HB

428/429

Sponsor Statement

CS for House Bill 428 (Jud)

by

The House Finance Committee

HB 428, by the House Finance Committee, allows the Commissioner of the Department of Corrections to pursue the use of private facilities for any prisoner as long as security at the facility is consistent with the classification of the prisoners housed at the facility. It provides that the department may enter into a lease purchase agreement with a private party to construct and operate a prison in the Third Judicial District. A group of employees from the Department of Corrections could be the private contractor if they bid competitively for the construction and operation of the facility.

Legislative Counsel advised us in an October 20, 1995 memorandum,

> "while the statutory basis for authorizing use of private facilities for state prisoners is **probably adequate, albeit barely,** the regulations cited -- particularly 22 AAC 05.300(e) -- impose real obstacles to extensive use of privately-contracted facilities, whether in state or outside." [emphasis added]

This bill makes clear the legal authority of the Department of Corrections to house any prisoners in private facilities. This will reduce the possibility of litigation to resolve what might be considered an open question by some people.

HB 428 also annuls 22 AAC 05.300(e) that may act to limit the Commissioner's ability to use private facilities for prisoners other than those in furlough status or in correctional restitution centers. This could be done by administrative action, but a statute will make legislative intent crystal clear.

The facility authorized by this legislation will

- include a maximum of 1000 beds
- be designed to allow expansion
- include housing for female prisoners
- not exceed construction costs of $100,000,000
- be constructed under a project labor agreement
- be accredited if state facilities are accredited
- will have correctional officers with the same training as state correctional officers

We need additional prison capacity in Alaska. The Department of Corrections reports that it is regularly exceeding the maximum and emergency capacity under the Cleary Agreement by over 100 prisoners. It also has 206 prisoners in a contract facility in Arizona. This proposal will address those needs and at a lower cost to the state, both in the operating and capital budget. It will also bring almost $6 million we spend outside back to Alaska, providing jobs for Alaskans and improving our economy.

The state has a need to improve its facilities for female prisoners. We have females housed in Lemon Creek, Fairbanks, Sixth Avenue, and Highland Mountain and are constantly over crowded at the Mat-Su Pretrial Facility. Only Highland Mountain was designed to house both males and females. The state needs to address this problem, and HB 428 does that by requiring that the new facility be designed to house women.

The House Finance Subcommittee on Corrections held interim hearings on the topic of privatization. It found that many states have entered into agreements with the private sector to construct and operate prisons. They have been successful in reducing the costs of incarceration and have maintained security for residents of the state.

Since February of 1995, Alaska has had 206 prisoners in a private facility in Arizona. We have had a positive experience. The facility has operated without any significant negative incidents. The savings have been significant. The daily cost at the Arizona facility is $59.00 per day per inmate. Alaskan facilities average $107.00 per day per inmate, not including the cost of construction or other capital appropriations.

The advantage of a private facility is significant. There is a strong possibility that the per day cost of a private facility in Alaska will be within $10.00 of the cost of the Arizona facility. In other states where private prisons have been built, there has been a very positive effect on state facilities. The entry of competition has reduced the cost of many state operated prisons.

A new contractor can bring new ideas to our state. If it happens to end up a national chain, it will bring the experience it gains in many other states and many other facilities. If a national chain teams up with local contractors, we will get the benefit of designs that work in prisons and construction techniques that fit the Alaska environment. We are told that a private sector contractor can begin serving prisoners as soon as 18 months after contract award and securing property for the facility.

HB 428 responds to concerns raised by public employees at the interim hearings. It requires that the correctional officers in the private institution will be trained to the same standards as state correction officers. It also requires the private facility will be accredited by any standards required of state facilities. We believe that these two provisions will protect the integrity of the prison system while taking advantage of the lower costs and innovative management techniques.

HB 428 requires the construction contractor build the facility under a project labor agreement, to assure the maximum possible Alaska hire.

HB 428

- Addresses the prison capacity problem
- Creates construction jobs
- Creates on going prison jobs for Alaskans
- Brings Alaskan money back into Alaska's economy
- Provides an innovative opportunity to address Alaska's needs

ALASKA STATE LEGISLATURE
HOUSE OF REPRESENTATIVES

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ANCHORAGE CAUCUS

REPRESENTATIVE ELDON MULDER
DISTRICT 23 MULDOON-FT. RICHARDSON

MEMORANDUM

DATE: November 2, 1995

TO: Representative Mulder
Representative G. Davis
Representative Rokeberg
Representative Brown
Representative Navarre
Senator Green

FROM: Denny DeWitt
Phone 465-2647

RE: Information on Tennessee Audit of CCA Facility

Mr. Don Valesko, Business Manager, Public Employees Local 71 provided written testimony to the committee at the October 19 hearing. In it he offered criticism of the safety record of facilities operated by Corrections Corporation of America. He referred to a study released by the state of Tennessee. He stated,

> "However, the privately run CCA facility ranked lower on safety in the Tennessee audit ..."

I enclosed the Executive Summary of the referenced report, dated February 1, 1995. Please note the bottom of page ix, where you will find the following comment from the authors,

> "We do not believe there was a significant security and safety performance difference among the three facilities during the rated evaluation period."

I will be happy to copy the entire report at your request.

cc: Office of Management and Budget
Legislative Finance
Department of Corrections

ALASKA STATE CAPITOL; JUNEAU, AK 99801-1182 • PHONE (907) 465-2647 • FAX (907) 465-3518
716 W. 4TH AVENUE; ANCHORAGE, AK 99501-2133 • PHONE (907) 258-8193 • FAX (907) 258-5511

ALASKA STATE LEGISLATURE
News

State Capitol
Juneau, AK 99801-1182
(907) 465-3804
Actuality line: 1-800-478-6540

House Finance Committee Introduces Prison Privatization Bills

For Immediate Release: January 17, 1996 Contact: Ken Freeman (907) 465-3804

JUNEAU -- Legislation to allow the construction and operation of a private prison in Alaska was introduced by the House Finance Committee Wednesday. The two bills facilitating this process are part of the Legislative Leadership's Renewed Commitment.

The first, HB 428, directs the Department of Corrections (DOC) to contract with a private party to construct and operate a prison in Southcentral Alaska, the Third Judicial District. The second, HB 429, gives DOC legal authority to house prisoners in private facilities.

"Our state facilities are full and regularly exceed maximum capacity. We have double bunked, used cots, and shipped 206 prisoners to Arizona. We need a facility to house female prisoners in an appropriate manner. These bills will address those problems at a lower cost than we could by constructing more state facilities," said Representative Eldon Mulder.

During the interim, the House Finance Subcommittee on Corrections, Chaired by Rep. Mulder, held hearings on the topic of privatization.

"The Committee found that there are many opportunities for the state to save on its cost of incarceration and provide the same level of protection to the public," said Mulder.

"Many other states are currently contracting with private vendors to provide prison service, including Texas, Oregon, as well as the Federal Government. Alaska has also had success with private contracting. We currently have 206 prisoners in a private prison in Arizona at a cost of $59.00 per day, compared to the average cost of incarceration in Alaska of $107.00 per day," said Representative Norm Rokeberg, who serves on the Subcommittee on Corrections.

Representative Gary Davis, who is also a member of the Subcommittee, noted public employees expressed concerns that correctional officer standards be maintained in every prison holding Alaskan prisoners.

"HB 428 requires correctional officers in a private prison to meet the State of Alaska training requirements. The proposed legislation also requires any private facility to maintain the same national accreditation standards required of state facilities," said Representative Davis.

HB 428 requires a project labor agreement for the construction of the new facility. Mulder noted this will help assure the maximum possible Alaska hire.

"Construction and operation of the new facility in Alaska will create new jobs for Alaskans," said Mulder.

Broadcast Note: An audio actuality is available from Rep. Eldon Mulder by calling 1-800-478-6540.

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LEGAL SERVICES

DIVISION OF LEGAL AND RESEARCH SERVICES
LEGISLATIVE AFFAIRS AGENCY
STATE OF ALASKA

(907) 465-3867 or 465-2450
FAX (907) 465-2029
Mail Stop 3101

130 Seward Street, Suite 409
Juneau, Alaska 99801-2105

MEMORANDUM January 26, 1996

SUBJECT: CSHB 428(JUD), "O" version, relating to authority of the Department of Corrections to contract for operation of correctional facilities and to lease-purchase agreement for construction and operation of a new correctional facility -- sectional analysis (Work Order No. 9-LS1338\O)

TO: Representative Brian Porter, Chair
House Judiciary Committee
Attn: Tom Meyer

FROM: Jack Chenoweth
Legislative Counsel

CSHB 428(JUD) combined HB 428 and HB 429. House Bill 428 was prepared and offered as uncodified law authorizing use of a lease-purchase agreement for the construction and operation of a new correctional facility, to be located in southcentral Alaska.

Current state law authorizes the commissioner of corrections to enter into an agreement with a third party for the latter to provide correctional facilities. House Bill 429 revises that authority and annuls an administrative regulation that limits the use of private third party correctional facility contractors.

Bill section 1: The bill section amends AS 33.30.031(a)

(1) to restate and expand the existing requirement that, when the commissioner proposes to enter into an agreement with a third party for the latter's provision of correctional facility services, the commissioner may do so only if the degree of custody, care, and discipline to be offered by the third party provider meets the standards required by state law, including those imposed by court order;

(2) to authorize use of contracted third party provider services without limitation by the nature of the prisoners' offenses--felony or misdemeanor--or by reference to prisoner custody classifications unless the security of the facility is inconsistent with prisoner custody classifications, and to prohibit an administrative determination that restricts or limits use of third party provider services under contract to rehabilitative or treatment purposes authorized by law.

Bill section 2: The bill section

(1) in its subsection (a), gives the notice and approval necessary for a lease-purchase agreement to initiate the project and sets out, in general terms, parameters applicable to the project's financing;

(2) in its subsection (b), sets out particulars applicable to other facets of the project including population housing perspectives, a requirement that the project be constructed under a project labor agreement, and a prohibition on direct state operation of the correctional facility with specific exceptions;

(3) in its subsection (c), describes the circumstances under which persons employed by the contractor as correctional officers may be required to meet the requirements of the Alaska Police Standards Council (AS 18.65) that are applicable to correctional officers employed by the state and its municipalities;

(4) in its subsection (d), describes the circumstances and limitations on the circumstances under which the state may require that the correctional facility gain accreditation; and

(5) in its subsection (e), declares that the measures section 1(a) "constitutes the notice and approval required by AS 36.30.085" for lease-purchase agreements that are entered into by the state.

Bill section 3: The bill section declares that the Act is not intended to preclude or prevent operation of the correctional facility by a private third-party contractor composed of persons employed by the Department of Corrections.

Bill section 4: The regulation proposed to be annulled, 22 AAC 05.300(c), limits the use of contract facilities to contract housing for confinement of prisoners convicted of misdemeanors. Since amendment of AS 33.30.031(a)(3)(B) made by bill section 1 would allow for use of contracted facilities for convicted felons, the regulation would be inconsistent with the relevant statute.

JBC:glc:pl
96-049.glc

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LEGISLATIVE AFFAIRS AGENCY
STATE OF ALASKA

(907) 465-3867 or 465-2450
FAX (907) 465-2029
Mail Stop 3101

130 Seward Street, Suite 409
Juneau, Alaska 99801-2105

MEMORANDUM October 20, 1995

SUBJECT: Private prisons (Work Order No. 9-LS1323\A)

TO: Representative Eldon Mulder

FROM: John B. Chenoweth
Legislative Counsel

This is by way of response to your inquiry concerning the use of privately-operated correctional facilities. The statutes and Department of Corrections' regulations usually refer to these as "contract facilities."

I

I am satisfied that the current set of statutes provides a minimally sufficient basis for Department of Corrections officials to house inmates in private contract facilities.[1/] The

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[1/] Under AS 33.30.031,

> (a) The commissioner shall determine the availability of state correctional facilities suitable for the detention and confinement of persons held under authority of state law or under agreement entered into under (e) of this section. **If the commissioner determines that suitable state correctional facilities are not available, the commissioner may enter into an agreement with a public or private agency to provide necessary facilities.** Correctional facilities provided through agreement with a public agency for the detention and confinement of persons held under authority of state law may be in this state or in another state. **Correctional facilities provided through agreement with a private agency must be located in this state unless the commissioner finds in writing that (1) there is no other reasonable alternative for detention in the state; and (2) the agreement is necessary because of health or security considerations involving a particular prisoner or class of prisoners, or because an emergency of prisoner overcrowding is imminent.** The commissioner may not enter into an agreement with an agency unable to provide a degree of custody, care, and discipline similar to that required by the laws of this state.

(continued...)

specific limitations imposed on private contract facilities should have your review to ascertain whether the constraints are too demanding. So, for example, AS 33.30.031(a) favors use of in-state private contract facilities over those located outside Alaska. AS 33.30.031(c) requires that the services of a private contract facility provider be obtained by competitive bid. Other constraints are imposed by department regulation. Under 22 AAC 05.252(a), a prisoner will be transferred to a private contract facility outside Alaska if "a determination is made that the prisoner's rehabilitation or treatment would not be substantially impaired by the transfer," while, under 22 AAC 05.300(e),

> [c]orrectional facilities provided through agreement with a private agency will be in this state, and will only be used to involve a prisoner in a program established under AS 33.30.091 - 33.30.131 or 33.30.151 - 33.30.181, or to confine a prisoner convicted of a misdemeanor.

My instincts tell me that, while the statutory basis for authorizing use of private facilities for state prisoners is probably adequate, albeit barely, the regulations cited--particularly 22 AAC 05.300(e)--impose real obstacles to extensive use of privately-contracted facilities, whether in state or outside.

II

To your second question, relating to encouraging use of private construction and operation of prisons:

I don't have any particular insight into this matter. I can share with you the benefit of some reading and research on the topic as related to contracts relating to **state**, as distinguished from county or local government, correctional facilities.

New Mexico was among the first of the states to call for construction and operation of a prison facility under contract. A 1985 law authorizes its corrections department to contract for the construction of a private facility to house that state's "special incarceration alternative program" and a separate provision authorizes the department to contract for the operation of a facility to house adult female inmates. Apparently in an effort to get its corrections department to move in the area of privately contracted construction and operation, in 1988, the New Mexico legislature appropriated one million dollars for expenditure "to contract for the operation of a two-hundred bed facility for housing female inmates . . . ." So, having given the department private facility contracting authority, New Mexico legislators used the

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[1]/(...continued)

> (c) Notwithstanding AS 36.30.300, an agreement with a private agency to provide necessary facilities under (a) of this section must be based on competitive bids.

appropriation process in an effort to secure operation of at least one facility by a private contractor.

The State of Tennessee adopted, in 1986, a comprehensive "Private Prison Contracting Act." Subsequent amendment of the Act assured a substantial amount of legislative branch oversight of requests for proposals and contracts for contracted prisons. Looking only at the text of that Act, it appears that Tennessee legislators were prepared to work with persons in the state's executive branch who had responsibility or authority for private contract operation in the field of corrections, but wanted to try to assure at key stages that state responsibility was not, in effect, surrendered.

The experience of these two jurisdictions is useful. First, my sense is that, if you really want to shift some responsibility for corrections operations to the private sector, Alaska probably needs to consider and enact a comprehensive private prison contracting measure. The Tennessee Act may be a useful model, but the Alaska measure ought also to address a host of problems such as the degree of delegation, responsibility for programs, liability, employment security, dispute resolution, performance monitoring, sanctions, and the employees' working conditions, including, particularly, the right of employees of the contractor to strike. That measure needs to take into consideration, as well, the state's existing obligations under the Final Settlement Agreement and Order in the principal decision in this state relating to conditions of incarceration, Cleary v. Smith.

New Mexico's use of an appropriation measure to "force" or require state action in the area of private contracting is also deserving of consideration. I would guess that, by withholding an appropriation to the Department of Corrections on a line-by-line basis for wages and benefits and other appropriations objects, and placing an amount in the contractual line with accompanying language indicating the intent to use the money for contracted purposes, you would send a sufficient message to the administration that the operation of a particular facility or facilities should be made the subject of a contract.

Finally, as to private construction of a prison facility, consider--as the last two administrations have done in other fields--the use of certificates of participation or similar form of lease financing arrangement, for which the legislature retains substantial approval authority under AS 36.30.085. As you no doubt know, in the quite recent past the initiative for lease financing arrangements has rested with the administration. But I can think of no reason why the legislature could not take advantage of the lease-financing provisions and use them to require the Department of Corrections to shift to private contractors for the construction and operation of new facilities, as the legislature may direct.

JBC:pl
95-170.plm

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STATE OF ALASKA

(907) 465-3867 or 465-2450
FAX (907) 465-2029
Mail Stop 3101

130 Seward Street, Suite 409
Juneau, Alaska 99801-2105

MEMORANDUM February 2, 1996

SUBJECT: Project labor agreement component of draft CSHB 428( )
(Work Order No. 9-LS1338\R)

TO: Representative Brian Porter, Chair
House Judiciary Committee

FROM: Jack Chenoweth
Legislative Counsel

Our Thursday conversation touched on the project labor agreement language of sec. 2(b)(3) of CSHB 428. After that conversation, you provided me copies of two 1990 opinions of Assistant Attorney General Carolyn Jones. The opinions raised objections to proposed project labor agreement language by the Alaska Energy Authority. Ms. Jones' objections were based on (1) perceived inconsistencies with the state's Procurement Code, AS 36.30, and (2) objections of constitutional magnitude based on the decision in State v. Enserch Alaska Construction, Inc., 787 P.2d 624 (Alaska 1989), wherein the Alaska Supreme Court struck down the state's regional preference law (AS 36.10.160) as a violation of the equal protection clause of the Alaska Constitution.

The decision in Enserch relied on an earlier decision, Lynden Transport, Inc. v. State, 532 P.2d 700 (Alaska 1975). In Lynden Transport, the Alaska Supreme Court determined that discrimination between state residents and state nonresidents based solely on the object of assisting the one class over the other economically could not be upheld under the state equal protection clause. However, since Lynden Transport, the legislature and the voters have enacted article I, section 23 as part of the Alaska Constitution, permitting the giving of preferences to residents over non-residents. Adoption of article I, section 23 arguably undercuts the court's reliance on the state constitutional equal protection provision as the basis to invalidate a residence preference over non-residents. It does not invalidate or set aside the equal protection provision as the basis to invalidate a preference among state residents who are also residents of economically distressed zones, nor does it avoid application of the alternative federal constitutional provision, the federal privileges and immunities clause.

CSHB 428 is silent on resident/nonresident distinctions, though it does require the project labor agreement to include a provision that hiring for the correctional facility's construction is to proceed under a local union hiring hall requirement.

As to project labor agreements, the leading decision apparently is Building and Construction Trades Council of the Metropolitan District v. Associated Builders and Contractors of Mass. R.I., Inc., -- U.S. --, 122 L.Ed.2d 565, 113 S.Ct. 1190 (1993). Because of the length of the caption, the decision is often called the "Boston Harbor" case. In that decision, the court approved the legality of a union-only pre-hire agreement for the Boston Harbor cleanup project against a pre-emption challenge that cited the National Labor Relations Act. The court determined that, when the state acts as the owner of a construction project, it is free to implement that kind of a pre-hire agreement entered into by the parties. The project labor agreement in CSHB 428 is differently structured. If it survives at all, it will surely survive only if the state can show that it is, as in the "Boston Harbor" decision, the owner of the construction project. Of course, as CSHB 428 is structured, the state is not the project owner at the outset; it becomes the owner at some future point. Whether that is enough to fulfill the "state-as-project-owner" rationale on which the "Boston Harbor" decision turned remains to be seen. So that a court does not lose sight of the eventuality of state ownership of the correctional facility to be constructed, I have so noted in the extended "project labor agreement" provision as redrafted.

