



Private Prisons

A BASTION OF SECRECY

Introduction

With ever increasing frequency, the federal government has been contracting out functions and responsibilities previously performed exclusively by the government. This trend has swept in the criminal justice system; correctional institutions, once operated wholly by federal, state, and local governments, increasingly are under the control of private companies. As a result, a large minority of prisoners currently are housed at these privately run institutions. Of the 1.57 million prisoners held in state and federal prisons as of December 31, 2012, 137,220 were housed at private correctional institutions.¹ Overall, the percentage of the U.S. prison population housed in private institutions increased from 8.2 percent in 2011, to 8.7 percent in 2012.² More than seven percent of the state prison populations and 18 percent of the federal prison populations were incarcerated in private facilities as of December 31, 2012.³

Privatizing entities once under exclusive governmental control has eliminated a key component of public accountability -- access to information that explains how the prisons are being run, at what cost, and the extent to which they are engaging in abuses that deprive prisoners of their basic civil liberties. This report examines the impact of privatizing prisons on transparency and accountability, and proposes a variety of solutions to address this growing problem.

¹ U.S. Department of Justice, Bureau of Justice Statistics, *Prisoners in 2012*, Bulletin NCJ 243920, December 2013, available at <http://www.bjs.gov/content/pub/pdf/p12tar9112.pdf>.

² *Id.*

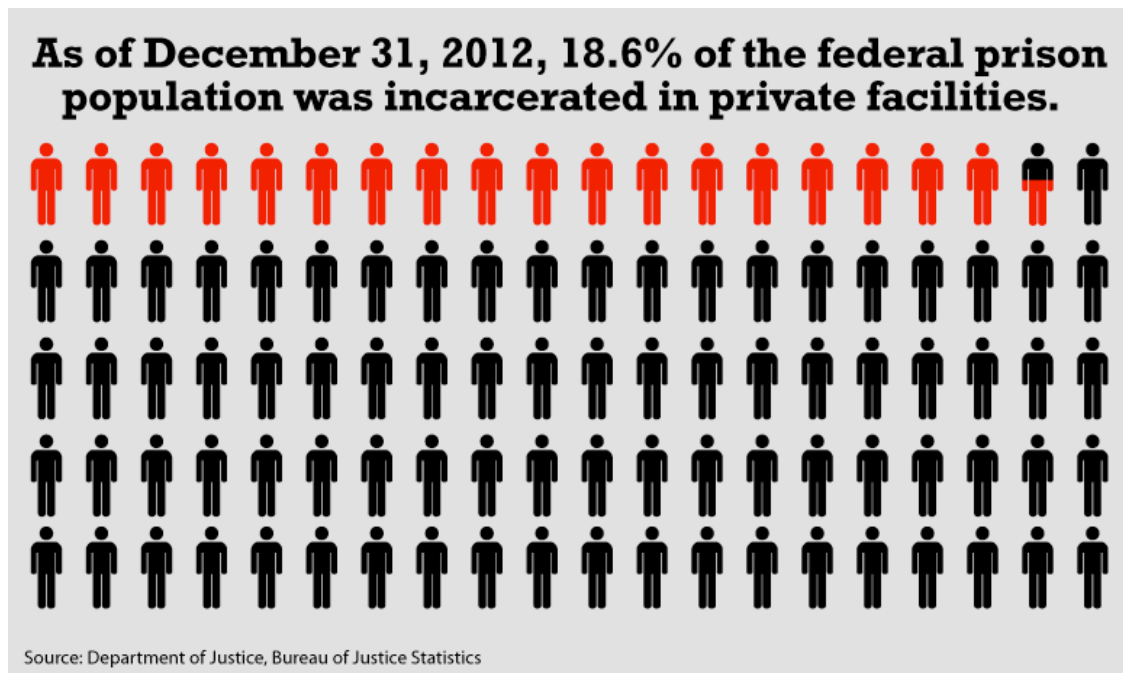
³ *Id.*

Private Versus Public Prisons – What Are The Differences?

Public prisons are government run institutions and, as such, are subject to the laws of the jurisdiction in which they are located. Under this structure, problems in such prisons can be addressed by the responsible governmental entity. Records pertaining to federal correctional institutions are maintained by the Bureau of Prisons (“BOP”), a component of the U.S. Department of Justice (“DOJ”), as well as Immigration and Customs Enforcement (“ICE”), a component of the U.S. Department of Homeland Security (“DHS”) that handles immigration detentions. Both agencies are subject to the Freedom of Information Act (“FOIA”), which provides the public with a mechanism to access these records. State and local government run prisons also generate records that are subject to the open records laws of the states in which they are located.

