



**PROCEEDINGS  
OF THE  
LARGE JAIL NETWORK  
MEETING**

**January 1997**



**National Institute of Corrections**  
**Jails Division**

**Large Jail Network Meeting**

**January 12-14, 1997**  
**Longmont, Colorado**



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# National Institute of Corrections

## Jails Division

### Large Jail Network Meeting

January 12-14, 1997

Longmont, Colorado

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These proceedings present highlights of a meeting of NIC's Large Jail Network held in Longmont, Colorado, January 12-14, 1997. The meeting was attended by approximately 70 administrators of the largest jails and jail systems in the country. Presentations and discussions focused on two issues: privatization of corrections and the Prison Litigation Reform Act of 1996.

- *Opening Address: Meeting the Competition of Privatization.* Richard J. Liles, Director of the General Government Group, Office of Information Technology, in Michigan's Department of Management and Budget, summarized the history of privatization of corrections functions and offered suggestions to public administrators to counter the privatization movement.
- *How to Avoid Privatization--* Howard Ferguson of St. Louis described how the Department of Public Safety examined its operations and found ways to be competitive with the private sector. John Clark summarized the U.S. Bureau of Prison's experience in facility contracting and described its approach to awarding contracts.
- *Why Do Elected Officials Support Privatization?--* Susan McCampbell of Broward County, Florida, pointed to the need for jail administrators to demonstrate a willingness to bring the private sector in but at the same time to keep some control. Jerry Krans, Orange County, California, defined elected official's interest in privatization as simply the desire to save money, especially in Orange County, the only county to declare bankruptcy. He emphasized the need to know what questions to ask to counter privatization. Savala Swanson, Tarrant County, Texas, pointed to the need for jail administrators to learn elected officials' agenda in order to promote their own. J. Daron Hall, Davidson County, Tennessee, summarized his experience with Corrections Corporation of America and emphasized that jail administrators must get active in presenting their case.
- *The Effect of Privatization of Other Governmental Functions--* Denis Dowd, Shelby County, Tennessee, pointed to the fact that definitions of success in facility management depend on a variety of factors. Rob Sprecher, Shelby County Division of Corrections, shared his insights about privatization based on years of experience working with Wackenhut.

- *Contracting for Jail Services* --Pat Sullivan, Arapahoe County, Colorado, described his agency's experience in contracting for a variety of services. John Rutherford summarized Duval County, Florida's approach to contracting for services and pointed to the importance of the quality of personnel in ensuring good services.
- *The Prison Litigation Reform Act* --Lynn Lund and William Collins, Attorneys at Law, provided extensive information about the Prison Litigation Reform Act and its potential impact on jail administrators.
- *Future Meeting Issues* --Richard Geaither led a discussion among meeting participants to identify a topic for the next meeting, to be held July 13-15, 1997. The meeting will focus on two issues, information technology and staff sexual misconduct.



## Opening Address:

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### **“Meeting the Competition of Privatization”**

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**Richard J. Liles, Director, General Government Group, Office of Information Technology, Michigan Department of Management and Budget**

#### *Opening Remarks*

I appreciate the opportunity to join you tonight and present my thoughts about the re-engineering, reinvention, and privatization of governmental services. I have had experience in both jails and prisons. I have been a local jail administrator, federal jail monitor, have taught corrections administration, and trained jail personnel in suicide prevention and management. Although currently not a working expert like all of you, I have been there.

About ten years ago, I left my job as acting director of the office of criminal justice and took a job with the office of information technology as an internal management consultant. I now have the responsibility of assisting state government department directors to re-engineer their departments to face the fiscal challenges of the nineties.

As you may have read during the recent presidential campaign, the state of Michigan has been touted as a leader in re-engineering government under Governor John Engler. The state government that many of us had grown to know and love in the 70's and 80's has been drastically changed and reduced for the 90's. In the past two years alone, the number of state departments has been reduced from 19 to 16, and a great number of services have been turned over to private sector vendors. There is more to come, as we face the reinvention, rightsizing, streamlining, and privatization of government services.

Over the next two days you will be discussing issues surrounding the privatization of corrections, particularly as it relates to jails, and developing a clearer perception of what privatization may mean for you as administrators of the 100 largest jails in the country. This is a serious and topical debate, which for some of you may represent a great deal of political peril. I hope that my remarks will help frame your discussion and help you as you deal with this highly controversial topic.

The public, governors, legislators, county commissioners, mayors and nearly everyone who is fed up with crime and the cost of jails and prisons appears to be in love with the concept of privatizing corrections. Corrections is one of many government services targeted for private sector delivery. Privatization is not a new concept; the United States has a long history of private firms providing public services. This is an old idea that has again surfaced. It will continue to find favor as state, local, and federal budgets tighten.

## *History of Privatization*

In 1968, management expert Peter Drucker first used the term “privatization” to describe some government options for providing services. As far back as 1955, the Federal Bureau of the Budget issued a directive encouraging agencies not to produce for themselves any product or service which could be procured from private industry. As an industrialized nation, the United States has always maintained a large private sector provision of goods and services for government--far more than most other countries. The private sector has long provided services in the areas of trash collection, fire-fighting, public transportation, water and power utilities, schools, social services, and policing. Corrections services were once mostly private enterprises, became exclusively a public responsibility, and are now slowly becoming privatized again.

A study of local government contracting conducted in 1982 indicated that over 100 government functions ranging from car towing to streetlight maintenance to firefighting and even in some cases, drug abuse counseling, are provided by private companies for government. Globally, the Reason Foundation, which tracks privatization efforts around the world, estimates that in the last ten years alone, 100 countries have privatized \$445 billion worth of state-owned assets and enterprises. For those of you who want to know more about this topic, I recommend the 1989 book entitled *The Privatization Decision* by John Donahue.

Donahue succinctly describes privatization as the practice of delegating public duties to private organizations. The most common examples of privatization include:

- The direct contracting out of public programs. (In Michigan there are plans to contract for a secure juvenile secure facility, or “punk prison” as the governor and press call it.)
- The financing of the private delivery of public services through the use of vouchers. (Educational vouchers which parents can use to send their children to schools of choice are a good example).
- The sale of public assets, including land, public infrastructure, and enterprises. (For example, Georgia is looking at the sale and private management of some parks and convention centers.)
- The elimination of programs, commonly known as “load shedding,” is often the simplest method of privatizing because government basically gets out of the business. (Michigan just got out of the liquor warehousing and shipping business last week.)
- A relatively new concept being touted by the federal government’s National Performance Review, headed by Vice President Gore, is called “franchising,” which means simply that administrative services will be sold to other government agencies rather than each providing the service itself

The most common form of privatization is through contracting out or outsourcing. This means that each of you local government officials is right in the center of the spotlight--or right in the

crosshairs of the private sector entrepreneurs. As I suggested earlier, privatization has clearly caught the public imagination and is seen as the answer to cutting the expense of government.

As Peter Kobrak points out in the article, "Privatization and Cozy Politics," the success at the local government level in the private provision of services such as solid waste collection, fire protection, transportation, and other services over the last 25 years has whetted a public appetite. In fact, there are many services which can be provided by the private sector cheaper and more efficiently. The trick is to identify them and provide mechanisms to protect the public interest.

### ***Privatization of Corrections***

In a 1985 Florida poll 43% of citizens declared themselves extremely concerned about crime, but most ranked prison construction the least popular use of tax dollars. This clearly indicates the dilemma faced by corrections administrators. More prison cells and jail beds are required to hold more prisoners; at the same time, lower taxes are demanded. The simplistic solution of contracting with private providers is appealing because of private providers' claims that they will cost less and provide better service. It is clear that the pressure to provide correctional services privately will increase. Corrections Corporation of America, Wackenhut, and Pricer all claim they can do your business better and at less cost than you can.

According to the latest estimates, about 50 sizable corrections facilities handling some 50,000 or more prisoners are being managed by private companies at the state, local, and federal levels. As private companies have captured only about 5% of the market, it is obvious that there will continue to be a great deal more interest in private prisons and jails. Each of you needs to be prepared to respond to this challenge.