JBC:klb
96-054.klb

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DIVISION OF LEGAL AND RESEARCH SERVICES
LEGISLATIVE AFFAIRS AGENCY
STATE OF ALASKA

(907) 465-3867 or 465-2450
FAX (907) 465-2029
Mail Stop 3101

130 Seward Street, Suite 409
Juneau, Alaska 99801-2105

MEMORANDUM January 22, 1996

SUBJECT: House Bill 428, lease-purchase agreement for construction and operation of a new correctional facility -- sectional analysis (Work Order No. 9-LS1338\K)

TO: Representative Eldon Mulder, Vice-Chair
House Finance Committee
ATTN: Dennis DeWitt

FROM: Jack Chenoweth
Legislative Counsel

House Bill 428 is prepared and offered as uncodified law authorizing use of a lease-purchase agreement for the construction and operation of a new correctional facility, to be located in southcentral Alaska.

Bill section 1: The bill section

(1) in its subsection (a), gives the notice and approval necessary for a lease-purchase agreement to initiate the project and sets out, in general terms, parameters applicable to the project's financing;

(2) in its subsection (b), sets out particulars applicable to other facets of the project including population housing perspectives, a requirement that the project be constructed under a project labor agreement, and a prohibition on direct state operation of the correctional facility with specific exceptions;

(3) in its subsection (c), describes the circumstances under which persons employed by the contractor as correctional officers may be required to meet the requirements of the Alaska Police Standards Council (AS 18.65) that are applicable to correctional officers employed by the state and its municipalities;

(4) in its subsection (d), describes the circumstances and limitations on the circumstances under which the state may require that the correctional facility gain accreditation; and

(5) in its subsection (e), declares that the measures section 1(a) "constitutes the notice and approval required by AS 36.30.085" for lease-purchase agreements that are entered into by the state.

Bill section 2: The bill section declares that the Act is not intended to preclude or prevent operation of the correctional facility by a private third-party contractor composed of persons employed by the Department of Corrections.

JBC:klb
96-017.klb

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DIVISION OF LEGAL AND RESEARCH SERVICES
LEGISLATIVE AFFAIRS AGENCY
STATE OF ALASKA

(907) 465-3867 or 465-2450
FAX (907) 465-2029
Mail Stop 3101

130 Seward Street, Suite 409
Juneau, Alaska 99801-2105

MEMORANDUM January 22, 1996

SUBJECT: House Bill 429, relating to authority of the Department of Corrections to contract for operation of correctional facilities -- sectional analysis (Work Order No. 9-LS1337\C)

TO: Representative Eldon Mulder, Vice-Chair
House Finance Committee
ATTN: Dennis DeWitt

FROM: Jack Chenoweth
Legislative Counsel

Current state law authorizes the commissioner of corrections to enter into an agreement with a third party for the latter to provide correctional facilities. House Bill 429 revises that authority and annuls an administrative regulation that limits the use of private third party correctional facility contractors.

Bill section 1: The bill section amends AS 33.30.031(a)

(1) to restate and expand the existing requirement that, when the commissioner proposes to enter into an agreement with a third party for the latter's provision of correctional facility services, the commissioner may do so only if the degree of custody, care, and discipline to be offered by the third party provider meets the standards required by state law, including those imposed by court order;

(2) to authorize use of contracted third party provider services without limitation by the nature of the prisoners' offenses--felony or misdemeanor--or by reference to prisoner custody classifications unless the security of the facility is inconsistent with prisoner custody classifications, and to prohibit an administrative determination that restricts or limits use of third party provider services under contract to rehabilitative or treatment purposes authorized by law.

Bill section 2: The regulation proposed to be annulled, 22 AAC 05.300(c), limits the use of contract facilities to contract housing for confinement of prisoners convicted of misdemeanors. Since amendment of AS 33.30.031(a)(3)(B) made by bill section 1 would allow for use of contracted facilities for convicted felons, the regulation would be inconsistent with the relevant statute.

JBC:klb
96-016.klb

STATE OF ALASKA

JAY S. HAMMOND, GOVERNOR

DEPARTMENT OF LAW

OFFICE OF THE ATTORNEY GENERAL

POUCH K – STATE CAPITOL
JUNEAU, ALASKA 99011
PHONE: (907) 465-3600

J66-159-82

November 3, 1981

Gerald Wilkerson
Legislative Auditor
Division of
Legislative Audit
Pouch W
Juneau, Alaska 99811

Dear Mr. Wilkerson:

You have requested an opinion from this office concerning an agreement between the State of Alaska and Phillips Petroleum Company for the sale of royalty gas produced from the North Cook Inlet field. On April 11, 1977, the commissioner of the Department of Natural Resources entered into separate agreements with Phillips Petroleum Company and the Alaska Pipeline Company for the sale of Cook Inlet royalty gas to the Alaska Pipeline Company. Alaska Pipeline Company agreed to take as much of the State's royalty share of gas as it could sell to its customers. Under the other agreement, Phillips agreed to:

> [P]urchase from the State from time to time those volumes which APC is unable to take. For such volumes which it purchases from the State, Lessee will pay the State a price equal to that amount which Lessee would have otherwise paid to the State as royalty if the State had not elected to receive its royalty gas in-kind and Lessee will not charge the State for gathering or compressing such volumes of gas or for other charges under this Agreement.

Both agreements include provisions which, in effect, preclude adjustments to billings more than two years after the date of payment.

On April 22, 1977, the governor transmitted a resolution to the legislature requesting approval of the sale of royalty natural gas from the North Cook Inlet field

to the Alaska Pipeline Company. The governor's letter to the legislature did not request approval of the Phillips Petroleum Company agreement because "it does not involve a sale of royalty gas." The 1977 legislative session approved Legislative Resolve 104 for the sale of royalty gas to the Alaska Pipeline Company. The legislature did not address the agreement between Phillips and the State. You have asked two questions:

1. Phillips Petroleum, despite the governor's statement, did acquire royalty gas during the period April 11, 1977 through December 31, 1979. Should these acquisitions be considered under the April 11, 1977 contract and therefore subject to the provisions of AS 38.06.050 and AS 38.06.055 or should the acquisitions be considered as in-value transactions subject to the provisions of the standard lease entered into between the producer (Phillips) and the State?

2. Assuming the contract prevails, does the inclusion in the contract of Article 10.3, restricting the adjustment of prices for royalty gas to two years following payment, violate AS 09.01.120, thus making the contract void?

Despite any contrary advice we may have given to the governor, we believe that the Phillips agreement is an agreement or other disposition within the meaning of AS 38.06.055(a), which at the time of the agreement provided:

> No sale, exchange, or other disposition of oil or gas or of the rights or waiver of the rights to receive future production of royalty oil or gas need be made by the commissioner of natural resources under AS 38.05.183 without the prior approval of the legislature by a concurrent resolution concurred in by a majority of the members of each house . . .

Recent amendments to AS 38.06.055 have, among other items, changed the requirement of approval by concurrent resolution to approval by enacting legislation.

Even though the price term is nominally the same as if the State had taken the gas in-value, the obligations assumed by Phillips under the agreement differ in material ways from the obligations Phillips would be subject to if the State took that gas in-value. The significantly shorter audit and adjustment period noted in your request is one such difference. The broad language of AS 38.06.055(a) indicates that significant changes from a straight in-value taking are subject to the statutory provisions. We believe that there are significant differences between an in-value taking and the arrangement set forth in the Phillips agreement.

We do not believe, however, that the Phillips agreement is invalid. It is our opinion that AS 38.06.055 was unconstitutional, and that the failure to secure legislative approval did not invalidate an otherwise valid agreement. We would note, however, that the Alaska Supreme Court has not ruled on this question.1/

In approving individual contracts, the legislature does not exercise a lawmaking function. Consequently, in the absence of a constitutional grant of such power or some unique circumstance that we cannot presently contemplate, a statute requiring legislative approval of an individual contract is a violation of the separation of powers.2/ See Chadha v. Immigration and Naturalization Service, 634 F.2d

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1/ Although briefed and argued, the Alaska Supreme Court declined to address this issue in McKinnon v. Alpetco, ____ P.2d ____, Slip Opinion No. 2413 (Alaska, September 19, 1981).

2/ Although the administration has taken the position that the requirement of subsequent approval violates separation of powers, as a matter of comity it has usually made such approvals a requirement as a matter of contract. Cf. Continental Insurance Co. v. Bayless & Roberts, Inc., 548 P.2d 398, 411 (Alaska 1976).

408 (9th Cir. 1980) ("Chadha").3/ In Public Defender Agency v. Superior Court, Third Judicial District, 534 P.2d 947 (Alaska 1975), the Alaska Supreme Court held that the doctrine of separation of powers, though not expressly set out in the Alaska Constitution, is clearly implied. See also Minutes of the Alaska Constitutional Convention 1955-56, at 2228-29. Furthermore, the court has expressly recognized that it was a purpose of the framers of the Alaska Constitution to create a strong executive branch of government. Bradner v. Hammond, 553 P.2d 1 (Alaska 1976).

Generally, the legislature's duty is to make laws, not to enforce them. In Springer v. Philippine Islands, 227 U.S. 198 (1928), the United States Supreme Court defined legislative powers as follows:

> Legislative power, as distinquished from executive power is the authority to make laws, but not to enforce them or appoint agents charged with such enforcement.

27 U.S. at 202. In Mitchell Coal & Co. v. Pennsylvania Railroad Co., 230 U.S. 247 (1913), Justice Pitney dissenting stated:

> Legislation consists in laying down laws or rules for the future; administration has to do with the carrying out of these laws into effect, their practical application to current affairs by way of management and oversight including investigation, regulation and control, in accordance with, and in execution of, the principles prescribed by the lawmaker . . .

3/ The United States Supreme Court has recently agreed to review the decision of the 9th Circuit in Chadha. Even if the Court reverses Chadha under the United States Constitution, however, we believe that the analysis still holds under the Alaska Constitution, with it design for a strong executive. E.g., Bradner v. Hammond, 533 P.2d 1, 3, n.3 (Alaska 1976).

In Stockman v. Leddy, 129 P. 220 (Colo. 1912) the Supreme Court of Colorado declared:

> In other words, the General Assembly not only passed an act -- that is, made a law -- but it made a joint committee of the Senate and the House as its executive agent to carry out that law. This is a clear and conspicuous attempt by the General Assembly to confer executive power upon a collection of its own members.

129 P. at 223. See also, 1976 Op. Att'y Gen. No. 28 (July 22, 1976).

The legislature has established a procedure and a set of criteria applicable to sales of royalty oil and gas (AS 38.05.183, AS 38.06.070), and the executive is carrying out those laws when it sells royalty oil and gas. However, the legislature is also attempting to carry out the law it has enacted, that is, exercise executive power, when it reserves to itself the ultimate authority to enter into individual contracts for the sale of royalty oil or gas.

There are several ways to illustrate why the retention of final approval constitutes the exercise of executive power. For example, there would be little doubt that it would be unconstitutional if the legislature appointed one of its own members to negotiate such a contract and place final approval of that contract with the legislature. Stockman v. Leddy, supra. There is no real difference when the legislature assigns the responsibility to the commissioner of Natural Resources but retains to itself the final power to approve or disapprove the contract. The commissioner becomes as much the agent of the legislature as would be any legislator designated to negotiate.

Legislative approval of a sales contract also frustrates the constitutional objective of making the executive branch accountable to the people.4/ If it is the

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4/ Accountability was one of the reasons for Mr. Ralph River's opposition to an elected attorney general:

> Now then, if we want to be sure that the strong executive who is going to have

legislature, rather than the commissioner or governor, who controls the final destiny of a sales contract, then accountability for the contract is spread among the members of the legislature, rather than with the executive.

Also, requiring final legislative approval limits, if not destroys, the very law that the legislature enacted. With the legislative veto, there are no real criteria for sales of royalty oil. The legal and practical standard for executing and reviewing the law would not be the standards specified in AS 38.06.070, but rather the contract terms which will command at least 11 votes in the senate and 21 votes in the house. This problem is even more apparent under the new AS 38.05.055, which requires legislative approval by enactment, not concurrent resolution. Under the new statute, it is only the thoughts and feelings of the legislature on that contract which are the criteria. The passage (and signing) of legislation to approve the individual contract, because it is a new statute, would be valid whether or not there was a violation of the previous legislation containing the general standards. There would be no fixed standards or criteria.

This opinion should not be misunderstood as an opinion that the legislature can have no role in the sale of the state's royalty oil. Indeed, there are few limits on the legislature's power to legislate in this (or for that matter any other) area. The legislature, if it wishes, can restrain the discretion of the executive in innumerable constitutionally permissible ways. For example, it can prevent the commissioner from selling royalty oil altogether. Or it can place limits on the types of sales he makes (e.g., not more than 5 years long, or not greater than X% of royalty from a particular reservoir, etc.). The legislature could specify the terms it wants included in a contract in a law requiring that

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4/ (continued)

> the responsibility of carrying out a successful administration is going to get the blame if he doesn't have a successful administration, let us not give him any outs. Let's not take him off the hook by giving him an attorney general that he can put the blame on.

those terms be included. E.g., AS 38.05.180(z).5/ The legislature could even go so far as to enact the entire sales contract as a law and permit the commissioner to sell gas only under that law. It is our opinion however, that the legislature exceeds constitutional bounds when it reserves to itself the right to carry out the laws it enacts, by retaining the right of final approval.6/

As the court in Chadha concluded, such a reservation of authority introduces a flexibility that is equivalent to having no law at all:

> Congress holds all legislative powers. We do not think that that body would confess itself unable to formulate . . . rules or policies applicable to individual cases that are sufficiently

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5/ AS 38.05.180(z) provides:

No leases may be issued under this section without the inclusion of the following language: "The landowners' royalty share of the unit production allocated to each separately owned tract shall be regarded as royalty to be distributed to and among, or the proceeds of it paid to, the landowners, free and clear of all unit expense and free of any lien for it." Leases issued in violation of this subsection shall, for all purposes, be construed as containing the language required by this subsection.

See also AS 38.05.125 (reservation of minerals in land disposal).

6/ Cf. A.L.I.V.E., supra, 606 P.2d at 770 (citation omitted):

> This statute encompasses a variant of what has come to be called the legislative veto. The question in this case is whether this device violates article II of the Alaska Constitution. We hold that it does.

A.L.I.V.E. was cited as supporting authority in Chadha, supra, 634 F.2d at 420, n.10.

> clear for compliance by the Executive and for ascertainment by the Judiciary. We cannot accept that definite, uniform and sensible criteria governing the conferral of government burdens and benefits on individuals should be replaced by a species of nonlegislation, wherein the Executive Branch becomes a sort of referee in making an initial determination which has no independent force or validity, even after review and approval by the Judiciary. . . . In such a world, the Executive's duty of faithful execution of the law becomes meaningless, as the law to be executed in a given case remains tentative until after action by the Executive has ceased. The role of judicial review in determining the procedural or substantive fairness of administrative action becomes equally nugatory because ex parte influence on administrative decisionmakers, once condemned, now is made the norm. Such flexibility is but the structural twin of lawless rule.

Chadha, supra, 634 F.2d at 435-436. The same principle and rule apply here.

Therefore, it is our opinion that the legislative veto in AS 38.06.055 was unconstitutional. If statutorily required legislative approval was unconstitutional, it follows that the Phillips agreement met all legal requirements for its approval.

Your second question involves AS 09.10.120, which provides:

> An action brought in the name of or for the benefit of the state, any political subdivision, or public corporation may be commenced only within six years of the date of accrual of the cause of action.

This provision is a standard statute of limitations applying to a state or municipal government. It does not affect the

ability of the state to enter into an agreement to reduce the period of time under which an action may be brought. Although there are some exceptions to this rule, usually involving whether the time stipulated in the contract is a reasonable period of time, we do not see how those exceptions apply to the general freedom to contract on a shorter time limit. See, generally, Annotation, "Validity of Contractual Time Period, Shorter than Statute of Limitations, for Bringing Action," 6 ALR 3d 1197. Therefore, we do not believe that the two-year time period agreed to in the Phillips contract voids that particular agreement.

If you have any questions, please do not hesitate to call.

Sincerely,

WILSON L. CONDON
ATTORNEY GENERAL

By: Robert M. Maynard
Robert M. Maynard
Assistant Attorney General

RMM:mr

MEMORANDUM

State of Alaska
Department of Law

TO J. Anthony Smith, Commissioner
Department Commerce & Economic Development

DATE August 26, 1988

FILE NO 663-89-0052

TEL NO 465-3600

SUBJECT LB&A Committee authority over Tourism Appropriation

FROM Jeffrey W. Bush
Assistant Attorney General

Separation of Powers Issue

You have asked our advice concerning the effect of a clause in the FY 89 Budget Act which purports to condition an appropriation to the Division of Tourism upon approval of the division's proposed program by the Legislative Budget and Audit Committee (LB&AC). The language in question provides:

> $490,000 is appropriated for international tourism marketing. None of these funds shall be expended until the department has reassessed its program and presented its plan for legislative budget and audit committee approval.

Section 27, ch. 154, SLA 1988 at 51. Briefly, we conclude that this language is invalid and of no effect for two reasons: 1) the language constitutes an improper attempt by the legislature to perform an executive function, in violation of the separation of powers doctrine; and 2) even if this oversight of the division's work were to be deemed a law-making function, this function could only be exercised by the legislature acting as a whole and could not be delegated to the LB&AC.

DISCUSSION

The Office of Legislative Auditor is established by article IX, section 14, of the Alaska Constitution. Under section 14, the auditor has the power to conduct post-audits as prescribed by law. The Constitutional provision has been implemented by the enactment of AS 24.20.151, which establishes the LB&AC to supervise the work of the legislative auditor. Members of the committee come equally from the two houses of the legislature. AS 24.20.161. The powers of that interim committee are specifically enumerated in AS 24.20.201(a)(1) - (12). In general, the committee is given the authority to review the state's fiscal policies and make recommendations to the governor and the legislature concerning appropriations, their expenditure, and the fiscal policies of the state.

Separation of powers:

The separation of powers doctrine forbids one branch of government from encroaching upon the functions of another. This doctrine has been recognized in Alaska. In Public Defender Agency v. Superior Court, Third Judicial District, 534 P.2d 947 (Alaska 1975), the Alaska Supreme Court held that the doctrine of separation of powers, though not expressly set out in the Alaska Constitution, is clearly implied. See also Minutes of the Alaska Constitutional Convention 1955-56, at 2228-29. Furthermore, the court has expressly recognized that it was a purpose of the framers of the Alaska Constitution to create a strong executive branch of government. Bradner v. Hammond, 553 P.2d 1 (Alaska 1976).

Generally, the legislature's duty is to make laws, not to enforce them. In Springer v. Philippine Islands, 227 U.S. 198 (1928), the United States Supreme Court defined legislative powers as follows:

> Legislative power, as distinguished from executive power is the authority to make laws, but not to enforce them or appoint agents charged with such enforcement.

227 U.S. at 202.

The Alaska Supreme Court has never addressed the limits of the legislature's authority with respect to supervision over state expenditures. However, it is well established in other jurisdictions that once an appropriation is made, the legislature's duty is completed, and it is then up to the executive branch to execute and administer the legislatively created program. Attempts by legislatures to condition appropriations on obtaining the prior approval of a particular program plan by a legislative committee invariably violate the separation of powers doctrine.

One of the leading cases in this area is People v. Tremaine, 168 N.E. 817 (N.Y. 1929), where the New York Court of Appeals struck down a statute granting certain legislative committee chairmen the authority to disapprove of the allocation of lump sum appropriations. In a well-reasoned concurring opinion, Justice Crane stated the basic rule that prohibits the legislature from attaching as a condition to an appropriation the approval of a legislative body:

> [T]he Legislature has absolute control over appropriations. It may make appropriations also

> upon such conditions and with such restrictions as it pleases. It can create or limit the power of administrative offices. There is one thing, however, it cannot do, and that is implied, if not expressed, in our Constitution. It cannot exercise the functions of the executive. It cannot administer the money after it has been once appropriated. If it makes lump sum appropriations, whatever conditions it may attach to the expenditure, it cannot make one of those conditions the approval by one of its own members; that is, to confer upon him the duties of an administrative office.

Id. at 828.

