



**PRIVATIZATION AS AN OPTION FOR
CONSTRUCTING AND OPERATING
LOCAL JAILS IN FLORIDA**

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Advisory Council on Intergovernmental Relations



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**PRIVATIZATION AS AN OPTION FOR CONSTRUCTING
AND OPERATING LOCAL JAILS IN FLORIDA**

OCT 10 1994

EXECUTIVE SUMMARY**ACQUISITIONS**

This report identifies and discusses the major issues that have been raised in debates pertaining to the privatization of local jails. In presenting a review of relevant literature and the experiences of jurisdictions in Florida and other states with the privatization of jails and prisons, a number of findings are highlighted. These findings are summarized as follows:

- * According to the United States General Accounting Office, a total of eighteen local jails in seven states were operated by private contractors as of November 1990. With the exception of the Detroit Municipal Jail, each of these facilities formerly was operated by the county government, and a majority were located in the state of Texas.
- * Currently, local jails in two Florida counties are operated by private firms. In Bay County, the county contracted with Corrections Corporation of America (CCA) in 1985, while Hernando County established a contractual arrangement for CCA to operate its jail in 1988. Although the Monroe County Jail was operated by Wackenhut Corrections Corporation for approximately 10 months in 1991, the county resumed operation of the jail after it denied a request by the contractor for additional funds to cover expenses.
- * Controversy surrounds the privatization of local jails in that there is still little conclusive evidence to support the view that the traditional advantages of the private sector in goods and services provision can be extended to the operation and construction of detention and correctional facilities. Furthermore, the courts have yet to directly address fundamental constitutional and legal questions of privatization on a national scale, and therefore have not defined the extent to which private sector involvement in the construction and operation of jails is permissible under current law.
- * In addition to financial, constitutional, and legal questions, a number of administrative and political issues should be considered and addressed by local government officials contemplating the privatization option. Concerns with the quality of services and ensuring accountability in facility operations represent a series of issues that should be dealt with administratively by governmental officials contemplating the privatization option. In the political realm, local officials must address the strong opposition to privatization that exists among significant interest groups, as well as a series of issues of concerning public accountability, management opposition, and public attitudes toward the privatization option.

The issues presented in the body of this report should be thoroughly discussed while giving consideration to increasing the level of private sector involvement in the operation and construction of local jails in Florida. In order to facilitate this discussion, this report closes by presenting a series of guidelines that can be used to structure consideration of the privatization option by government officials.

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PRIVATIZATION AS AN OPTION FOR CONSTRUCTING AND OPERATING LOCAL JAILS IN FLORIDA

Abstract

The primary objective of this report is to identify and discuss the major issues that should be addressed by state and local government officials who are considering privatization as an option for constructing and operating local jails in Florida. Although many of the issues discussed in the report initially have been raised in the context of private sector involvement in the construction and operation of state correctional facilities, they are equally applicable to detentions and corrections facilities operated by local governments.

The report is organized into three major sections. In the first section, information is presented in order to describe the current status of privatized jails both nationally as well as in Florida. In the second section, the key issues that have been raised in debates relative to privatization of prisons and jails are discussed by presenting supporting and opposing arguments, as well as available evidence used to bolster these respective positions. The final section of the report presents an analytic framework that is intended to assist policy makers who are considering the privatization of local jails.

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Appreciation is also extended to Mary Hall of the United States Government Accounting Office (GAO). Ms. Hall was a major contributor to a recent GAO report on privatization, and clarified questions about data included in the report. Finally, Professor Charles Thomas of the Center for Studies in Criminology and Law of the University of Florida, also provided helpful insights relative to data contained in the GAO report. In addition, he shared his own perspectives on the issue of governmental liability in the area of privately operated jails and prisons.

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PRIVATIZATION AS AN OPTION FOR CONSTRUCTING AND OPERATING JAILS IN FLORIDA

Although a number of state and local governments have contracted with private entities to construct and/or operate jails and prisons, substantial controversy characterizes the debate over the appropriateness and benefits associated with these policy options.¹ Such controversy exists insofar as there is little conclusive evidence to support the view that the traditional advantages of the private sector in goods and service provision² can be extended to the operation and construction of detention and correctional facilities. Furthermore, the courts have yet to directly address fundamental constitutional and legal questions of privatization in these areas, and thus have not defined the extent to which private sector involvement in the construction and operation of jails and prisons is permissible under current law. Finally, a number of political and administrative issues have arisen which policy makers need to address in order to make informed decisions relative to the appropriateness of privatizing detentions and corrections facilities.

The objective of this report is to identify and discuss the major issues to be considered by state and local government officials when considering privatization as an option for the construction and operation of local jails in Florida. Although these issues generally have been raised in the context of private sector involvement with state correctional facilities, they are equally applicable to local jails. The report is organized into three major sections. In the first section, information is presented in order to describe the current status of privatized jails both nationally as well as in Florida. In the second section, the key issues that have been raised in debates on correctional facility privatization are discussed by presenting supporting and opposing arguments as well as available evidence used to bolster these respective positions. The final section presents an analytic framework to assist policy makers who are considering the privatization of local jails.

¹ In part, private sector involvement in the construction and operation of jails and prisons is controversial because these policy options contemplate governmental arrangements with the private sector that are fundamentally different from the more traditional roles that the private sector has assumed in the detentions and corrections area. In general, these more traditional roles have been secured through contractual arrangements that provide for private sector involvement in the provision of discrete services within jails and prisons such as meals, medical care, vocational training, drug treatment, and inmate counseling. For example, see Allen, J. W., et. al., The Private Sector and State Service Delivery: Examples of Innovative Practices, (Washington, D.C.: Urban Institute Press; 1989); Savas, E. S., "Privatization and Prisons", 40 Vanderbilt Law Review 4(1987), pp. 889-899; Becker, C. and Stanley, A. D., "The Downside of Private Prisons", The Nation, 240(1985), pp. 728-730.

² According to proponents of privatization, private ownership and control are viewed as more efficient in allocating resources than public ownership and control (Donahue, 1989; Henig, 1989-90; Savas, 1987). There is a presumption that public and private enterprises have different incentive structures, hence, different efficiency or costs outcomes. Organizations operating within a competitive environment are expected to be more efficient because of pressures to maximize effort while minimizing costs; lower costs generally translate into lower prices.

**SECTION I:
THE CURRENT STATUS OF PRIVATELY OPERATED JAILS
IN THE UNITED STATES AND FLORIDA**

Overview of Privately Operated Jails Across the States³

According to the United States General Accounting Office, a total of eighteen local jails in seven states were operated by private contractors as of November, 1990 (see Chart 1).⁴ The major contractors were Corrections Corporation of America and Pricor, which together had assumed responsibility for the operation of twelve of the eighteen facilities. Wackenhut Corrections Corporation, Detentions Systems Inc., U.S. Corrections Corporation, and Texas Detention Management Inc., operated one or more of the remaining 6 facilities. With the exception of the Detroit municipal jail, each of these privatized facilities was formerly operated by the county government, and the majority were located in the state of Texas.

As the data presented in Chart 1 indicate, privately operated jails in the United States tend to be new facilities and to be of moderate size. Thus, eleven of the eighteen facilities were new, and as of 1990 housed between 117 and 500 inmates. In addition, these facilities for most part were designed to house adult male prisoners under minimum and medium security conditions (see Chart 2). Although no information was presented by the GAO to indicate whether any of the privatized facilities were built by the private contractor, the Bay County, Florida, Jail Annex was constructed by the Corrections Corporation of America, which currently is responsible for the operation of the facility.