Even President Clinton is on the bandwagon, having recently proposed that five federal prisons be run by private firms. Based on his budget message, Clinton would also like to see all future minimum and low security federal prisons built, owned, and managed by private companies.

### ***Pros and Cons of Privatization***

The basic premise is that the private sector can outperform the public sector in the provision of goods and services, primarily because private firms must constantly enhance their performance to meet competition. There is clearly some merit to this argument, but it bears more scrutiny. There are also studies that indicate that public sector providers can outperform the private sector in some areas. The belief in the private sector is probably best stated by Representative Scott Klug of Wisconsin: "The thread of similarity that runs through all privatization is increased value to taxpayers. .(because). .the private sector, driven by profits and regulated by market forces, performs more effectively, more efficiently, and at a lower cost."

The key arguments for privatizing public services are as follows:

1. The primary underlying premise is that since government agencies and employees are in essence a monopoly, there is no incentive for them to be efficient. Unfortunately, in many cases this is true. We have all worked in agencies that are simply not interested in being

efficient.

2. Competition will be dictated by market forces which will continually keep down the price for goods or services because the inefficient operations will disappear and only the most competitive will survive.
3. The private sector can change more readily to maintain its competitive advantage. Because of the bureaucratic nature of government with its rules, procedures, policies, and regulations, rapid change is thought to be impossible.
4. There is also a simple distrust of government and its ability to produce worthwhile goods and services. Many politicians at all levels have ridden this horse to election and re-election. Public sector employees are simply not respected as good workers.
5. Finally, supporters of privatization believe that, by injecting competition into public services, they will force the public sector to become more efficient.

The bottom line is that most citizens believe that private companies will be more effective, less expensive, and will provide superior services. As Alida Merlo says in her article on corrections privatization issues: "The government's reliance on the private sector in recent years has been due, in part, to the public's disenchantment and frustration with corrections systems, the rising costs of incarceration, the demand for more prison space, and the perception and fear of crime."

### ***Arguments Against Privatization***

1. There are higher overall costs associated with contracting out for services. The private companies need to make a profit will eventually drive up the cost of the service. In addition, there are a number of hidden costs for government such as contract preparation, contract administration, and, in some cases, the use of public facilities and materials. When all the associated costs are totaled, the 5% to 15% cost savings that are usually estimated by private groups tend to evaporate.
2. Lower quality of services will be provided. Private firms must reduce costs, which usually means costs for personnel. Lower wage and inexperienced workers will be hired, resulting in a reduction of the quality of services provided.
3. There is a potential for corruption. Because money is involved and contracts to be awarded, there is a greater likelihood of corruption. Kobrak discusses this as a potential pitfall in his article, "Privatization and Cozy Politics," and points out the need to recognize the political activity that surrounds contracting for public services.
4. It will be difficult to write contracts with the specifications necessary to ensure that adjustments can be made to accommodate changing conditions. Opponents claim that flexibility is lost because firms will deliver only what is specified under the contract, unless additional costs are assumed by the government.

5. Accountability to the public is lost. In addition, the only recourse for lack of delivery is to renegotiate the contract or terminate the project, whereas public employees can be held directly accountable.
6. There are a myriad of legal issues, especially legal liability. There are concerns about constitutional protections still unresolved. In the case of corrections, many states have statutes that may restrict certain activities to government agencies.

If there are all these concerns, why privatize corrections at all? In the Heartland Institute's policy study entitled "Corrections and the Private Sector: A Guide for Public Officials," the answer is summed up in the following: "A principal reason for this return to private providers is the convergence of three historic trends: increasing public demand for imprisonment of criminals, increasingly stringent court-imposed standards requiring significant new investments in manpower and facilities, and growing fiscal strain on governments. Simply put, the public demand for quality corrections is outstripping the ability of the public sector to provide them."

### ***How to Compete With the Private Sector***

This brings us to the crux of the issue facing each of you today--how to compete with the private sector and how to manage your resources to meet the challenge of privatization and turn it to your advantage. One way to approach this task is to look at what others have learned about the privatization of public services and see if they apply to jails. For example, John Donahue believes that contracting works best when public agencies can:

1. Define precisely what is to be done;
2. Generate competition for the job;
3. Evaluate the contractor's performance; and
4. Rapidly replace or penalize the contractor if it fails to perform.

According to Donahue, the existence of these four conditions is essential before public dollars should be committed to a private venture.

There is also some evidence that government is better at services involved with:

- policy management
- regulation
- ensuring equity
- preventing discrimination or exploitation
- ensuring continuity and stability
- ensuring social cohesion

The private sector appears to be better at:

- performing complex tasks
- replicating successes of other organizations
- delivering services that require rapid adjustment to change and

-delivering services that quickly become obsolete.

Obviously, these are general categories and exceptions may be found for each. However, using them as an overlay to proposed private sector contracts can generate some questions and further analysis. Donahue concludes, "The trick is to match the design to the task, choosing civil servants where procedural fairness matters most, choosing profit seekers where productive efficiency matters most." The question is where do jails fit? Are they procedural or productive?

I suggest that there is another obvious alternative, which is to develop a public-private partnership in which government maintains control over the process to insure fairness where it is required and limits the private sector to production activities.

The key to successful contracting and privatizing appears for government policy makers to be in a position to:

- Specify exactly what is wanted and expected. This means identifying the deliverables--what is to be purchased in terms of quantity, quality, and cost.
- Have a process for administering the contract once it is developed. Monitoring and contract administration are essential. Constant reporting on progress is necessary, and oversight of the terms of the contract must become an assigned task.
- Select and train high- level staff to perform contract administration and project management tasks.
- Make sure there is competition so that firm bids are under market pressure and there are alternatives if one provider fails to deliver the contract.

To summarize, then, the basic questions to be asked before making a decision to privatize are:

1. Does the arrangement between government and the private vendor specify goals and objectives?
2. Is there a specific measurable set of tasks and deliverables?
3. Is there competition? Are the services readily available elsewhere? Is there more than one provider?
4. Is there a way to enforce the contract? Are there knowledgeable and competent contract monitors and administrators?
5. Is there any conflict of interest? Do private vendors have influence over the decision?

## ***Conclusions***

The arguments for and against prison and jail privatization parallel the general arguments outlined earlier. In summary, proponents of private jails argue that private companies can:

1. Provide better services at lower cost
2. Save money for taxpayers
3. Use the latest technologies and management techniques
3. Reduce bureaucratic red tape
4. Implement innovative strategies
5. Build more quickly and cheaply
6. Have greater flexibility in labor policies

Opponents counter that private companies will:

1. Profit from the misery of others
2. Lobby for increased incarceration
3. Have no incentive to lower recidivism
4. Provide negative reports on prisoner behavior to keep population numbers high
5. Reduce the number, quality, training of staff
6. Abuse inmates' civil rights
7. Skim the "cream of the crop"

As sheriffs, jail administrators, and key policy makers in your respective jurisdictions, what should you do to face this challenge?

First, your participation in this meeting should equip you with new knowledge on the topic of privatization and prepare you for the future discussions in which you will inevitably participate. This is a good first step.

The second step will be to analyze your current operation and determine how your department stacks up in areas of efficiency, effectiveness, and cost containment. Are you using the newest technology available, and have you incorporated the newest management techniques? Are you constantly improving operations and using the best practices in corrections management? If not, you are ripe for a private sector assault.

I am convinced that the answer, if there is one, to the public-private debate is going to be what John Osborne and Ted Gaebler call "competitive government. Their 1992 best seller, *Reinventing Government*, declares that the issue is not public versus private, but competition versus monopoly. This concept has caught on in many places, and more competition is in our future.