By contrast, private prisons are not subject to the FOIA and generally are not subject to state open records laws. Recent efforts to extend state open records laws to private prisons on the theory the prisons are functioning as “public agencies” within the meaning of the relevant state law have had some success. State open records laws also provide access to records maintained by a government agency, such as the contracts they entered with the private prisons. At best, however, these contracts may show the estimated costs of operating the prison in question, but do not provide any details about how a particular prison is run and at what actual expense. Moreover, because private prisons answer only to the governmental bodies with which they contract, they have no obligation to publicly report problems or issues within the prison. As a result, the public is denied access to basic information that would provide a full picture of the workings and conditions of private prisons. Details of private prisons are, like the prisoners themselves, locked to the outside world.

Two large companies lead the burgeoning private prison industry: the Corrections Corporation of America (“CCA”) and GEO Group. CCA is the nation’s largest company engaged in the private prison industry, running 66 facilities with over 90,000 beds for federal, state, and local governments.⁴ CCA currently houses approximately 6,500 federal prisoners in 13 facilities located throughout the United States.⁵ GEO Group is the largest private prison company world-wide, and houses immigration detainees for the federal government at seven facilities across the United States.⁶ These two companies had combined annual revenues of over



⁴ Suevon Lee, *By the Numbers: The U.S.’s Growing For-Profit Detention Industry*, *ProPublica*, June 20, 2012.

⁵ <http://www.cca.com/partnering-with-cca/cca-partners/> (last visited October 9, 2013 but no longer available as of November 15, 2013).

⁶ <http://www.geogroup.com/immigration> (last visited October 4, 2013).

\$2.9 billion in 2010.⁷ According to USASpending.gov, as of December 19, 2013, CCA and GEO Group collectively have been awarded at least \$5.2 billion in federal contracts since 2007.⁸

While there are a number of other smaller private correctional companies, CCA and GEO monopolize the federal prison market. Much of their growth has resulted from the purchase of smaller companies looking to leave the federal private prison market.

Private Prisons And Influence Peddling

Private prisons are for-profit entities, which makes them responsible to shareholders and the bottom line rather than the public. According to Justice Policy.org, in their quest for profits private prisons “use three strategies to influence policy: lobbying, direct campaign contributions, and building relationships, networks and associations.”⁹ A number of CCA’s members of its board of directors have little corrections industry expertise. Former United States Senator Dennis DeConcini (D-AZ); former Reagan administration official Donna M. Alvarado; former Clinton administration official, son of Supreme Court Justice, and civil rights icon Thurgood Marshall Jr.; and the President of the Freedom Forum,¹⁰ Charles L. Overby, provide bipartisan political access cover.¹¹ While none of these individuals have spent any time working in the

⁷ Justice Policy Institute, *Gaming the System: How the Political Strategies of Private Prison Companies Promote Ineffective Incarceration Policies*, June 2011 (hereinafter *Gaming the System*, at 2, available at http://www.justicepolicy.org/uploads/justicepolicy/documents/gaming_the_system.pdf).

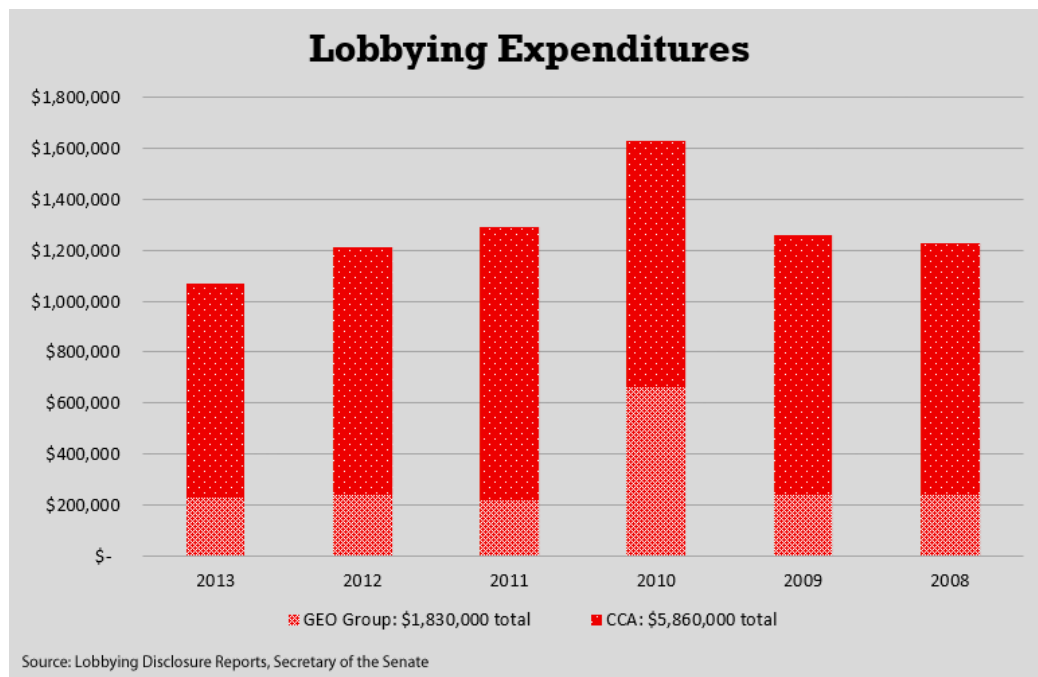
⁸ USA Spending, Recipient Lookup, Corrections Corporation of America, 2007-December 2013; USA Spending, Recipient Lookup, GEO Group, 2007-December 2013.