In 1976, the South Carolina legislature created a Joint Appropriation Review Committee, composed of 12 legislators, to review and approve any expenditure of funds by the state not otherwise subject to appropriation; these funds primarily consisted of unanticipated program receipts from the federal government. */ In State v. McInnis, 295 S.E.2d 633 (S.C. 1982), the state supreme court held that this grant of authority was an unconstitutional infringement upon the executive branch by the legislature, in violation of the separation of powers doctrine. The court held that although the legislature certainly may control state spending through the appropriation process, it may not do so

> through the administration of appropriations which is the function of the executive department. The desirability of the General Assembly's "getting a handle" on these matters is understandable and appropriate but its effort to control these matters through a committee composed of twelve of its members is constitutionally impermissible.

Id. at 637. See also, Advisory Opinion in re Separation of Powers, 295 S.E.2d 589 (N.C. 1982).

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*/ In Alaska, an agency may expend unanticipated program receipts only after submitting a revised program to the LB&AC. The LB&AC, however, does not have the authority to veto the expenditure. AS 37.07.080(h).

In a case involving the same question you have asked, the Colorado Supreme Court held that various provisions in an appropriations bill violated the separation of powers doctrine. Anderson v Lamm, 579 P.2d 620 (Colo. 1978). Of particular note, the court held not only that a requirement of prior legislative Joint Budget Committee approval of an executive expenditure was unconstitutional (Id. at 627), but also that conditioning an appropriation on an agency's prior preparation of a report and a five-year plan, where committee approval was not required, was invalid.

> This particular requirement of a cost-benefit report and a five-year plan in effect gives the Joint Budget Committee a close supervisory role over the administration of the appropriated funds. As such, the requirement impermissibly infringes upon the executive's administrative authority.

Id.

Although there are no reported decisions in Alaska over the appropriate role of the LB&AC, in 1978 the Juneau Superior Court dealt with this issue in the case of Kelley v. Hammond, Case No. 77-4 (Order on motion for summary judgment, dated April 12, 1978). Kelley involved a challenge to a legislative enactment that required the LB&AC to approve any transfer between appropriations. The court held that the grant of this approval/veto authority to the LB&AC constituted a violation of the separation of powers doctrine and was therefore invalid. Id., Transcript of Order at 3; see also, 1976 Op. Att'y Gen. #28 (July 22). Numerous opinions of this office have also concluded that attempts by the LB&AC to exercise authority in areas traditionally under the province of the executive were invalid. 1984 Inf. Op. Att'y Gen. (July 3; 661-84-0440); 1981 Inf. Op. Att'y Gen. (Nov. 3; 663-82-0159); 1980 Inf. Op. Att'y Gen. (Oct. 8; 663-81-0019).

We find the reasoning in these cases and opinions persuasive, and we believe the Alaska Supreme Court would do the same. We do not know, and decline to predict, whether the Alaska court would adopt the position taken by the Colorado court prohibiting the legislature from requiring agency reports as a precondition for expending appropriations. Also, we believe the legislature can require the Division of Tourism to answer questions and cooperate in investigations performed by the LB&AC, under the committee's constitutional and statutory authority. However, we conclude that the language purporting to condition

the division's appropriation on prior LB&AC approval of the division's program violates the separation of powers doctrine.

Delegation of legislative authority:

Although the legislature may not invade the functions of the executive, the legislature does have the authority to control agency expenditures through the appropriations process. Thus, although it cannot condition an appropriation on subsequent LB&AC approval of the details of a program's administration, and it also cannot too closely supervise an agency's use of appropriated funds, the legislature can control an agency's programs by controlling the amount of various appropriations and putting reasonable restrictions on them. However, this is a law-making function, which may be performed only by the legislature acting as a whole.

Assuming arguendo that the LB&AC approval authority contained in this appropriation were considered to be a legislative act and therefore constitutional under the separation of powers doctrine, this authority could not be delegated to a committee. In State v. Legislative Finance Committee, 543 P.2d 1317 (Mont. 1975), relied on by the Alaska Supreme Court in State v. A.L.I.V.E., 606 P.2d 769, 778 (Alaska 1980), the court struck down a legislative enactment that granted an interim legislative committee the authority to review and approve budget amendments, i.e., expenditures by state agencies in excess of appropriations. After recognizing that the authority to approve such expenditures was certainly a proper legislative function, the court nonetheless held that the grant of this authority to a committee was an unconstitutional delegation of legislative power.

> [T]he 1975 Montana Legislature in its enactment of S.B. 401 and H.B. 1 (Special session) empowering the Finance Committee to approve budget amendments delegated a power properly exercisable only by either the entire legislature or an executive officer or agency, to one of its interim committees. Such a hybrid delegation does not pass constitutional muster. The power in question here resides in either the entire legislative body while in session or, if properly delegated, in an executive agency.

Id. at 1321. Other cases reaching a similar conclusion include State v. McInnis, 295 S.E.2d at 639 and Advisory Opinion, 295 S.E.2d 589.

The particular provision in the FY 89 Budget Act constitutes a significant encroachment into the exclusive province of the executive branch by the legislature, unlike the act at issue in the Montana case. However, in the unlikely event that a court were to find this provision to be constitutional under the separation of powers doctrine, the rationale used by the Montana court would apply, and we conclude that the provision would certainly fail as an improper delegation of legislative authority.

We hope this answers your questions.

JWB:jf

cc: Legislative Budget & Audit Committee

pretative approach of the unusually distinguished panel of Circuit Judges who, shortly after the FTCA was passed, wrote:

"When after many years of discussion and debate Congress has at length established a general policy of governmental generosity toward tort claimants, it would seem that that policy should not be set aside or hampered by a niggardly construction based on formal rules made obsolete by the very purpose of the Act itself. Particularly should this be true as to the broad terms of coverage employed in the basic grant of liability itself." Spelar v United States, 171 F2d 208, 209 (CA2 1948).[16]

The wisdom that prompted the Court's grant of certiorari is not reflected in its interpretation of the 1946 Act. Rather, it reflects a vision that would exclude electronic eavesdropping from the coverage of the Fourth Amendment and satellites from the coverage of the Commerce Clause. The international community includes sovereignless places but no places where there is no rule of law. Majestic legislation like the Federal Tort Claims Act should be read with the vision of the judge, enlightened by an interest in justice, not through the opaque green eyeshade of the cloistered bookkeeper. As President Lincoln observed in his first State of the Union Message:

"It is as much tho duty of Government to render prompt justice against itself, in favor of citizens, as it is to administer the same between private individuals."[17]

I respectfully dissent.

16. The members of the panel were Learned Hand, Chief Judge, and Augustus N. Hand and Charles E. Clark, Circuit Judges.

17. Cong Globe, 37th Cong, 2d Sess, App (1861).

BUILDING AND CONSTRUCTION TRADES COUNCIL OF THE METROPOLITAN DISTRICT, Petitioner

v

ASSOCIATED BUILDERS AND CONTRACTORS OF MASSACHUSETTS/RHODE ISLAND, INC., et al. (No. 91-261)

MASSACHUSETTS WATER RESOURCES AUTHORITY, et al., Petitioners

v

ASSOCIATED BUILDERS AND CONTRACTORS OF MASSACHUSETTS/RHODE ISLAND, INC., et al. (No. 91-274)

507 US —, 122 L Ed 2d 565, 113 S Ct 1190

[Nos. 91-261 and 91-274]

Argued December 9, 1992. Decided March 8, 1993.

Decision: National Labor Relations Act (29 USCS §§ 151 et seq.) held not to pre-empt enforcement by Massachusetts agency, acting as owner of construction project, of prehire collective bargaining agreement.

SUMMARY

An independent government agency charged by the Massachusetts Legislature with providing water-supply services, sewage collection, and treatment and disposal services for eastern Massachusetts was ordered by the United States District Court for the District of Massachusetts to build sewage treatment facilities for the cleaning of Boston Harbor. Under the agency's enabling statute and Massachusetts' public bidding laws, the agency was to (1) provide funds for construction, (2) own the facilities to be built, (3) establish all bid conditions, (4) decide all contract awards, (5) pay the contractors, and (6) generally supervise the project. An engineering firm, hired as the agency's project manager, negotiated a labor agreement which, among other items, (1) recognized a particular union as the exclusive bargaining agent for all craft employees, and (2) established a 10-year no-strike commitment. The agency approved the agreement and adopted a bid specification, which required each contractor and subcontractor to agree to

abide by the agreement and to be bound by the agreement's provisions. In response to a charge by a contractors' association that the agreement violated the National Labor Relations Act (NLRA) (29 USCS §§ 151 et seq.), the general counsel of the National Labor Relations Board found that (1) the agreement was a valid prehire agreement under § 8(f) of the NLRA (29 USCS § 158(f)), and (2) the agreement's provisions limiting work on the project to contractors who agreed to abide by the agreement were lawful under a construction-industry proviso to § 8(e) of the NLRA (29 USCS § 158(e)). An organization representing nonunion construction industry employers—seeking, among other items, to enjoin enforcement of the bid specification as pre-empted under the NLRA—brought suit in the District Court against the agency, the engineering firm, and the union. The District Court denied the organization's motion for a preliminary injunction. On appeal, the United States Court of Appeals for the First Circuit reversed, expressing the view that the bid specification was pre-empted under the NLRA (135 BNA LRRM 2713, 117 CCH LC ¶ 10392, 1990-2 CCH Trade Cases ¶ 69229). The Court of Appeals subsequently vacated this opinion, but on rehearing en banc, the Court of Appeals again reversed the District Court, expressing the view that (1) the agency's intrusion into the bargaining process was pervasive and was not a permissible sort of peripheral regulation; and (2) the bid specification was pre-empted, because the agency was regulating activities that Congress intended to be unrestricted by governmental power (935 F2d 345).

On certiorari, the United States Supreme Court reversed and remanded. In an opinion by BLACKMUN, J., expressing the unanimous view of the court, it was held that (1) the NLRA does not pre-empt enforcement by a state agency, acting as the owner of a construction project, of an otherwise lawful prehire collective bargaining agreement negotiated by private parties; (2) under the circumstances, the agency's enforcement of the bid specification was not government regulation and was therefore not subject to NLRA pre-emption, as the agency was the proprietor of the construction project under state law and was acting as a purchaser of construction services; (3) permitting the state to participate freely in the marketplace under such circumstances promoted the legislative goals that animated the passage of the §§ 8(e) and 8(f) provisions regarding construction-industry prehire agreements; and (4) thus, a preliminary injunction against enforcement of the bid specification was improper.

HEADNOTES

Classified to United States Supreme Court Digest, Lawyers' Edition

Commerce § 129.5 — National Labor Relations Act — pre-emption — state agency's construction project — prehire collective bargaining agreement

1a-1c. The National Labor Relations Act (NLRA) (29 USCS §§ 151 et seq.) does not pre-empt enforcement by a state agency, acting as the owner of a construction project, of an otherwise lawful prehire collective bargaining agreement negotiated by private parties; in connection with a state agency's construction of sewage treatment facilities

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48 Am Jur 2d, Labor and Labor Relations § 1313; 48A Am Jur 2d, Labor and Labor Relations § 2003

10A Am Jur Legal Forms 2d, Labor and Labor Relations §§ 159:184, 159:285-159:287, 159:1164

USCS, Constitution, Art VI, cl 2; 29 USCS §§ 158(e), 158(f)

Employment Coordinator ¶¶ LR-12,261, LR-12,262, LR-12,265—LR12,267, LR-31,020—LR-31,022

L Ed Digest, Commerce § 129.5

L Ed Index, Collective Bargaining; Hiring Employees; Labor and Employment

ALR Index, Collective Bargaining; Labor and Employment; Pre-emption

Auto-Cite®: Cases and annotations referred to herein can be further researched through the Auto-Cite® computer-assisted research service. Use Auto-Cite to check citations for form, parallel references, prior and later history, and annotation references.

ANNOTATION REFERENCES

State court jurisdiction as pre-empted by National Labor Relations Act as amended (29 USCS §§ 141 et seq.)—Supreme Court cases. 75 L Ed 2d 988.

National Labor Relations Act and Labor Management Relations Act as excluding state action—federal cases. 93 L Ed 470, 94 L Ed 984, 95 L Ed 384, 98 L Ed 245, 99 L Ed 559, 100 L Ed 1174.

Municipal ordinance or other enactment as pre-empted by National Labor Relations Act (29 USCS §§ 151 et seq.). 110 ALR Fed 879.

Validity, construction, and application of the construction industry proviso to NLRA hot cargo provision (29 USCS § 158(e)). 39 ALR Fed 16.

Rights of collective action by employees as declared in § 7 of National Labor Relations Act (29 USCS § 157). 6 ALR2d 416.

for the cleaning of a harbor, the agency's enforcement of a bid specification requiring each contractor and subcontractor to agree to abide by a prehire collective bargaining agreement negotiated by the agency's hired project manager—which agreement, among other items, recognizes a particular union as the exclusive bargaining agent for all craft employees and establishes a 10-year no-strike commitment—is not government regulation and is therefore not subject to NLRA pre-emption, where (1) the agency is the proprietor of the construction project under state law and is acting as a purchaser of construction services, (2) the agency, in adopting the bid specification, is attempting to insure an efficient project that is completed as quickly and effectively as possible at the lowest cost, (3) enforcement of the bid specification is specifically tailored to the one particular project in question, and (4) it is undisputed that the prehire agreement is a valid labor contract under the provisions of §§ 8(e) and 8(f) of the NLRA (29 USCS §§ 158(e), 158(f)) regarding prehire agreements in the construction industry; permitting the state to participate freely in the marketplace under such circumstances promotes the legislative goals that animated the passage of the §§ 8(e) and 8(f) provisions, even though those provisions are not made specifically applicable to the state in such circumstances; thus, a preliminary injunction against enforcement of the bid specification is improper.

Commerce § 129 — National Labor Relations Act — pre-emption of state law

2. Because the National Labor Relations Act (29 USCS §§ 151 et seq.) contains no express pre-emption provision, the United States Supreme Court should not find a state labor provision federally pre-empted unless (1) the provision conflicts with federal law or would frustrate the federal scheme, or (2) the court discerns from the totality of the circumstances that Congress sought to occupy the field to the exclusion of the states.

States, Territories, and Possessions § 22 — federal pre-emption

3. Consideration of a state law under the Federal Constitution's supremacy clause (Art VI, cl 2) starts with the basic assumption that Congress did not intend to displace state law; the United States Supreme Court is reluctant to infer pre-emption of state law.

Commerce § 129 — National Labor Relations Act — pre-emption of state regulation

4a, 4b. The National Labor Relations Act (NLRA) (29 USCS §§ 151 et seq.) pre-empts state law in that the NLRA prevents a state from regulating within a zone that is protected and reserved for (1) National Labor Relations Board (NLRB) jurisdiction or (2) market freedom; the first pre-emption principle, forbidding state and local regulation of activities that are protected by § 7 of the NLRA (29 USCS § 157), or that constitute an unfair labor practice under § 8 of the NLRA (29 USCS § 158), (1) prohibits regulation even of activities that the NLRA only arguably protects or prohibits, and (2) is designed to prevent conflict between, on the one hand, state and local regulation and, on the other, Congress' integrated scheme of regulation, embodied in §§ 7 and 8, which scheme includes the choice of the NLRB, rather than state or federal courts, as the appropriate body to implement the NLRA; the second pre-emption principle, which prohibits state and municipal regulation of areas that have been left to be controlled by the free play of economic forces, preserves Congress' intentional balance between the uncontrolled power of management and labor to further their respective interests; however, such pre-emption doctrines apply only to state regulation, and a state does not regulate simply by acting within one of the protected areas.

Commerce § 129 — National Labor Relations Act — pre-emption — action of state as proprietor

5a-5c. A state, acting as a proprietor, may manage state-owned property without offending the pre-emption principles of the National Labor Relations Act (29 USCS §§ 151 et seq.), given that such state acts, which involve the state's interaction with private participants in the marketplace, are not tantamount to regulation or policymaking; in the absence of any express or implied indication by Congress that a state may not manage the state's own property when the state pursues purely proprietary interests, the United States Supreme Court will not infer a restriction on such state conduct.

Commerce § 129; States, Territories, and Possessions § 11 — National Labor Relations Act — pre-emption — private actors — supremacy clause

6. The fact that a private actor may "regulate" does not mean that the private actor may be "pre-empted" by the National Labor Relations Act (NLRA) (29 USCS §§ 151 et seq.), as the Federal Constitution's supremacy clause (Art VI, cl 2) does not require pre-emption of private conduct; therefore, private actors may "regulate" as they please, as long as their conduct does not violate the law; thus, a private actor, unlike a state actor, may—without violating the NLRA—participate in a boycott of a supplier on the basis of a labor policy concern rather than a profit motive, even though the private actor, under such circumstances, would be attempting to "regulate" the suppliers and would not be acting as a typical proprietor.

Labor § 114 — construction industry proviso — prehire agreements

7. The construction-industry proviso to § 8(e) of the National Labor Relations Act (29 USCS § 158(e))—setting forth an exception from § 8(e)'s prohibition against "hot-cargo" agreements that require an employer to refrain from doing business with any person not agreeing to be bound by a prehire agreement—permits a general contractor's prehire collective bargaining agreement to require an employer not to hire other contractors performing work on a particular project site unless such contractors agree to become bound by the terms of that agreement.

Labor §§ 37, 45 — construction industry — changes to prehire agreement

8. The final proviso to § 8(f) of the National Labor Relations Act (NLRA) (29 USCS § 158(f)) permits construction industry employees, once hired, to utilize the National Labor Relations Board election process under §§ 9(c) and 9(e) of the NLRA (29 USCS §§ 159(c), 159(e)) if such employees wish to reject the bargaining representative or to cancel the union security provisions of a prehire agreement.

Labor § 40 — construction industry agreements

9. The intent of Congress, in enacting exemptions in §§ 8(e) and 8(f) of the National Labor Relations Act (NLRA) (29 USCS §§ 158(e), 158(f)) authorizing certain kinds of project labor agreements in the construction industry, is to accommodate conditions specific to that industry, such conditions including (1) the short-term nature of employment, which makes posthire collective bargaining difficult; (2) the contractor's need for predictable costs and a steady supply of skilled labor; and (3) a longstanding custom of prehire bargaining in the industry.

Appeal § 1339.5 — certiorari — Federal Court of Appeals decision — what reviewable

10a, 10b. On certiorari to review a Federal Court of Appeals' decision as to whether the National Labor Relations Act (NLRA) (29 USCS §§ 151 et seq.) pre-empts enforcement by a state authority, acting as the owner of a construction project, of an otherwise lawful prehire collective bargaining agreement negotiated by private parties, the United States Supreme Court will decline to address the application, if any, of § 8(d) of the NLRA (29 USCS § 158(d)) to the agreement, where (1) the Court of Appeals did not rely on that section of the NLRA, and (2) the Supreme Court did not grant certiorari on that question.

SYLLABUS BY REPORTER OF DECISIONS

Following a lawsuit over its failure to prevent the pollution of Boston Harbor, petitioner Massachusetts Water Resources Authority (MWRA)—the state agency that provides, inter alia, sewage services for eastern Massachusetts—was ordered to clean up the Harbor. Under state law, MWRA provides the funds for construction, owns the sewage-treatment facilities to be built, establishes all bid conditions, decides all contract awards, pays the contractors, and generally supervises the project. Petitioner Kaiser Engineers, Inc., the project manager selected by MWRA, negotiated an agreement with petitioner Building and Construction Trades Council and affiliated organizations (BCTC) that would assure labor stability over the life of the project, and MWRA directed in Specification 13.1 of its solicitation for project bids that each successful bidder must agree to abide by the labor agreement's terms. Respondent organization, which represents nonunion construction industry employers, filed suit against petitioners, seeking, among other things, to enjoin enforcement of Bid Specification 13.1 on the grounds that it is pre-empted under the National Labor Relations Act (NLRA). The District Court denied the organization's motion for preliminary injunction, but the Court of Appeals reversed, holding that MWRA's intrusion into the bargaining process was pervasive and not the sort of peripheral regulation that would be permissible under San Diego Building Trades Council v Garmon, 359 US 236, 3 L Ed 2d 775, 79 S Ct 773, and that Bid Specification 13.1 was pre-empted under Machinists v Wisconsin Employment Relations Comm'n, 427 US 132, 49 L Ed 2d 396, 96 S Ct 2548, because MWRA was regulating activities that Congress intended to be unrestricted by governmental power.