Indianapolis, Indiana and Phoenix, Arizona provide good examples of municipalities that have reinvented to face competition. In 1978, Phoenix began to bid out trash collection to private contractors, but allowed the public works department to prepare bids as well. For the first four years, the city department was unsuccessful in competing for the work. By the fifth year, public works had become sufficiently innovative with new equipment and techniques that it won back

work from the private contractors. At last report, public works had responsibility for all trash collection, again--only this time, it was won competitively. This is a perfect example of public sector employees rising to the challenge of private sector competition.

The privatization threat which each of you face will require you to make your operations as efficient and competitive as the private firms claim they are. Reinvent your operations by adopting the entrepreneurial approach to government. Look at all your current processes and determine if they still have value. Question everything you do. If you can't see a reason for doing something, allocate your resources to other more important tasks. Use the latest technology and management techniques. Model your operations after the competition to the degree that you can. In other words, become competitive if you aren't, and demonstrate that there are no cost advantages in private companies doing your work. This may be a difficult road to take, but it is not an impossible journey.



# **Session 1: How to Avoid Privatization**

## **Howard Ferguson, St. Louis, Missouri**

### ***Background***

The City and County of St. Louis have different jurisdictions and share no common services. The city has an elected mayor. The fiscal managers are controlled by the Estimates and Appropriations Committee, which is controlled by the mayor, controller and the head of the board of aldermen. As these are all elected officials, budget decisions can be controversial, but fortunately, the officials now all seem to be going in a similar direction.

The police chief and police department answer to a police commission, which consists of four people appointed by the governor and one by the mayor of St. Louis. The police department is funded by the city and the state. The city sheriff is an elected official and is responsible primarily for transportation between the courts. The city marshal is responsible for city courts and city buildings. The city has two court systems; one is for city violations and one is the state circuit court, so we must deal with two different presiding judges.

Another major department is the Department of Public Safety, which includes fire, air pollution, excise tax, neighborhood stabilization and corrections. Corrections is responsible for two facilities and an annex; parole and probation; alternative sentencing; community service for those who can't pay fines; community service; and a training academy.

### ***Privatization***

St. Louis now has a vertical building 84 years old that houses 280 inmates and another that houses 820 inmates and is 33 years old. A housing unit opened last year with 224 beds and four pods at a cost of \$17 million. It was designed to take the place of the old facility. However, because of the population surge in inmates, all facilities were required to remain open. There is an annex for the female population, but because it has a population cap of 60, there are 20 females housed outside the city. Eighty-five to ninety males are also housed outside the city.

The mayor decided the city needed a new justice center, which will be constructed downtown. The estimated cost is \$72 million. After the mayor made his decision, the operations manager posed the question of whether to privatize this new facility. The budget staff, project manager and other key players in the city developed RFPs. The original proposal request included the tasks of designing, building, and operating the facility, but there was not much interest from contractors. The subsequent RFP was for operation only, and four companies responded. The city took the responses, looked at the lowest estimate, and questioned the city's capacity to compete with these private vendors.

In putting out the RFPs, there was concern that the private vendor would want to bring in new staff and about what would happen to existing employees in the old jail. Would a private vendor

bring in new staff or use existing staff? The RFP went out with a stipulation that required the vendor to hire new staff at the same salary as the city staff. The low bid came in at \$10 million.

### ***Results of the RFP Process***

The bids forced the county to look at its operation and see where improvements could be made. Some services, including food services and the commissary) had already been contracted to private vendors. Other services were being provided by the city (maintenance, medical services, laundry, religious programs). All these services and the cost of their delivery were examined.

A staffing analysis found that correction officers were often acting as clerks. They were not being used efficiently and often were working “out of class”. A final report revealed that the county could compete with the private vendors, so a recommendation was sent to the mayor proposing that the city manage all the facilities.

This process aroused interest in the staff at the city jail, and administrators felt an obligation to retain people who had worked at the facility for 15 to 20 years. The city jail is a threatening environment for everyone, and the county felt obligated to hire long-term employees to work in the new building as city employees.

*For additional information, contact Howard Ferguson, Commissioner, St. Louis Division of Corrections, Department of Public Safety, 1200 Market, Room 402, St. Louis, MO 63103; (314) 622-4991.*

# **How to Avoid Privatization**

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## **John Clark, U.S. Bureau of Prisons**

The Bureau of Prisons (BOP) operates 25 pretrial facilities. The Bureau has 105,000 inmates in 90 institutions, three times as many as 15 years ago. About 10% of BOP's inmate population is contracted out.

Three issues to be considered in deciding to contract:

1. The need for specific contract requirements.
2. The need for a good evaluation and selection process to maximize competition.
3. The need to monitor the contractor extensively and continually.

### ***The Bureau of Prison's Experience in Facility Contracting***

The BOP has considerable experience in contracting for facility operations, including:

- In west Texas three local jurisdictions subcontract with the BOP to hold sentenced criminal aliens.
- A 1,000 bed facility in Eloy, Arizona, holds 500 BOP inmates and 500 INS prisoners.
- A current administrative initiative to privatize a number of institutions.

### ***The West Texas Facility***

Most inmates in the West Texas facilities are aliens from southern California. The facilities in Pecos, Big Springs and Eden, Texas, began as a short-term solution to the rapid growth in the number of aliens. All the facilities have grown; one now has over 1,000 beds. In Big Springs, Texas, the BOP has one contract; per diem rates were originally \$30-33/day, but, after negotiations, are now \$35-36/day.

These are spartan institutions without much programming. Inmates are far from their families. The facilities have experienced a series of escapes and minor disturbances. The situation has gotten better, but there have been a few disturbances recently. An investigation into the disturbances revealed that there has recently been a real change in the kinds of cases being sent to the facilities. No longer are the inmates those sentenced six months for illegal entry. As a result of major initiative by federal prosecutors, most are now graduates of the California Department of Corrections' high security institutions.

### ***The Eloy, Arizona, Facility***

This institution is between Phoenix and Tucson and is the result of a Republican initiative in the late 80's to experiment with one facility to do immigration hearings. This 1,000-bed facility is a joint Immigration and Naturalization Service/Bureau of Prisons facility administered by the Bureau. It includes courtrooms and INS staff space.

Eloy's RFP resulted in the selection of a Kentucky company called Concepts. However, because of problems such as disturbances and major escapes, they were losing money and were forced to sell. CCA bought them out, and the facility is doing better, despite some continuing problems, including a few disturbances and some escapes.

Private corrections companies, which are growing rapidly, have very good leadership at the top levels, but problems with middle management. For example, the Chief of Security sometimes has had no prior experience in a correctional facility.

### ***The Clinton Initiative on Privatizing Federal Prisons***

The President's initiative resulted from a collision course between BOP's rapid growth and a mandate to cut the number of federal employees by 270,000. A lot of political push and pull resulted in the decision to privatize all future minimum security and administrative low security (pretrial) facilities unless they are in a complex with other facilities. Senators were generally in favor of privatization, but they did not want privately operated facilities in their own states because they didn't want to lose federal jobs. The BOP initially believed that five of its facilities would be privatized, but at this point, only one is scheduled to be privately operated.

### ***Approach to Awarding Contracts***

Rather than simply accepting the lowest bid, the BOP uses an approach that scores "best value" by evaluating quality of service, past performance of the company, and price.

- BOP is getting away from a per-inmate per-day approach, and asking for a single fixed price to operate the facility up to a fixed capacity.
- An incentive/award fee of up to 5% for outstanding performance is added to contracts
- Medical costs of prisoners are included in the bid. The contractors can bid either with no catastrophic limit or a \$25,000 catastrophic limit.
- Financial penalties for sub-par performances are built into the contract. Monitoring of the contract becomes very important; a quality assurance plan is a must.
- Vendors are not required to mirror BOP operations, and they may develop their own innovative services.