⁹ *Gaming the System*, at 3.

¹⁰ According to its website, the Freedom Forum is a nonpartisan foundation dedicated to “free press, free speech and free spirit.” See <http://www.freedomforum.org/about/default.asp>. Freedom Forum also houses the FOIA Hall of Fame. See <http://www.firstamendmentcenter.org/hall-of-fame>.

¹¹ <http://www.cca.com/about/management-team/board-directors/>.

corrections field during their careers, all have experience building relationships with legislators and agency officials. In fact, as discussed below, two of these individuals – Sen. DeConcini and Mr. Marshall -- are registered lobbyists.



Private prisons spend a great deal of time and money on lobbying activities. Although it is difficult to determine the exact amount of funds spent on state-level lobbying, CCA reportedly has spent at least \$900,000 annually on federal lobbying activities since 2003.¹² As of the third quarter of 2013, CCA had spent over \$5.8 million and GEO Group had spent over \$1.8 million on federal lobbying activities since 2008.¹³

¹² Gaming the System, at 22.

¹³ Lionel “Leo” Aguirre, 2008-13 Lobbying Disclosure Reports on behalf of The GEO Group, Inc., Secretary of the Senate, Office of Public Records; Navigators Global LLC, 2011-13 Lobbying Disclosure Reports on behalf of The GEO Group, Inc., Secretary of the Senate, Office of Public Records; Podesta Group, Inc., 2010 Lobbying Disclosure Reports on behalf of The GEO Group, Inc., Secretary of the Senate, Office of Public Records; Public Policy Partners, 2010 Lobbying Disclosure Reports on behalf of The GEO Group, Inc., Secretary of the Senate, Office of Public Records; Bryan Cave LLP, 2010 Lobbying Disclosure Reports on behalf of The GEO Group, Inc., Secretary

Over the past two years, CCA and GEO Group have lobbied Congress on a number of issues related to their bottom line, such as the construction and management of privately operated prisons and detention facilities, and appropriations for both BOP and ICE.¹⁴ With respect to ICE appropriations, both companies lobbied on issues related to the funding of ICE detention facilities.¹⁵ GEO Group's lobbyists reported lobbying on "issues Related to Alternatives to Detention within ICE" in connection with the administration's 2013 and 2014 budget requests, and CCA's lobbyists reported lobbying on "funding related to immigration and Customs Enforcement in the FY2013 Budget Request."¹⁶ These budgets include proposals to

of the Senate, Office of Public Records; Corrections Corporation of America, 2008-13 Lobbying Disclosure Reports, Secretary of the Senate, Office of Public Records.

