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TESTIMONY ON HOUSE BILL 246
PRESENTED BY THE AMERICAN CIVIL LIBERTIES UNION
OF PENNSYLVANIA TO THE PENNSYLVANIA
HOUSE JUDICIARY COMMITTEE
SUBCOMMITTEE ON CRIME AND CORRECTIONS

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Good afternoon. My name is Larry Frankel and I am the Executive Director of the American Civil Liberties Union of Pennsylvania. I would like to thank you for providing the ACLU with the opportunity to testify on House Bill 246 and the issue of private prisons.

The ACLU has long had an interest in private prisons and we have testified before the General Assembly several times regarding the various problems associated with private prisons. The ACLU opposes private prisons because we firmly believe that private for-profit corporations should not assume the state's responsibility for punishing those found guilty of committing criminal offenses.

The goals of private enterprise conflict with the goals of punishment and rehabilitation. The primary interest of private entrepreneurs is and should be the earning of profits. The managers of any business owe a duty to the owners of that business - a return on their

investment. We believe that the operators of private prisons will face conflicts between providing safe and secure facilities and meeting the expectations of the owners of the prisons. We think that these conflicts will be manifested in a number of ways.

First, the state's responsibility for maintaining conditions that do not endanger public safety may be contrary to the private operator's need to keep expenses down. Running any prison is costly - just look at how much Pennsylvania spends on its prisons and jails. Aside from maintaining buildings, feeding prisoners and providing health care for inmates, there must be an adequate warning system and sufficient number of well-trained security guards to protect the public from escapes and prison disturbances. Any attempt by a private operator to save money by reducing some of these expenses will jeopardize public safety. Pennsylvania cannot afford to take a risk that a for-profit company might eliminate important positions or compromise its security procedures in order to meet its bottom line.

Second, the state has the ultimate responsibility for the conditions of confinement of prisoners. State officials cannot escape liability for unconstitutional conditions in prisons. A private operator could gain control over the prisons while leaving liability in the hands of the state. If prisoners are injured or their constitutional rights violated, the state can be found liable for those harms. West v. Atkins, 487 U.S. 42 (1988); Ancata v. Public Health Service, 769 F.2d 700 (11th Cir. 1985).

Requiring the operators of private prisons to carry liability insurance will not necessarily solve the problem. Truly adequate coverage will probably have very expensive premiums, thus increasing the costs to the operator. Insurance will be of little use if coverage lapses, the

insurance carrier is inadequately funded or the private prison operator goes bankrupt. The Commonwealth will have to pick up the pieces when the private market fails.

It is also a realistic possibility that the state or a political subdivision will be sued for negligence in selecting or monitoring a private prison operator. Potential plaintiffs include citizens whose lives are disrupted due to an escape from a facility, particularly if there is evidence that the government failed to discharge its duties under HB 246. You may have noted that on Monday, the United States Supreme Court accepted a case that raises this very issue. The question in the case that the Court accepted is whether a county's negligent hiring decision is sufficient to make the county responsible for injuries caused by the negligently hired employee:

Third, permitting private companies to operate prisons and receive payments for housing prisoners, will create a unique special interest that will have a stake in any legislation affecting what conduct is criminalized and the severity of sentences that will be imposed. The state has legitimate, and at times competing, concerns which are weighed when determining what activities will constitute criminal offenses and what circumstances call for mandatory sentences. In assessing those concerns, the General Assembly must look at a host of factors. One factor it should **not** be considering when it balances those concerns is the interest of a private entrepreneur in making a profit.

HB 246 contemplates private prisons on the county level for low-risk offenders. It is not unreasonable to expect that considerable pressure will be exerted to increase the number of offenders that are deemed to be low-risk. Private prison operators will have a considerable stake in actions taken by legislators, judges and prosecutors when decisions are made in our criminal

justice system. Those who stand to gain economically from certain results should not influence those actions.