Although the GAO presented information pertaining to the operating costs of a number of these facilities both prior and subsequent to private sector involvement, this information was deemed to be of little use and therefore has not been included here.⁵ For this reason, there is no conclusive evidence relative to the cost-savings that actually have been achieved through the privatization of local jails nationwide. Information on changes in cost and quality of service in state correctional and detention facilities under private sector management, such as those in Kentucky and Massachusetts which are discussed below, suggests that the difference between private sector and public sector costs may be

³ The data presented here are extracted from summary tables contained in United States General Accounting Office, Private Prisons: Cost Savings and BOP's Statutory Authority Need to be Resolved, (Washington, D.C.; 1991), Appendix 1, pp. 32-44.

⁴ In 1991, the Monroe County jail under the operations of Wackenhut Corrections Corporation reverted to county management. The circumstances surrounding the change of management are discussed later in this report.

⁵ Indeed, the GAO report states that researchers "did not verify the accuracy or completeness of the data or whether cost comparisons of private and public facilities met the same operational standards". See United States General Accounting Office, Private Prisons, p.15.

CHART 1- PRIVATELY OPERATED JAILS AND OPERATORS ACROSS STATES, 1990

<u>State</u>	<u>Jurisdiction</u>	<u>Capacity (Beds)</u>	<u>Company</u>	<u>New Facility vs. Existing Facility (Takeover)¹</u>
Florida	Bay County	204	Corrections Corp. of America	Takeover
	Bay County	257	Corrections Corp. of America	New Facility
	Hernando County	252	Corrections Corp. of America	Takeover
	Monroe County	320	Wackenhut Corrections Corp.	Takeover
New Mexico	Santa Fe County	256	Corrections Corp. of America	Takeover
Tennessee	Hamilton County	320	Corrections Corp. of America	Takeover
	Hamilton County	117	Corrections Corp. of America	Takeover
Texas	Zavala County	226	Detention Systems, Inc.	New Facility
	Limestone County	500	Detention Systems, Inc.	New Facility
	Pecos County	500	Pricor	New Facility
	San Saba County	500	Pricor	New Facility
	Swisher County	500	Pricor	New Facility
	Angelina County	500	Pricor	New Facility
	LaSalle County	500	Pricor	New Facility
	Newton County	440	Texas Detention Management, Inc.	New Facility
Kentucky	Jefferson County	320	U.S. Corrections Corporation	New Facility
Alabama	Tuscaloosa County	144	Pricor	New Facility
Michigan	City of Detroit	400	Wackenhut Corrections Corporation	Takeover

Source: United States Government, General Accounting Office, Private Prisons: Cost Savings and BOP's Statutory Authority Need to be Resolved, (Washington, D.C.; 1991), Appendix 1, pp. 32-44. Professor Charles W. Thomas (Center for Studies of Criminology and Law, University of Florida) is credited with compiling this information.

¹ New Facility: New facility at the time facility was taken over by the private contractors.

CHART 2 - PRIVATELY OPERATED JAILS: SECURITY LEVEL AND SEX COMPOSITION OF INMATES, 1990

<u>State</u>	<u>Jurisdiction</u>	<u>Security Level</u>	<u>Sex Composition</u>
Florida	Bay County	Minimum, medium	Male
	Bay County	Minimum, medium, maximum	Male
	Hernando County	Minimum, medium, maximum	Male and Female
	Monroe County	Minimum, medium, maximum	Male and Female; adult and juvenile
New Mexico	Santa Fe County	Minimum, medium, maximum	Male and Female; adult and juvenile
Tennessee	Hamilton County	Minimum, medium, maximum	Male
	Hamilton County	Minimum, medium, maximum	Female
Texas	Zavala County	Minimum, medium	Male
	Limestone County	Minimum, medium	Male
	Pecos County	Minimum, medium	Male
	San Saba County	Minimum, medium	Male
	Swisher County	Minimum, medium	Male
	Angelina County	Minimum, medium	Male
	LaSalle County	Minimum, medium	Male
	Newton County	Minimum, medium, maximum	Male
Kentucky	Jefferson County	Minimum	Male
Alabama	Tuscaloosa County	Minimum	Male
Michigan	City of Detroit	Minimum, medium, maximum	Male and Female

Source: United States General Accounting Office, Private Prisons: Cost Savings and BOP's Statutory Authority Need to be Resolved, (Washington, D.C.; 1991), Appendix 1, pp. 32-44. Professor Charles W. Thomas (Center for Studies of Criminology and Law, University of Florida) is credited with compiling this information.

¹ In the general case, 'maximum security' facilities are those in which custody and security of inmates are the primary concern, and which are "designed, built, and managed so as to minimize escape, disturbance, and violence, while maximizing control" over inmates. In contrast, 'medium security' facilities, while also designed to prevent escape, disturbances, and violence, impose fewer restrictions on the movement and activities of inmates. Finally, 'minimum security' institutions emphasize maximum inmate movement, freedoms, and self determination, while also adhering to procedures and methods intended to avoid escape, violence, and inmate disturbance. See Allen, H.E., and C.E. Simonson, Corrections In America, 5th Edition (New York: Macmillan; 1989), pp. 220-230.

minimal and, in both cases, costs under private sector operation are slightly above public sector operating costs.

Privately and Publicly Operated Facilities in Kentucky and Massachusetts

The Urban Institute's⁶ 1989 evaluation of privatization in Kentucky and Massachusetts is among the few well-documented assessments of changes in costs and quality of service in privately operated detentions and corrections facilities relative to facilities under government operation.

Kentucky

In Kentucky, the state-managed Blackburn Correctional Complex was compared with the privately operated Marion Adjustment Center. Although both facilities were adult, minimum security prisons, they differed in significant ways. First, the building and land used by the private contractor was provided by the firm, which means that the average costs for the private operator included costs of structure and land. Second, the privately operated facility had a larger percentage of "property" offenders (53% to 41%), while the state-operated facility had a larger percentage of "violent" offenders (46% to 32%). Consequently, the institutions differed in length of sentence served by offenders. Sixty-two percent of the inmates of the state-operated facility were serving from 1 to 10 years, compared with 78 percent in the privately operated facility. However, 25 percent of the offenders of the state-operated facility were serving sentences of 25 years and over, compared to 10 percent in the privately operated facility.

In the Kentucky comparison, information was collected from three sources. First, a survey of corrections staff and offenders was undertaken; second, in-depth interviews with wardens at both institutions were conducted; and third, information was collected from inmate files. Direct and indirect costs were examined to assess differences across both facilities: personnel, meal, education, utility, insurance, property tax and performance bonds, and capital costs. Costs for one year only were compared: January to December 1987 for the privately operated facility, and the 1987-88 fiscal year for the state-operated facility. The overall cost was \$30.00 per day per inmate for the privately operated facility and \$27.00 for the state-operated facility. These results were qualified by the authors, who noted that had the state-operated facility been comprised of newly constructed buildings, the daily cost per inmate would have increased to \$38.00 per day per inmate, and would have been 28 percent higher than the cost of the privately operated facility.

⁶ The Urban Institute, Comparison of Privately and Publicly Operated Corrections Facilities in Kentucky and Massachusetts (Washington, D.C.: The Urban Institute; 1989), compared costs, service quality, effectiveness, and program content in facilities in Kentucky and Massachusetts.

Massachusetts

Two groups of secure facilities for juveniles in Massachusetts were examined to compare program costs and effectiveness under private and government operation. The Connelley Treatment Unit and the Westboro Secure Treatment Program, two publicly operated facilities, were compared with two privately operated facilities, the Boston Secure Treatment Program and the Delaney School. Information was collected from: (1) a survey of residents; (2) a review of records; and (3) interviews with personnel with varying levels of responsibility. The facilities were comparable in size: three were 15-bed facilities and the fourth was a 16-bed facility. Three cost components, including program costs, facility costs, and state agency administrative costs were examined for the period extending from January 1987 through March 1988. When the cost components were combined, very little difference in overall costs was found between both pairs of facilities, with an average of \$197.00 per resident per day for the publicly operated facilities and \$199.00 per resident per day for the privately operated facilities.