*For additional information, contact John Clark, Assistant Director, Community Corrections & Detention Division, Federal Bureau of Prisons, 320 1st St, NW, Room 500; Washington, DC 20534; (202) 514-8585.*

## **Session 2: Why Do Elected Officials Support Privatization?**

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**Susan McCampbell, Broward County, Florida**

### ***Background***

There are about 4200 inmates in the Broward system, and the rapid growth of the system has pressed Broward to look for a way to undertake some private initiatives. Broward was interested in finding a legitimate way to divert pretrial offenders. There was also the impulse to look at privatization before elected officials put pressure on us to do so.

Medical services and food services are already operated by contractors. Broward also gave a contract to Wackenhut for a 300-bed work release center, which will open in six months at a daily cost of \$39. Because of a lawsuit, Wackenhut probably spent between \$600,000 and \$800,000 in the past year--without a contract.

### ***Privatization***

Instead of fighting privatization, it is better to find a way to live with privatization. There are appropriate operations to privatize. For Broward, the issue of privatization is not over. The sheriff's office and the Board of County Commissioners reached a compromise. Of the total 1024 beds being constructed, the county will build, construct, and operate the work release facility and juvenile facility. After that, the county must bid against private companies on everything else. The county has an advantage in that private companies will be forced to cost out transportation and other services that the sheriff's office would have to do for them.

### ***Other Observations***

From a jail administrator's perspective, we need to remember that corrections is not owned by anyone. Whenever we have a story, we should go to the board of commissioners. It is important to give corrections a face. Other important considerations include:

- Unions--Their views on privatization can become an issue in contract negotiations. Unions' relationship with other public entities can also affect privatization
- Money--Money is always an issue. Broward seems to have an unending supply of it, used not to build schools but only to build jails. Broward has elementary schools that are nothing but trailers, and the county estimates that it needs \$2 billion to deal with school needs.
- Data--Who has the data is an important issue. The Florida Privatization Commission put together a good piece of propaganda, which praised the private prison, its programs, and educational services. Their promotion points to the issue of who has the data. Jail administrators should develop their own data and not wait for private groups to put forth

their data.

- Media--We need to help the public understand the real issues. Broward is using human interest stories to put a personal face on corrections.

The middle ground is the key. Jail administrators who refuse to recognize that privatization is coming will simply be run over. Especially for those jail administrators who might have options, it's best to look at privatization as a way to demonstrate a willingness to bring the private sector in but at the same time to keep some control.

In summary: avoid hysterics; find a quiet way for private companies to get involved; talk with the unions and see how they can help; and find positions and opportunities for other people who want to help. All these things point to formulating an early battle plan. Align your community and help move it in your direction. Know who your allies and enemies are on the local political scene. Facing the realities that give jail administrators some options is really the way to deal with the privatization issue.

*For additional information, contact Susan McCampbell, Corrections/Rehabilitation, Broward County Sheriffs Department, 2601 West Broward Blvd., Fort Lauderdale, FL 33312; (954) 831-8916.*

# **Why Do Elected Officials Support Privatization?**

## **Jerry Krans, Orange County, California**

Orange County is the only county in the United States that has filed bankruptcy. Going through bankruptcy was a learning experience for public officials, as numerous private companies came to the county and said that they could do things better and cheaper. A large private firm said it could save Orange County millions of dollars by privatizing jail operations. Another firm maintained that it could run corrections' food services for much less money.

These firms did not initially come to the sheriff or any of the corrections people. Instead, they went to the media, to television stations and newspapers. By the time they went before the Board of Supervisors, the sheriffs department had anticipated meetings with them and had done extensive studies. We collected data on the whole issue of privatization and identified areas in which it had failed. The private firms were then asked a great many questions, including some about their past failures. They were also asked if they knew that it is illegal for a private firm to run a jail in California.

### ***California's Jails***

California has 58 counties, and 57 have a jail. One county is so small that it contracts with an adjacent county. The sheriff is the chief law enforcement officer in each county, responsible not only for criminal activity but also for patrol and investigation. A number of the sheriffs are coroners; a number are public guardians. Economies of scale are what the politicians, are interested in, especially in this bankruptcy situation. Their focus is simply on dollars.

Orange County hired an attorney to research the California law on privatizing a jail and found out that privatizing is against the law. California has two different kinds of counties: a general law county and a charter county. Particularly in general law counties, which is what Orange County happens to be, it is illegal to privatize jail operations. Four years ago in one county in California a Board of Supervisors took the jail away from the sheriff. The sheriffs association put together legislation that says that the duties of the sheriff, one of which is running the jail, cannot be taken away.

At the end of the legislative session, one private firm put up a bill to form a California Privatization Commission patterned after Florida's. On the last day of the legislative session, this bill was defeated, despite the significant amount of money behind the privatization lobbyists.

### ***Growth of Private Jails***

Roughly two per cent of all persons incarcerated in the United States are in some type of private corrections institution. Of these, 11 percent are at the federal level, 83 percent are in state institutions, and six percent are in privately operated jails. That is, only two-tenths of one percent of those incarcerated in local facilities are in privately run jails.

This is also the case in California. Two California jails, both run by cities, are privatized.

One example is Miramar. The facility opened March 13, and in about a week, the inmates took over and did \$2 million in damages. The contract had no contingency clause to cover in case of a disturbance, and it turned out that there was no middle management. The private company had claimed that 70% of the 77 employees who were hired to run this facility had a corrections background and that all staff had received training. It turned out that the training consisted of one week. The facility lasted a total of 16 days, which is not too surprising given the staffs lack of direct experience in corrections.

It is important to counter privatization by knowing what questions to ask.

- Monitoring--A number of institutions have no idea what a contract monitor is.
- Responsibility-- Who is responsible for repairs if there is damage? Often a private company only pays for \$1000, and the government must pay for the rest.
- Disturbances--Who responds to riots or disturbances?
- Strikes--Who responds in case of strikes?
- Crime--When there are crimes in facilities, who does the prosecution?
- Employees--What are the backgrounds of the employees the private company is hiring?

All of these considerations add costs to a contract. However, the damage to Miramar was \$2 million, which the private firm is not going to pay for. Jail administrators need to educate legislators and public officials about these considerations.

The state of California has just developed a new state inspection process in which volunteers will inspect the jail in adjacent counties. This process is likely to encourage innovations from county to county and to promote the exchange of ideas. Orange County has learned that privatization gives administrators an opportunity to look at their operations and to find ways to be competitive.

*For additional information, contact Jerry Krans, Assistant Sheriff] Orange County Sheriffs Department, P.O. Box 449, 550 No. Flower Street, Santa Ana, CA 92702; (714) 647-1802.*



# **Why Do Elected Officials Support Privatization?**

## **Savala Swanson, Tarrant County, Texas**

In Tarrant County a Commissioners Court is responsible for the jail facilities. The sheriff is responsible for jail operations and is the chief law enforcement officer in each county. Whenever a decision is made related to the jail, the sheriff needs to be included because he has to operate the facility. Privatizing jail facilities clearly affects both elected officials and jail administrators.

The elected official is viewed as a public servant. His or her approach to any proposal will be closely scrutinized by the media and the public as well as those directly influenced by it. The decision to privatize is usually based on the belief that privatization can result in savings or additional funding for new programming. It is important to realize, however, that legal liabilities cannot be disposed of through private contracts. Federal, state, and county mandates are still the responsibility of the governmental body.

### ***Important Issues Related to Privatization***

- Public Opinion--The public wants to know why is it necessary, if taxes are going to be increased, and whether the contractor is a local company. Tarrant County has had huge out-of-state contracts canceled because of public and media opinion.
- Cost of Operations--What will the cost for the physical facility be? Will it be a renovation or conversion? What are the costs to build a new facility, including utilities and parking? The same questions apply to equipment, which might be updated or purchased new.
- Personnel--Personnel issues include whether there will be a reduction in numbers of staff, how overtime will be handled, what the benefits package will be like, and whether training will be done internally or not. It is also important to address lawsuits and union issues, such as strikes and slow-downs in productions.
- Contract Terms--Terms of the agreement should address longevity, legal obligations, and conditions of termination.