Our opposition to private prisons is not based on abstract considerations. I would like to briefly relate some of the history of private prisons in Pennsylvania and other parts of the country. I think that there have been a sufficient number of bad experiences with private prisons to justify barring them from Pennsylvania.

In 1985, Buckingham Security Ltd., a private, for-profit corporation, sought legislative authorization to operate a facility in Beaver County. Two of the principal officers of that company were Charles Fenton and Joseph Fenton. Buckingham Security distributed a glossy newsletter and vigorously worked for passage of private prison legislation.

This legislature asked a lot of very good questions. Members of the General Assembly probed into the issues of an operator filing for bankruptcy, strikes by nonunion guards, liability for escapees and the potential for higher fees once the state became dependent on private prisons. Before authorization was given, Buckingham Security abandoned its plans and tried to sell the parcel of land on which the prison would have been built. This site turned out to be a hazardous waste dump.

That was not Pennsylvania's only experience with private prisons. In March of 1986, the 268 Center, a for-profit private prison incarcerating minimum-security prisoners in Armstrong County, bussed in 55 inmates from a Washington, D.C., jail. The out-of-state inmates were brought in to boost the 268 Center's population and profits. The neighbors strenuously objected. Governor Thornburgh requested Attorney General Zimmerman to obtain a Commonwealth Court injunction. The Commonwealth Court ordered the 268 Center to return the inmates immediately,

once it found “a clear and present danger and a threat to the irreparable harm to the public welfare and interest.” In response to this breach of the public trust, the General Assembly enacted a moratorium on private prisons. In 1987 a Joint State Government Commission issued its report on private prisons. A majority of that task force supported the prohibition on private prisons in Pennsylvania.

The experience with private prisons outside Pennsylvania has not been much better. A 1990 government audit found numerous problems in Texas’ private prisons including several breaches of contract. Florida’s first private prison has been cited for lapses in security, such as inoperable security cameras, and failure to follow staff training guidelines. The operation of private prisons in Tennessee by the Corrections Corporation of America has raised significant concerns in that state, particularly after several prisoners escaped from two different facilities and a riot broke out in another facility.

The jury is still out on the question of whether private prisons can actually save money. There are conflicting reports and studies on this question. No one can really predict what will happen with costs if governments become dependent on private prisons. Similarly, no one can provide a reliable estimate of the additional costs that will be incurred if Pennsylvania continues to incarcerate more individuals for longer periods of time.

I would like to draw your attention to a New York Times article, “The Pitfalls of Private Penitentiaries,” dated November 24, 1995, that is attached to my testimony. The story reports several problems that the Federal Bureau of Prisons has encountered, including in one instance a transfer of violent criminals to a private institution, even though residents of the neighborhood where the institution was located had been promised that the prison would hold white-collar and

less violent prisoners. The New York Times story also reports on overly generous contracts and difficulties the government has in supervising the private companies. Justice Department officials have even admitted that the private companies have negotiated contracts that allow them to recover their financing costs at a shockingly rapid rate while those same contractors are shifting enormous medical costs to the government.

The ACLU knows that Pennsylvania's prisons are overcrowded and that the costs of corrections are skyrocketing. We do not believe that the privatization of prisons is the answer to this problem. We doubt that the cost savings will be as much as promised. We have little reason to think that the problems encountered elsewhere will not reappear here in Pennsylvania. We particularly fear the distortions in policy-making that will result if the state creates a financial incentive for locking up people and keeping them incarcerated. The ACLU thinks that private prisons will not lead us to a better criminal justice system; rather, they will only compound the problems that already exist.

The Pitfalls of Private Penitentiaries

By JEFF GERTH
and STEPHEN LABATON

CENTRAL FALLS, R.I., Nov. 17 — Two years ago, the owners of the red cinder-block prison in this poor mill town threw a lavish party to celebrate the prison's opening and show off its computer monitoring system, its modern cells holding 300 beds and a newly hired cadre of guards.