Privately Operated Facilities in Florida

Currently, three correctional facilities in the state of Florida are operated by private contractors. The Eckerd Youth Development Center is operated by the non-profit Eckerd Foundation, while the Bay County Jail and Jail Annex and the Hernando County Jail are operated by Corrections Corporation of America. The Monroe County Jail was operated by Wackenhut Corrections Corporation for a brief period in 1991 with current operation assumed by the county. While the operation of the Okeechobee School for Boys by The Eckerd Foundation has been evaluated with an eye towards identifying the extent to which cost savings have been realized under privatization, there has been no formal evaluation of Corrections Corporation of America operations at either of the facilities it manages. The following subsections provide a brief overview of the Florida facilities currently under private sector management.

The Eckerd Youth Development Center (The Okeechobee School for Boys)⁷

In 1982, operational responsibility for the Okeechobee School for Boys, a 400-plus-bed secure facility for adjudicated delinquents falling under the jurisdiction of the Florida Department of Health and Rehabilitative Services (HRS), was transferred from the Department to the non-profit Eckerd Foundation. It was expected that the private foundation would provide a more cost-effective program of equal or better quality. Although the Foundation was charged under contractual arrangements with funding an independent

⁷ This overview is based on Levinson, Robert B., "Okeechobee: An Evaluation of Privatization of Corrections", LXV *The Prison Journal* 2(1985):75-93. Dr. Levinson reviewed the Okeechobee project report which was prepared by the American Correctional Association, and obtained additional information from: (1) key personnel who were participants in the Okeechobee/Eckerd Foundation project and (2) questions raised by the American Correctional Association evaluation team.

performance evaluation of its operations to be conducted by the American Correctional Association, it failed to fund the evaluation within the required timeframe. As a result, baseline data pertaining to operational costs of the School at the time the facility was transferred to the Foundation were not collected, thereby limiting the ability of the evaluators to assess any changes in costs and performance that may have been affected by the takeover. In order to estimate changes in costs and quality of service, the Okeechobee facility was evaluated against the Dozier facility, which was operated by HRS and was assumed to be similar to the Okeechobee School at the time of the transfer.

Despite methodological shortcomings, the American Correctional Association's evaluation of the Okeechobee facility under the operation of the Eckerd Foundation offered several conclusions. Among these were the following:

1. The Eckerd Foundation achieved no significant reduction in operational costs of the facility;
2. The Eckerd Foundation program achieved no significant increase in the quality of services provided at the facility.

On this basis, available data suggest that the decrease in operational costs and improvement in program quality that initially motivated the transfer of the Okeechobee facility to the private contractor were not realized within the time frame anticipated by state officials.⁸

The Bay and Hernando County Jails

The Corrections Corporation of America (CCA) has been operating facilities in Bay and Hernando counties since 1985 and 1988, respectively. CCA was awarded the contract to operate both facilities through a process of competitive bidding, although the contract with Bay County contained provisions for negotiation. In Bay county, CCA financed and constructed a jail annex, in addition to assuming responsibilities for the operation of the existing main jail.

Under the terms of the Bay and Hernando County contracts, CCA does not exercise complete control over the operation of the jail facilities it operates.⁹ Rather, the governing bodies of each county continue to have substantial involvement in facility operations. In addition to providing for the custody and care of all inmates during their stay in the local jail, CCA's responsibilities at both the Bay and Hernando facilities extend to the following:

⁸ See Levinson, "Okeechobee" p. 82.

⁹ Information on Bay and Hernando counties was obtained through telephone interviews with the "contract monitors", the county employees responsible for ensuring compliance with the terms of the contract, that were conducted on July 13th and 14th, 1992.

1. The jail intake and booking process, including fingerprinting, photographing, running criminal history record checks, and making prisoner classification decisions;
2. Providing in-house medical care to jail inmates;
3. Transporting jail inmates to outside community health care facilities for purposes of receiving medical care;
4. Guarding jail inmates while they remain in outside medical facilities;
5. Providing reports to the county pertaining to jail census data, inmate offenses, and the like.

In contrast, the responsibilities of the county governments in both Bay and Hernando Counties include the following:

1. Calculating gain time awarded to jail inmates;
2. Payment of medical bills in cases involving the hospitalization of jail inmates in community-based medical facilities;
3. Transporting inmates to court for purposes of attending court hearings;
4. Providing pretrial release services (Bay County only);
5. Detention case monitoring.

In each case, the county monitors the operations of CCA to ensure compliance with the terms of the contract. Contract monitors interviewed by ACIR staff in July 1992, reported that the respective county governments generally were satisfied with the contractual arrangements to-date, seven years after CCA began operating the Bay County facilities, and 4 years after it assumed operation of the Hernando county facility. However, as yet there have been no formal evaluations focussing on the costs and benefits of operating these facilities under private management.

The Monroe County Experience

In February, 1990, Wackenhut Corrections Corporation assumed responsibility for the operation of the Monroe County Jail. Three primary reasons prompted the county's decision to shift control over jail operations from the Sheriff to Wackenhut. First, in early 1988, the Board of County Commissioners had been approached by the Sheriff, who suggested that substantial cost savings potentially could be realized under the privatization option. Second, it must also be recognized that the Monroe County jail imposed substantial administrative difficulties on county government and the Sheriff as a result of its chronically overcrowded conditions. Finally, the Monroe County Board of County Commissioners was in the process of developing a master plan for local correctional facilities and services that included provisions for a new jail. In the process of drafting this plan, it was contemplated by both the Sheriff and the county governing body that responsibility for the operation of the new facility could be turned over to a private firm under contract with the county.

In order to assess the extent of private sector interest and to more properly consider

the implications of privatization, the county government issued a Request for Proposal (RFP) for the construction and operation of local jail facilities in Monroe County. Both Corrections Corporation of America and Wackenhut submitted proposals to the county, which were screened by a Jail Advisory Committee established by the Board of County Commissioners. This Committee consisted of representatives of all state and local government entities that would be affected by privatizing local detentions and corrections responsibilities. After evaluating the proposals using a formal, weighted scoring scheme, the Committee reported to the Board that CCA appeared to be the most qualified firm to assume operational responsibility for the jail. Despite this recommendation, the Board of County Commissioners voted to enter into a contract with Wackenhut.

As provided in the contract, Wackenhut assumed responsibility for virtually all operational aspects of the existing Monroe County Jail. In addition to providing for the custody, supervision, and feeding and clothing of jail inmates, Wackenhut was responsible for the following:

1. Operation of the jail booking process, including fingerprinting, photo-identification, criminal history record-checking, and inmate classification;
2. Transportation of prisoners to-and-from court, and outside medical and mental health service providers and facilities;
3. Provision of Inmate medical care. In addition to administering in-jail care to inmates, Wackenhut assumed financial responsibility for medical care rendered to inmates outside the jail in facilities such as hospitals and dental offices. Moreover, the firm was responsible for guarding prisoners while they were in the care of outside medical service providers.

In other areas, local officials report that under the terms of the contract Wackenhut was not responsible for operating in-jail programs such as alcohol, drug abuse, and mental health treatment services, nor were they required under the contract to provide educational, adult vocational, or life skills programming to inmates. However, local officials also note that such programming was not available in the jail due to severe overcrowding.

