs.* Other fees and expenses to be assessed as additional court costs shall be approved by the court, unless specifically fixed by statute. Other fees shall include, but not be limited to, witness fees, appraisers' fees, fees for service of process outside the state, fees for depositions, transcripts and publication, attorneys' fees, court costs from other courts and any other fees and expenses required by statute. All additional court costs shall be taxed and billed against the parties as directed by the court. No sheriff in this state shall charge any district court in this state a fee or mileage for serving any paper or process.

[, *alternative dispute resolution fees*]

Sec. 2. ~~Sec. 60~~ K.S.A. 60-2003 is hereby amended to read as follows: 60-2003. Items which may be included in the taxation of costs are:

(1) The docket fee as provided for by K.S.A. 60-2001, *and amendments thereto.*

(2) The mileage, fees, and other allowable expenses of the sheriff or other officer incurred in the service of process outside of this state or in effecting any of the provisional remedies authorized by this chapter.

(3) Publisher's charges in effecting any publication of notices authorized by law.

(4) Statutory fees and mileage of witnesses attending court or the taking of depositions used as evidence.

(5) Reporter's or stenographic charges for the taking of depositions used as evidence.

(6) *The postage fees incurred pursuant to K.S.A. 60-303 or subsection (e) of K.S.A. 60-308, and amendments thereto.*

(7) Such other charges as are by statute authorized to be taxed as costs.

(8) Alternative dispute resolution fees shall be those fees, expenses and other costs arising from mediation, conciliation, arbitration, settlement conferences or other alternative dispute resolution means, whether or not such means were successful in resolving the matter or matters in dispute, which the court shall have ordered or to which the parties have agreed. The court shall have the discretion to order that the alternative dispute resolution fees be, in whole or in part, paid by or from any combination of any party or parties, from any alternative dispute resolution fund established in the judicial district where any part of the matter may be pending, or from the proceeds of any settlement or judgment.

KBA
Proposal 3B

Sec. 1. ~~Sec. 33.~~ K.S.A. 60-2001 is hereby amended to read as follows: 60-2001. (a) *Docket fee.* Except as otherwise provided by law, no case shall be filed or docketed in the district court, whether original or appealed, without payment of a docket fee in the amount of ~~$55~~ *$60* to the clerk of the district court.

(b) *Poverty affidavit in lieu of docket fee.* (1) *Effect.* In any case where a plaintiff by reason of poverty is unable to pay a docket fee, and an affidavit so stating is filed, no fee will be required.

(2) *Form of affidavit.* The affidavit provided for in this subsection shall be in the following form and attached to the petition:

State of Kansas, _____ County.

In the district court of the county: I do solemnly swear that the claim set forth in the petition herein is just, and I do further swear that, by reason of my poverty, I am unable to pay a docket fee.

(c) *Disposition of docket fee.* The docket fee shall be the only costs assessed in each case for services of the clerk of the district court and the sheriff. The docket fee shall be disbursed in accordance with K.S.A. 20-362 and amendments thereto.

(d) *Additional court costs.* Other fees and expenses to be assessed as additional court costs shall be approved by the court, unless specifically fixed by statute. Other fees shall include, but not be limited to, witness fees, appraisers' fees, fees for service of process outside the state, fees for depositions, transcripts and publication, attorneys' fees, court costs from other courts and any other fees and expenses required by statute. All additional court costs shall be taxed and billed against the parties as directed by the court. No sheriff in this state shall charge any district court in this state a fee or mileage for serving any paper or process.

Sec 2. ~~Sec. 34.~~ K.S.A. 61-2501, as amended by section 9 of 1990 House Bill No. 2439, is hereby amended to read as follows: 61-2501. (a) *Docket fee.* No case shall be filed or docketed pursuant to this chapter without the payment of a docket fee in the amount of ~~$10~~ *$15*, if the amount in controversy or claimed does not exceed $500, or ~~$30~~ $35, if the amount in controversy or claimed exceeds $500 but does not exceed $5,000, or ~~$55~~ *$60*, if the amount in controversy or claimed exceeds $5,000. If judgment is rendered for the plaintiff, the court also may enter judgment for the plaintiff for the amount of the docket fee paid by the plaintiff.

(b) *Poverty affidavit; additional court costs.* The provisions of subsections (b), (c) and (d) of K.S.A. 60-2001 and amendments thereto shall be applicable to actions pursuant to this chapter.

(c) Each judicial district is hereby granted the power to assess, by local court rule, an additional docketing fee of up to $5.00. Said additional docketing fee shall be utilized to promote and facilitate developing, implementing and providing alternative dispute resolution services within the judicial district.

(e) Each judicial district is hereby granted the power to assess, by local court rule, an additional docketing fee of up to $5.00. Said additional docketing fee shall be utilized to promote and facilitate developing, implementing and providing alternative dispute resolution services within the judicial district.