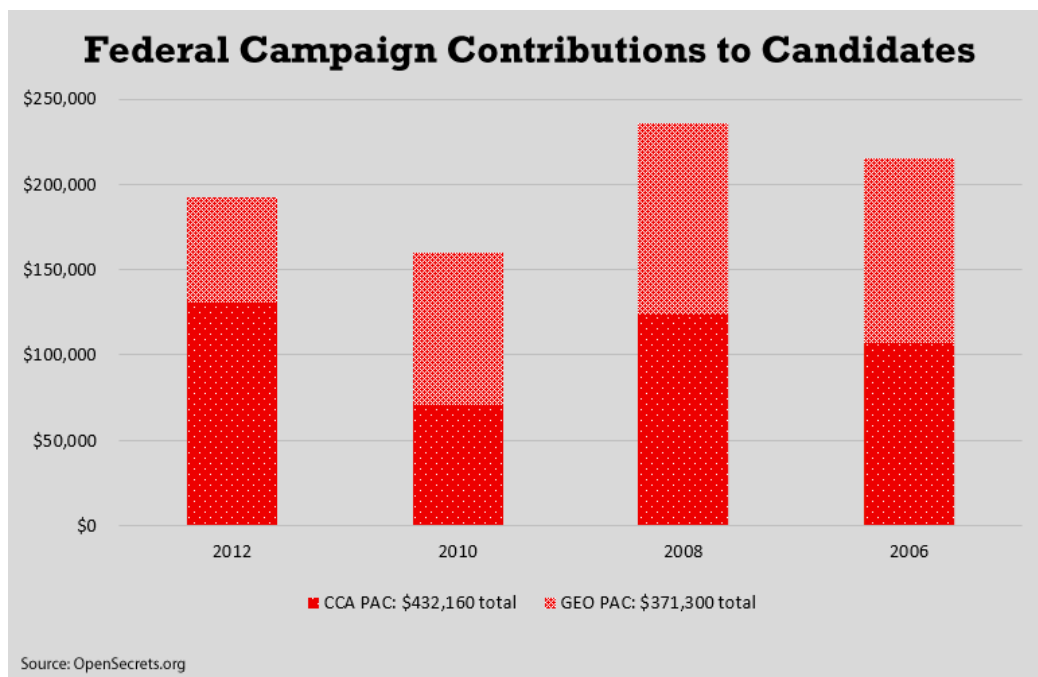
¹⁴ *Id.*; Lionel "Leo" Aguirre, 2008-13 Lobbying Disclosure Reports on behalf of The GEO Group, Inc., Secretary of the Senate, Office of Public Records; Navigators Global LLC, 2011-13 Lobbying Disclosure Reports on behalf of The GEO Group, Inc., Secretary of the Senate, Office of Public Records; Podesta Group, Inc., 2010 Lobbying Disclosure Reports on behalf of The GEO Group, Inc., Secretary of the Senate, Office of Public Records; Public Policy Partners, 2010 Lobbying Disclosure Reports on behalf of The GEO Group, Inc., Secretary of the Senate, Office of Public Records; Bryan Cave LLP, 2010 Lobbying Disclosure Reports on behalf of The GEO Group, Inc., Secretary of the Senate, Office of Public Records; McBee Strategic Consulting, LLC, 2008-13 Lobbying Disclosure Reports on behalf of Corrections Corporation of America, Secretary of the Senate, Office of Public Records; Akin Gump Strauss Hauer & Feld, 2008-13 Lobbying Disclosure Reports on behalf of Corrections Corporation of America, Secretary of the Senate, Office of Public Records; Mehlman Vogel Castagnetti, Inc., 2010-13 Lobbying Disclosure Reports on behalf of Corrections Corporation of America, Secretary of the Senate, Office of Public Records; The Ingram Group LLC, DBA The FIRST Group, 2013 Lobbying Disclosure Reports on behalf of Corrections Corporation of America, Secretary of the Senate, Office of Public Records; Sisco Consulting, LLC, 2008-11 Lobbying Disclosure Reports on behalf of Corrections Corporation of America, Secretary of the Senate, Office of Public Records; Podesta Group, Inc., 2008-9 Lobbying Disclosure Reports on behalf of Corrections Corporation of America, Secretary of the Senate, Office of Public Records; Sindquist Group, 2008 Lobbying Disclosure Reports on behalf of Corrections Corporation of America, Secretary of the Senate, Office of Public Records.

¹⁵ Lionel "Leo" Aguirre, 2012-13 Lobbying Disclosure Reports on behalf of The GEO Group, Inc., Secretary of the Senate, Office of Public Records; Navigators Global LLC, 2012-13 Lobbying Disclosure Reports on behalf of The GEO Group, Inc., Secretary of the Senate, Office of Public Records; Corrections Corporation of America, 2012-13 Lobbying Disclosure Reports, Secretary of the Senate, Office of Public Records; McBee Strategic Consulting, LLC, 2012-13 Lobbying Disclosure Reports on behalf of Corrections Corporation of America, Secretary of the Senate, Office of Public Records.

¹⁶ Lionel "Leo" Aguirre, 2012-13 Lobbying Disclosure Reports on behalf of The GEO Group, Inc., Secretary of the Senate, Office of Public Records; Navigators Global LLC, 2012-13 Lobbying Disclosure Reports on behalf of The GEO Group, Inc., Secretary of the Senate, Office of Public Records; McBee Strategic Consulting, LLC, 2012 Lobbying Disclosure Reports on behalf of Corrections Corporation of America, Secretary of the Senate, Office of Public Records.

reduce the amount spent on immigration detention by transferring low risk detainees to less costly alternatives.¹⁷

In addition, both CCA and GEO Group have lobbied aggressively against a bill that would have subjected private prisons to the federal Freedom of Information Act (“FOIA”). CCA also has encouraged its shareholders to vote against measures that would have brought more transparency to the company. For example, in 2012, CCA’s board of directors recommended CCA shareholders vote against a resolution that would have required CCA to report on steps it was taking to reduce incidents of rape and sexual abuse in its for-profit prisons.¹⁸ CCA’s efforts were successful and the resolution did not pass.¹⁹



¹⁷ Office of Management and Budget, Fiscal Year 2013 Budget of the U.S. Government, at 120; Office of Management and Budget, Fiscal Year 2014 Budget of the U.S. Government, at 105.