Consistent with the provisions of Section 951.062, F.S., a contract monitor was appointed by the Sheriff, who retained status as the chief correctional officer of Monroe County. According to local officials, the contract monitor was a full-time employee of the Sheriff's Office, and was responsible for monitoring the jail in order to insure that Wackenhut's operations complied with relevant policies and procedures of the Sheriff, the Board of County Commissioners, and the Florida Department of Corrections. In addition to these responsibilities, the contract monitor generated inmate population or "jail census" reports on a regular basis in order to provide the courts and county administration with information pertaining to local initiatives designed to manage the growth in the local jail population. Responsibility for many of these managerial initiatives, such as pretrial services

and jail case management, remained vested in the county and the Monroe County judiciary.

After approximately 10 months of operation, Wackenhut officials submitted a request to the Monroe County Board of County Commissioners in which they sought approximately \$800,000 in additional funds in order to cover unforeseen expenses associated with the operation of the jail. According to county officials, this request was accompanied by an allegation that the county had failed to accurately advise the firm of certain costs that eventually were incurred in the operation of the facility. Among the areas for which increased funding was sought were inmate security (additional correctional officers), utilities, and proration costs. The county government responded that they would not meet the firm's demand for additional funding, and that Wackenhut officials had been provided with a full opportunity to assess facility operations and estimate the costs associated with these prior to entering into the contract with the county. As a result, by mutual agreement, the contract providing for the private operation of the Monroe County Jail was terminated in December, 1990, at which time the sheriff resumed control over the facility.

SECTION II: ISSUES PERTAINING TO THE PRIVATIZATION OF JAILS

Overview

There are five major categories of issues to be considered in the privatization of detentions and corrections facilities: Constitutional, Legal, Financial, Administrative and Political. Each of these sets of issues should be considered prior to making decisions about privatization and, should the choice to privatize be made, these issues should influence the structure of the contract that must be entered into and other systems for which the county must provide. As presented here, each issue category summarizes concerns that have been raised by participants in the privatization debate and interested observers, including legal scholars, state and local correctional officials and employees, and private sector representatives. By and large, these issues are applicable to detentions and corrections institutions regardless of the unit of government which is involved (federal, state and local). Finally, they are more concerned with the operation of prisons and jails rather than with the construction of such facilities. The respective categories, as well as the sub-issues falling under each, are depicted below.

1. Constitutional Issues
 1. Delegation of governmental authority
 2. Liability of government and contractors

2. Legal Issues
 1. Use of deadly force
 2. Participation in classification/disciplinary proceedings
 3. Protection of inmates' rights

4. Selective acceptance of inmates
 5. Provisions in the event of bankruptcy
3. Financial Issues
 1. Efficiency and costs
 2. Profitability
 4. Administrative Issues
 1. Quality of service
 2. Accountability
 5. Political Issues
 1. Effects on public policy
 2. Labor relations
 3. Management opposition
 4. Public attitudes

Constitutional Issues

Constitutional issues are the broadest and pose the most philosophical set of questions concerning the privatization of jail and prison operations. At the most basic level, they concern the extent to which federal, state, and local government entities can "separate" themselves from their constitutionally-based duties and responsibilities to discharge the penal function in society. Such issues have become manifest in two primary ways. The first concerns the extent to which governments can delegate the "prison function" to private entities. The second concerns the extent to which a governmental authority that has contracted with a private firm to operate a jail or prison retains liability for actions taken by the private provider and its employees in the course of operating the facility. Ultimately, the manner in which these issues are resolved by the courts will define the scope and direction of privatization in the field of corrections.

Delegation of Functional Authority

The constitutional issue of delegation concerns whether the state has the authority to delegate control of "the prison function" to the private sector.¹⁰ No case law has yet addressed the constitutionality of delegating the provision of detentions and corrections services to the private sector, hence there is far less consensus on this issue than on the issue of governmental liability. Among others, legal scholars are divided over this issue, with one

¹⁰ See Field, J. E., "Making Prisons Private: An Improper Delegation of a Governmental Power", 15 Hofstra Law Review, (Spring, 1987), pp. 649-675; Ellison, W. J., "Privatization of Corrections: A Critique of Contemporary Views", 17 Cumberland Law Review, (1986/1987), pp. 683-730; Robbins, Ira P., "Privatization of Corrections: Defining the Issues", 33 Federal Bar News and Journal 1986, pp. 194-199; Mullen, J., et.al., The Privatization of Corrections, Washington, D.C.: National Institute of Justice; 1985).

view holding that privatization in this area inherently involves the delegation of government's corrections function and its power to impose penal sanctions.¹¹ For example, one noted observer argues that the "non-delegation doctrine" of constitutional law does not permit the delegation of legislative power to another branch of government or to a private party, because they are not politically accountable for the administration of these functions.¹² In contrast, other scholars argue that the non-delegation doctrine is basically defunct insofar as it has been invoked only rarely by the courts since the 1930s. Instead, these observers note that courts today are using the "state action" doctrine, under which the vesting of power in private entities has not been ruled unconstitutional. Furthermore, they argue that courts generally differentiate between the delegation of legislative powers and delegation of administrative powers,¹³ and often consider the delegation of police powers to private sector entities to constitute an administrative delegation.

Liability of Government and Contractors

The second constitutional issue involved in this area concerns governmental liability where detentions or corrections facilities are operated by a private entity. Critics of privatization argue that government entities at any level cannot shift liability to the private operator of a jail or prison under the Federal Civil Rights Act, 42 U.S.C. Section 1983, pursuant to which most inmate litigation is brought. This issue has been addressed by the courts at the federal, state, and local levels, which largely have held that governments are liable when inmates bring suits against privately operated institutions and the unit of government responsible for the facility.

Two key standards the courts have applied in establishing state liability are "state action" and whether the governmental unit has "a clear duty" to perform the function. Under the first, the courts must establish that "state action" was present in order to hear lawsuits brought under 42 U.S.C., Section 1983 that allege governmental liability as a result of actions taken by private operators of detentions and corrections facilities.¹⁴ In recent and earlier cases, the courts have found governmental liability in suits brought by prisoners in which federal, state and local entities have been named as party.

¹¹ See Field, "Making Prisons Private" pp. 656-662, 668; Robbins, "Privatization of Corrections" pp. 197-198.

¹² Field, "Making Prisons Private" p.656.

¹³ See Evans, Brian B., "Private Prisons", 36 Emory Law Journal 1(1987), pp. 253-284; Ellison, "Privatization of Corrections" pp. 689-694.

¹⁴ Thomas, C.W., "Prisoners Rights and Correctional Law", 10 Business and Professional Ethics Journal, (1991), pp. 3-46; Ellison, "Privatization of Corrections" p. 695; Robbins, "Privatization of Corrections" p. 196; Mayer, C., "Legal Issues Surrounding Private Operation of Prisons", 22 Criminal Law Bulletin, (1986), pp. 309-325.

At the Federal level, Medina v. O'Niell¹⁵ illustrates the reasoning of the courts in applying the "state action" standard. Here, inmates of a privately operated Immigration and Naturalization Service (INS) detention facility brought suit against the INS on the basis of the conditions of confinement within the facility and the accidental killing of an inmate by a security guard who had not been trained in the use of firearms. The inmates alleged that INS had a duty to oversee their detention and that the failure of INS to do so constituted "state action." The INS contended that at all times the plaintiffs were in the custody of the private company, and that the conditions that the inmates were subject to during their detention resulted solely from the "private" actions of the facility operator. The federal district court rejected this argument and found "obvious state action" to exist on the part of both the federal government and the private company. In doing so, the court noted that although there was no precise formula for defining state action, the Supreme Court had recognized a "public function" concept, which provides that state action exists when the state delegates to private parties a power that "traditionally [has been] exclusively reserved to the state".¹⁶

In Ancata v. Prison Health Services, Inc.,¹⁷ the federal courts again applied the state action doctrine in a case involving a government contract with a private firm for the provision of medical services to jail inmates. Here, the courts focussed on the question of whether the private firm that was responsible for providing medical care for county jail inmates was liable in circumstances leading to the death of the inmate, under s. 1983. The court found state action to be obvious and the unanimous panel stated:

"Although Prison Health Services and its employees are not strictly speaking public employees, state action is 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."