Benefits of privatizing seen by elected officials include:

- No tax increase or no new taxes
- Lower operating costs
- New revenue sources
- Strong media support
- In most cases, public support

### *Concerns of the Jail Administrator*

The jail administrator views the same window of opportunity somewhat differently from the elected official. Administrators who have built good solid programs in their confinement facilities are protective when the possibility of using private companies for jail management is discussed. Many long hours have gone into establishing management standards and operating procedures. The administrator may oppose the elected official's decision to privatize, because privatization may affect the way the jail unit is to be managed. When private companies or agencies are allowed to operate within the confinement walls, there can also be a security concern. The introduction of non-departmental staff into the jail can cause problems between the jail staff and staff of the private entity.

The possibility of losing experienced personnel concerns not only the administration but the supervisors who perform the daily work. A well-trained officer can do many tasks, but if the staff are not employed by the governmental agency, their training and skill level are hard to determine.

In some cases, the loss of operations to a private company means a cut in programming. Certainly, governmental entities have to begin to network together, with the result that some programs are being offered without cost to the government. However, a private company may not offer programming of the same type. The cost factors should be monitored constantly in order to note any increase in cost to operate. This is a real task.

However, there are areas where privatizing can be a benefit to both elected officials and jail administrators:

- In the area of support services, private companies can be a help. In Tarrant County, food and medical services are privatized. Private companies costs for food are 81.3 cents, and the county was unable to get lower than \$1.12.
- Medical costs are skyrocketing. Tarrant County uses a county hospital and its staff, which has been a benefit not only in terms of cost, but also in federal court.

In many cases, our elected officials have a different agenda than we do. Jail administrators need to learn what the agenda is in order to promote their own. We must learn to become proactive instead of reactive.

*For additional information, contact Savala Swanson, Chief Deputy, Tarrant County Sheriffs Department, 100 N. Lamar, Fort Worth, TX 76196; (817) 884-3173.*

# **Why Do Elected Officials Support Privatization?**

## **J. Daron Hall, Davidson County, Tennessee**

### ***Background***

I am in my twelfth year in corrections. In the Nashville's sheriffs office, I worked my way up to assistant administrator of their downtown facility. After a few years I went to work for Corrections Corporation of America (CCA), but I had the opportunity to return to the public sector. Now I am the chief deputy in Nashville and oversee all the jails including those with CCA contracts. We have five facilities and 2500 inmates, 1500 are ours, and 1000 are CCA's.

I stole a lot of ideas from CCA, including an understanding of the importance of accountability. CCA also taught me that overtime--unlike pay raises or benefit packages--is one of the few things that you can control. By controlling overtime, I saved \$400,000 in six months. With the money saved we bought new uniforms and service pins, and we have an awards dinner every year.

The current sheriff of Nashville won 70% of the vote by saying, "I want to run corrections like a business." This is what the public thinks it wants. This sheriff, who came from the business world, had never set foot in a jail at that time. Nashville did save money, in part because eight miles away is a multi-million dollar company that is building facilities and getting positive press every day. That puts enormous pressure on Nashville corrections.

We keep track of what CCA is doing in terms of salary. I was sending officers through pre-service training at CCA and then they would come to work with us. People were leaving the private sector to work for us because we were paying more and staying in the competition.

### ***Comparison of Public and Private Corrections***

- Is there corruption in private corrections? Of course. Is there corruption in public corrections? Yes. There are corrupt people in both systems.
- Politics-- Are the private companies better at politics? Not really. Jail administrators can either complain about their inability to wine and dine people or do something about it. Politics is going to the city council meetings and talking and putting a face on our business.

Private corrections companies would rather run prisons rather than jails. Prisons are much easier for them, because they are more profitable and more predictable. The next markets for private companies are likely to be juveniles and women. The state of Tennessee has hard data comparing private and public facilities. Tennessee built three prisons, one private and two public, and at the end of a two year period, costs and operations were compared. An outside group and accounting firm that came in to study the operations found that costs were 3-4 cents less a day in CCA facilities. The difference was very minimal, and operations were also similar. The general belief was that both facilities operated better than they would have if they were not being compared. The report, entitled "Comparative Evaluation of a Privately Managed CCA Prison (South Central

Correctional Center) and State-Managed Prototype Prisons (Northeast Corrections Center, Northwest Correctional Center)” is available from the MC Information Center.

My final recommendation is to find a middle ground. The public wants jails to be run in a business-like manner, but the design of the contract should be up to jail administrators, not lawyers, Privatization is potentially a win-win situation. Private companies have a role, but we must get active in presenting our case.

*For additional information, contact J. Daron Hall, Chief Deputy, Davidson County Sheriffs Department, 501 Second Ave., Nashville, TN 37201; (615) 862-8166.*

## **Session 3: The Effect of Privatization of Other Governmental Functions**

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### **Denis Dowd, Shelby County, Tennessee**

#### ***Background***

The Shelby County Sheriff is an elected official, and the Shelby County Corrections Center works for the mayor. Neither the director of the jail nor the sheriff controls funds independently. Everything is funneled through the county, and local political issues are very important.

In the jail, medical services, telephones, and commissary are privatized. In addition, the county hospital has been converted to a privately operated facility, and mental health services are also being privatized. There have been repeated successes and failures in Memphis, but, regardless of success or failure, privatization is a fact of life.

CCA is just a few miles away from the Shelby County Corrections Center. The CCA jail in Nashville is an example of what private contractors can do. Because it is CCA's showpiece, the jail will continue to run no matter what the cost. There is no doubt that CCA has a great deal of support from state and local governments. CCA officers grew up in Tennessee; it is a publicly owned corporation and a number of public leaders own shares in CCA, so they have a vested interest in its success.

#### ***Reasons for Privatizing***

The overall efficiency of the operation combined with its cost are the reasons leaders look to privatization. These are the appeals of privatization for elected officials. The question is whether it is true. Success in one facility is not necessarily the same as success in another facility or another part of government.

Several factors affect the definitions of success:

- The ground rules may be different from facility to facility. The ability to run a minimum security female jail is not the same as being able to run a maximum facility for male offenders. What is required is absolutely different. Private companies would much rather run long-term minimum facilities than maximum, high-turnover facilities. Success can't be projected across the board.
- The starting point is also important. If a facility is managed badly, it is easier to improve than a well-managed facility. Success does not have the same definition in these two situations.
- The political and social environments are important. The political environment determines how success is measured. In some areas, the local government's only interest is money. In that context, if money can be saved, that would be a successful operation.

In the future, there will be more privatization of both entire facilities and particular components of these facilities. One hundred thousand investors cannot all be wrong. Whether it is done right or not, privatization is here to stay. Because political entities don't like to deal with the intricacies of private sector contracts, jail administrators will have to do so.

The senior managers in private companies are usually people with years of experience in the public sector of corrections. They tend to be former wardens, public managers, or former superintendents. Elected officials have a limited interest in the details of the agreements, but the private sector is interested in the involvement of jail administrators.

### ***Closing Observations***

- Agreements need to be defined by jail administrators, who need to decide what the private contractor can reasonably provide.
- People who work in jails tend to develop an agency loyalty, a sense of ownership in the enterprise. The private sector may not get that same level of personal loyalty in a crisis.

*For additional information, contact Denis Dowd, Jail Director, Shelby County Sheriffs Office, 201 Poplar Avenue, Memphis, TN 38103; (901) 576-2414.*

# The Effect of Privatization of Other Governmental Functions

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## Robert Sprecher, Shelby County Division of Corrections, Tennessee

I spent 20 years in county jails, then six years at Wackenhut, so I know that no one in Wackenhut or any other private company sets out to do a bad job. They set out to fulfill the contract. Their role is to provide a service, not to deal with public policy.