But one important element was in short supply: Federal prisoners.

It was more than an embarrassing detail. The new prison, the Donald W. Wyatt Detention Facility, is run by a private company and financed by investors. The Federal Government had agreed to pay the prison \$83 a day for each prisoner it housed. Without a full complement of inmates, it could not hope to survive.

So the prison's financial backers began a sweeping lobbying effort to divert inmates from other institutions. Rhode Island's political leaders pressed Vice President Al Gore while he was visiting the state as well as top officials at the Justice Department to send more prisoners. Facing angry bondholders and insolvency, the company, Cornell Corrections, also turned to a lawyer who was then brokering prisoners for privately run institutions in search of inmates.

The lawyer, Richard Crane, has done legal work for private corrections companies and Government penal agencies. He put the Wyatt managers in touch with North Carolina officials. Soon afterward, 232 prisoners were moved to Rhode Island from North Carolina, and Mr. Crane was paid an undisclosed sum by Cornell Corrections.

But the new batch of inmates included 18 murderers, a surprise for local leaders who say they were promised the prison would hold white-collar and less violent prisoners.

PRISONS FOR PROFIT

A special report.

said Philip B. Heymann, who was the Deputy Attorney General as the White House began formulating the new policy and is now a professor at Harvard Law School. "I hear a shift to something that is defensible ideologically. But the justifications for it are satisfying what is sort of an arbitrary political target. Prisons are a very sensitive thing to run. This is the No. 1 place I wouldn't try and play games with for reasons of political accounting."

Administration officials acknowledge that the policy to privatize more prisons has some weaknesses. For example, they say that although the plan is based on Mr. Gore's sweeping review to reinvent government, it ignored critical conclusions from that review.

In addition, White House and Justice Department officials say they have no studies showing that the policy will save money, and in some instances, the department has found that its use of privately run prisons costs more. In fact, an examination of Federal contracts with privately run prisons and jails showed that many are overly generous, leaving significant financial risk with the Government.

Moreover, just as the Justice Department has been struggling to allay public concern about the Government's control of Federal prisons at Ruby Ridge in Idaho, and Waco, Tex., the prison privatization policy cedes broad law-enforcement responsibilities to private contractors who assert they are not subject to Federal rules.

And interviews with Administration and prison officials raised questions about the ability of the Justice Department to oversee the expensive and complex new policy, although the department is preparing a new bureaucracy and set of procurement rules to exert more control over its contractors.

Mr. Heymann's successor at the Justice Department, Deputy Attorney General James Gorelick, has overseen the new policy. She declined to be interviewed, referring questions to the Justice Department's chief spokesman, Carl Stern.

The story behind the Wyatt prison is a stark example of some of the pitfalls involved in putting prisons under the control of private companies. Those pitfalls include overly generous contracts and the hiring of companies that are difficult for the Government to supervise.

But since Wyatt opened, the Clinton Administration has quietly proposed to have such companies run most new low-security Federal prisons and detention centers. The proposal is meant to help fulfill President Clinton's campaign pledge to slash the growth of employees on the Federal payroll.

The Justice Department has already put control of a few of its jails in private hands. And in the next few weeks, the Administration is expected to complete a plan to open a privately run prison in Taft, Calif., that could become the standard contract used by the Federal Government around the nation.

But some experts say Mr. Clinton's plan is fundamentally flawed because the Bureau of Prisons, the unit of the Justice Department that oversees most Federal prisons, does not need fixing. They argue that it already does a good job.

"We have a well-functioning prison system, a minimum of scandals, no escapes, few riots,"

In response to written questions, Mr. Stern wrote that the privatization effort was a "pilot program" spearheaded by a White House effort "to make government more efficient by privatizing heretofore governmental functions." He acknowledged that "there are concerns that must be addressed before any programmatic commitment can be made to privatization."