An example of the "clear duty" rule was the case of Milonas v. Williams.¹⁸ Here, it was alleged that a behavioral program at a juvenile institution had violated the constitutional rights of the children held at the facility. In issuing its ruling in the case, a unanimous panel of the 10th Circuit Court of Appeals ruled state action to be present to the extent that it found that the state had a clear duty to perform the services it had delegated to the company.

¹⁵Medina v. O'Neill, 589 F. Supp. 1028 SD. Tex. (1984).

¹⁶In Rendell-Baker v. Kohn 457 U.S. 830 (1982) the Supreme Court ruled that "the relevant question is not whether a private group is serving a public function...but whether the function had been traditionally, the exclusive prerogative of the state."

¹⁷769 F.2d 700 11th Cir. (1985).

¹⁸691 F. 2d 931 (10th Cir. 1982), cert. denied, 460 U.S. 1069 (1983).

Legal Issues

Legal issues generally involve questions pertaining to the duties and responsibilities which a private entity assumes when contracting to operate a detentions or corrections facility, and the extent to which the manner in which these duties and responsibilities are discharged safeguard the rights of inmates and the governmental entity. The legal issues most frequently raised relate to the use of deadly force by an employee of a private entity, the ability of the private entity to affect the length of a prisoner's confinement by participating in classification and disciplinary decisions, and the private entity's responsibility to insure that conditions of confinement within the facility meet standards established by the courts in the area of inmate rights. In addition, legal questions have been raised relative to the ability of private operators to selectively accept prisoners for purposes of confinement, and safeguards for the contracting governmental entity in the event that the company files for bankruptcy.

Use of Deadly Force

According to the literature on privatization, questions have been raised relative to the appropriate use of deadly force¹⁹ by employees of a private firm that has contracted to operate a prison or jail as they discharge their responsibilities. Although the issue has implications for governmental liability, the courts have yet to clarify conditions under which the use of deadly force by an employee is justified. According to one observer, there is agreement that employees of private contractors have the same arrest power and right to use force in most jurisdictions as public employees, but the use of deadly force by a private sector employee in disturbances other than escape would be ruled excessive where it is determined that the guard is not acting in self-defense or in defense of another person. The guard would be liable under criminal law, and the guard, contractor, and possibly the unit of government, would likely be found liable under civil law.²⁰ In light of this, it has been recommended that the use of deadly force by a correctional officer employed by a private corporation to prevent escapes be restricted to at least the standard established in *Tennessee v. Garner*²¹. Here, the court ruled that deadly force may be used against a fleeing felon only where it is:

¹⁹ According to authoritative sources, deadly force refers to "the degree of force that may result in the death of the person against whom the force is applied", or a degree of force that is "...likely or intended to cause death or great bodily harm". Furthermore, deadly force may be deemed to be reasonable or unreasonable, depending on the circumstances. See Black's Law Dictionary, 6th edition.

²⁰ See Mayer, Connie, "Legal Issues Surrounding Private Operation of Prison", 22 Criminal Law Bulletin 22(1986), pp. 309-325.

²¹ 105 S. Ct. 1694, 85 L. Ed.2d 1 (1985). See Mayer, "Legal Issues" p. 319.

"necessary to prevent the escape and the officer has probable cause to believe that the suspect poses a significant threat of death or serious physical injury to the officer or others."

On this basis, governments contemplating contracting with a private entity for the operation of prisons or jails have been counseled to take precautions in order to limit the authorization of deadly force to situations in which there is probable cause of death or serious physical injury to the correctional officer or others. In addition, it appears advisable for governmental officials to consult local laws in order to determine whether special statutory authorization is necessary for legitimate use of force by private sector correctional officers.

Participation in Classification and Disciplinary Proceedings

A third legal issue concerns whether the private operator of a jail or prison should have the authority to define the types of behaviors that shall constitute punishable conduct by inmates, apply sanctions to prisoners who violate the facility's code of behavior, and thereby prolong the confinement of prisoners. In the general case, the classification of inmates according to the behavior they exhibit during their term of incarceration often determines the amount of "good time" the inmate can earn, and the types of disciplinary actions taken by prison administrators against an inmate often affect parole decisions. Since these functions affect the length of an inmate's incarceration, there is concern about the private operator's involvement in either of these functions. For example, one observer points out that participation in these functions is tantamount to making sentencing decisions, and cites decisions of the federal courts in support of this interpretation.²² On this basis, it is argued that private operators should not be allowed to define punishable offenses and that statutes authorizing private operators to determine punishment are unconstitutional. At the state level, New Mexico law explicitly forbids private contractors from affecting good time credits awarded to inmates, while the Tennessee legislature has explicitly precluded their participation in developing or implementing procedures which affect the inmate's release.²³ In the absence of such a regulatory framework by the state, local governments considering the privatization option are cautioned that a private firm's participation in disciplinary hearings may be challenged on due process grounds, since these decisions may change the length of incarceration for criminal offenses.²⁴

²² See Mayer, "Legal Issues" p. 320. The cases cited in this regard include Seele v. United States, 133 F.2d 1015 (8th Cir. 1943), and State v. Goodseal, 186 Neb. 359, 366, 183 N.W.2d 258, 263, cert. denied, 92 S. Ct. 146 (1971).

²³ See Ellison, "Privatization of Corrections" p. 706.

²⁴ See Mayer, "Legal Issues" p. 320.

Protection of Inmates Rights

Protection of religious freedoms, provision of adequate food and medical services, provisions for transfer from correctional to medical health facilities, safeguards from physical abuse by corrections staff and other inmates, and freedom from chronic overcrowding are but several of the numerous guarantees that have been provided jail and prison inmates by federal and state courts in responding to suits alleging unconstitutional conditions of confinement.²⁵ One of the concerns raised in the privatization debate is the extent to which these and other rights will be protected in privately run facilities.

It has already been established that prisoners housed in privately operated local corrections facilities can sue the operators alleging unconstitutional conditions of confinement and name the contracting governmental entity as a party in the suit. Citing the U.S. Supreme Court's decision in Monell v. New York City Department of Social Services²⁶, one observer notes that plaintiff-prisoners have a wide range of statutory and constitutional provisions available to them to safeguard their rights. In Monell, the court ruled that local governments are persons within the meaning of s. 1983, U.S.C., and held that they can be sued for compensatory damages (including monetary), but not punitive damages. Private contractors, however, are not precluded from judgements for punitive damages. In light of this, state and local government officials contemplating the privatization of local jails should incorporate provisions in the contract that address conditions of confinement within the facility, and should closely monitor the operation of the facility throughout the period of its private operation.

Selective Acceptance of Inmates

Questions have arisen as to whether private contractors would have the ability to discriminate in accepting inmates on the basis of medical or behavioral conditions.²⁷ This issue has been raised in regard to inmates with acquired immune deficiency syndrome (AIDS) by the National Institute of Justice (NIJ),²⁸ but it applies equally to persons with other contagious and debilitating illnesses that require extended and expensive medical treatment. The NIJ recommends that states, and by inference, local governments, protect themselves against the prospect of selective acceptance of inmates by making contracts very specific with respect to which prisoners a private operator must accept into custody, and the circumstances, if any, under which it may exercise discretion in this area.