Held: The NLRA does not pre-empt enforcement by a state authority, acting as the owner of a construction project, of an otherwise lawful prehire collective-bargaining agreement negotiated by private parties. This Court has articulated two distinct NLRA pre-emption principles: "Garmon pre-emption" forbids state and local regulation of activities that are protected by § 7 of the NLRA or constitute an unfair labor practice under § 8, while "Machinists pre-emption" prohibits state and municipal regulation of areas that have been left to be controlled by the free play of economic forces. These pre-emption doctrines apply only to state labor *regulation*, see, e.g., Machinists, 427 US, at 144, 49 L Ed 2d 396, 96 S Ct 2548. A State may act without offending them when it acts as a proprietor and its acts therefore are not tantamount to regulation or policymaking. Permitting States to participate freely in the marketplace is not only consistent with NLRA pre-emption principles generally but also, in this case, promotes the legislative goals that animated the passage of the NLRA's § 8(e) and § 8(f) exceptions regarding prehire agreements in the construction industry. It is undisputed that the Agreement between Kaiser and BCTC is a valid labor contract under §§ 8(e) and (f). In enacting the exceptions, Congress intended to accommodate conditions specific to the construction industry, and there is no reason to expect the industry's defining features to depend upon the public or private nature of the entity purchasing contracting services. Absent any express or implied indication by Congress that a State may not manage its own property when pursuing a purely proprietary interest such as MWRA's interest here, and where analogous private conduct would be permitted, this Court will not infer such a restriction.

935 F2d 345, reversed and remanded.

Blackmun, J., delivered the opinion for a unanimous Court.

APPEARANCES OF COUNSEL

Charles Fried argued the cause for petitioners.

Maureen E. Mahoney argued the cause for the United States, as amicus curiae, by special leave of court.

Maurice Baskin argued the cause for respondents.

OPINION OF THE COURT

Justice **Blackmun** delivered the opinion of the Court.

[1a] The issue in this case is whether the National Labor Relations Act, 49 Stat 449, as amended, 29 USC § 151 et seq. [29 USCS §§ 151 et seq.], pre-empts enforcement by a state authority, acting as the owner of a construction project, of an otherwise lawful prehire collective-bargaining agreement negotiated by private parties.

I

The Massachusetts Water Resources Authority (MWRA) is an independent government agency charged by the Massachusetts Legislature with providing water-supply services, sewage collection, and treatment and disposal services for the eastern half of Massachusetts.

Mass Gen Laws, ch 92 App, §§ 1-1 et seq. (Supp 1992). Following a lawsuit arising out of its failure to prevent the pollution of Boston Harbor, in alleged violation of the Federal Water Pollution Control Act, 86 Stat 816, as amended, 33 USC § 1251 et seq. [33 USCS §§ 1251 et seq.], MWRA was ordered to clean up the Harbor. See United States v Metropolitan Dist. Comm'n, 757 F Supp 121, 123 (Mass 1991). The cleanup project was expected to cost $6.1 billion over 10 years. 935 F2d 345, 347 (CA1 1991). The District Court required construction to proceed without interruption, making no allowance for delays from causes such as labor disputes. App 71 (Affidavit of Richard D. Fox, Director of the Program Management Division of MWRA). MWRA has primary responsibility for the project. Under its enabling statute and the Commonwealth's public-bidding laws, MWRA provides the funds for construction (assisted by state and federal grants), owns the sewage-treatment facilities to be built, establishes all bid conditions, decides all contract awards, pays the contractors, and generally supervises the project. See 935 F2d, at 347 (citing Mass Gen Laws, ch 92 App §§ 1-1 et seq. (Supp 1992), ch 149, §§ 44A to 44I, and ch 30, § 39M) (1991).

In the spring of 1988, MWRA selected Kaiser Engineers, Inc., as its project manager. Kaiser was to be primarily in charge of managing and supervising construction activity. Kaiser also was to advise MWRA on the development of a labor-relations policy that would maintain worksite harmony, labor-management peace, and overall stability throughout the duration of the project. To that end, Kaiser suggested to MWRA that Kaiser be permitted to negotiate an agreement with the Building and Construction Trades Council and affiliated organizations (BCTC) that would assure labor stability over the life of the project. App to Pet for Cert. in No. 91-274, p 75a (MWRA Pet App). MWRA accepted Kaiser's suggestion, and Kaiser accordingly proceeded to negotiate the Boston Harbor Wastewater Treatment Facilities Project Labor Agreement. Ibid. The Agreement included: recognition of BCTC as the exclusive bargaining agent for all craft employees; use of specified methods for resolving all labor-related disputes; a requirement that all employees be subject to union-security provisions compelling them to become union members within seven days of their employment; the primary use of BCTC's hiring halls to supply the project's craft labor force; a 10-year no-strike commitment; and a requirement that all contractors and subcontractors agree to be bound by the Agreement. 935 F2d, at 348. See generally MWRA Pet App 107a (full text of Agreement). MWRA's Board of Directors approved and adopted the Agreement in May 1989 and directed that Bid Specification 13.1 be incorporated into its solicitation of bids for work on the project.[1] 935 F2d, at 347. Bid Specification 13.1 provides in pertinent part:

> "[E]ach successful bidder and any and all levels of subcontractors, as a condition of being awarded a contract or subcontract, will agree to abide by the provisions of the Boston Harbor Wastewater Treatment Facilities Project Labor Agreement as executed and effective May 22, 1989, by and between Kaiser . . . on behalf of [MWRA], and [BCTC] . . . and will be bound by the provisions of that agreement in the same manner as any other provision of the contract." MWRA Pet App 141a-142a.

In March 1990, a contractors' association not a party to this case filed a charge with the National Labor Relations Board contending that the Agreement violated the NLRA. The NLRB General Counsel refused to issue a complaint, finding: (1) that the Agreement is a valid prehire agreement under § 8(f) of the NLRA, 29 USC § 158(f) [29 USCS § 158(f)], which authorizes such agreements in the construction industry, and (2) that the Agreement's provisions limiting work on the project to contractors who agree to abide by the agreement are lawful under the construction-industry proviso to § 8(e), 29 USC § 158(e) [29 USCS § 158(e)]. This proviso sets forth an exception from § 8(e)'s prohibition against "hot cargo" agreements that require an employer to refrain from doing business with any person not agreeing to be bound by a prehire agreement. Building & Trades Council (Kaiser Engineers, Inc.), Case 1-CE-71, NLRB Advice Memo, June 25, 1990, MWRA Pet App 88a.

Also in March 1990, respondent Associated Builders and Contractors of Massachusetts/Rhode Island, Inc. (ABC), an organization representing nonunion construction industry employers, brought this suit against MWRA, Kaiser, and BCTC, seeking, among other things, to enjoin enforcement of Bid Specification 13.1. ABC alleged pre-emption under the NLRA, pre-emption under § 514(c) of the Employee Retirement Income Security Act, 88 Stat 897, 29 USC § 1144(c) [29 USCS § 1144(c)] (ERISA), violations of the Equal Protection and Due Process Clauses of the Fourteenth Amendment, conspiracy to reduce competition, in violation of the Sherman Act, 26 Stat 209, as amended, 15 USC § 1 [15 USCS § 1], and various state-law claims. Only NLRA pre-emption is at issue here.

The United States District Court for the District of Massachusetts rejected each of ABC's claims and denied its motion for a preliminary injunction. MWRA Pet App 76a-83a. The Court of Appeals for the First Circuit reversed and directed entry of a preliminary injunction restraining the use of Bid Specification 13.1, reaching only the issue of NLRA pre-emption. 135 LRRM 2713 (1990). The Court of Appeals subsequently granted a petition for rehearing en banc, vacating the panel opinion. MWRA Pet App 84a. Upon rehearing en banc, the Court of Appeals, by a 3-2 vote, again reversed the judgment of the District Court, once more reaching only the pre-emption issue. 935 F2d, at 359-360. The court held that MWRA's intrusion into the bargaining process was pervasive and not the sort of peripheral regulation that would be permissible under San Diego Building Trades Council v Garmon, 359 US 236, 3 L Ed 2d 775, 79 S Ct 773 (1959). See 935 F2d, at 353. It also held that Bid Specifi-

1. Massachusetts competitive-bidding laws require MWRA to state its preference for a contract term, such as a project labor agreement, in the form of a bid specification. These laws, which MWRA's Enabling Act explicitly incorporates, see Mass Gen Laws, ch 92 App, § 1-8(g) (Supp 1992) (incorporating Mass Gen Laws ch 30, § 39M, and ch 149, §§ 44A to 44H (1991)), require that the competitive-bidding process be carried out by the awarding authority. See Modern Continental Constr. Co. v Lowell, 391 Mass 829, 836, 465 NE2d 1175, 1177-1178 (1984).

cation 13.1 was pre-empted under Machinists v Wisconsin Employment Relations Comm'n, 427 US 132, 49 L Ed 2d 396, 96 S Ct 2548 (1976), because MWRA was regulating activities that Congress intended to be unrestricted by governmental power. Because of the importance of the issue, we granted certiorari, 504 US ——, 118 L Ed 2d 541, 112 S Ct 1935 (1992).

II

[2, 3] The NLRA contains no express pre-emption provision. Therefore, in accordance with settled pre-emption principles, we should not find MWRA's bid specification pre-empted "' " . . . unless it conflicts with federal law or would frustrate the federal scheme, or unless [we] discern from the totality of the circumstances that Congress sought to occupy the field to the exclusion of the States."' " Metropolitan Life Ins. Co. v Massachusetts, 471 US 724, 747-748, 85 L Ed 2d 728, 105 S Ct 2380 (1985) (citations omitted). We are reluctant to infer pre-emption. See Cippolone v Liggett Group, Inc., 504 US ——, ———. 120 L Ed 2d 407, 112 S Ct 2608 (1992); Rice v Santa Fe Elevator Corp., 331 US 218, 230, 91 L Ed 1447, 67 S Ct 1146 (1947). "Consideration under the Supremacy Clause starts with the basic assumption that Congress did not intend to displace state law." Maryland v Louisiana, 451 US 725, 746, 69 L Ed 2d 156, 101 S Ct 3075 (1981). With these general principles in mind, we turn to the particular pre-emption doctrines that have developed around the NLRA.

[4a] In Metropolitan Life Ins. Co. v Massachusetts, 471 US, at 748, 85 L Ed 2d 728, 105 S Ct 2380, we noted: "The Court has articulated two distinct NLRA pre-emption principles." The first, "Garmon pre-emption," see San Diego Building Trades Council v Garmon, supra, forbids state and local regulation of activities that are "protected by § 7 of the [NLRA], or constitute an unfair labor practice under § 8." 359 US, at 244, 3 L Ed 2d 775, 79 S Ct 773. See also Garner v Teamsters, 346 US 485, 498-499, 98 L Ed 228, 74 S Ct 161 (1953) ("[W]hen two separate remedies are brought to bear on the same activity, a conflict is imminent"). Garmon pre-emption prohibits regulation even of activities that the NLRA only *arguably* protects or prohibits. See Wisconsin Dept. of Industry v Gould Inc., 475 US 282, 286, 89 L Ed 2d 223, 106 S Ct 1057 (1986). This rule of pre-emption is designed to prevent conflict between, on the one hand, state and local regulation and, on the other, Congress' "integrated scheme of regulation," Garmon, 359 US, at 247, 3 L Ed 2d 775, 79 S Ct 773, embodied in §§ 7 and 8 of the NLRA, which includes the choice of the NLRB, rather than state or federal courts, as the appropriate body to implement the Act. Metropolitan Life Ins. Co. v Massachusetts, 471 US, at 748-749, and n 26, 85 L Ed 2d 728, 105 S Ct 2380.

In Garmon, this Court held that a state court was precluded from awarding damages to employers for economic injuries resulting from peaceful picketing by labor unions that had not been selected by a majority of employees as their bargaining agent. 359 US, at 246, 3 L Ed 2d 775, 79 S Ct 773. The Court said: "Our concern is with delimiting areas of conduct which must be free from state regulation if national policy is to be left unhampered." Ibid. In Gould, we held that the NLRA pre-empts a statute that disqualifies from doing business with the State persons who have violated the NLRA three times within a 5-year period. We emphasized there that "the Garmon rule prevents States not only from setting forth standards of conduct inconsistent with the substantive requirements of the NLRA, but also from providing their own regulatory or judicial remedies for conduct prohibited or arguably prohibited by the Act." 475 US, at 286, 89 L Ed 2d 223, 106 S Ct 1057 (citing 359 US, at 247, 3 L Ed 2d 775, 79 S Ct 773).

A second pre-emption principle, "Machinists pre-emption," see Machinists v Wisconsin Employment Relations Comm'n, 427 US, at 147, 49 L Ed 2d 396, 96 S Ct 2548, prohibits state and municipal regulation of areas that have been left "'to be controlled by the free play of economic forces.'" Id., at 140, 49 L Ed 2d 396, 96 S Ct 2548 (citation omitted). See also Golden State Transit Corp. v Los Angeles, 475 US 608, 614, 89 L Ed 2d 616, 106 S Ct 1395 (1986) (Golden State I); Golden State Transit Corp. v Los Angeles, 493 US 103, 111, 107 L Ed 2d 420, 110 S Ct 444 (1989) (Golden State II). Machinists pre-emption preserves Congress' "intentional balance "'between the uncontrolled power of management and labor to further their respective interests."' " Golden State I, 475 US, at 614, 89 L Ed 2d 616, 106 S Ct 1395 (citations omitted).

In Machinists, we held that the Wisconsin Employment Relations Commission could not designate as an unfair labor practice under state law a concerted refusal by a union and its members to work overtime, because Congress did not mean such self-help activity to be regulable by the States. 427 US, at 148-150, 49 L Ed 2d 396, 96 S Ct 2548. We said that it would frustrate Congress' intent to "sanction state regulation of such economic pressure deemed by the federal Act 'desirabl[y] . . . left for the free play of contending economic forces . . . ." Id., at 150, 49 L Ed 2d 396, 96 S Ct 2548 (citation omitted). In Golden State I, we applied the Machinists doctrine to hold that the city of Los Angeles was pre-empted from conditioning renewal of a taxicab operating license upon the settlement of a labor dispute. 475 US, at 618, 89 L Ed 2d 616, 106 S Ct 1395. We reiterated the principle that a "local government . . . lacks the authority to "'introduce some standard of properly 'balanced' bargaining power" . . . or to define "what economic sanctions might be permitted negotiating parties in an 'ideal' or 'balanced' state of collective bargaining."' " Id., at 619, 89 L Ed 2d 616, 106 S Ct 1395 (quoting Machinists, 427 US, at 149-150, 49 L Ed 2d 396, 96 S Ct 2548) (internal citation omitted). In Golden State II, 493 US 103, 107 L Ed 2d 420, 110 S Ct 444 (1989), we determined that the taxicab employer who was challenging the city's conduct in Golden State I was entitled to maintain an action under 42 USC § 1983 [42 USCS § 1983] for compensatory damages against the city. In so holding, we stated that the Machinists rule created a zone free from all regulations, whether state or federal. 493 US, at 112, 107 L Ed 2d 420, 110 S Ct 444.

III

[4b, 5a] When we say that the NLRA pre-empts state law, we mean that the NLRA prevents a State

from regulating within a protected zone, whether it be a zone protected and reserved for market freedom, see Machinists, or for NLRB jurisdiction, see Garmon. A State does not regulate, however, simply by acting within one of these protected areas. When a State owns and manages property, for example, it must interact with private participants in the marketplace. In so doing, the State is not subject to pre-emption by the NLRA, because pre-emption doctrines apply only to state *regulation*.

Our decisions in this area support the distinction between government as regulator and government as proprietor. We have held consistently that the NLRA was intended to supplant state labor *regulation*, not all legitimate state activity that affects labor. In Machinists, for example, we referred to Congress' pre-emptive intent to "leave some activities *unregulated*," 427 US, at 144, 49 L Ed 2d 396, 96 S Ct 2548 (emphasis added), and held that the activities at issue—workers deciding together to refuse overtime work—were not "*regulable* by States." Id., at 149, 49 L Ed 2d 396, 96 S Ct 2548 (emphasis added). In Golden State I, we held that the reason Los Angeles could not condition renewal of a taxicab franchise upon settlement of a labor dispute was that "Machinists pre-emption . . . precludes state and municipal *regulation* 'concerning conduct that Congress intended to be *unregulated*.'" 475 US, at 614, 89 L Ed 2d 616, 106 S Ct 1395 (emphasis added) (quoting Metropolitan Life Ins. Co. v Massachusetts, 471 US, at 749, 85 L Ed 2d 728, 105 S Ct 2380). We refused to permit the city's exercise of its regulatory power of license nonrenewal to restrict Golden State's right to use lawful economic weapons in its dispute with its union. See 475 US, at 616-619, 89 L Ed 2d 616, 106 S Ct 1395. As petitioners point out, a very different case would have been presented had the city of Los Angeles purchased taxi services from Golden State in order to transport city employees. Brief for Petitioners 35. In that situation, if the strike had produced serious interruptions in the services the city had purchased, the city would not necessarily have been pre-empted from advising Golden State that it would hire another company if the labor dispute were not resolved and services resumed by a specific deadline.

In Gould, we rejected the argument that the State was acting as proprietor rather than regulator for purposes of Garmon pre-emption when the State refused to do business with persons who had violated the NLRA three times within five years. We noted in doing so that *in that case*, "debarment . . . serves plainly as a means of enforcing the NLRA." 475 US, at 287, 89 L Ed 2d 223, 106 S Ct 1057. We said there that "[t]he State concedes, as we think it must, that the point of the statute is to deter labor law violations"; we concluded that "[n]o other purpose could credibly be ascribed." Ibid.

Respondents quote the following passage from Gould, arguing that it stands for the proposition that the State as proprietor is subject to the same pre-emption limitations as the State as regulator:

> "Nothing in the NLRA, of course, prevents private purchasers from boycotting labor law violators. But government occupies a unique position of power in our society, and its conduct, regardless of form, is rightly subject to special restraints. Outside the area of Commerce Clause jurisprudence, it is far from unusual for federal law to prohibit States from making spending decisions in ways that are permissible for private parties . . . . The NLRA, moreover, has long been understood to protect a range of conduct against state but not private interference . . . . The Act treats state action differently from private action not merely because they frequently take different forms, but also because in our system States simply are different from private parties and have a different role to play." Id., at 290, 89 L Ed 2d 223, 106 S Ct 1057.

The above passage does not bear the weight that respondents would have it support. The conduct at issue in Gould was a state agency's attempt to compel conformity with the NLRA. Because the statute at issue in Gould addressed employer conduct unrelated to the employer's performance of contractual obligations to the State, and because the State's reason for such conduct was to deter NLRA violations, we concluded: "Wisconsin 'simply is not functioning as a private purchaser of services.' . . . [and therefore,] for all practical purposes, Wisconsin's debarment scheme is tantamount to regulation." Id., at 289, 89 L Ed 2d 223, 106 S Ct 1057. We emphasized that we were "not say[ing] that state purchasing decisions may never be influenced by labor considerations." Id., at 291, 89 L Ed 2d 223, 106 S Ct 1057.

[6] The conceptual distinction between regulator and purchaser exists to a limited extent in the private sphere as well. A private actor, for example, can participate in a boycott of a supplier on the basis of a labor policy concern rather than a profit motive. See id., at 290, 89 L Ed 2d 223, 106 S Ct 1057. The private actor under such circumstances would be attempting to "regulate" the suppliers and would not be acting as a typical proprietor. The fact that a private actor may "regulate" does not mean, of course, that the private actor may be "pre-empted" by the NLRA; the Supremacy Clause does not require pre-emption of private conduct. Private actors therefore may "regulate" as they please, as long as their conduct does not violate the law. As the above passage in Gould makes clear, however, States have a qualitatively different role to play from private parties. Id., at 290, 89 L Ed 2d 223, 106 S Ct 1057. When the State acts as regulator, it performs a role that is characteristically a governmental rather than a private role, boycotts notwithstanding. Moreover, as regulator of private conduct, the State is more powerful than private parties. These distinctions are far less significant when the State acts as a market participant with no interest in setting policy.