Meanwhile, as the Government increasingly turns to private companies to run prisons, those businesses are hiring a growing number of former senior law-enforcement officials. At the same time, industry representatives are occasionally providing help to Federal officials in developing the privatization plan. A new revolving door has opened in Washington.

The Plan's Origins

2 Political Goals Shaped a Solution

In the fall of 1993, White House officials found themselves caught between two sensitive political goals: putting more criminals in jail and reducing the size of the Federal bureaucracy.

Both grew out of promises made by Mr. Clinton during his Presidential campaign when he adopted Ross Perot's popular theme and vowed to reduce the size of the Government. At the same time, Mr. Clinton pledged to continue putting more criminals in Federal prisons for longer sentences, and building more jails to house them.

Those two objectives inevitably clashed. More prisons meant more people would be needed to run them. In fact, White House budget officials began to realize that the growing stream of Federal inmates would force the Government to hire more than 4,000 new employees at new prisons by the end of the decade. How could the Justice Department, one of the few growing Federal agencies, hire thousands of new employees just as the Government was supposed to be shrinking?

The solution was an accounting sleight of hand. The department, after initial resistance, agreed to use private companies to run most new prisons; the employees at the new prisons would not show up on the department's official payroll.

NY Times
11/24/95

In pushing the prison privatization plan, Mr. Clinton embraced the concepts behind the National Performance Review, Mr. Gore's 1993 study to reinvent government so that it "works better and costs less," especially the commitment to cut 252,000 Federal employees from the payroll.

But that study did not even mention as an option the hiring of private firms to operate prisons. In fact, Mr. Gore's report was cautious about making changes in the prison system, recommending only lower cost solutions to Federal prison space problems. In addition, the privatization plan ignored some of the review's general recommendations about overhauling government.

For example, Mr. Gore's report warned against the use of arbitrary personnel ceilings to control the work force and called on Mr. Clinton to halt the practice. It said such arbitrary ceilings would "cause inefficientcies and distortions" and "rarely account for changing circumstances."

When it came to prisons, as well as other agencies, that recommendation was never followed. Instead, the White House took the first step toward prison privatization by capping the future growth of prison employees. This move was a small part of the larger effort to cut 252,000 Federal positions, leaving the Government with less than two million civilian workers in a piece of politically appealing arithmetic, officials said. In the case of prisons, the idea was that after reducing personnel, the Government would then turn to private contractors to do their work.

"We needed something to force the downsizing, we needed a target, we needed something to get people to start weeding out" Government positions, said Elaine C. Kamarck, a senior policy adviser to Mr. Gore responsible for the National Performance Review.

But Robert Dodge, an official in Mr. Gore's office, said in an interview that the decision to hire private contractors to run prisons should be based on saving money and getting better results. The personnel ceilings in the Bureau of Prisons was "a poor rationale" for using private companies, he said.

Even in the early stages of developing the privatization policy, questions were raised about its cost-effectiveness. Both senior Justice Department and budget officials rejected a White House analysis that suggested that the program might save money.

After the Justice Department finally signed onto the plan, the proposal was buried deep in the Clinton Administration's budget plan, presented to Congress last January, where it received little attention. It required four new prisons to immediately come under private control in New York, California, Mississippi and Arkansas. The Bureau of Prisons estimated the plan would eliminate more than 1,600 new positions on its books.

But officials in Arkansas and Mississippi objected to the change and helped persuade their senators to block the Administration from using money to hire companies to run the prisons in their states.

Surprisingly, the proposal was also coolly received in the House, where Republicans have long sought to create new opportunities for businesses to take over government functions. Although the House included a scaled-back version of the policy in its appropriation bill for the Justice Department this year, in a report accompanying the bill, the Republicans said the Administration's plan had gone "too far too fast." Noting that the Bureau of Prisons had "relatively limited experience regarding the cost and performance of private prisons," the report called for a comprehensive study of the policy's costs and benefits.