²⁵ See Thomas, Charles W., "Prisoners Rights and Correctional Privatization", 10 Business and Professional Ethics Journal 2(1991), pp. 3-46.

²⁶ 436 U.S. 658 (1978).

²⁷ See Hackett, J., et. al., Issues in Contracting for the Private Operation of Prisons and Jails, (Washington, D.C.: National Institute of Justice; 1987) p. 11.

²⁸ See Hackett, Issues in Contracting p. 11.

Provisions in the Event of Bankruptcy

Local governments that are considering privatization should also consider their options in the event that a contractor files for bankruptcy. Some of the important issues suggested²⁹ for consideration in this area include the following:

1. Whether the contract is automatically void if the company files for bankruptcy;
2. Whether filing for bankruptcy constitutes a breach of the contract by the company;
3. Whether the company can assign its contractual obligations to another company in the event of its bankruptcy.

Local governments can protect their interests in this area by ensuring that the contract entered into with a private entity addresses in very specific terms the consequences and courses of action in the event of contract default involving bankruptcy.

Financial Issues

The relative monetary costs and benefits associated with public versus private-sector construction and operation of detention and correction facilities are at the core of privatization discussions. Issues of efficiency, costs, and profitability are the major components of these discussions and are presented below.

Efficiency and Costs

One of the central issues raised in the debate over the privatization of prisons and jails concerns whether a private corporation can operate equivalent facilities at lower costs by using resources more efficiently. On the one hand, supporters of privatization suggest that private vendors can operate equivalent facilities at lower costs than the government because of staffing efficiencies. Here it is argued that cost-savings would accrue to the private sector due to the absence of civil service regulations, lower private-sector pension and benefit costs, and greater market incentives to increase productivity. On the other hand, some observers suggest that the extent to which efficiency gains will be achieved in the private corrections field will depend on the nature and degree of competition.³⁰ In this regard, analysts point out that while there have been savings in costs over the short term as

²⁹ See Holley, C. E., "Privatization of Corrections: Is the State Out On a Limb When the Company Goes Bankrupt?", 41 *Vanderbilt Law Review* 2(1988), pp. 317-342.

³⁰ See Donahue, John D., *The Privatization Decision* (New York: Basic Books, Inc.; 1989) p. 160.

a result of private management,³¹ questions have been raised relative to whether private sector operation will offer durable efficiency gains and costs savings over the longer term. In this regard, analysts have cited a lack of comparable cost data and the relatively low cost savings that have been estimated in the case of privately operated juvenile facilities.

Investigators who have examined preliminary evidence suggest that if the governmental entity's goal is greater efficiency and cost reduction, contracting does not necessarily save a significant amount of money.³² One of the most prominent proponents of privatization in general cautions: "Although public costs are said to be twenty to forty percent greater than private costs, the evidence is not yet persuasive because public costs omit various factors and private costs may or may not cover the construction costs of new facilities". This observer further argues that a definitive study of the relative costs of private and public institutions cannot be completed until more private institutions are operating and uniform cost frameworks are established.³³

To address this issue, policy makers must evaluate evidence on efficiency and cost savings. This process, however, is not clear-cut. In fact, establishing the relative costs of private vs. public operation of detentions and corrections facilities is a highly controversial aspect of the privatization debate. First, there is the difficulty of selecting appropriate institutions for comparison. Comparing information on costs from the same institution before and after the facility has been turned over to a private firm is difficult because the characteristics that are the subject of comparison may have been altered. Making comparisons across institutions currently operated by the private and public sectors also is difficult because it is necessary to control for differences in several factors, such as security levels, types of inmates, and tenure of personnel. Furthermore, allowances must be made for the costs of facilities built by the public sector and operated by the private sector and facilities built and operated by the private sector.

Second, there are "hidden costs" that are not foreseen at the time of contracting, or costs which may escalate through time beyond anticipated levels. Some observers fear that hidden costs will increase the costs of private operation but, because private operators will have become entrenched it will be impractical to turn contracts over with sufficient frequency to maintain a competitive market environment.³⁴

³¹ Donahue, The Privatization Decision, p. 160, cites reports by Corrections Corporation of America (C.C.A) of savings of 12.5% in their operation of a Tennessee Work Farm and, their winning bid for the operation of the Bay County Jail which was 20% below the budget.

³² See Allen, Joan W., Keon S. Chi, Kevin M. Devlin, et. al., The Private Sector and State Service Delivery: Examples of Innovative Practices, (Washington, D.C.: Urban Institute Press; 1989), p. 34.

³³ Savas, E.S., "Privatization and Prisons", 40 Vanderbilt Law Review 4(1987), pp. 889-899.

³⁴ Gentry, James Theodore, "The Panopticon Revisited: The Problem of Monitoring Private Prisons", 96 The Yale Law Journal 2(1986), pp. 353-375; Mullen, "Corrections and the Private Sector" p. 10.

Costs associated with the monitoring and evaluation of corrections operations represent one type of hidden cost. The creation of such systems can be quite complex and often requires considerable expertise in both designing and implementing appropriate frameworks. An important component of this process is the establishment of baseline information against which changes can be assessed through time. This implies that provisions for monitoring and evaluation, including funding, must be specified at the outset of the contractual agreement. If either one or both of these processes are to be adequately implemented, they can be expected to place a considerable burden on the private sector, which would then be passed on to the governments.³⁵ This happened, for example, with the Okeechobee Boys Home, when it was transferred from public to private sector management under The Eckerd Foundation.

A third difficulty associated with evaluating the relative costs of privately versus publicly operated facilities concerns selecting an appropriate time-frame for making cost comparisons. Thus, long-term costs can be expected to differ from short-term costs insofar as they are influenced by different factors. Short-run costs are affected primarily by varying the units and cost of labor. Over the longer term, costs will be affected by a wide range of factors, including those both internal to the facility (eg., labor through staff turnover) and those external to the facility (eg., interest rates on the entire portfolio of the private operator).

In light of the foregoing, local governments should clearly stipulate the number and timing of financial and performance monitoring and evaluation systems to be implemented by private contractors, and the penalties to be imposed if appropriate criteria are not met by the private provider. In addition, the contracting governmental entity should identify areas of shared responsibility for these systems, and outline the eligibility requirements and process for selecting independent monitoring and evaluation teams.

Profitability

Beyond the issue of efficiency gains, a second major financial dimension to the privatization debate in the corrections area concerns whether profits to private operators will be earned at the expense of reductions in the quality of service and personnel. Pointing to the fact that personnel and training costs are the largest components of the budgets of correctional facilities, opponents of privatization³⁶ argue that profits can be ensured only by pursuing one or more of the following strategies:

³⁵ Durham, Alexis M. III, "Evaluating Privatized Correctional Institutions: Obstacles to Effective Assessment", *LII Federal Probation* 2(1988):65-71.

³⁶ For example, opponents of privatization include the National Sheriffs' Association, the Council of Prison Locals of The American Federation of Government Employees, and the American Federation of State, County and Municipal Employees (AFSCME).

1. Paying lower wages, which is expected to result in higher staff turnover;
2. Employing fewer personnel, which may adversely affect inmate security and the ability of the facility operator to respond to crises such as inmate disturbances and riots, etc.;
3. Employing less qualified and committed personnel.

While it is unlikely that any of these scenarios would occur in the short-run when the private contractor is concerned with making a "good impression" on both the contracting government and the citizenry of the jurisdiction, continuous monitoring by government officials may be needed in order to preserve the integrity of facility operations in these areas.