[5b] In Gould, we did not address fully the implications of these distinctions. We left open the question whether a State may act without offending the pre-emption principles of the NLRA when it acts as a proprietor and its acts therefore are not "tantamount to regulation," or policy-making. As explained more fully below, we now answer this question in the affirmative.

IV

[1b, 7, 8] Permitting the States to

participate freely in the marketplace is not only consistent with NLRA pre-emption principles generally but also, in this case, promotes the legislative goals that animated the passage of the §§ 8(e) and 8(f) exceptions for the construction industry. In 1959, Congress amended the NLRA to add § 8(f) and modify § 8(e). Section 8(f) explicitly permits employers in the construction industry—but no other employers—to enter into prehire agreements. Prehire agreements are collective-bargaining agreements providing for union recognition, compulsory union dues or equivalents, and mandatory use of union hiring halls, prior to the hiring of any employees. 935 F2d, at 356; Jim McNeff, Inc. v Todd, 461 US 260, 265-266, 75 L Ed 2d 830, 103 S Ct 1753 (1983). The 1959 amendment adding a proviso to subsection (e) permits a general contractor's prehire agreement to require an employer not to hire other contractors performing work on that particular project site unless they agree to become bound by the terms of that labor agreement. See Woelke & Romero Framing, Inc. v NLRB, 456 US 645, 657, 72 L Ed 2d 398, 102 S Ct 2071 (1982). Section 8(f) contains a final proviso that permits employees, once hired, to utilize the NLRB election process under §§ 9(c) and 9(e) of the Act, 29 USC §§ 159(c) and (e) [29 USCS §§ 159(c) and (e)], if they wish to reject the bargaining representative or to cancel the union security provisions of the prehire agreement. See NLRB v Iron Workers, 434 US 335, 345, 54 L Ed 2d 586, 98 S Ct 651 (1978).

It is undisputed that the Agreement between Kaiser and BCTC is a valid labor contract under §§ 8(e) and (f). As noted above, those sections explicitly authorize this type of contract between a union and an employer like Kaiser, which is engaged primarily in the construction industry, covering employees engaged in that industry.

Of course, the exceptions provided for the construction industry in §§ 8(e) and 8(f), like the prohibitions from which they provide relief, are not made specifically applicable to the State. This is because the State is excluded from the definition of the term "employer" under the NLRA, see 29 USC § 152(2) [29 USCS § 152(2)], and because the State, in any event, is acting not as an employer but as a purchaser in this case. Nevertheless, the general goals behind passage of §§ 8(e) and 8(f) are still relevant to determining what Congress intended with respect to the State and its relationship to the agreements authorized by these sections.

[9] It is evident from the face of the statute that in enacting exemptions authorizing certain kinds of project labor agreements in the construction industry, Congress intended to accommodate conditions specific to that industry. Such conditions include, among others, the short-term nature of employment which makes post-hire collective bargaining difficult, the contractor's need for predictable costs and a steady supply of skilled labor, and a long-standing custom of prehire bargaining in the industry. See S Rep No. 187, 86th Cong, 1st Sess, 28, 55-56 (1959); HR Rep No. 741, 86th Cong, 1st Sess, 19-20 (1959).

[5c, 10a] There is no reason to expect these defining features of the construction industry to depend upon the public or private nature of the entity purchasing contracting services. To the extent that a private purchaser may choose a contractor based upon that contractor's willingness to enter into a prehire agreement, a public entity *as purchaser* should be permitted to do the same. Confronted with such a purchaser, those contractors who do not normally enter such agreements are faced with a choice. They may alter their usual mode of operation to secure the business opportunity at hand, or seek business from purchasers whose perceived needs do not include a project labor agreement. In the absence of any express or implied indication by Congress that a State may not manage its own property when it pursues its purely proprietary interests, and where analogous private conduct would be permitted, this Court will not infer such a restriction. See, e.g., Maryland v Louisiana, 451 US, at 746, 68 L Ed 2d 576, 101 S Ct 2114 ("Consideration under the Supremacy Clause starts with the basic assumption that Congress did not intend to displace state law").[2] Indeed, there is some force to petitioners' argument, Brief for Petitioners 25, that denying an option to public owner-developers that is available to private owner-developers itself places a restriction on Congress' intended free play of economic forces identified in Machinists.

V

[1c] In the instant case, MWRA acted on the advice of a manager hired to organize performance of a clean-up job over which, under Massachusetts law, MWRA is the proprietor. There is no question but that MWRA was attempting to ensure an efficient project that would be completed as quickly and effectively as possible at the lowest cost. As petitioners note, moreover, Brief for Petitioners 26, the challenged action in this case was specifically tailored to one particular job, the Boston Harbor clean-up project. There is therefore no basis on which to distinguish the incentives at work here from those that operate elsewhere in the construction industry, incentives that this Court has recognized as legitimate. See Woelke & Romero Framing Co. v NLRB, 456 US, at 662, and n 14, 72 L Ed 2d 398, 102 S Ct 2071.

We hold today that Bid Specification 13.1 is not government regulation and that it is therefore subject to neither Garmon nor Machinists pre-emption. Bid Specification 13.1 constitutes proprietary conduct on the part of the Commonwealth of Massachusetts, which legally has enforced a valid project labor agreement. As Chief Judge Breyer aptly noted in his dissent in the Court of Appeals, "when the MWRA, acting in the role of purchaser of construction services, acts just like a private contractor would act, and conditions its purchasing upon the very sort of labor agreement that Congress explicitly authorized and expected frequently to find, it does not 'regulate' the workings of the market forces

2. [10b] Respondents suggest in their brief, Brief for Respondents 22, n 12, that under H.K. Porter Co. v NLRB, 397 US 99, 103, 25 L Ed 2d 146, 90 S Ct 821 (1970), § 8(d) of the NLRA expressly prohibits the conduct of MWRA at issue in this case. The Court of Appeals did not rely on this section of the statute, nor did we grant certiorari on this question. We therefore decline the invitation to address the application, if any, of § 8(d) to Bid Specification 13.1.

that Congress expected to find; it exemplifies them." 935 F2d, at 361.

Because we find that Bid Specification 13.1 is not pre-empted by the NLRA, it follows that n preliminary injunction against enforcement of this bid specification was improper. We therefore reverse the judgment of the Court of Appeals and remand the case for further proceedings consistent with this opinion.

It is so ordered.

JOSE ANTONIO ORTEGA-RODRIGUEZ, Petitioner

v

UNITED STATES

507 US —, 122 L Ed 2d 581, 113 S Ct 1199

[No. 91-7749]

Argued December 7, 1992. Decided March 8, 1993.

Decision: Dismissal of appeal of accused whose postconviction flight and recapture occurred before filing of appeal, held improper without sufficient connection between fugitive status and appellate process.

SUMMARY

A 1982 decision by the United States Court of Appeals for the Eleventh Circuit ruled to the effect that a criminal defendant who fled after conviction, but before sentencing, waived the right to appeal from the conviction unless the defendant could establish that the defendant's absence was due to matters completely beyond the defendant's control. After being tried and convicted in the United States District Court for the Southern District of Florida for violations of federal drug laws, an accused failed to appear for sentencing in 1989 and was sentenced in his absence to a prison term. Although the accused's two codefendants appealed their convictions and sentences, no appeal was filed on behalf of the accused. Following the arrest of the accused 11 months after the original sentencing date, the accused was indicted and found guilty of contempt of court and failure to appear, and was sentenced by the District Court to a prison term to be served after completion of the sentence for the drug offenses. (Meanwhile, the United States Court of Appeals for the Eleventh Circuit affirmed the conviction of one of the accused's codefendants, but reversed the second codefendant's conviction on the basis of insufficient evidence.) With respect to the accused's drug offenses, the District Court denied the accused's motion for a judgment of acquittal, but granted his motion for resentencing. The accused filed an appeal after the resentencing, and argued that the same insufficiency-of-the-evidence rationale underlying the reversal of the second codefendant's conviction ought apply with respect to the accused's drug conviction. The Court of Appeals, however, granted the government's motion to

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d April 1, 1995.

Sec. 36.30.085. Lease-purchase agreements. (a) To perform its duties and statutory functions, the department, the Board of Regents of the University of Alaska, the legislative council, or the supreme court may enter into lease-purchase agreements. The department, the Board of Regents, the legislative council, or the supreme court may enter into a lease-purchase agreement only if the department, the Board of Regents, the legislative council, or the supreme court is the lessee under the agreement.

(b) When evaluating proposals to acquire or improve real property under a lease-purchase agreement, the department, the Board of Regents, the legislative council, or the supreme court shall consider

(1) in addition to lease costs, the life cycle costs, function, indoor environment, public convenience, planning, design, appearance, and location of the real property proposed for acquisition or improvement; and

(2) whether acquisition or improvement of the real property by lease-purchase agreement is likely to be the least costly means to provide the space.

(c) A lease-purchase agreement

(1) may not provide for a period of occupancy under the full term of the lease-purchase agreement that is greater than 40 years;

(2) must provide that lease payments made by the department, the Board of Regents, the legislative council, or the supreme court are subject to annual appropriation.

(d) If the department, Board of Regents, legislative council, or supreme court intends to enter into or renew a lease-purchase agreement for real property, the department, Board of Regents, legislative council, or supreme court shall provide notice to the legislature. The notice must include the

(1) anticipated total construction, acquisition, or other costs of the project;

(2) anticipated annual amount of the rental obligation; and

(3) total lease payments for the full term of the lease-purchase agreement.

(e) The department, the Board of Regents, the legislative council, or the supreme court may not enter into a lease-purchase agreement to acquire or improve real property unless the agreement has been approved by the legislature by law.

(f) The provisions of (d) and (e) of this section do not apply to a lease-purchase agreement

(1) related to the refinancing of an outstanding balance owing on an existing lease-purchase agreement; or

(2) by the University of Alaska if the lease-purchase agreement is secured by student fees or university receipts as defined in AS 14.40.491.

(g) In this section,

(1) "full term of the lease-purchase agreement" includes all renewal options that are defined within the lease-purchase agreement;

(2) "lease-purchase agreement" includes a lease-financing agreement. (§ 7 ch 75 SLA 1994; am §§ 2, 3 ch 36 SLA 1995)

Effect of amendments. — The 1995 amendment, effective May 25, 1995, inserted "or improve" in subsections (b) and (e) and "or improvement" in paragraphs (b)(1) and (b)(2).

Effective dates. — Section 13, ch. 75, SLA 1994 makes this section effective June 7, 1994, in accordance with AS 01.10.070(c).

Sec. 36.30.095. Procurement of paper. Except as otherwise required under AS 36.15.050 or AS 36.30.322 — 36.30.338, when a state agency purchases paper, at least 25 percent of the quantity purchased must be recycled paper unless the commissioner of the department in which the agency is located makes a written finding that recycled paper is not available for the purchase or that, after application of the procurement preference under AS 36.30.339, the recycled paper is more expensive than the nonrecycled paper. If the agency is not located in a department, the procurement officer for the agency shall make the written finding. If the agency is located in the Office of the Governor, the governor shall make the written finding. (§§ 1, 2 ch 175 SLA 1990)

Effect of amendments. — The 1990 amendment, effective July 1, 1994, substituted "25 percent" for "15 percent" in the first sentence.

Editor's notes. — Section 9, ch. 175, SLA 1990 provides that this section applies to procurements that begin on or after September 19, 1990. Section 10, ch. 175, SLA 1990 provides that the amendments to this section that are effective July 1, 1994, apply to procurements that begin on or after July 1, 1994.

Article 2. Competitive Sealed Bidding.

Sec. 36.30.130. Public notice of invitation to bid. (a) [Effective until August 22, 1998.] The procurement officer shall give adequate public notice of the invitation to bid at least 21 days before the date for the opening of bids. If a determination is made in writing that a shorter notice period is necessary for a particular bid, the 21-day period may be shortened. The determination shall be made by the chief procurement officer for bids for supplies, services, or professional services. The determination shall be made by the commissioner of transportation and public facilities for bids for construction or acquisition of property for the state equipment fleet. Notice shall be published in the Alaska Administrative Journal. The time and manner of notice must

(4) United States Public Health Service, the Indian Health Service, or any affiliated group or agency if the prisoner is a Native American and is entitled to medical care from those agencies or groups; and

(5) parent or guardian of the prisoner if the prisoner is under the age of 18.

(b) The commissioner shall require prisoners who are without resources under (a) of this section to pay the costs of medical, psychological, and psychiatric care provided to them by the department. At a minimum, the prisoner shall be required to pay a portion of the costs based upon the prisoner's ability to pay. (§ 13 ch 70 SLA 1995)

Effective dates. — Section 13, ch. 70, SLA 1995, which enacted this section, took effect on September 3, 1995.

Sec. 33.30.030. Commissioner to adopt regulations. [Repealed, § 12 ch 88 SLA 1986.]

Sec. 33.30.031. Contracts for confinement and care of prisoners. (a) The commissioner shall determine the availability of state correctional facilities suitable for the detention and confinement of persons held under authority of state law or under agreement entered into under (e) of this section. If the commissioner determines that suitable state correctional facilities are not available, the commissioner may enter into an agreement with a public or private agency to provide necessary facilities. Correctional facilities provided through agreement with a public agency for the detention and confinement of persons held under authority of state law may be in this state or in another state. Correctional facilities provided through agreement with a private agency must be located in this state unless the commissioner finds in writing that (1) there is no other reasonable alternative for detention in the state; and (2) the agreement is necessary because of health or security considerations involving a particular prisoner or class of prisoners, or because an emergency of prisoner overcrowding is imminent. The commissioner may not enter into an agreement with an agency unable to provide a degree of custody, care, and discipline similar to that required by the laws of this state.

(b) *[Repealed, § 37 ch 2 FSSLA 1992.]*

(c) Notwithstanding AS 36.30.300, an agreement with a private agency to provide necessary facilities under (a) of this section must be based on competitive bids.

(d) A person employed outside the facility while confined in a privately operated correctional facility established under (a) of this section is subject to the provisions of AS 33.30.131.

(e) The commissioner may enter into an agreement with the United States, another state, a municipality of this state, or another state

agency, to provide a correctional facility for the custody, care, and discipline of a person held under authority of the law of that jurisdiction. (§ 6 ch 88 SLA 1986; am § 49 ch 138 SLA 1986; am § 55 ch 14 SLA 1987; am § 14 ch 90 SLA 1991; am §§ 5, 37 ch 2 FSSLA 1992)

Cross references. — For interstate compacts concerning the confinement of inmates, see AS 33.36.

Effect of amendments. — The 1991 amendment, effective July 3, 1991, in subsection (e), deleted the former last two sentences.

The 1992 amendment, effective July 1, 1992, rewrote subsection (g) and repealed subsection (b).

Opinions of attorney general. — On September 4, 1986, the commissioner of corrections obtained authority to contract for the placement of prisoners found guilty but not mentally ill into privately operated treatment facilities. July 8, 1986 Op. Att'y Gen.

NOTES TO DECISIONS

Annotator's notes. — The Department of Corrections was created from the Division of Corrections of the Department of Health and Social Services by E.O. No. 55 (1984). Earlier cases refer to the executive administration then in effect.

Authority granted. — The legislature has authorized the commissioner of health and welfare to designate an appropriate facility for service of a sentence by an Alaskan prisoner whether or not such facility is in another state, territory, or possession of the United States. Dwyer v. State, 449 P.2d 282 (Alaska 1969), decided under former AS 33.30.060.

Alaska's legislature authorized the commissioner of health and welfare to enter into agreements with the proper United States authorities for the placement of of Alaskan prisoners in federal facilities. Dwyer v. State, 449 P.2d 282 (Alaska 1969), decided under former AS 33.30.060.

Judicial precedent has supported the validity of contractual arrangements entered into under statutory provisions similar to those found in former AS 33.30.060 and former AS 33.30.100. Dwyer v. State, 449 P.2d 282 (Alaska 1969).

Incarceration in federal facility. — Defendant's incarceration upon a sentence for violation of Alaska's burglary statute in a federal facility located in the State of California is not unlawful. Dwyer v. State, 449 P.2d 282 (Alaska 1969), decided under former AS 33.30.060.

The Congress of the United States has authorized the Attorney General of the United States to contract with proper state officials for the care of state prisoners in federal facilities. Dwyer v. State, 449 P.2d 282 (Alaska 1969), decided under former AS 33.30.060.

Collateral references. — Liability of private operator of "halfway house" or group home housing convicted prisoners before final release, for injury to third person caused by inmate. 9 ALR5th 969, § 4.

Sec. 33.30.035. Notice to sex offenders of registration requirement. The department shall provide written notice to a sex offender of the registration requirements of AS 12.63.010, and shall obtain a signed acknowledgement of receipt of notice from the sex offender

(1) at the time of the sex offender's release from a state correctional facility;

(2) immediately after taking supervision of a sex offender under the Interstate Corrections Compact or AS 33.36.110. (§ 8 ch 41 SLA 1994)

the appropriate security level of a correctional facility. The security level of a correctional facility will be maximum, medium, minimum, or multi-level, based on the security features and staffing ratio of the facility. (Eff. 11/3/84, Register 92; am 1/9/87, Register 101)

Authority: AS 33.30.011
AS 33.30.021
AS 44.28.030

Article 5. Programs

22 AAC 05.300. CONTRACT FACILITIES. (a) The commissioner will, in his or her discretion, contract for residential correctional facilities and programs under AS 33.30.031 to supplement the resources of the department for the care, custody, and rehabilitation of prisoners meeting the eligibility criteria set out in this chapter.

(b) Community residential centers will, in the commissioner's discretion, be contracted for and used for the placement of prisoners on a prerelease furlough in accordance with 22 AAC 05.321.

(c) Contract misdemeanant housing will, in the commissioner's discretion, be contracted for and used for the confinement of prisoners convicted of a misdemeanor.

(d) Restitution centers will, in the commissioner's discretion, be contracted for and used for the placement of certain non-violent prisoners in accordance with 22 AAC 05.350.

(e) Correctional facilities provided through agreement with a public agency will, in the commissioner's discretion, be in this state or another state. Correctional facilities provided through agreement with a private agency will be in this state, and will only be used to involve a prisoner in a program established under AS 33.30.091 — 33.30.131 or AS 33.30.151 — 33.30.181, or to confine a prisoner convicted of a misdemeanor.

(f) Contract facilities must provide a degree of custody, care, and discipline for prisoners similar to that required by the laws of this state, consistent with the security and custody status of the prisoners who have been placed there under contract.

(g) A prisoner incarcerated in a contract facility in the state is subject to the provisions of 22 AAC 05.400 — 22 AAC 05.480 unless informed in writing of other disciplinary provisions approved by the commissioner as applicable to prisoners in contract facilities. (Eff. 1/9/87, Register 101)

Authority: AS 33.30.011 AS 33.30.031
AS 33.30.021 AS 44.28.030

22 AAC 05.305. INSTITUTION FROM WHICH A PRISONER IS FURLOUGHED. Repealed 1/9/87.

22 AAC 05.310. FURLOUGH FOR PRISONERS OUTSIDE ALASKA. Alaska prisoners incarcerated outside Alaska under contract with another jurisdiction may not participate in a furlough program unless approved by the commissioner. Before being considered by the commissioner, a prisoner requesting furlough must (1) first meet the eligibility criteria for a furlough established by the contract facility, (2) have served at least a third of the sentence and be within three years or less of release, and (3) be recommended for furlough by officials of the contract facility. (Eff. 9/10/77, Register 63; am 1/9/87, Register 101)

Authority: AS 33.30.011 AS 33.30.111
AS 33.30.021 AS 44.28.030
AS 33.30.031

22 AAC 05.315. REHABILITATION FURLOUGHS. Repealed 1/9/87.

22 AAC 05.316. FURLOUGH. A prisoner may be granted a prerelease or short-duration furlough for a purpose listed in AS 33.30.101(a), after consideration of the factors in AS 33.30.101(b) and after meeting the criteria set out in 22 AAC 05.321 or 22 AAC 05.326, as appropriate. (Eff. 1/9/87, Register 101)

Authority: AS 33.30.011 AS 33.30.111
AS 33.30.021 AS 33.30.121
AS 33.30.101 AS 44.28.030

22 AAC 05.320. WORK FURLOUGHS. Repealed 1/9/87.

22 AAC 05.321. PRERELEASE FURLOUGH. (a) A prerelease furlough is an authorized leave of absence from a correctional facility designed to facilitate the reintegration of a prisoner into society.