The House bill, and its Senate counterpart, are being considered by a Congressional conference committee. In the meantime, the Administration is moving ahead only with its plans to privatize the prison in Taft, Calif.

Drafts of the contract, for that prison, more than 140 pages of minute detail, cover everything from the prisoners' daily food regimen of "heart healthy diets," to prohibitions on using inmates for medical experiments, to requiring intelligence gathering by the companies to avoid uprisings.

A Learning Experience Justice Officials Admit Mistakes

Justice Department officials admit that their record of using prison companies has been plagued by costly mistakes. Repeatedly, prison and Administration officials say, the companies have negotiated lucrative contracts in which the businesses involved have been able to recover their financing costs unusually fast and shift huge medical expenses for inmates to the Government.

The experience of the United States Marshals Service, the unit of the Justice Department that holds and transports prisoners both before and during trial, is one such example. The service uses hundreds of local- and state-owned institutions to house its 22,000 inmates. Less than a dozen of these, including the one in Central Falls, are privately run. In fact, the Wyatt prison was named for the United States Marshal who helped get the institution built by projecting the numbers of inmates that would need housing. A political appointee, he was out of office by the time the prison opened.

The privately operated jails cost the marshals 24 percent more than the public ones in the same region, marshals officials say. While reluctant to draw any broad conclusions from that statistic, the officials acknowledged costly contracting errors by the Marshals Service.

For instance, the service hired the nation's largest prison company, the Corrections Corporation of America, to build and operate the Leavenworth Detention Center in Leavenworth, Kan., a maximum security jail that opened in 1992.

The marshals paid the company \$113.70 a day for each of the first 198 prisoners. Each additional prisoner cost the marshals \$18.05, which an official described as the company's out-of-pocket or variable expense of each inmate.

The costs of the first 198 prisoners covered repayment for the company's construction costs to build Leavenworth, an unusually generous repayment schedule that enabled the company to recover its capital costs in five years. Construction costs are typically financed over 20 to 30 years.

"Five years is unbelievable, it's amazing," said Mr. Crane, the lawyer who brokered the prisoner deal in Rhode Island and who was Corrections Corporation's general counsel until the late 1980's. "No wonder it's more than \$100 per diem."

Doctor R. Crants, the chairman and chief executive of Corrections Corporation, defended the arrangement, saying the Government got a fair price considering the expenses incurred by the company both in building the jail and in supervising the inmates.

But officials at the Marshals Service eventually recognized they had made a mistake and renegotiated the contract last April, slightly lowering the rate they paid for prisoners.

The Marshals Service is not the only unit of the Justice Department to negotiate such a contract. At the Federal detention center in Eloy, Ariz., which opened last year and is the first privatized jail in the Bureau of Prison's system, officials also agreed to a rate that enabled a company to recover its construction costs in five and a half years.

In the future, officials said, newly constructed prisons will be owned by the Federal Government so that construction costs will not be covered by the daily reimbursement for supervising prisoners.

The contracts have had other problems, too. Both the Bureau of Prisons and the marshals signed contracts in which prison companies paid the medical costs for treatment of inmates inside the institution, while the Government picked up the cost when prisoners sought special treatment outside. As a result, company doctors would regularly refer prisoners to outside specialists merely to shift the costs onto the Government, Mr. Crane and Federal prison officials said.

After a Justice Department study found that medical costs for prisoners had grown to \$250 million last year, from \$175 million in 1991, the Bureau of Prisons decided to renegotiate the medical costs at two Texas pris-

ons.

A Revolving Door

Federal Workers Join Private Ranks

Federal officials say they are comfortable with letting private companies run Federal prisons because the industry has become mature, gaining experience running state and local jails. But Federal officials have also grown comfortable with the prison industry because its ranks now include former colleagues as senior and other law-enforcement officials have taken positions at private corrections companies, Washington's latest revolving door profession.