¹⁸ Grassroots Leadership, *The Dirty Thirty: Nothing To Celebrate About 30 Years Of Corrections Corporation Of America*, June 2013 (hereinafter *The Dirty Thirty*), available at <http://grassrootsleadership.org/cc-dirty-30#1>.

¹⁹ *Id.*

The private prison industry also provides millions of dollars in campaign contributions at the state and federal levels. CCA 's political action committee ("PAC") contributed over \$130,000 and GEO's PAC contributed just over \$60,000 to congressional candidates in the 2012 election cycle.²⁰ CCA and GEO Group also make corporate political donations. In the 2012 cycle, CCA itself, its PAC, its employees and their families contributed more than \$1.1 million to candidates, leadership PACs, parties, and committees organized under § 527 of the Tax Code.²¹ GEO Group, its PAC, its employees and their families contributed over \$400,000 to candidates, leadership PACs, parties and § 527 committees in the 2012 cycle.²² According to political contribution reports released by CCA, the company gave over \$680,000 to state candidates, parties, and committees in the 2012 cycle.²³

These campaign contributions have allowed CCA and GEO to successfully influence congressional action and the public discourse. Congress has, at the urging of the private prison industry, required the federal government to continually house 34,000 undocumented immigrants, regardless of whether or not there is an actual need to detain this many.²⁴ This mandate was championed by legislators who received contributions from the private prison industry, and enacted despite arguments by the Obama administration that there are less costly

²⁰ <https://www.opensecrets.org/pacs/lookup2.php?strID=C00366468&cycle=2012>; <https://www.opensecrets.org/pacs/lookup2.php?strID=C00382150&cycle=2012>.

²¹ <http://www.opensecrets.org/orgs/summary.php?cycle=2012&id=D000021940>.

²² <http://www.opensecrets.org/orgs/summary.php?cycle=2012&id=D000022003>.

²³ <http://ir.correctionscorp.com/phoenix.zhtml?c=117983&p=irol-politicalcontributions>.

²⁴ William Selway and Margaret Newkirk, Congress Mandates Jail Beds for 34,000 Immigrants as Private Prisons Profit, *Bloomberg*, September 24, 2013.

measures than detention for many of these undocumented immigrants.²⁵ Further, lobbying has stalled any progress on a bill that would subject private prisons to federal disclosure laws.

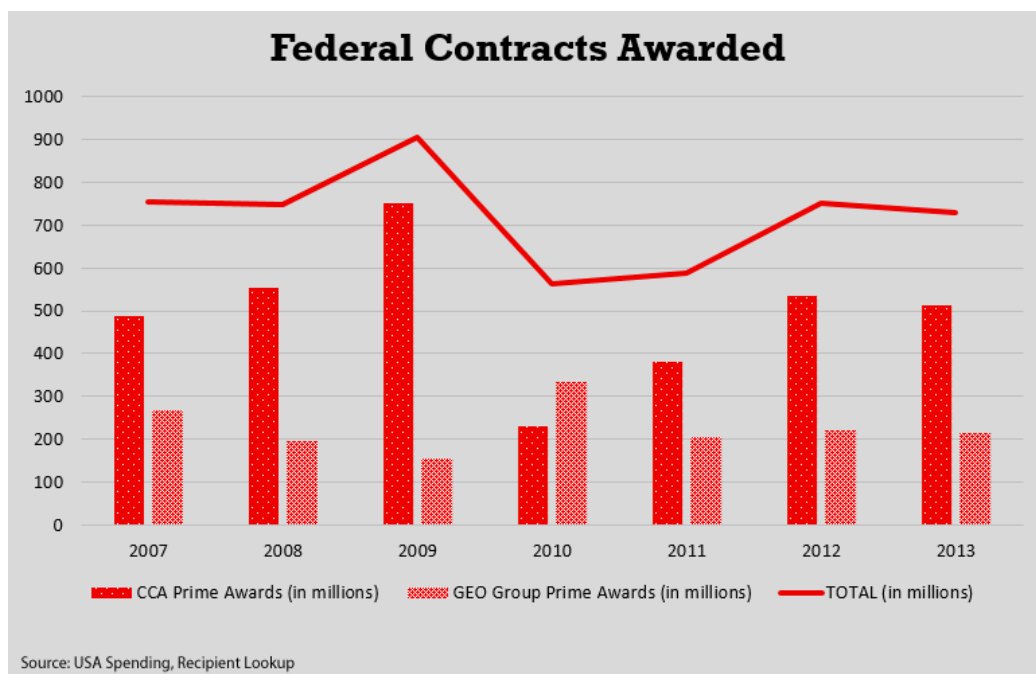
Finally, private prisons have used philanthropic giving as a way to curry influence. For example, The GEO Group Foundation, Inc., the tax-exempt organization established by GEO Group, reported a donation of \$25,000 in April 2012 to the U.S. Marshall's Association in Texas, and a \$20,000 donation in November 2012 to the Florida Governors Mansion Foundation.²⁶ The GEO Group also attempted to purchase the naming rights to Florida Atlantic University's football stadium with its gift of \$6 million, a move that coincided with its attempts to take over a large portion of Florida's state prison system.²⁷ CCA was among the companies that underwrote a children's charity established by then House Majority Leader Tom DeLay in 2005, with its contribution of \$100,000.²⁸