(b) The regional director may grant an eligible sentenced prisoner a prerelease furlough in accordance with (c) of this section. If a request for prerelease furlough is denied, the prisoner must be provided a

Comparative Evaluation
of
Privately-managed CCA Prison
(South Central Correctional Center)
and
State-managed Prototypical Prisons
(Northeast Correctional Center, Northwest Correctional Center)

Executive Summary

February 1, 1995

value and weighting of indicators, and the process for conducting the evaluation. In October of 1992, the Oversight Committee adopted a resolution confirming the methodology endorsed by all parties.

- The first step in organizing the comparative evaluation was to identify the measures or indicators to be used. The object was to identify indicators that would reveal the most relevant information about the operational performance of the facilities being compared.

- The second step was to identify the source of those measures. Where would the data and information come from and how would it be collected.

- The third step was to define how the information would be validated or verified to be true and accurate.

- The fourth step was to define the value of each indicator or what the measure was worth.

- The fifth step was to define how the actual comparison would be made.

The specific indicators to determine the nature of inmates in each facility were:

Age
Race
Custody Level or Classification
Medical Classification
Education Level

Audit

An operational audit was conducted at each of the three facilities. This audit was very similar to the annual inspection process conducted by the TDOC Office of Compliance. The purpose was to conduct an inspection of programs and operations at the three facilities.

Security and Safety Index

The security and safety evaluation considered a wide variety of factors. Some of the factors considered included:

Disciplinary Reports
The Use Of Force
Assaults
Deaths
Injuries
Escapes

CORRECTION

THE FOLLOWING DOCUMENT(S)
HAVE BEEN REFILMED TO
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Executive Summary

This summary answers key questions about the Comparative Evaluation purpose, process and results. The question and answer format and numbers follow the major sections of the report. This summary provides the reader with an overview of the evaluation process, results and conclusions.

1. What is the Comparative Evaluation?

In 1991, because of the State's interest in improving the quality of prison operation and to learn, if possible, from the private sector, the State decided to enact legislation allowing a private company to operate one of its prototypical medium-security facilities. The objective was to compare public and private operation at basically the same type of physical plants. This legislation required a comparison of the performance and cost of the private operation to that of the State operation. This report is the performance comparison.

2. Why was a comparative evaluation conducted?

This evaluation was conducted and a report submitted in response to the requirements of TCA 41-24-105, which directs the Select Oversight Committee on Corrections to compare the quality of services provided by a private contractor to the quality of services provided by the State at prisons which are comparable in size, population, and physical plant. This statute also mandates that the Fiscal Review Committee conduct a comparison of the costs of the State and private operations at the three prototypical prisons. The law requires that contract renewal be based on the results of these two studies.

TCA 41-24-105 (d) The contract may be renewed only if the contractor is providing at least the same quality of services as the state at a lower cost, or if the contractor is providing services superior in quality to those provided by the state at essentially the same cost.

3. How was the comparative evaluation conducted?

As a means of satisfying the statutory requirement, the Select Oversight Committee on Corrections brought together leaders of the Department of Correction and executives of Corrections Corporation of America for the purpose of agreeing upon the method to be used for comparing the performance and quality of services provided by the three prisons. Department of Correction and CCA representatives met over five times with the Oversight Committee director and consultant as all parties joined together in developing a strategy to fairly compare all three prisons given the limited resources to undertake such a difficult task. A consensus was reached on the methodology as all parties agreed upon the measures or indicators to be used, the collection methods, the means of validation, the

value and weighting of indicators, and the process for conducting the evaluation. In October of 1992, the Oversight Committee adopted a resolution confirming the methodology endorsed by all parties.

- The first step in organizing the comparative evaluation was to identify the measures or indicators to be used. The object was to identify indicators that would reveal the most relevant information about the operational performance of the facilities being compared.

- The second step was to identify the source of those measures. Where would the data and information come from and how would it be collected.

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Security and Safety Index

The security and safety evaluation considered a wide variety of factors. Some of the factors considered included:

Disciplinary Reports
The Use Of Force
Assaults
Deaths
Injuries
Escapes

Program and Activity Index

The program and activity index measured inmate assignments, and activity or idleness.

Source

The source of the indicators and measures came from existing records, reporting procedures, and inspection processes. The primary sources were:

1 TDOC and CCA records
2 TDOC and CCA weekly, monthly, quarterly, and annual reports.
3 The Performance Audit Inspection
4 The Program and Activities Records and Jobs Audit

In addition to the records and reporting processes and the audits, the SOCC staff and consultant made site observations and conducted interviews with staff and inmates.

Validation

The primary process of validating or verifying the data and information routinely reported by TDOC and CCA was the Performance Compliance Audit and the Program and Activities and Jobs Audit.

Value or Weight

The value or numerical weight given to each indicator or measure previously discussed was agreed-to by TDOC and CCA as follows:

Element	Value
Nature of Inmates	0
Professional Standards	0
Audit	60
Security and Safety Index	25
Program and Activity Index	15
Survey	0

The nature of inmates, and the professional standards, were control measures. They were given no score. The performance audit consisted of nearly 200 elements. Each element was worth one point. The total performance audit was worth sixty (60) percent of the aggregate comparison score.

The security and safety index is worth twenty five (25) percent of the total comparison score. The program and activity index is worth fifteen (15) percent of the total score

Comparison

Describing what is a "comparable, superior, or poorer-than" quality of performance for correctional services is subjective. The risks associated with giving a numerical score to the quality of correctional performance is high. There are very few outcome measures that are either easily quantified or are very meaningful in judging quality of performance. There are many variables to consider when making a judgment about the quality of correctional services. This approach was designed to be as objective, fair, and comprehensive as was practical.

During the development of this design approach, it was clear the parties were concerned about a process that concludes with a numerical score. They were concerned about being given a score that may be misunderstood or misinterpreted. Since this project did not attempt to have scientific rigor, it would be misleading and imply a sense of false precision to rely on a numerical score. On the other hand, it was essential to give some weight and value to indicators and measures used. We have tried to avoid the limits of heavy reliance on a numerical score. The audit, security and safety, and program and activities measures were given a numerical score. They are supported by interpretations and explanations.

In each area where deficiencies are noted or comments are made by the SOCC staff or consultant, an opportunity was given to TDOC or CCA to present facts or evidence to clarify any misunderstandings and correct any misrepresentations.

LIMITATIONS

The methodology described above was sufficient to conduct the comparative evaluation. However, there are limitations and factors that were beyond the control of the State or the private contractor, and the evaluation methodology, that could affect the quality of the data described and the interpretation of that data.

It is important to point out those limitation factors, so they can be given consideration when reviewing or interpreting the data and findings in this comparative evaluation report.

- The first limiting factor was that each of the three institutions opened at different times. There was nearly a 1 1/2 year difference between the opening of Northeast and Northwest Correctional Centers. The methodology attempted to account for this starting time discrepancy by picking points in time that were consistent for data collection and evaluation. However, the fact remains that one institution had more than a year's experience over the other two institutions.

- There was an initial apparent lack of clarity regarding authority and responsibility, as it related to "care, custody, and control" by the private operator. This report was not an attempt to discuss or describe contractual language or responsibilities between the State and the private operator. However, the complexities in operational practices with regard to disciplinary authority and responsibility between the State and the private operator took several months to resolve. This critical period of opening and operating a new prison usually sets the tone for the operation, for a long time. This was not a quantifiable observation, but was based on the experience of opening prisons and jails and observing the impact of an organized transition and activation process, and the first year of operation of a new prison.

- The quality of data used in any evaluation is critical. The initial plan for the methodology was to use the State's Tennessee Offender Management Information System, (TOMIS) as the primary data source. The TOMIS system was being developed as the comparative evaluation data was being collected. This resulted in an inability to obtain certain data, a change in data reporting formats, and an agreement by the State and the private contractor to use certain data collection and verification efforts. It should be noted that the State, particularly the Department of Correction's Planning and Research Division, did an excellent job in controlling, managing, and reporting on the quality and quantity of data used throughout this comparative evaluation.

- The demands placed on the Office of Compliance, Tennessee Department of Correction, were not fully anticipated. The workload and tasks associated with contract monitoring, compliance monitoring, liaison and communication responsibilities were substantial. The TDOC Office of Compliance assumed these additional responsibilities and did an excellent job in coordinating and reporting compliance issues for the comparative evaluation process.

- The corrections system must be flexible and meet the demands of a constantly changing inmate population. A limiting factor in this comparative evaluation was some of the demand for change on the system. For example, during some of the evaluation period, the Northwest Correctional Center was partly used as a reception center because of system demands.

- A primary focus of the programs and activities associated with the correctional system was inmate jobs and work assignments. The industry component at each of the three facilities that was anticipated to supply substantial jobs, did not meet expectations.

In spite of these limitations and factors that could affect the quantity and quality of data, or the interpretation of the findings, it did not have a significant affect on the comparative evaluation approach. In fact, the State and the private contractor, particularly the wardens at the three institutions, used administrative prerogatives, creativity, and good judgment in mitigating many of the limitations.

4. What were the findings of the annual audits?

The following table represents the second annual inspection of each facility by the special comparative evaluation inspection team.

Second Inspection	NECC		SCCC		NWCC	
Element	Comp.	Non-C.	Comp.	Non-C.	Comp.	Non-C.
Administration	87.7	12.3	97.9	2.1	97.6	2.4
Safety & Conditions	95.6	4.4	88.1	11.9	94.5	5.5
Health Services	96.7	3.3	100.0	0.0	97.8	2.2
Mental Health	96.3	3.7	100.0	0.0	100.0	0.0
Treatment	95.9	4.1	99.35	.6	95.1	4.9
Security	99.5	.5	99.5	.5	98.4	1.6
AVERAGE (**)	95.28	4.72	97.48	2.52	97.23	2.77

** Does not include Correctional Enterprises

Compare Two Insp.	NECC		SCCC		NWCC	
Element	Comp.	Non-C.	Comp.	Non-C.	Comp.	Non-C.
First Inspection	90.67	9.35	84.53	15.47	90.08	9.92
Second Inspection	95.28	4.72	97.48	2.52	97.23	2.77
Percent Improvement	5.08		15.32		7.94	

For evaluation purposes, the second inspection score was counted in the overall rated comparison. After each audit the ratings were reviewed with the facility. It is interesting to note the substantial improvement for all three facilities between the first and second inspections. SCCC made the biggest improvement. It is also interesting to note the very high levels of compliance and the closeness of the scores. This is all the more impressive since it was done independently by a bi-partisan team from TDOC and CCA. Also, the scores are consistent with the ACA accreditation ratings.

ACA Accreditation Ratings

Facility	Date	Score
NECC	June 7-9, 1993	98.78
SCCC	October 4-6, 1993	99.29
NWCC	June 6-8, 1994	98.88

5. What were the findings of the Security and Safety review?

A wide range of security and safety factors were reviewed. The review included reports on serious incidents for a fifteen-month period from July 1993 through September 1994, and a review of Disciplinary Classification reports and Dispositions for different periods in 1993 and 1994.

It is very difficult to say that one facility is more or less secure or safe than another facility. There are many variables that constitute safe and secure. Nearly everyone has an opinion. Our opinions were based on observations, data, and our best professional judgment. We started with some assumptions and we referred to data from TDOC and CCA reports for most of our comments

Our first assump on was that there was full compliance with security and safety practices, and that our observations and comments would describe deficiencies in security, or safety compliance, or practices. Our second assumption was that we would refer to serious incident and disciplinary reports, because they have been accepted by the parties, and are the parties' reports.

Statement of Qualifications

Before we discuss specific security and safety issues it is important to remind the reader of the need to qualify and condition the interpretation, use, and referencing of a single number or set of numbers, or narrow specific statements in this report. We recognize the wide and varied interests in the results of this evaluation. We have attempted to present information in text and tables that are clear and concise in form and style.

However, we are very conscious that information can be taken out of context and appear to be much more than it is. Or worse, what it is not. The reporting of events described as "serious incidents" in a prison report can have unintended consequences. We urge the reader to read the full report before reaching conclusions or quoting things out of context.

One measure of security and safety is the number and type of assaults that occur in a facility. During the fifteen-month period, NWCC had significantly more assaults than either NECC or SCCC. NWCC reported 165 assaults.

NECC reported 69 and SCCC reported 80. 62 of NWCC's assaults resulted in minor injuries to staff. Assaults reported for the three facilities include serious and minor assaults involving staff, inmates and visitors.

Disturbances, or the loss or threat of a loss of control is a measure of the security and safety of a facility. NWCC reported 7 temporary losses of control and NECC and SCCC each reported 2. A review of the 7 incidents at Northwest reflect the differences in reporting as the incidents were very minor, for example; a disruptive student in a classroom, a disruptive inmate in line to receive clothes, an inmate refusing to enter his cell and being escorted.

Escapes are an obvious measure of security for a prison. During the fifteen-month period, NECC had two, NWCC had one, and SCCC had no escapes from secure supervision. SCCC had 2 attempted escapes from secure supervision.

The number of injuries to staff and prisoners is a measure of the security and safety of a facility. During the fifteen-month period, SCCC reported significantly more injuries to prisoners and staff than either NECC or NWCC, with 214 injuries reported at SCCC, 21 and 51 at NECC and NWCC respectively.

The use of force is also reviewed when looking at the security and safety of a prison. The facilities have significantly different reported incidents of the use of force. SCCC had 30 reported incidents, NECC 4 and NWCC 6.

Both the injury and use of force data is as reported on TOMIS and does not necessarily reflect a higher incidence of injury or use of force at SCCC or NWCC. Rather, the data may be indicative of the focus of the facilities in reporting and the discretionary nature of the reporting requirements.

The use of a disciplinary system, and the writing of charges and disposition of those charges is a measure of the security and safety of a prison. There was not much difference in the issuing of disciplinary tickets among facilities. SCCC appears to write more minor infractions and NWCC appears to write more serious infractions.

The disposition of disciplinary charges is also a very good measure of the security and safety of a prison. It is an indication of how the facility manages its problems, and can be an indicator of facility safety. During the fifteen-month period, NECC reported 500 dispositions to verbal reprimand, while NWCC and SCCC reported seven and 13, respectively.

Each of the institutions met the security and safety requirements of two annual inspections and an ACA audit. Their respective scores were exceptionally high, in fact, almost identical. There were differences in certain indicators. However, in reviewing the entire period, in our

judgment, there was very little difference in the performance of security and safety among the three facilities.

6. What were the findings of the Program and Activities Review?

The following table summarizes the first and second years of operation at the three facilities regarding the percent of inmates inactive or idle due to job waiting.

This category depicts inmates who are eligible for a work or program assignment but remain idle and unassigned.

	Job Waiting Percent		
Compare First and Second Years	NECC	SCCC	NWCC
First Year	11	19	21
Second Year	4	11	12

The tables reflect the high rate of inmates in the "job waiting" category during the first year of operation. This is a critical time when inmates should be assigned to programs and work because the facility is setting its operational tone.

The tables also reflect the substantial improvement at each facility in reducing the amount of job waiting in the second year of operation.

The primary reason the job-waiting numbers and percents were so high was because the facilities had no industry program. The facilities were constructed but the program was not operational. SCCC and NWCC have had no real industry program during the evaluation period. NECC had a small industry program during the second year of operation.

The State recognized the prisoner "job waiting" and industry problem. In 1994 the SOCC initiated efforts that led to legislation creating a new prison industry board and a renewed focus to develop work opportunities and prisoner jobs.

7. What conclusions were reached from the comparative evaluation?

There were elements within each area that was reviewed where one facility received a higher rating than another facility. However, there were also elements within each area where one facility received a lower rating. In total, the facilities all rated very high and are nearly identical in their overall performance. The closest objective numerical rating to support this conclusion was the second annual inspection reports and the ACA audit.

We do not believe there was a significant security and safety performance difference among the three facilities during the rated evaluation period.

We do believe there was a significant "job-waiting" difference among the three facilities during the evaluation period. However, as TDOC and CCA agreed during the development of the methodology, adjustments could be made to the Program and Activity Index rating based on the jobs audit and verification of program and activity assignments. It is difficult to penalize SCCC and NWCC for not assigning inmates to an industry program that was not provided. On the other hand, the State was responsible for providing the industry program at all three facilities.

It was our judgment to rate all three facilities the same for the program and activity index.

Overall Rating

The overall Comparative Evaluation rating is depicted in the following table. It includes the second Annual Audit, worth 60 %, the Security and Safety Index, worth 25 %, and the Program and Activity and Jobs Index, worth 15 %.

Evaluation Rating	NECC	SCCC	NWCC
Audit (60 %)	57.17	58.49	58.34
Security and Safety Index (25 %)	25.00	25.00	25.00
Program and Activity Index (15 %)	15.00	15.00	15.00
	97.17	98.49	98.34

In reviewing the ratings we considered the range of difference of up to 3 % among the three facilities, as essentially comparable. Therefore, our conclusion was that all three facilities were operated at essentially the same level of performance.

8. What recommendations are being made?

The following recommendations were developed from information learned and opinions formed during the evaluation process. They are intended to guide State policy makers as they look for ways to improve the correctional system. They are intended to guide State policy makers in their decision making process, if the State decides to continue this contract or contracts for correctional services in the future. We recommend the following:

- Establish an independent contract monitoring and operational compliance capability for corrections contracts where a comparative evaluation will be conducted. The potential conflict and the complexities require a separate contract monitor.

- Review State restrictions and TDOC policy to provide maximum flexibility to allow corrections operational contractors to use their business and marketplace creativity; obviously, with appropriate legal safeguards.

- Allow the private contractor the authority and opportunity to privatize the industry program at SCCC. This could take several different forms. This should not preclude a contract with the TRAIL Board.

- Review the "start-up" needs and provide TDOC with adequate resources to service the operational demands of a new private prison contract. The need for transitioning into the new facility and the prison activation process require commitment of time and resources.

- Review the needs and establish clearer lines of authority, accountability, and communication, between the State and a private contractor. Set policy and establish more formal and documented procedure.

Private Adult Correctional Facility Census

Seventh Edition

prepared by

Charles W. Thomas, Director
Private Corrections Project
Center for Studies in Criminology & Law
University of Florida
Gainesville, Florida

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Preface

Established in 1988 for the purpose of conducting policy-relevant research on correctional privatization, the Private Corrections Project at the University of Florida is now internationally recognized as the most authoritative source of information about this innovative means of providing correctional services. The core research goals of the Project require timely and accurate information about contract awards. Originally an informal by-product of meeting this requirement, today the semi-annual publication of the *Private Adult Correctional Facility Census* attracts more interest from the academic, corporate, financial, and political communities than does any other single Project-based initiative.

Those who are or who have been associated with the Private Corrections Project are gratified by so much interest being focused on the *Census* by so large and diverse a group of readers. At the same time, however, the fact that so many readers rely on the *Census* as the authoritative source of information about correctional privatization gives rise to a pressing need to guarantee that the information presented in the *Census* is both comprehensive and valid. It also establishes a responsibility to assure that readers fully understand both what the *Census* contains and what, in effect, it consciously ignores. Thus, in addition to reviewing the key findings of the 7th Edition of the *Census* and describing some significant expansions in the coverage this and future editions of the *Census* will provide, I will use this preface as an opportunity to review some definitional and methodological features of the *Census* that readers should carefully take into account.

The Census Format & Methodology

First, the *Census* contains information only about the privatization of secure adult correctional facilities. This intentionally narrow focus sometimes has caused previous editions of the *Census* to be misinterpreted by readers for whom "secure adult correctional facilities" is an unfamiliar concept. As used here the concept refers to detention and correctional facilities within which adult prisoners are, with the exception of some relatively isolated work assignments they may have outside the security perimeter of facilities, confined on a twenty-four hour a day basis. Such prisoners may or may not have been convicted on criminal charges. For example, pre-trial detainees housed in local jails prior to their trials and prisoners housed in facilities being operated under contract with the Immigration and Naturalization Service and the U.S. Marshals Service have not been convicted.