### *Points to Consider*

- The public sector is eager to hand off a large number of functions to private companies. It's important to realize the fundamental purpose of providing services. Are they transaction-based or outcome-based? Food services and medical services are naturals because they are measurable.
- Craft a contract so that it meets the jail's needs rather than the contractor's. When a request is made of a contractor to send a sample contract, the contractor will naturally send one that favors itself and potentially eliminates others. Their role is to maximize the chances that the company will win the bid.
- One reason CCA is adept at press relations is that every time they announce a new contract, they have an easier selling job to a state legislature down the road. One thing counties often take advantage of is the political cover that a private entity provides. When there is a tragedy, it is CCA's tragedy, not the county's.
- The private providers have an advantage in that they can provide budget certainty. Some governmental agencies that are accredited may come close, but private contractors automatically have an advantage because they can point to the contract. The county knows the company won't come back for supplemental appropriations. Private providers can shift resources in a different way than public agencies can.
- Early on when I was at Arapahoe County, we contracted for medical services. Initially this was a very good decision, but the contractor then came back with an enormous budget. A very sharp budget analyst suggested that we take back responsibility for medical services. The result was a tremendous success in which we saved \$250,000 in overhead in a year. It is important to grow your own financial analysis. Start developing your own sources of information and then take this information to the elected officials. This protects your agency from a private provider criticizing your operation.
- Private providers prefer facilities they have designed rather than existing facilities because they can control staffing efficiencies. They can also build in 18 or 19 months rather than four years.

- Disturbances and escapes are often presented as arguments against privatization, but elected officials are most interested in saving money.
- Companies directly contribute to elected officials' campaigns. The influence is direct, but not illegal. However, CCA has direct personal contact with the government. They have political action committees and they use them effectively.

*For additional information, contact Robert Sprecher, Director, Shelby County Division of Corrections, 1045 Mullins Station Road, Memphis, TN 38134; (901) 377-4502.*



## **Session 4: Contracting for Jail Services**

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### **Pat Sullivan, Sheriff, Arapahoe County, Colorado**

When Arapahoe County opened a new facility ten years ago, privatization was as hot a topic as it is today. Arapahoe County decided to draw a line in the sand around inmates regarding privatization. Anyone who was in direct contact with the inmates was to be a government employee. However, everything beyond the direct handling of inmates was subject to privatization.

- Kitchen--Arapahoe County's kitchen contract takes advantage of mass purchasing power and inmate labor to lower costs. For 886 inmates, there is one kitchen manager, an assistant manager, and five cooks, The cost is \$1.025 per meal, including one staff meal per shift. There is a problem with smuggling related to the kitchen, in spite of the fact that background checks are done on the kitchen employees.
- Laundry--ARA has both the laundry and kitchen contracts. One employee at \$480/week covers the laundry. The county owns the equipment and inmate labor is used.
- Library--The county contracted with the local library district, an arrangement that has been going well.
- Courthouse Security--There have been two shootings in the Arapahoe County courthouse. For courthouse security, the county has contracted with Wackenhut, which operates the magnetometers (two per court house) and the three courthouses. This security is backed up by one deputy in the courthouse on patrol in the building.
- Commissary--The commissary contract is 20% of gross, which brings in about \$20,000 a month.
- Phones--The telephone arrangement is for 39% of gross. A phone call costs \$2.10 and results in \$20,000-\$30,000 per month.

The county paid for the initial set of televisions and recreation equipment. Now, revenue from the telephone and commissary contracts in the inmate welfare fund has replaced all the furniture, the televisions, and the service for the televisions. All the recreation equipment has been paid for from the profits of the commissary and the telephone service.

- Guarding disabled inmates--The county has also contracted for guarding inmates who are really disabled. When the inmate is close to ambulatory, county officers take over.
- Medical services--Rob Sprecher was one of our lieutenants at the time the county was designing and opening its new facility. He was involved in monitoring the contracts when it was determined that the county could operate medical services for \$250,000 less than the

contractor. So after two years, the county went back to self-operation and we are still operating medical services today. All the nursing staff is the county's, but many aspects are contracted out, including doctors, psychologists, and the dentist. The county also has a telemedical contract with Denver General Hospital to reduce the trips to specialists. The system enables a specialist to provide advice based on a video hook-up. A West Virginia company, MDI, provides the equipment.

*For additional information, contact Patrick Sullivan, Sheriff, Arapahoe County Sheriffs Office, 5686 South Court Place, Littleton, CO 80120-1200; (303)795-4701.*

# **Contracting for Jail Services**

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## **John Rutherford, Duval County, Florida**

Duval County contracts for physical and mental health services, food services, and the commissary. Our experience has taught us that success in contracting depends on the personnel performing the contracted services. When Duval County outsourced these services, especially medical, one of the first steps was to develop a staffing contract.

### ***Keys to Success***

- Develop a good RFP--The key in contracting is to develop a high quality RFP. A contract attorney can help. Duval County's RFP was specific about sick call procedures, code red requirements, and a staffing mandate. Fortunately, in the second stage, the solicitation of competitive bids, three or four contractors bid, which created qualified competition. The RFP emphasized services, not just cost. Price was just one of nine selection criteria. The other considerations included quality of staff, the financial position of the company, and its history in corrections. All of these elements are important in the selection of providers.
- Be aware of everyone's agendas--Duval County had problems with the transition phase. If all the medical staff had been swept clean, we would have been better off. The problem was that we asked for employment of a core of previous employees in the transition phase. However, many of the nurses were against privatization and this caused big problems. You need to be aware that everyone has his/her own agenda.
- Monitor contract performance--The monitoring and evaluation of contracts are perhaps most important. Success is like a vapor; it comes and goes. Six months ago I thought our medical service contractor would not be here today because their performance was poor and the administrator was less than adequate. They had a lot of personnel problems. Two administrators, two doctors and one psychiatrist later, we have a good group, and contracting is a success. Part of what forced the failure into a success was the fact that we had a very strong and competent contract administrator who held the contractors' feet to the fire on a lot of issues.

### ***Duval County's Staffing Contract***

If the employees don't show up to work, their salaries are returned. Under the first two administrators, we were averaging \$29,000 a month in payback. No one was happy about this situation. They were trying to use part-time staff who came to work if they felt like it. If we hadn't written this penalty into the contract, it would have been a problem. We also have lockout privileges on these private providers as well as approval of prospective employees.

*For additional information, contact John H. Rutherford, Director, Duval County Sheriff's Office, 501 East Bay Street, Jacksonville, FL 32202; (904) 630-5847.*



## **Session 5: The Prison Litigation Reform Act**

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**Lynn Lund, Attorney at Law, Salt Lake City, Utah**

**William Collins, Attorney at Law, Olympia, Washington**

### ***PLRA Background***

As a background to the discussion of the Prison Litigation Reform Act, Lynn Lund summarized the four major eras in the Supreme Court's approach to inmate litigation.

- *Hands-Off Era*-- Inmate had no constitutional rights regarding conditions of confinement. This era ended in 1974, with the Supreme Court's decision in *Wolff v. McDonnell*, which said that inmates are entitled to due process.
- *Hands-On Era*-- In effect, courts became the administrators of corrections. A landmark case in this era was in 1983, *Smith v. Wade*, in which the Court ruled that a jail administrator was liable if a) the administrator knew or should have known b) of a pattern of gross abuse, c) and after such knowledge, did nothing.
- *Great Deference Era* --The "hands-on era" ended in 1987, with *Turner v. Safley*, which ruled that "great deference" must be given to corrections administrators' decisions.
- *'Nuff Foolishness Era* --Beginning in 1991, the courts, in effect, said no more coddling of inmates. For example, in *Hudson v. Jack McMilliam*, the Court ruled that correctional officers must be protected from litigation on use of force except when they "maliciously and sadistically use force." And in *Sandin v. Conner*, the Court stated that an inmate is not entitled to the procedural protections set forth in *Wolff*, unless discipline imposes atypical hardship or an extension of a sentence.

In essence, the current era forecasts the intent behind the passage of the Prison Litigation Reform Act (PLRA), which restricts the power of federal courts to order relief in prisoner cases and creates deterrents and limitations on inmates filing civil rights cases.