Beyond quality of service implications, profitability concerns also can be expected to affect the likelihood that a private operator of a prison or jail will attempt to terminate the contractual relationship earlier than specified in the initial agreement. Thus, firms that are unable to achieve and maintain projected cost savings or otherwise realize adequate profit margins may be forced to turn over the operation of the facility to the government or another private entity. In attempting to assess the likelihood of potential administrative and operational turnover, governmental entities that are exploring the privatization option should be cautioned that it more often is long-term rather than short-term profitability that ultimately will determine whether private operators will remain "in business".

Administrative Issues

Concerns with quality of service and ensuring accountability and flexibility ultimately represent a series of administrative issues that should be confronted by state and local government entities contemplating the privatization of prisons and jails. Often, these issues can be addressed successfully by establishing monitoring and rebidding procedures as part of contractual arrangements with the private sector, and by clearly specifying in the contractual agreement the respective areas of responsibility of the governmental entity and private provider that will be adhered to over the term of the contract.

Quality of Service

With respect to quality of service concerns, the main focus is on whether privately operated institutions will neglect or abuse inmates, or relax inmate security in order to realize costs savings. Proponents of privatization argue that because the private contractor is under competition to perform, the quality of services under the privatization option is likely to be better than that achieved under public operation, at least in the short run. Over the longer term, concerns over whether there will be sufficient market pressure to sustain improvements in quality can be addressed by appropriate monitoring, frequent on-site

inspections, and carefully designed competitive rebidding procedures.³⁷ Inevitably, such procedures require administrative arrangements and often entail additional costs on the part of the public sector, which should be provided for and taken into account when contracts are negotiated.

Accountability

In seeking to promote accountability when providing for the private operation of prisons and jails, several issues need to be addressed. The first concerns delineating the respective roles and responsibilities of the private contractor and the contracting unit of government³⁸. For example, both the service provider and the governmental entity should agree a priori who is to be responsible for such aspects of service delivery as outside prisoner medical care, prisoner transportation to and from judicial proceedings, conducting jail censuses, and other services that are not directly related to the care and custody of inmates while they remain within the facility. In order to promote accountability and avoid conflicts between the private firm and the governmental body, the division of responsibility that ultimately is agreed to by the parties should be clearly stipulated in the contract document. The consequences of non-compliance with the terms of the contract should also be clearly stipulated.

Beyond clarifying the specific areas of responsibility that have been assigned to the contracting government and the private provider, accountability considerations require that there be continual efforts to monitor contract performance. In Florida, state law requires any county that has entered into a contract with a private entity for the operation and maintenance of a county jail to appoint a "contract monitor"³⁹. In addition to performing other duties and responsibilities that may be assigned at the discretion of the county governing body, the contract monitor is charged with documenting adherence to the contract and compliance with the rules, policies, procedures, and performance standards established by the county. Pursuant to this requirement, both Hernando and Bay counties employ "contract monitors", whose responsibilities are to ensure that the private operator complies with the requirements of the contract and that corrective actions are taken for areas that are found to be not in compliance.

Political Issues

Beyond the constitutional, legal, financial, and administrative issues discussed above, important political concerns have been raised in debates over privatization in the field of detentions and corrections. As with other issues relevant to this policy arena, public officials

³⁷ Mullen, "Corrections and the Private Sector" p. 8.

³⁸ Mullen, "Corrections and the Private Sector" p. 8.

³⁹ See Section 951.062, Florida Statutes.

contemplating the privatization option should acknowledge the existence of these and attempt to address them at each step of the policy development and implementation processes. In the following paragraphs, the basic parameters of several political issues are identified and discussed.

Interest Group Politics

As a political issue, privatization can be divisive insofar as it involves transferring control over the delivery of critical public services from the governmental sector to the private sector. Often times, such a shift will diminish the political power and influence of key governmental officials. Beyond this, privatization represents a reform that necessitates a redistribution of incomes and usually a change in employment patterns as public sector employees are displaced by non-governmental workers.⁴⁰ Thus, privatization has the potential to affect not only a change in the distribution of political power within a jurisdiction, but also may jeopardize the positions of employment held by public sector workers.

Among the most prominent groups that have taken positions on the privatization of prisons and jails are the following:

1. County governments;
2. County sheriffs, and their state and national associations;
3. Public employee labor organizations;
4. The American Civil Liberties Union;
5. The American Bar Association;
7. Legal scholars;
8. Private firms that provide detentions and corrections services.

In November 1985 and March 1986, a subcommittee of the U.S. House of Representatives held hearings on the privatization of corrections.⁴¹ Included among the many interested parties that appeared before the subcommittee were representatives of the National Sheriffs' Association, Corrections Corporation of America, and the Council of Prison Locals of the American Federation of Government Employees. The Subcommittee also heard from one prominent legal scholar, Ira P. Robbins, who has studied and published reports in this area. Beyond receiving formal testimony, a number of position papers were submitted to the subcommittee, and were included in the public record of its deliberations.

A review of subcommittee materials is helpful in understanding the various bases of support and opposition to privatization in the detentions and corrections field.

⁴⁰ Jones, Susan K., "The Road to Privatization: The Issues Involved and Lessons from New Zealand's Experience", 28 *Finance and Development* 1(1991), pp.39-41.

⁴¹ Ellison, "Privatization of Corrections" p. 686.

Representatives of the National Sheriffs' Association expressed opposition to private operation of detention facilities, and raised concerns that the profit motive would result in a reduction of personnel, a lowering of wages and benefits, and a motivation to institute policies that would increase rather than decrease jail populations.⁴² The American Bar Association opposed privatization and cautioned that serious and complex constitutional, statutory, and contractual issues exist in this area, and that these need to be resolved before a jurisdiction contracts with private industries.⁴³ The American Federation of State, County and Municipal Employees, a union that represents 40,000 correctional employees across the U.S., took the position that privatization will result in lower wages and benefits for jail and prison workers. In addition, the National Institute of Corrections and the National Institute of Justice raised concerns in a number of areas, including the legality of delegating correctional operations to the private sector, the use of deadly force by private sector employees, and the participation of private firms in disciplinary proceedings that could influence the duration of confinement. Finally, the American Jail Association argued for more qualified jail staff and encouraged private sector contributions to this process. It contends that the few jails that have been privatized were run poorly before privatization occurred. This association warns that private jails whose motives are profit-oriented will be "hard put" to gain the acceptance of their colleagues in the public sector.⁴⁴

Public Policy Concerns

One of the issues raised in the context of the privatization of prisons and jails focusses on the potential for public officials to invoke the privatization option in order to sidestep the process that is normally required when a local government seeks to fund large-scale capital projects through the issuance of debt.⁴⁵ In Florida, as in many other states, the ability of local governments to use long-term debt backed by general obligation bonds is tied to requirements that the local citizenry approve the issuance of the bonds through referenda.⁴⁶ In Florida, public approval also is required where the county wishes to employ special revenue sources such as the local option sales tax as a source of finance capital.⁴⁷ In commenting upon this situation, observers have noted that where local officials perceive a lack of public support for raising new revenues through these means, they may contract with a private entity to construct a facility and enter into a leasing arrangement with the

⁴² Mayer, "Legal Issues" p. 310.

⁴³ Mayer, "Legal Issues" p. 310.

⁴⁴ Kerle, Ken, "Jails and Privatization", IV American Jails 4(1990), p. 3.

⁴⁵ Donahue, The Privatization Decision pp.174-175.

⁴⁶ In Florida, new jail construction through bond issuance requires voter approval (ss. 130.01 - 130.03, Florida Statutes.

⁴⁷ See Section 212.055, Florida Statutes.

private sector. The public's approval would not be required for this type of arrangement, although it ultimately will pay for the new facility. Under such a scenario, the legal provisions of public accountability would be eliminated or reduced. In addition, there are no guarantees that such contracting would be more cost-effective for the taxpayer in the long run than raising new revenue.