²⁵ *Id.*

²⁶ The GEO Group Foundation, Inc., IRS Form 990-PF, Return of Private Foundation 2012, filed August 20, 2013.

²⁷ Greg Bishop, A Company That Runs Prisons Will Have Its Name on a Stadium, *New York Times*, February 20, 2013, available at <http://www.nytimes.com/2013/02/20/sports/ncaaf/football/a-company-that-runs-prisons-will-have-its-name-on-a-stadium.html>.

²⁸ Philip Shenon and Stephanie Strom, DeLay Charity for Children Financed by Corporation, *New York Times*, April 21, 2005, available at <http://www.nytimes.com/2005/04/21/politics/21delay.html>.



Private Prisons And The Data Problem

The lack of publicly available data regarding private prisons raises a number of significant problems. The creation of private prisons is based on the public policy theory they would be able to house prisoners at less cost to taxpayers.²⁹ Under this theory, governments would no longer have to build, staff, and maintain prisons, but could instead contract out these responsibilities to private corporations that, in turn, would run the prisons much more cheaply than could governments. Although for many years governments have been contracting with private prisons, the public has no way of knowing whether these private prisons save taxpayer funds or, if so, how much. Private prisons provide no meaningful statistics from which to compare the per inmate costs, while, by contrast, the government maintains detailed per inmate costs that include salaries, employee benefits, equipment, and utilities.³⁰

²⁹ Office of Research and Evaluation, Bureau of Prisons, *Private Adult Prisons: What Do We Really Know And Why Don't We Know More?*, August 3, 1999 (hereinafter *Private Adult Prisons*), at 1, available at http://www.bop.gov/resources/research_projects/published_reports/pub_vs_priv/oreprcampgaes.pdf.

Even the federal government has been unable to measure the success of private prisons as a cost-savings alternative, notwithstanding that many private prisons house federal prisoners and detainees. In 2007, the U.S. Government Accountability Office (“GAO”) conducted a study and concluded, “[i]t is not currently feasible to conduct a methodologically sound cost comparison of BOP and private low and minimum security facilities because these facilities differ in several characteristics and BOP does not collect comparable data to determine the impact of these differences on cost.”³¹ In responding to the GAO study, the BOP justified its inability to provide GAO with the necessary data by noting there are no laws or regulations mandating the maintenance of such information. BOP claimed further to collect these figures would drive up the costs of the contracts themselves.³² Previously, in 1999, the BOP attempted to conduct its own study comparing private and public prisons, but concluded due to a lack of critical information, it was difficult to compare the two types of correctional institutions.³³ Thus, the lack of transparency and access to the data prevent even the federal government from evaluating the costs of private versus public prisons. Notably, after the BOP responded to GAO’s findings, its Director, Harley Lappin, retired and went to work for CCA.³⁴

This failure to keep critical statistics also impacts the reports conducted by the Bureau of Justice Statistics (“BJS”), a component of DOJ with statutory authority to collect and report

³⁰ U.S. Government Accountability Office, *Cost of Prison: Bureau of Prisons Needs Better Data to Assess Alternatives for Acquiring Low and Minimum Security Facilities*, GAO-08-6, October 2007(hereinafter GAO Report), available at <http://www.gao.gov/assets/270/267839.pdf>.

³¹ *Id.*

³² *Id.* at 9-10.

³³ Private Adult Prisons.