### ***The Prison Litigation Reform Act***

Congress acted as the cavalry in passing the Prison Litigation Reform Act. PLRA, originally known as the STOP act, was tacked onto a budget act, which made it impossible to oppose. It was not well-drafted, and has a patchwork, hurry-up quality. Based on input from many sources, it is a very broad statute addressing all conditions of confinement. The act also includes jails, although some courts will maintain that jails are not included.

PLRA represents a huge tipping of the scales away from the traditional court approach to inmate cases. In some ways, it echoes the approach in *Lewis v. Casey*, but Congress has gone much farther and much faster.

### ***The PLRA Has Broad Application***

- Applies to all “inmates rights” suits, including Section 1983 claims. Limits relief power of courts to order relief when they find violations of federal law.
- Limits powers of special masters.
- Limits the power of parties to settle
- Limits the size of attorneys’ fees
- Invites termination of old court orders
- It creates disincentives to inmate suits.

### ***Questions Related to PLRA***

- A major question is whether all or parts of the PLRA are Constitutional. There are likely to be conflicting court interpretations. Especially at issue are the following provisions:
  - It has retroactive application.
  - Its three-strikes-and-out provision says that after an inmate files three frivolous cases, they are barred from any Civil Rights cases. Suits prior to the enactment of PLRA all count toward this three strikes provision.
  - It seems to violate “separation of powers’ provisions by barring inmates’ access to the courts. Many federal judges are opposed to the PLRA because it decreases the power of the federal court.
- Will the PLRA have unintended consequences?
  - Congress has taken a dramatic step, but without examining the alternatives. For example, PLRA creates limits on population caps imposed by the courts, but if the court cannot impose population caps, what will it do instead? The alternative may be to raise facility capacity, with results that may be worse than the present situation.

### ***Section 802 Provisions***

#### **Limits Court’s Power to Order “Prospective Relief”**

One of two major themes of PLRA is to limit the court’s power; the other is to create disincentives for inmates to file suits. Goals are to:

- Make the court take the low road, not the high road. Congress decided that courts were abusing their powers, but Congress’ assumption is that defendants don’t need courts to micromanage.
- Set presumptive end dates for cases. The good news is that cases must have end dates. This is a major change. Courts should no longer operate jails or prisons for 10 to 20 years. Congress cited never-ending consent decrees in enacting the PLRA, but they did not

examine why they lasted so long.

- Get rid of big consent decrees. Provisions make it virtually impossible to enter into consent decrees.
- Limit powers of Master. The federal court judge must now pay for the Master, and the payment can only be about \$60-\$70 per hour rather than the current rate of approximately \$250 an hour.

### **Prospective Relief: The Magic Words**

All prospective relief injunctions must include the following “magic words”:

- *Narrowly drawn*--All injunctions ordering a jail or prison administration to do something different must reflect that the order is narrowly drawn to correct specific violations of federal law.
- Extends *no further than necessary* to correction violation of a federal right
- The *least intrusive* means necessary and
- Give “substantial weight” to its effect on public safety and the operation of the criminal justice system. Injunctions must give substantial weight to public safety and criminal justice concerns.

These requirements include consent decrees, which is where they are most important

### **Prospective Relief: Prisoner Release Orders**

A prisoner release order is any court order that affects a prison’s or jail’s population. Population caps, which have been the savior of many jails, will now be harder to obtain. The question is, what will be the effect of this change under PLRA?

- Prisoner Release Orders must be the last choice, not the first. This means that if the court finds a violation is related to conditions of crowding, reducing the population is the last choice. The court has to enter other forms of relief first. Only then can a population cap be imposed.
- Prisoner Release Orders require a three-judge court. A single judge cannot enter a population cap. The intention of a three-judge court is to limit the power of the court to impose release orders.
- Crowding must be found the primary cause of the violation. The court may find this and simply require a doubling of staff to correct the problem rather than dealing with the jail

population directly.

- No other relief will work. One question about this requirement is how seriously courts will apply this requirement.
- Others can intervene. Other parties with an interest in population caps--e.g., legislative bodies, prosecuting authorities, police agencies--can enter the case. If a state institution is faced with population cap, jails might intervene. In any case, this should force judges to realize that crowding will affect local jails.

One effect of these changes may be that judges will look closer at poor management, which is often a contributing factor in current crowding cases. Courts may look at the incidence of violence and deprivation of programs. This means that, in effect, jail administrators need to set caps themselves. In any case, it is difficult to predict what will happen in terms of the court's intervention in crowding cases.

### **Terminating Relief: The End is in Sight**

Prior to PLRA, the burden was on defendants to show that violations were cured and were unlikely to return if the case was dismissed. If the judge was unsure, he/she could keep a finger on the case for a long time. New provisions change this:

- PLRA applies to all orders, including consent decrees.
- If the violation of the federal law no longer exists, the case is over. This means that there will be no more orders because violations might occur. Now, at prescribed intervals, defendants can come to the court and ask to terminate the decree.
- The court *must* terminate unless it finds *current* violations of a federal right. The burden is on the plaintiffs to prove a continuing Constitutional violation. This is a huge shift. Its goal is to keep the court's oversight as brief as possible. Even if a judge thinks the cure is a facade, the law doesn't give the judge authority to do anything except terminate the order.

### **Motions to Terminate: Timing**

- New Orders--A defendant can make a motion to terminate two years after the order and again one year after a denial.
- For old orders that have the "magic words" there can be a motion to terminate two years after the passage of PLRA (on April, 1998).
- Old orders that do not have the "magic words" are subject to termination right now. This process includes settlements, consent decrees, stipulations.



- Stays are automatic if the judge has not decided on a motion within 30 days of the date of filing. This is a rigid time limit, and impossible to meet in a big case. This provision has already been held unconstitutional under the separation of powers.

### **Motions to Terminate: The Loophole**

- There will be no termination if the *court* finds *current* violations of federal rights. The plaintiffs must prove this current violation, which has a practical effect because of the expense of a new trial.
- Even if current violations are found, relief will have to be re-tailored. This means that the scope of the order will be reduced because current violations are likely to be less serious than the original violation. Corrections has been on the defensive in the past, but the shoe is now on the other foot. There is a psychological advantage in deciding when to make a motion to terminate.

### **Settlements: A new Endangered Specie?**

- ◆ PLRA addresses settlements (consent decrees) as well. The goal is to get rid of sweeping consent decrees that go on forever, where extra-constitutional issues become the focus of litigation.
- ◆ Consent decrees must include the magic words. This requirement is intended to tie a consent decree very closely to minimal requirements of the Constitution.
- ◆ It is more difficult to arrive at consent decrees because defendants must admit constitutional violations.
- ◆ The inducement for plaintiffs to settle is that they will get something, although not as much as before. The relief phase gets started, and input into structuring the decree is more predictable.
- ◆ The result of this provision is that there will be no more big consent decrees, because they do not constitute narrowly drawn relief

### **Settlements: The Alternative?**

- Private settlements are the alternative to consent decrees. A private settlement is the defendant's agreement to do something in return for the plaintiffs not continuing to pursue a case.
- It is not clear that private settlements will be used. The model comes from Pennsylvania, where the former DOC director convinced the court to dismiss a consent decree on the basis of a promise to make improvements. This was an amazing agreement.

- The other option, if both parties agree, is a sweeping agreement that can be enforced in state court. The controversy then shifts from the federal to the state court. The law allows this enforcement possibility.

### **Limits on Masters' Powers**

- PLRA requires a structured appointment process. This is based on the perception that Masters were inappropriately selected. They were seen as “warden wannabes” who only made problems worse. In the formal appointment process, each side nominates five persons, of which the other side can delete three. This leaves three nominees from which the judge can choose.
- The Master must act only as judge, presiding over hearings and finding facts. The Master cannot wander around the facility, and ex parte contacts with the parties are forbidden. The Master cannot talk to one side without the presence of the other. The term expires every six months, and the Master is subject to reappointment.
- Compensation is limited. The Master can receive no more than \$75/hour in urban districts and \$60/hour elsewhere. Previous pay was \$125-\$225/hour.
- The court pays, not the defendant, as previously. However, courts do not actually have the discretionary funds to do so. This is an area where judges will find loopholes. One approach might be to appoint an independent expert who can do the walking around/fact gathering the Master can no longer do. The defendants must pay for experts, rather than the court.