One observer of the debate over privatization in the area of detentions and corrections has identified other potential public policy impacts that governmental officials should consider when contemplating the privatization option. These potential impacts include the following:

1. Implications associated with creating an entrenched privatization lobby:
 - (a). Will the private provider use its political power to lobby for development or continuation of programs that may not be in the public interest?
 - (b). Will the corrections field, which typically operates without political advantage, benefit from the new lobbying skills of private providers?
2. Consider the effects of "Contract Distribution":
 - (a). Will the private operator be assigned facilities with the least troublesome inmates, leaving the most troublesome cases with the public sector?
3. Effects on Quality of Service:
 - (a). Will the economic motives of the private provider conflict with the objectives of providing decent and "constitutional" conditions of confinement?
 - (b). Will public agencies develop sufficient proficiency in contractor selection to resolve this concern?
4. Effects on Regulating the Size of Inmate Populations:
 - (a). Will the private provider attempt to maintain high occupancy rates even in the absence of demonstrated need? Or can payment provisions and careful admissions screening, and release and transfer policies minimize this tendency?

Labor Relations

A third series of political issues surrounding the privatization option involve labor relations. The first labor relations issue concerns the potential threat of job loss for public sector employees, which can be expected to become manifest in heavy resistance to

privatization whether or not there is formal union opposition.⁴⁸ Among organized labor groups, the American Federation of State, County and Municipal Employees (AFSCME) already has taken a formal position in opposition to privatization.

A second labor relations issue of relevance concerns the right of private sector employees to strike.⁴⁹ While it is illegal for state correctional officers to strike, private prison guards are not denied this avenue.⁵⁰ In a 1979 decision involving the National Transportation Service, the National Labor Relations Board rejected the argument that private employees should be entitled to the same protection as public employees. The Board found that private employees cannot be covered under the National Labor Relations Act "merely because they provide services similar to those provided by public employees." Strikes could be costly in many ways, particularly if the public agencies are forced to provide emergency support.

Management Opposition

A third series of political issues surrounding the privatization option stems from its potential to eliminate or reduce the control which public sector corrections officials exert over the operations of prisons and jails. In this regard, several observers have suggested that the potential loss of agency control may pose a greater obstacle to privatization than the potential threat of job loss.⁵¹

Public Attitudes

A final set of political issues involved in this area concerns public attitudes towards privatization. Thus, the public may resist the idea of privately operated facilities if there are concerns about the ability of private firms to maintain acceptable levels of security in the facilities they operate. Alternately, public attitudes may become shaped by perceived threats of job losses in the public sector. In any event, public attitudes relative to the privatization of prison and jail facilities constitute a force that has the potential to play an important role in both the development and implementation of policy initiatives in this area.

⁴⁸ Mullen, "Corrections and the Private Sector" p. 7.

⁴⁹See Hackett, Judith, et. al., Issues in Contracting for the Private Operation of Prisons and Jails p. 11; Mullen "Corrections and the Private Sector" p. 7.

⁵⁰See Hackett, et. al., Issues in Contracting for the Private Operation of Prisons and Jails p. 11.

⁵¹See Mullen, "Corrections and the Private Sector" LXV The Prison Journal p. 7; Mullen, et. al., The Privatization of Corrections pp. 74.

SECTION III: GUIDELINES FOR DISCUSSION OF THE PRIVATIZATION OPTION

The issues presented here should be thoroughly discussed before any attempts are made to increase the level of private sector involvement in the operation and construction of Florida's jails. The absence of any formal assessments of changes in costs and quality of service at the Bay and Hernando County facilities after seven and four years of operations, respectively, coupled with the short-lived private sector operation of the Monroe county jail, reinforce the need for thorough discussions.

While information on changes in costs and quality of service of the privately operated jails in Florida may become more readily available over time and hence, provide evidence about the cost-effectiveness of private sector operations, the constitutional and political issues that private sector operations raise will be more difficult to resolve. The opposition of powerful interest groups must certainly be reckoned with. Furthermore, although inmates in privately operated facilities which achieve improvements in service quality may be less likely to initiate legal proceedings in which county governments are named as defendants, it is virtually impossible to design contractual agreements that will absolve county governments of their responsibilities to perform functions delegated to private contractors. Certainly, the cases referenced in this report show that local governments do not "transfer" their responsibility simply because there is a contract permitting a private contractor to operate local jails.

In order to assist policy makers to make informed decisions regarding private sector construction and operation of county jails before it is embraced as the answer to soaring jail expenditures and inmate populations, the remainder of this section condenses the constitutional, legal, financial, administrative, and political issues which have been presented above. A series of policy questions and options are presented that may be utilized by governmental officials contemplating the privatization of detentions and corrections facilities. These questions are posed in a decision-making framework that consists of two major steps. The first step consists of questions dealing with constitutional concerns, which in essence should be treated as threshold issues insofar as answers to these will indicate the extent to which private operation of prisons and jails is permissible under current constitutional provisions as these have been interpreted by the courts. Step 2 consists of questions dealing with specific legal, financial, administrative, and political questions that should be addressed once a review of the constitutional issues indicates or suggests that privatization in this area is an alternative that is available to the governmental entity giving consideration to this option.

Step 1

Consider questions on the constitutionality of private sector operation of detention and correction facilities:

1. Is it likely that the courts will uphold the decision to contract with a private firm to operate jails?
2. Are there significant indicators from existing case law of the direction the courts will take on this issue?
3. What are the consequences for government of facilities currently under private management if the court rules such delegation unconstitutional?

Step 2

If the decision to privatize is made, specific options for construction and operation of facilities should be considered.

Options for Construction. There are three basic options available to local governments with respect to the use of privately financed and constructed correctional facilities:

1. Lease the facility from the corporation with an option to buy the facility at some later date;
2. Lease the facility and place it under the management of a private correctional corporation;
3. Lease the facility and operate it with public employees.

Options for Operation. Two options are available for operations of facilities:

1. All aspects of the facilities to be handled by private operators;
2. Selected aspects of the facilities are to be handled by private operators, with others to be assigned to the contracting governmental entity.

The current arrangements between Corrections Corporation of America (CCA) and Bay and Hernando Counties involve shared aspects of jail operation between the county and the private operator.

In choosing among these options, policy makers should consider the following questions suggested by observers who have been involved in this area:⁵²

Legal Questions

1. Who will be responsible for maintaining security and using force at the institution?
2. Who will be responsible for maintaining security if private personnel go on strike?

⁵² See Robbins, "Privatization of Corrections" p. 198; Mullen, "Corrections and the Private Sector" pp. 6-7.

3. Where will the responsibility for prison disciplinary procedure lie?
4. Will the company be able to refuse to accept certain inmates, such as those who have contracted AIDS?
5. What will happen if the company declares bankruptcy, or simply goes out of business because there is not enough profit?
6. What options will be available to the government if the corporation substantially raises its fees?
7. What safeguards will prevent a private contractor from making a low initial bid to obtain a contract, only to subsequently raise the price after the government is no longer able to resume operating the facilities?

Efficiency Questions

1. What are the expected reductions in operating costs associated with the move to privatization?
2. What is the time frame over which these reductions should be achieved?

Political Questions

1. How will opposition from powerful interest groups be handled?
2. What safeguards will prevent private vendors, after gaining a foothold in the corrections field, from lobbying for changes that would ensure greater profits?
3. Will the Public have access to the facility?
4. What recourse will members of the public have if they do not approve of how the institution is being operated?

Administrative Questions

1. What standards will govern the operation of the institutions?
2. Who will monitor the implementation of the standards?

At a minimum, before proceeding with the privatization option, a formal evaluation of changes in costs of existing facilities under private sector management in Bay and Hernando counties should be undertaken.

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