Perhaps more importantly, this focus ignores both secure facilities for juvenile offenders and non-secure facilities for adults (e.g., community corrections centers, halfway houses, work-release centers, and restitution centers) that are operated by private firms. Contracting with the private sector for the management of non-secure correctional facilities was common long before the privatization of secure adult facilities began in the early 1980s. *Census* results, however, have never and do not now indicate the fraction of pre-trial detainees, adjudicated delinquents, and sentenced offenders who are housed in non-secure facilities for which private firms are responsible.

Second, the methodology and reporting format adopted for the *Census* must be fully appreciated. Regarding the methodological issue, data are collected on an international basis toward the end of December and June of each year. This is generally accomplished by my personally contacting one or more top executives of each private corrections management firm, questioning them about recent corporate developments, reviewing data regarding each secure facility their firm operates, and obtaining information from them about developments in other firms they believe would be of relevance to the *Census*. When I have any reservations about the completeness or accuracy of the information those senior executives have provided, I can and do contact facility-level administrators and/or government officials in an effort to assure that what is published in the *Census* is valid. Sometimes it is also possible to cross-validate the information provided by comparing it with various other sources (e.g., corporate press releases, media reports, analyses I receive from brokerage firm analysts, and documents a growing number of firms are obliged to file with the Securities and Exchange Commission).

Regarding the reporting of data, those who review the *Census* data with special care--a group that always includes but is certainly not limited to financial analysts--sometimes report what they perceive to be inconsistencies. Looked at in some ways, these readers are absolutely correct, but the core problem is that they are assuming a bit more by way of exhaustive data analysis than the *Census* is designed to provide. Specifically, each edition of the *Census* depicts where the private corrections management firms are regarding secure adult correctional facility contracts at a particular point in time and how that point in time differs from where they were at an earlier point in time. What the *Census* does not expressly address, however, is a narrow range of adjustments that can take and have taken place within the private corrections industry.

This potential problem is well-illustrated by the fate of Pricor, Inc., a firm that is no longer a component of the industry. At one time the *Census* reported that Pricor would assume management responsibility for six 500-bed minimum security facilities in Texas once their construction was completed. Later it became clear that only one of the six would receive prisoners. The *Census* was revised accordingly. Still later the State of Texas purchased all six facilities and made a policy decision that all six would be publicly rather than privately managed. The *Census* was again revised accordingly, but the *Census* did not overtly direct attention toward the diminishing fortunes of Pricor—although a careful comparison of Pricor's position in the private corrections industry across several editions of the *Census* certainly did document its demise.

The same problem has materialized in a less extreme form in other editions of the *Census*. Indeed, a careful comparison of the results reported here with those of the 6th Edition, for example, will reveal that Capital Correctional Resources no longer operates the parish-level facility it previously operated in Louisiana and that the GRW Corporation has both gained and lost one facility in Texas.

This ebb and flow of activity can be monitored by readers of the *Census*. The monitoring, however, requires a careful consideration of more than a single edition of the *Census*.

Changes in the Content of the Census

Turning now to adjustments in the scope of the coverage provided by the *Census*, readers will find four changes.

First, many readers have asked that more historical data be provided. The inclusion of what appears here as Figure 1 reflects an effort to respond to that request. Based on a combination of statistical information drawn from prior editions of the *Census* and comparable information published in the *1993 Annual Report* of the Corrections Corporation of America, Figure 1 graphically depicts historical growth in the private corrections industry as measured by the total number of secure beds for which private firms were responsible.

Second, readers have encouraged more emphasis on adjustments that have been made or are about to be made in the rated capacity of existing facilities. This has been done by printing information on all new contract awards in bold-faced type and by printing information on existing facilities whose size changed by ten percent or more since the last *Census* in italics.

Third, several of the private management firms—Cornell Cox, Inc., the Corrections Corporation of America, Corrections Partners, Inc., Esmor Correctional Services, Inc., the GRW Corporation, and the Wackenhut Corrections Corporation--provide management services for types of correctional facilities that fall beyond the scope of the *Census*. This has resulted in some misinterpretations of *Census* results by, for example, government agencies and more than a few representatives of the financial industry. An effort to clarify the broader roles being played by these firms is provided by the narrative that appears in Appendix B.

Finally, a particularly troublesome problem for those working within as well as those observing developments in correctional privatization is linked to questions regarding the jurisdictions within which full-scale privatization of secure adult facilities is permitted by law. Framing complete and authoritative answers for such questions is exceedingly difficult. To be sure, sometimes the state of existing law can be determined in quite a matter-of-fact manner. In Florida, for instance, one statute expressly authorizes contracting

by the management of county-level facilities, one statute expressly authorizes contracting by the Florida Department of Corrections, and yet another statute expressly authorizes state-level contracting by the Florida Correctional Privatization Commission. All three statutes have been exercised. None of the three has ever been successfully challenged on constitutional or legal grounds.

Suffice it to say that life is not always so simple as it is in Florida. There are isolated jurisdictions that expressly prohibit contracting. There are jurisdictions that expressly authorize contracting by one level of government (e.g., the relevant state agency) but that do not expressly authorize contracting by other governmental entities (e.g., counties). There are jurisdictions where positive or negative assessments of existing legal authority are provided by attorney general opinions rather than by statutes. There are jurisdictions whose statutes are silent with regard to local- and/or state-level contracting. There are many jurisdictions that impose one or more limitations on contracting authority (e.g., limiting contract awards to prisoners with a particular security classification).

Even though a thorough understanding of this issue is of critical importance both to those who would like to make or receive contract awards, there is no authoritative source of up-to-date information on where the private management of one or more types of secure correctional facilities is lawful. Thus, the Private Corrections Project has initiated an on-going research initiative aimed at providing the necessary information. Much of the research was conducted by Mr. Kevin Mayeux, a graduate research assistant with the Project who is also a student at the College of Law of the University of Florida. Importantly, the findings summarized in Appendix C of the *Census* are preliminary. Comments from readers of the *Census* would be both welcomed and greatly appreciated.

Key Census Survey Findings

The first half of 1993 witnessed unprecedented changes within as well as rapid growth of the private corrections industry. No period in the brief history of correctional privatization comes even remotely close to matching what has transpired since the 6th Edition was published in January.

Regarding changes within the industry, at least five events are especially noteworthy. Several of them are likely to have multiple implications for the future of the correctional privatization industry.

- *In February Esmor Correctional Services, Inc. became a publicly-held company and began trading on the NASDAQ exchange under the symbol ESMR. The warm reception accorded Esmor's initial public offering (IPO) rather clearly demonstrates a perception on the part of individual and institutional investors that correctional privatization is becoming an increasingly attractive means of providing for the delivery of correctional services. The same perception clearly contributed to major upward movement in market evaluations of the common stock of the Corrections Corporation of America (CCA). (Prior to the Esmor IPO, CCA, which trades on the NASDAQ under the symbol CCAX, was the only publicly-traded private corrections management firm.)*
- *In March The Cornell Cox Group was transformed into Cornell Cox, Inc. and announced its acquisition of Eclectic Communications, Inc. (ECI). ECI, the oldest company in the private corrections industry, is now operating as a wholly-owned subsidiary of Cornell Cox, Inc.*
- *In May the Wackenhut Corrections Corporation (WCC), a wholly-owned subsidiary of The Wackenhut Corporation, filed an S-1 Registration Statement with the Securities and Exchange Commission. The S-1 filing is a prerequisite to the issuance of an IPO by WCC. Presupposing the success of the IPO, WCC, which should begin trading soon on the NASDAQ under the symbol WCCX, will become the third publicly-held private corrections management firm.*
- *In June the Corrections Corporation of America announced the formation of what it described as "an international strategic alliance" with Sodexho, S.A., a multi-national French firm that, among its many other business involvements, provides a broad array of contract services in five French prisons. The formation of this relationship between CCA and Sodexho is but one of multiple indicators of the growing interest in and attractiveness of correctional privatization on the international scene.*

- *Also in June there were additional signs of a strengthening of the corporate ties between Correction Management Affiliates, Inc. (CMA) and Correctional Services Group, Inc. It continues to seem likely that the two companies will merge to form Correctional Partners, Inc. (CPI). In anticipation of that corporate development, this edition of the Census identifies facilities previously shown as being operated by CMA as being operated by CPI.*

Regarding contract and contract-related developments that have taken place since the 6th Edition of the *Census* was published in January, the changes have been significant and the growth has exceeded what many perceived to be the aggressive projections I made in the preface to the 6th Edition. Key illustrations of those developments would certainly include the following items.

- *Between 12/31/93 and 6/30/94 the number of secure private facilities rose by 15.07% to 84 and the rated capacity of all secure private facilities rose by 33.64% to 43,508.*
- *Between 12/31/93 and 6/30/94 the rated capacity of secure private facilities already in operation rose by 6.87% to 26,445 and the actual prisoner population in those facilities rose by 10.77% to 24,677.*
- *Between 12/31/93 and 6/30/94 the capacity utilization for secure private facilities already in operation rose by 3.64% to 93.31%.*
- *Between 12/31/93 and 6/30/94 planned expansions, which includes both the construction of new facilities and the expansion of existing facilities, moved upward more sharply than in any previous report. The number of new facilities projected to receive prisoners within the coming 12-18 months rose by 61.54% to 21. Industry-wide capacity increases attributable to both new construction and expansions of existing facilities leaped forward by 118.45% to 17,063 beds.*
- *The size and number of new contract awards in some jurisdictions are especially noteworthy. In particular, since 12/31/93 Texas has awarded contracts for 5 new state facilities that will have an aggregate rated capacity of 5,500 prisoners (contracts for three 1,000-bed facilities were awarded to the Wackenhut Corrections Corporation, a 1,500-bed contract was awarded to Management and Training Corporation, and a 1,000-bed contract was awarded to Concept, Inc.).*
- *At least two jurisdictions that previously had awarded no contracts for the design, construction, and management of secure facilities began doing so rather aggressively. Since 12/31/94 Puerto Rico has awarded a 1,500-bed and a 1,000-bed contract to the Corrections Corporation of America. During the same time period, corporate sources report two 400-bed contract awards in Virginia to Corrections Partners, Inc.*
- *Florida, which for many years chose not to act on the expressed statutory authority to contract granted to it by the Florida Legislature in the mid-1980s, awarded contracts for two 750-bed state facilities. (One contract was awarded to the Corrections Corporation of America and one contract was awarded to the Wackenhut Corrections Corporation.) Significantly, both Florida contract awards were made by the Florida Correctional Privatization Commission, which was created by the Florida Legislature in 1993, rather than by the Florida Department of Corrections. It is altogether possible that this statutory means of brushing agency resistance to contracting aside will provide a model for legislation in other jurisdictions whose legislative bodies are confronting comparable public agency opposition.*

Implications for the Future of Correctional Privatization

Six months ago I predicted that "the number of privately managed facilities will increase to between 85-90 by the end of the year" and that "the rated capacity of facilities under contract will increase to between 42,500-45,000." Several representatives of the financial community and more than a few of the private corrections management firms swiftly advanced the opinion that my forecast was too aggressive. I, of course, am so polite and diplomatic that I will refrain from putting too much emphasis on the fact that six months into the calendar year covered by my forecast already finds us with 84 privately managed facilities with a rated capacity of 43,508.

The more interesting questions shift the focus of attention from what already has happened to what

the balance of the year and beyond are likely to bring. Looked at on quite a general level, the only possible conclusion would appear to be that the alternative created by correctional privatization has moved well beyond the "interesting experiment" status it had in the mid-1980s to the proven option position it now enjoys. As I and others have documented in various published studies, the evidence unequivocally demonstrates that---presupposing it exercises reasonable judgment in the preparation of procurement documents, contract preparation, and contract monitoring---government can realistically anticipate operating cost savings in the range of 10-20 percent by contracting with the added benefit of an improvement in the caliber of services it receives.

This general conclusion is easily illustrated by a recent set of contract awards. In December of 1993, the Florida Correctional Privatization Commission issued a request for proposals providing for the private design, financing, construction, and management of two 750-bed medium security state prisons. The controlling statute mandated a cost savings of at least 7 percent below a benchmark price established by the Florida Auditor General. The benchmark price was determined by full-scale audit of costs for the construction and operation of substantially similar facilities constructed and operated by the Florida Department of Corrections.

Each private firm was allowed to submit proposals for one or both of the two facilities. Eight firms submitted a total of twelve proposals. All twelve proposals yielded cost savings of at least the required 7 percent. The contract awards to the Corrections Corporation of America and the Wackenhut Corrections Corporation will yield cost savings to Florida modestly above 10 percent. Further, language in both contracts is such that cost savings equal to or greater than those realized during the initial year of contract performance will persist for the three-year term of the base contracts. Further still, the contracts require prompt award of accreditation by the American Correctional Association, basic services that are at least the equivalent of those provided by the Florida Department of Corrections, and programs in the areas of education, vocational training, and substance abuse education/treatment that are more elaborate than those presently provided by the Florida Department of Corrections.

Examples like that provided by Florida's recent experience has spawned a growing interest in correctional privatization both within and beyond the boundaries of the United States. Still, it would be unrealistic to expect that the torrid pace of new contract awards witnessed during the past six months will persist in an uninterrupted fashion indefinitely.

My best judgment is that the immediate future will bring more modest numbers of new contract awards coupled with sizable increases in the number of private facilities that are in operation. Those increases are essentially guaranteed by the number of new facilities that are presently under construction.

Importantly, this does not mean that the immediate future will yield no opportunities for significant growth. During the balance of 1994, for example, there are good reasons to anticipate significant contract awards in, on the international scene, Australia and Great Britain and in such American jurisdictions as Arizona, California, Colorado, Florida, Louisiana, Mississippi, Utah, and Virginia. Thus, were I asked to provide a more precise year-end forecast, I would have to estimate that the end of 1994 will reveal 90-95 private facilities with a rated prisoner capacity of 48,000-50,000 prisoners. Even if this upward adjustment of my December 31, 1993 projections proves to be too optimistic, there already is no question whatsoever about 1994 bringing a record increase in all statistical categories monitored by the *Private Adult Correctional Facility Census*.

Charles W. Thomas, Ph.D.
Director, Private Corrections Project
Center for Studies in Criminology & Law
University of Florida
(904) 392-1025; (904) 392-3974 (FAX)
June 30, 1994

Private Adult Facility Census Summary for June 30, 1994

Management Firm	Rated Capacity of All Facilities Under Contract*	# Facilities Under Contract	Rated Capacity of Facilities Now In Operation	Prisoner Populations on 6/30/94	% Occupancy for Facilities in Operation	New Facilities to to Open within 12-18 months	Expansion Anticipated Within 12-18 Months
Alternative Programs, Inc.	240	1	240	240	100.00%	0	0
The Bobby Ross Group	872	1	872	868	99.54%	0	0
Capital Correctional Resources	836	1	836	796	95.22%	0	0
Concept, Inc.	4,426	8	1,926	1,876	97.40%	3	2,500
Cornell Cox, Inc.	794	3	794	752	94.71%	0	0
Corrections Corporation of America	13,056	23	8,593	8,251	96.02%	4	4,463
Corrections Partners, Inc.	1,672	4	584	562	96.23%	2	1,088
Corrections Services, Inc.	32	1	32	29	90.63%	0	0
Dove Development Corporation	762	2	762	633	83.07%	0	0
Eden Detention Center	699	1	499	565	113.23%	0	200
Esmor Correctional Services, Inc.	1,170	4	870	845	97.13%	1	300
Group 4 - ICS	300	1	300	300	100.00%	0	0
The GRW Corporation	244	2	244	244	100.00%	0	0
Management & Training Corporation	2,400	3	450	425	94.44%	2	1,950
Mid-Tex Detention, Inc.	1,236	3	736	744	101.09%	1	500
North American Corrections	633	1	489	489	100.00%	0	144
U.S. Corrections Corporation	2,918	6	1,650	1,465	88.79%	2	1,268
The Villa at Greeley, Inc.	400	1	0	0	N/A	1	400
Wackenhut Corrections Corporation	10,818	18	6,568	5,593	85.16%	5	4,250
TOTALS	43,508	84	*26,445*	*24,677*	93.31%	*21*	*17,063*
% Changes Since 12/31/93	*33.64%*	*15.07%*	*6.87%*	*10.77%*	*3.64%*	*61.54%*	*118.48%*

**Capacity Figures Include New Facilities and Expansions of Existing Facilities.*

Private Adult Correctional Facility Census, United States Facilities

Management Company	Alternative Programs, Inc.	*Bobby Ross Group*	*Capital Correctional Resources, Inc.*	Concept, Inc.	Concept, Inc.
Facility Location	Bakersfield, CA	*Newton Co., TX*	*Groesbeck, TX*	Tuscaloosa, AL	Eloy, AZ
Facility Name	Mesa Verde Community Correction Facility	*Newton County Detention Facility*	*Limestone County Detention Facility*	Tuscaloosa Metro Detention Facility	FBOP/INS Detention Center
Primary Source of Prisoners	*State of California	**State of Texas*	**State of Texas*	Tuscaloosa County	Federal Bureau of Prisons
Secondary Source of Prisoners	N/A	*N/A*	*N/A*	City of Tuscaloosa City of Northport	Immigration and Naturalization Service
Rated Capacity	240	*872*	*836*	176	1,000
Present Population	240	*868*	*796*	176	N/A
Occupancy Percentage	100.00%	*99.54%*	*95.22%*	100.00%	N/A
Security Level	minimum	*minimum/medium*	*minimum/medium*	minimum	medium
Ownership of Facility	private	*public*	*public*	public	public
First Received Prisoners	May-89	*Jun-93*	*Apr-93*	Dec-92	Jul-94
ACA Accreditation?	no	*no*	*no*	no	will be sought
Facility Construction	new construction	*take-over*	*new construction*	new construction	new construction
Facility Expansion Planned?	no	*no*	*no*	no	no
*** Notes**	*Parole Division	**TDJC Institutional Division* *See Appendix A, Notes 1 & 2*	**TDCJ Institutional Division* *See Appendix A, Notes 1 & 3*	*See Appendix A, Note 4*	

Facilities not reported in the 12/31/93 Census appear in bold. Facilities whose size has changed significantly since the 12/31/93 Census appear in italics

Private Adult Correctional Facility Census, United States Facilities

Management Company	Concept, Inc.	Concept, Inc.	*Concept, Inc.*	Concept, Inc.	Concept, Inc.
Facility Location	Bridgeport, TX	Brownfield, TX	*Mineral Wells, TX*	Overton, TX	Sweetwater, TX
Facility Name	Bridgeport Pre-Parole Transfer Facility	Brownfield Intermediate Sanction Facility	*Mineral Wells Pre-Parole Transfer Facility*	TBA	Sweetwater Pre-Parole Transfer Facility
Primary Source of Prisoners	*State of Texas	*State of Texas	*State of Texas	*State of Texas	*State of Texas
Secondary Source of Prisoners	N/A	N/A	*N/A*	N/A	N/A
Rated Capacity	200	200	*1,100*	500	250
Present Population	200	200	*1,050*	N/A	250
Occupancy Percentage	100.00%	100.00%	*95.45%*	N/A	100.00%
Security Level	minimum	minimum/medium	*minimum*	minimum	minimum
Ownership of Facility	private	public	*private*	public	public
First Received Prisoners	Nov-87	Jul-92	*Jul-89*	Feb-95	Mar-92
ACA Accreditation?	no	no	*no*	will be sought	no
Facility Construction	renovation	new construction	*renovation*	new construction	take-over
Facility Expansion Planned?	no	no	*no*	no	no
* Notes	*TDCJ Board of Pardons & Paroles	*TDCJ Board of Pardons & Paroles	**TDCJ Board of Pardons & Paroles See Appendix A, Note 5*	*TDJC Institutional Division	*TDCJ Board of Pardons & Paroles *See Appendix A, Note 6*