### ***Section 803 Provisions***

Section 803 of the PLRA focuses on a second theme; it is designed to cut down on inmate filings. In 1995 there were 40,500 Sec. 1983 filings by state prisoners, an increase of nearly 20,000 in five years. Most of this increase tracked the general increase in the number of inmates. Ninety-five percent of the cases filed were dismissed before trial. Section 803 is not likely to apply retroactively.

### **Exhaustion: Discourage Case Filing**

- Before filing cases, inmates must exhaust all other remedies, including administrative review, internal appeals, and grievance procedures. This creates even more reason for jails and prisons to have a formal grievance system.
- No special form of grievance system is required. CRIPA (Civil Rights Institutionalized Persons Act) certification is not important. Any system will do. It is important to document the system and the exhaustion process in the inmate handbook.

- It is important to have a system that documents grievance records. Your lawyer will need it and so will the court.
- If the inmate begins the grievance process or does not follow it, he will probably not be allowed to proceed with a case. The inmate will have no other recourse unless he can show a good reason for the failure to exhaust other remedies.

### **Limit Attorneys' Fees**

- There will no longer be “catalyst” or other “special” fees. The lawyer must win the case not just be the catalyst for change.
- The size of the fee must be related to the size of the relief.
- There is a limit on the hourly rate to 150% of the rate paid an appointed criminal counsel.
- Up to 25% of the damage award goes toward the attorney’s fee.
- There used to be a lot of money in inmate cases, but now there will be very little, which will make attorneys reluctant to take inmates’ cases.

### **Hearings, Waiver of Reply**

- PLRA encourages the court to avoid bringing inmates to court for hearings. The jail can help if it (a) has an internal courtroom or (b) has equipment for telephone or video court.
- Waivers are a mystery section. The section allows a defendant to waive filing a response to a complaint without being deemed to have admitted the allegations. The court cannot grant relief to the inmate unless a response has been filed. The court may order a response.

### ***In Forma Pauperis*: AKA, There is No Free Lunch**

- *In Forma Pauperis* is a loan, not a gift. Under the old process, claims of poverty resulted in a waiver of the \$120 filing fee; now the fee will not be waived. Before the court screens a complaint, it will ask how much money the inmate has in his account.
- Partial payment is required. A payment of 20% of the inmate’s account can be used as a down payment. A payment schedule will be developed when the account goes over ten dollars.
- The burden on the jail is to provide the court with six months accounting. The jail must forward money to the court when the account goes over ten dollars.
- Who gets priority? It is not clear who has priority when an inmate has medical co-pay requirements or a restitution order.

## **Successive Claims or ‘Three Strikes and You’re Out’**

- An inmate is barred from new Section 1983 actions if he has filed three prior actions that were dismissed as
  - Frivolous, malicious or
  - Failed to state a claim.
- The provision applies to anysuits filed while the inmate was incarcerated, not just to suits filed in the present facility.
- The provision does not apply if the inmate pays the full filing fee up front.
- Constitutional? This provision will clearly bar some legitimate claims when the inmate has no money.
  - *Lyon*, 940 F.Supp 1433 (S.D.Iowa, 1996)--The court ruled that the provision violates equal protection.
  - This section probably won’t stand up, but it may encourage courts to get tougher on frequent filers.

## **Judicial Screening**

- Judges must screen *In Forma Pauperis* complaints. The provision broadens the court’s power to dismiss without participation of defendants. This should eliminate cases before they become a burden to the facility.
- A high percentage of cases are already dismissed by the court without input from defendants. This will increase the number by mandating the review and expanding the grounds for dismissal.
- Grounds for dismissal are: frivolous, malicious; fails to state a claim; seeks money from an immune defendant.

## **Share the Wealth**

- Compensatory damages to the inmate go first to restitution and second to victims.
- Inmates’ victims get notice of compensatory damages prior to the award.

## **PLRA: The Short Term Future**

- There will be a reduction in the number of inmate filings.

- There will be an end to consent decrees as they have been known.
- There will be surprises in big cases because a lot about the new law is not yet understood.
- A long-term result will be a lot of work for lawyers. There will also be a professional challenge to corrections administrators to maintain good conditions.

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## **Session 6: Presentation of Future Meeting Issues**

Richard Geather led a discussion among meeting participants to identify topics for the next meeting of the Large Jail Network. Topics suggested were the following:

- Women in custody
- Staff sexual misconduct (inmates and staff, cross gender supervision, sexual harassment)
- Staff domestic violence--predictive validity screening process for staff
- Interpersonal communication--case studies
- Managing juvenile population in adult facilities--legal issues, recent OJJDP regulations changes
- Management information systems--hardware and software on the horizon; RFPs; performance measures, connecting incompatible systems, etc.
- Information technology
- Innovative work details
- How to develop a criminal justice coordinating council
- PLRA update

A vote among participants determined that the next meeting will focus on two topics:

1. Information technology
2. Staff sexual misconduct

The meeting will be held July 13-15, 1997, in Longmont, Colorado.





# **APPENDIX A**

## **Meeting Agenda**



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# LARGE JAIL NETWORK MEETING

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Longmont, Colorado

January 12-14, 1997

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Raintree Plaza Conference Center

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## Agenda

**SUNDAY, January 12, 1997 6:00 PM - 8:00 PM**

### Informal Dinner

Welcome . . . . . Michael O'Toole, Chief  
National Institute of Corrections

Introductions and Program Overview . . . . . Richard Geather  
Correctional Program Specialist, NIC Jails Division

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### Opening Address:

Presentation

#### *Meeting the Competition of Privatization*

. . . . . Richard J. Liles, Director  
General Government Group, Office of Information Technology  
Michigan Department of Management and Budget

7:30 AM            **BREAKFAST**

8:30 AM            *Discuss approaches that have been used to improve the use of public funds for the specific purpose of avoiding local jail system privatization.*

..... Howard E. Ferguson, St. Louis, MO

..... John Clark, Ass't, Director  
BOP Community Corrections

Group Discussion

10:00 AM          **BREAK**

10:15 AM          *Discuss the perception that privatization may be a more acceptable option for elected officials than administrators of jail systems.*

..... Susan McCampbell, Broward Co., FL

..... Jerry Krans, Orange Co., CA

..... Savala Swanson, Tarrant Co. TX

..... J. Daron Hall, Davidson Co., TN

**Group Discussion**

12:00 NOON        **LUNCH**

1:00 PM            *When considering the privatization of jail facilities, discuss whether there are issues which arise when other governmental functions have previously been successfully privatized.*

..... Peter Matos, Connecticut DOC

..... Denis Dowd, Shelby Co., TN

Group Discussion

2:15 PM BREAK

2:30 PM *Discuss a successful or unsuccessful experience with contracting for a specific major jail function or service. Discuss whether privatization of the operations of the jail facility was an initial option.*

..... Patrick Sullivan, Arapahoe Co., CO

..... John H. Rutherford, Duval Co., FL

**Group Discussion**

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3:45 PM BREAK

4:00 PM Prison Litigation Reform Act of 1995 (PLRA)  
..... Lynn Lund and William Collins  
Attorneys at Law

5:00 PM ADJOURN

5:30 PM DINNER

***Please note evening session.***

7:00 PM PLRA and Its Impact on the Administration of the Jail and Criminal Justice Functions  
..... Lynn Lund and William Collins



# **APPENDIX B**

## **Meeting Participants**





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# LARGE JAIL NETWORK MEETING

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January 12-14, 1997

Raintree Plaza Hotel

Longmont, Colorado

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