³⁴ <http://www.cca.com/newsroom/news-releases/256/>.

prison and prisoner statistics “concerning the operations of the criminal justice system at the Federal, State, and local levels.”³⁵ BJS publishes reports and statistics on a wide variety of corrections data, including, *inter alia*, prison population counts, prisoner characteristics, and state and federal prison facility characteristics. Specific surveys and data collection programs conducted by BJS include the National Prisoner Statistics, the Census of State and Federal Adult Correctional Facilities, the National Corrections Reporting Program, the Survey of Inmates in Federal Correctional Facilities, the Survey of Inmates in State Correctional Facilities, Deaths in Custody Reporting Program, the National Inmate Survey, and the National Former Prison Survey.³⁶ But while BJS provides a wealth of data and information from which to assess federal and state prisons, its jurisdiction does not extend to private prisons, which leaves a gaping hole in prison statistics and data. Private prisons provide only limited data as required by specific contracts or the relevant state’s laws. As GAO reported, this minimal data is not remotely comparable to that available for public prisons.

Further compounding the problem is the probable lack of accuracy in whatever statistics private prisons may maintain. According to a high ranking executive of GEO Corp., private prisons provide false information to federal agencies “all the time.”³⁷ In a lawsuit filed against CCA in Idaho, the company admitted to falsifying nearly 4,800 hours of staffing records over a seven-month period. In another separate lawsuit, inmates claim CCA falsified staff logs to hide

³⁵ *The Justice Systems Improvement Act of 1979*, Pub. L. No. 96-157, 93 Stat. 1167 (1979), an amendment to the Omnibus Crime Control and Safe Streets Act of 1968.

³⁶ <http://www.bjs.gov/index.cfm?ty=abu>.

³⁷ *Private Prison Company Executive Thomas Weirdsma: Lying to Federal Agencies ‘Happens All the Time,’* *Huffington Post*, December 11, 2012, available at http://www.huffingtonpost.com/2012/12/11/thomas-weirdsma-private-prison_n_2278935.html.

chronic understaffing.³⁸ Thus, absent outside verification of the information provided by private prisons, their records may be as worthless as having no records at all.

The lack of data on how private prisons are performing also makes it impossible to evaluate the studies issued by the private prison industry itself, which proclaim the superior efficiency and safety of private prisons compared to those publicly operated.³⁹ Other, more neutral studies have challenged these assertions, concluding private prisons do not save taxpayer money, and provide a poor quality of care to their inmates.⁴⁰ But an effective counter to the private prison industry's claims requires access to data currently in the sole possession of the private prisons and the corporations that run them.

The 2007 GAO study highlighted particular problems hampered by the lack of access to key data. GAO found:

a private prison is not required to keep data comparable to what it maintains for its own facilities with regard to safety and security issues and, consequently, a facility's quality of service. These include data on the number of inmates attended to by health care professionals due to misconduct, staff turnover rates, and the experience level of the staff.⁴¹

Thus, because the federal government does not require private prisons to keep the same types of data required of federal prisons, comparing the full range of potential benefits of private prisons simply is not possible.

³⁸ Hannah Furfaro, *Corrections Corporation of America Admits to Falsifying Staffing Records*, *Huffington Post*, April 12, 2013, available at http://www.huffingtonpost.com/2013/04/11/corrections-corporation-of-america-private-prison_n_3064795.html.

³⁹ Christopher Petrella, *Private Prisons Currently Exempt from Freedom of Information Act*, *Nation of Change*, September 25, 2012, available at <http://www.nationofchange.org/private-prisons-currently-exempt-freedom-information-act-1348581256>.

⁴⁰ The Dirty Thirty.

⁴¹ GAO Report, at 9 (citation omitted).

Further, the lack of information about private prisons on a range of issues impacts not only questions of cost, but also makes it impossible to monitor the extent of prisoner abuse and fraud. For example, a recent U.S. Department of Justice investigation of a private prison for youths aged 13-22 in Mississippi operated by GEO Group found the institution continually subjected prisoners to abuse and failed to report the excessive use of force and child abuse.⁴² Similarly, CCA was found to be in contempt of court for fraudulently understaffing an Idaho prison it ran – a fact discovered only after an Idaho State Police investigation.⁴³ Indeed, the situation in Idaho’s largest private prison, run by CCA, was so bad Idaho Gov. Butch Otter recently announced the state was taking over the prison’s operation.⁴⁴ Long an advocate of privatizing prisons, Gov. Otter abruptly ended the state’s contract with CCA after a news report raised questions about staffing at the prison, announcing the state could run the prison for “very, very close” to the \$29 million CCA was paid annually to run it.⁴⁵ University of North Florida Criminal Justice Professor Michael Hallett, commenting on the situation in Idaho, stated:

A private prison corporation operates just like an old-fashioned HMO, where the less they spend the more they make . . . Typically, they negotiate for a per diem per inmate . . . There’s lots of ways to game the system, through contract violations and even just legal contracts to house easier inmates.⁴⁶

⁴² U.S. Department of Justice, Civil Rights Division, *Investigation of the Walnut Grove Youth Correctional Facility, Walnut Grove, Mississippi*, March 20, 2012, available at <http://www.justice.gov/crt/about/spl/documents/walnutgrovefl.pdf>.