Facilities not reported in the 12/31/93 Census appear in bold. Facilities whose size has changed significantly since the 12/31/93 Census appear in italics

Private Adult Correctional Facility Census, United States Facilities

Management Company	Concept, Inc.	Cornell Cox, Inc.	Cornell Cox, Inc.	Cornell Cox, Inc.	Corrections Corporation of America
Facility Location	Williamson County, TX	Baker, CA	Live Oak, CA	Central Falls, RI	Florence, AZ
Facility Name	TBA	Baker Community Correction Facility	Leo Chesney Community Correction Facility	Central Falls Detention Facility	Pinal County Detention Facility
Primary Source of Prisoners	*State of Texas	*State of California	*State of California	U.S. Marshals Service	U.S. Marshals Service
Secondary Source of Prisoners	N/A	N/A	N/A	*State of North Carolina	N/A
Rated Capacity	1,000	272	220	302	500
Present Population	N/A	262	200	290	N/A
Occupancy Percentage		96.32%	90.91%	96.03%	N/A
Security Level	minimum	minimum/medium	minimum/medium	maximum	medium
Ownership of Facility	public	private	private	public	private
First Received Prisoners	Feb-95	Jan-88	May-89	Oct-93	Nov-95
ACA Accreditation?	will be sought	yes - 8/90	yes - 1/91	will be sought	will be sought
Facility Construction	new construction	renovation	new construction	new construction	new construction
Facility Expansion Planned?	no	no	no	no	no
* Notes	*TDCJ Institutional Division *See Appendix A, Note 7*	*Parole Division *See Appendix A, Note 8*	*Parole Division *See Appendix A, Note 8*	*North Carolina Department of Corrections	

Facilities not reported in the 12/31/93 Census appear in bold. Facilities whose size has changed significantly since the 12/31/93 Census appear in italics

Private Adu't Correctional Facility Census, United States Facilities

Management Company	Corrections Corporation of America	Corrections Corporation of America	Corrections Corporation of America	Corrections Corporation of America	Corrections Corporation of America
Facility Location	Panama City, FL	Panama City, FL	Bay County, FL	Brooksville, FL	Winnfield, LA
Facility Name	Bay County Jail Annex	Bay County Jail	TBA	Hernando County Jail	Winn Parish Correction Center
Primary Source of Prisoners	Bay County	Bay County	*State of Florida	Hernando County	*State of Louisiana
Secondary Source of Prisoners	U.S. Marshals Service & INS	U.S. Marshals Service	N/A	U.S. Marshals Service	N/A
Rated Capacity	257	276	750	252	1,282
Present Population	237	255	N/A	260	1,274
Occupancy Percentage	92.22%	92.39%	N/A	103.17%	99.38%
Security Level	all levels	all levels	medium	all levels	medium
Ownership of Facility	private	public	public	public	public
First Received Prisoners	May-86	Oct-85	Sep-95	Oct-88	Mar-90
ACA Accreditation?	yes - 8/88	yes - 8/88	will be sought	yes - 8/91	yes - 5/91
Facility Construction	new construction	take-over	new construction	take-over	new construction
Facility Expansion Planned?	yes, 48 beds	no	no	yes, 50 beds	no
* Notes			*Florida Correctional Privatization Commission		*Louisiana Department of Corrections

Facilities not reported in the 12/31/93 Census appear in bold. Facilities whose size has changed significantly since the 12/31/93 Census appear in italics

Private Adult Correctional Facility Census, United States Facilities

Management Company	Corrections Corporation of America	Corrections Corporation of America	Corrections Corporation of America	Corrections Corporation of America	Corrections Corporation of America
Facility Location	Leavenworth, KS	Estancia, NM	Grants, NM	Santa Fe, NM	**Guayama, Puerto Rico**
Facility Name	Leavenworth Detention Center	Torrance County Detention Facility	NM Women's Correction Facility	Santa Fe Detention Center	**TBA**
Primary Source of Prisoners	U.S. Marshals Service	U.S. Marshals Service	*State of New Mexico	Santa Fe County/ U.S. Marshals Service	***Commonwealth of Peurto Rico**
Secondary Source of Prisoners	N/A	Federal Bureau of Prisons	N/A	City of Santa Fe City of Moriarty	N/A
Rated Capacity	256	256	204	201	**1,000**
Present Population	186	204	214	233	N/A
Occupancy Percentage	72.66%	79.69%	104.90%	115.92%	N/A
Security Level	maximum	minimum/medium	all levels	all levels	**medium**
Ownership of Facility	private	private	public	public	**public**
First Received Prisoners	Jun-92	Dec-90	Aug-89	Aug-86	**Jan-96**
ACA Accreditation?	yes - 8/93	no	yes - 5/91	yes - 8/88	**will be sought**
Facility Construction	new construction	new construction	new construction	take-over	**new construction**
Facility Expansion Planned?	no	no	yes, 25 beds	no	**no**
*** Notes**			*New Mexico Department of Corrections		***Puerto Rico Administration of Corrections**

Facilities not reported in the 12/31/93 Census appear in bold Facilities whose size has changed significantly since the 12/31/93 Census appear in italics

Private Adult Correctional Facility Census, United States Facilities

Management Company	Corrections Corporation of America	Corrections Corporation of America	Corrections Corporation of America	Corrections Corporation of America	Corrections Corporation of America
Facility Location	Ponce, Puer.o Rico	Nashville, TN	Clifton, TN	Chattanooga, TN	Mason, TN
Facility Name	TBA	Metro-Davidson Co. Detention Center	South Central Correctional Center	Silverdale Facilities	West Tennessee Detention Facility
Primary Source of Prisoners	*Commonwealth of Peurto Rico	*Davidson County	*State of Tennessee	Hamilton County	U.S. Marshals Service
Secondary Source of Prisoners	N/A	N/A	N/A	U.S. Marshals Service	Washington, D.C.
Rated Capacity	1,500	870	1,336	414	416
Present Population	N/A	664	1,287	414	432
Occupancy Percentage	N/A	76.32%	96.33%	100.00%	103.85%
Security Level	medium	medium	medium	minimum	all levels
Ownership of Facility	public	public	public	public	private
First Received Prisoners	Sep-96	Feb-92	Mar-92	Sep-84	Oct-90
ACA Accreditation?	will be sought	yes - 1/94	yes - 1/94	no	yes - 8/92
Facility Construction	new construction	new construction	new construction	take-over	new construction
Facility Expansion Planned?	no	no	no	no	no
* Notes	*Puerto Rico Administration of Corrections	*Houses state prisoners	*Tennessee Department of Corrections		

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Private Adult Correctional Facility Census, United States Facilities

Management Company	**Corrections Corporation of America**	**Corrections Corporation of America**	**Corrections Corporation of America**	**Corrections Corporation of America**	**Corrections Corporation of America**
Facility Location	Cleveland, TX	Laredo, TX	Houston, TX	Venus, TX	Venus, TX
Facility Name	Cleveland Pre-Release Center	Laredo Processing Center	Houston Processing Center	Venus Pre-Release Center	TBA
Primary Source of Prisoners	*State of Texas	Immigration and Naturalization Service	Immigration and Naturalization Service	*State of Texas	*State of Texas
Secondary Source of Prisoners	N/A	Federal Bureau of Prisons	*State of Texas	N/A	N/A
Rated Capacity	520	258	350	520	500
Present Population	520	261	397	520	500
Occupancy Percentage	100.00%	101.16%	113.43%	100.00%	100.00%
Security Level	minimum	minimum	minimum	minimum	minimum
Ownership of Facility	public	private	private	public	public
First Received Prisoners	Sep-89	Mar-85	May-84	Aug-89	Oct-94
ACA Accreditation?	yes - 7/90	no	yes - 1/86	yes - 10/90	will be sought
Facility Construction	new construction	new construction	new construction	new construction	new construction
Facility Expansion Planned?	no	no	no	no	no
*** Notes**	*TDCJ Institutional Division		*TDCJ Board of Pardons & Paroles	*TDCJ Institutional Division	*TDCJ Institutional Division

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Private Adult Correctional Facility Census, United States Facilities

Management Company	Corrections Partners, Inc.	Corrections Partners, Inc.	Corrections Partners, Inc.	Corrections Partners, Inc.	Corrections Services, Inc.
Facility Location	Oswego, KS	Hinton, OK	**Chesapeake, VA**	**TBA**	Seal Beach, CA
Facility Name	Labette County Conservation Camp	Great Plains Correctional Facility	**TBA**	**TBA**	Seal Beach Detention Facility
Primary Source of Prisoners	*State of Kansas	*State of North Carolina	***State of Virginia**	*State of Virginia	City of Seal Beach
Secondary Source of Prisoners	N/A	Federal Bureau of Prisons	**N/A**	**N/A**	Adjoining localities
Rated Capacity	104	480	**400**	**400**	32
Present Population	90	472	**N/A**	**N/A**	29
Occupancy Percentage	86.54%	98.33%	**N/A**	**N/A**	90.63%
Security Level	minimum	medium	**minimum**	**minimum**	pre-arraignment
Ownership of Facility	public	public	**public**	**public**	public
First Received Prisoners	Feb-91	Oct-91	**Jul-95**	**Jul-95**	Jul-94
ACA Accreditation?	in progress	yes - 8/93	**will be sought**	**will be sought**	will be sought
Facility Construction	new construction	new construction	**new construction**	**new construction**	renovation
Facility Expansion Planned?	will be sought	yes, 288 beds	**no**	**no**	no
*** Notes**	*Commitments ordered Kansas District Courts	*North Carolina Department of Corrections	***Virginia Department of Corrections**	*Virginia Depa ment of Corrections	

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Private Adult Correctional Facility Census, United States Facilities

Management Company	***Dove Development Corporation***	***Dove Development Corporation***	**Eden Detention Center, Inc.**	**Esmor Correctional Services, Inc.**	**Esmor Correctional Services, Inc.**
Facility Location	*Crystal City, TX*	*Pearsall, TX*	Eden, TX	Elizabeth, NJ	Tarrant Co., TX
Facility Name	*Crystal City Detention Center*	*Frio Detention Center*	Eden Detention Center	Elizabeth Processing Center	Tarrant County Community Correction Facility
Primary Source of Prisoners	**State of Texas*	**State of Texas*	Federal Bureau of Prisons	Immigration and Naturalization Service	Tarrant County
Secondary Source of Prisoners	*N/A*	*Frio County*	Immigration and Naturalization Service	N/A	N/A
Rated Capacity	*467*	*295*	499	300	320
Present Population	*321*	*312*	565	N/A	310
Occupancy Percentage	*68.74%*	*105.76%*	113.23%	N/A	96.88%
Security Level	*medium*	*minimum/medium*	minimum/medium	minimum/medium	minimum
Ownership of Facility	*private*	*public*	private	private	public
First Received Prisoners	*Jul-93*	*Dec-92*	Jan-89	Jul-94	Feb-92
ACA Accreditation?	*being considered*	*being considered*	no	will be sought	yes - 8/93
Facility Construction	*take-over*	*take-over*	new construction	renovation	new construction
Facility Expansion Planned?	*no*	*no*	yes, 200 beds	no	no
*** Notes**	**TDCJ Institutional Division See Appendix A, Note 1 & 9*	**TDCJ Institutional Division See Appendix A, Note 1*			

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Private Adult Correctional Facility Census, United States Facilities

Management Company	Esmor Correctional Services, Inc.	Esmor Correctional Services, Inc.	GRW Corporation	GRW Corporation	Management & Training Corporation
Facility Location	Houston, TX	Seattle, WA	Ector County, TX	Odessa, TX	Marana, AZ
Facility Name	State of Texas Intermediate Sanction Facility	Seattle Processing Center	Ector County Detention Annex	Odessa Detention Center	Marana Community Treatment Facility
Primary Source of Prisoners	*State of Texas	Immigration and Naturalization Service	Ector County	City of Odessa	*State of Arizona
Secondary Source of Prisoners	N/A	N/A	N/A	*State of Texas	N/A
Rated Capacity	400	150	144	100	450
Present Population	390	145	144	100	N/A
Occupancy Percentage	97.50%	96.67%	100.00%	100.00%	N/A
Security Level	minimum	minimum/medium	medium	all levels	minimum
Ownership of Facility	public	public	public	pubic	private
First Received Prisoners	Dec-93	Jul-89	Jun-94	Oct-93	Sep-94
ACA Accreditation?	will be sought	yes - 9/91	no	no	no
Facility Construction	renovation	renovation	new construction	take-over	new construction
Facility Expansion Planned?	no	no	no	no	no
* Notes	*TDCJ Board of Pardons & Paroles			*TDCJ Institutional Division *See Appendix A, Note 1*	*Arizona Department of Corrections

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Private Adult Correctional Facility Census, United States Facilities

Management Company	Management & Training Corporation	Management & Training Corporation	Mid-Tex Detention, Inc.	Mid-Tex Detention, Inc.	Mid-Tex Detention, Inc.
Facility Location	Desert Center, CA	Henderson County, TX	Big Spring, TX	Big Spring, TX	Big Spring, TX
Facility Name	Eagle Mountain Return-to-Custody Facility	Texas State Jail Fallity, Henderson	City of Big Spring Correctional Center (Interstate)	City of Big Spring Correctional Center (Airpark)	TBA
Primary Source of Prisoners	*State of California	*State of Texas	Federal Bureau of Prisons	Federal Bureau of Prisons	Federal Bureau of Prisons
Secondary Source of Prisoners	N/A	N/A	Immigration and Naturalization Service	Immigration and Naturalization Service	Immigration and Naturalization Service
Rated Capacity	450	1,500	360	376	500
Present Population	425	N/A	368	376	N/A
Occupancy Percentage	94.44%	N/A	102.22%	100.00%	N/A
Security Level	minimum	minimum	minimum/medium	minimum/medium	minimum/medium
Ownership of Facility	private	public	public	public	public
First Received Prisoners	Sep-88	Jun-95	May-89	Feb-91	Jan-95
ACA Accreditation?	yes - 6/93	will be sought	no	no	no
Facility Construction	renovation	new construction	renovation	renovation	new
Facility Expansion Planned?	no	no	no	no	no
* Notes	*Parole Division	*TDCJ Institutional Division *See Appendix A, Note 7*			

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Private Adult Correctional Facility Census, United States Facilities

Management Company	*North American Corrections*	U.S. Corrections Corporation	U.S. Corrections Corporation	U.S. Corrections Corporation	U.S. Corrections Corporation
Facility Location	*Spur, TX*	Gretna, FL	Beattyville, KY	Louisville, KY	St. Marys, KY
Facility Name	*Dickens Detention Center*	Gadsden County Correctional Facility	Lee Adjustment Center	River City Correctional Center	Marion Adjustment Center
Primary Source of Prisoners	**State of Texas*	*State of Florida	*Commonwealth of Kentucky	Jefferson County	*Commonwealth of Kentucky
Secondary Source of Prisoners	*N/A*	N/A	N/A	N/A	N/A
Rated Capacity	*489*	768	500	350	500
Present Population	*489*	N/A	450	325	450
Occupancy Percentage	*100.00%*	N/A	90.00%	92.86%	90.00%
Security Level	*maximum*	minimum/medium	minimum	minimum	minimum
Ownership of Facility	*private*	public	private	private	private
First Received Prisoners	*Jul-91*	Feb-95	Aug-90	Jan-90	Jan-86
ACA Accreditation?	*no*	will be sought	yes - 1/94	no	yes - 8/92
Facility Construction	*new construction*	new construction	new construction	renovation	new construction
Facility Expansion Planned?	*yes, 144 beds*	no	no	no	no
* Notes	**TDCJ Institutional Division See Appendix A, Note 1*	*Florida Department of Corrections	*Kentucky Department of Corrections		*Kentucky Department of Corrections

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Private Adult Correctional Facility Census, United States Facilities

Management Company	**U.S. Corrections Corporation**	**U.S. Corrections Corporation**	**The Villa at Greeley, Inc.**	**Wackenhut Corrections Corporation**	**Wackenhut Corrections Corporation**
Facility Location	Wheelwright, KY	Diboll, TX	Del Camino, CO	McFarland, CA	San Diego, CA
Facility Name	Otter Creek Correctional Center	TBA	TBA	McFarland Return-to-Custody Facility	San Diego City Jail
Primary Source of Prisoners	*Commonwealth of Kentucky	*State of Texas	*State of Colorado	*State of California	City of San Diego
Secondary Source of Prisoners	N/A	N/A	N/A	N/A	N/A
Rated Capacity	300	500	400	224	200
Present Population	240	N/A	N/A	215	88
Occupancy Percentage	80.00%	N/A	N/A	95.98%	44.00%
Security Level	minimum	minimum/medium	minimum	minimum	minimum
Ownership of Facility	private	public	private	private	public
First Received Prisoners	Oct-93	Mar-95	May-95	Jan-89	May-92
ACA Accreditation?	will be sought	will be sought	will be sought	no	will be sought
Facility Construction	new construction	new construction	new construction	new construction	new construction
Facility Expansion Planned?	no	no	no	no	no
*** Notes**	*Kentucky Department of Corrections	*TDCJ Institutional Division	*Colorado Department of Corrections	*Parole Division	

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Private Adult Correctional Facility Census, United States Facilities

Management Company	Wackenhut Corrections Corporation	Wackenhut Corrections Corporation	Wackenhut Corrections Corporation	Wackenhut Corrections Corporation	Wackenhut Corrections Corporation
Facility Location	Aurora, CO	Glades County, FL	Kinder, LA	Jamaica/Queens	Bridgeport, TX
Facility Name	Aurora/INS Processing Center	TBA	Allen Correctional Center	New York INS Processing Center	Bridgeport Pre-Release Center
Primary Source of Prisoners	Immigration and Naturalization Service	*State of Florida	*State of Louisiana	Immigration and Naturalization Service	*State of Texas
Secondary Source of Prisoners	N/A	N/A	N/A	N/A	N/A
Rated Capacity	300	750	1,282	105	520
Present Population	199	N/A	1,275	100	519
Occupancy Percentage	66.33%	N/A	99.45%	95.24%	99.81%
Security Level	minimum	medium	medium	medium	minimum
Ownership of Facility	private	public	public	private	public
First Received Prisoners	May-87	Jun-95	Dec-90	Oct-89	Aug-89
ACA Accreditation?	yes - 9/89	will be sought	yes - 1/93	no	yes - 5/91
Facility Construction	new construction	new construction	new construction	renovation	new construction
Facility Expansion Planned?	no	no	no	no	no
* Notes		*Florida Correctional Privatization Commission	*Louisiana Department of Corrections		*TDCJ Institutional Division

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Private Adult Correctional Facility Census, United States Facilities

Management Company	Wackenhut Corrections Corporation	Wackenhut Corrections Corporation	Wackenhut Corrections Corporation	Wackenhut Corrections Corporation	Wackenhut Corrections Corporation
Facility Location	Fort Worth, TX	**Jack County, TX**	Kyle, TX	Lockhart, TX	Lockhart, TX
Facility Name	North TX Intermediate Sanctions Facility	**TBA**	Kyle Pre-Release Center	Lockhart Work Program Facility	Lockhart Pre-Release Center
Primary Source of Prisoners	*State of Texas	***State of Texas**	*State of Texas	City of Lockhart	*State of Texas
Secondary Source of Prisoners	N/A	**N/A**	N/A	*State of Texas	N/A
Rated Capacity	400	**1,000**	520	500	500
Present Population	397	**N/A**	520	499	N/A
Occupancy Percentage	99.25%	**N/A**	100.00%	99.80%	N/A
Security Level	minimum	**minimum**	minimum	minimum	minimum
Ownership of Facility	public	**public**	public	public	public
First Received Prisoners	Aug-91	**Jul-95**	Jun-89	Jan-93	Oct-94
ACA Accreditation?	no	**will be sought**	yes - 9/90	will be sought	will be sought
Facility Construction	renovation	**new construction**	new construction	new construction	new construction
Facility Expansion Planned?	no	**no**	possible	no	no
*** Notes**	*TDCJ Board of Pardons & Paroles	***TDCJ Institutional Division** ***See Appendix A, Note 7***	*TDCJ Institutional Division	*TDCJ Board of Pardons & Paroles	*TDCJ Institutional Division

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