The industry leader is the Corrections Corporation of America, a 12-year-old company based in Nashville. Some of the company's officials are former Federal prison employees, and the company's director of strategic planning, Michael Quinlan, headed the Bureau of Prisons in the Bush Adminis-

tration.

Another industry leader is the Wackenhut Corrections Corporation of Coral Gables, Fla. Its directors include Norman A. Carlson, Mr. Quinlan's predecessor as the director of the prisons bureau, and Benjamin R. Civiletti, a former Attorney General.

The Acting Attorney General in the first months of the Clinton Administration, Stuart Gerson, is on the board of Esmor Correctional Services of Sarasota, Fla. Four months ago, the Immigration and Naturalization Service, a unit of the Justice Department, canceled its contract with Esmor after an uprising at its detention center in Elizabeth, N.J. An investigation by immigration officials concluded that Esmor, trying to cut costs, had failed to train guards, some of whom beat detainees.

The revolving door is beginning to work both ways. Not only has the private sector turned to former Federal officials, the Government has also started to look to industry leaders for aid in developing plans to hand new prisons over to private management.

Mr. Crane, a general counsel at the Corrections Corporation in the 1980's, was retained briefly as a consultant by the Bureau of Prisons to help write a model contract that is going to be used to hire the company to run the Federal prison in Taft.

"The fact they brought me in shows they have something to learn," Mr. Crane said.

The Future

Regulating Costs, And Setting Rules

As the Government embarks on privatizing prisons, officials say they are confident they will not repeat their earlier mistakes:

"We've learned from our experience," said Mr. Clark, the assistant director of the prisons bureau. One major change is that the Government intends to pay companies for every bed in a prison, regardless of whether they are filled. Government officials said the provision is in the interests of both parties because it eliminates the uncertainty and potential problems that could occur by manipulating prison populations. The model contract will also try to control medical costs by shifting more of the burden to the companies, Mr. Clark said.

But experts, Government officials and industry executives continue to debate how much, if anything, is saved by privatizing prisons and whether companies can do a better job than governments. Some states have found cost savings of 10 percent or more. But the Federal Government's experience is limited and it has only begun to realize the reverberations from the new policy. Difficult legal issues have yet to be sorted out. Some experts have raised concern, for instance, about the ability of the Government to control the contractors.

"It's harder to enforce Federal and constitutional rules," said Mr. Heymann, the Deputy Attorney General in the first year of the Clinton Administration. "You can't fire or discipline employees. The Federal Government can't issue orders to private guards."

At the privately run prisons, officials believe that in some cases, Federal rules may not apply to them, and there is some confusion about how government regulations affect private contractors.

The Attorney General's new policy on the use of deadly force is a case in point. John Glutch is the warden at the Eloy Detention Center in Arizona. When questioned about the applicability of that policy in a recent interview, Mr. Glutch said, "The Federal rules don't apply to us just because we have Federal inmates."

The Attorney General's new policy, which was issued to address criticism at Congressional hearings over the conduct of Federal agents at Ruby Ridge, permits the use of deadly force against prisoners when they are escaping.

Mr. Stern, the Justice Department spokesman, said the corrections companies "are mistaken" if they think the rules do not apply to them.

Joseph Ponte, the director at the Wyatt Detention Facility in Rhode Island, takes a different view. He said he was unfamiliar with the month-old Federal guidelines. His prison's policy gives far greater latitude to the guards, permitting them to use firearms merely "to protect property which if compromised could reasonably be used in an escape."

Mr. Stern said the Central Falls lethal force policy was not in conformity with the Attorney General's new guidelines, going significantly beyond them. He said that Federal contract officials had been instructed to review existing contracts to make sure they conform to the new policy.

As the Government grapples with these issues, the prison industry has welcomed the new Federal policy as a lucrative opportunity.

Speaking of the new contract that helped the Government to write, Mr. Crane said: "This is the best of all possible worlds. There's very little risk."