⁴³ George Prentice, U.S. Judge: CCA Violated Idaho Contract When it Understaffed Private Prison, *Boise Weekly*, September 16, 2013.

⁴⁴ Idaho to Operate Troubled Correctional Center Publicly, *Spokesman-Review*, January 4, 2014.

⁴⁵ *Id.*

⁴⁶ *Id.*

Other state and local governments have transferred prisoners from privately run facilities after reports of sexual assaults on prisoners surfaced.⁴⁷

As these examples illustrate, only the most egregious instances become public; more typically the private correctional facilities and the companies that run them largely escape liability and accountability. Without meaningful data, it is simply impossible for the public to evaluate the success or failure of the privatization of what historically has been an essential governmental function.

The Value Of Applying Open Records Laws to Prisons

The Freedom of Information Act is one of the most powerful tools available to the public to promote accountability. Under the federal statute, any person can make a request for reasonably described federal agency records. This includes records that originated outside the federal government, but at the time of a request are within an agency's custody and control. In response to a FOIA request, an agency must provide all responsive records, unless they fall within one of the FOIA's nine enumerated exemptions. Further, if a requester believes an agency has not complied with its legal obligations under the FOIA, the requester may file a lawsuit against that agency in federal district court.

As federal agencies, both the BOP and DHS are subject to the FOIA. This means any records in their possession regarding or reflecting on prisons may be requested under the statute. While in theory this would include information they may have about private prisons, they appear to have little data both because they do not collect any and because private prisons frequently do not create records in the first place. Similarly, as a component of DOJ, BJS's records also are

⁴⁷ *Id.*

subject to the FOIA. Because its authority does not extend to private prisons, however, any FOIA request to that agency is unlikely to yield much, if any, private prison data.

The biggest obstacle to greater transparency is the limited reach of the FOIA. Even though private prisons may house federal prisoners convicted of violating federal laws, or federal detainees held on suspicion of committing or having some relation to federal crimes of terrorism, such prisons do not fall within the FOIA's definition of "agency." The FOIA defines "agency" as "any executive department, military department, Government corporation, Government controlled corporation, or other establishment in the executive branch of the Government (including the Executive Office of the President), or any independent regulatory agency."⁴⁸ Private prisons – as entities outside the executive branch of government – fall outside this definition. Nor do their records satisfy the two-part test adopted by the Supreme Court for determining whether a record is an agency record subject to the FOIA: (1) the record was either created or obtained by an agency; and (2) the agency was in control of the requested materials at the time of a FOIA request.⁴⁹ The records that would prove most useful in evaluating private prisons reside exclusively within the custody and control of those prisons and the corporations that run them. While the FOIA authorizes access to records maintained by outside entities for government agencies, this was intended to sweep in records placed in the physical possession of a government contractor for purposes of records management, and therefore would not apply to private prisons.⁵⁰ In short, there is nothing in the FOIA that would extend the statute's coverage

⁴⁸ 5 U.S.C. § 552(f)(1).

⁴⁹ *U.S. Dep't of Justice v. Tax Analysts*, 492 U.S. 136, 144-45 (1989).

⁵⁰ 5 U.S.C. § 552(f)(2).

to records generated and maintained by private prisons, even if they are performing governmental functions pursuant to contracts with the federal government.⁵¹

At the state level, there have been some attempts to subject private prisons to state information laws on the theory they are performing state functions. For example, in May 2013, the *Prison Legal News*, a nationwide monthly publication dealing with prisoner rights, prisoner litigation, and prisoner conditions, brought a lawsuit against CCA in a state court in Vermont seeking records from the company under Vermont's open records law.⁵² *Prison Legal News* argued because CCA is acting as a substitute for the Vermont Department of Corrections in housing and caring for Vermont prisoners, CCA is a "public agency" under the state records law and therefore documents CCA produced or acquired while performing these delegated duties are publicly accessible.⁵³ The court has yet to rule on this issue. *Prison Legal News* brought a similar lawsuit against CCA in Tennessee, where it secured a legal victory in the Tennessee Court of Appeals, which ruled CCA was required to produce documents under the state records law because it was the functional equivalent of a government agency.⁵⁴ Such an argument would not prevail under the federal FOIA, however, given the strict construction courts have given to the term "agency."

⁵¹ In a similar vein, the records of grantees are not subject to the FOIA because, as the Supreme Court reasoned in *Forsham v. Harris*, 445 U.S. 169, 179-80 (1980), Congress "exclude[ed] them from the definition of 'agency,' an action consistent with its prevalent practice or preserving grantee autonomy."

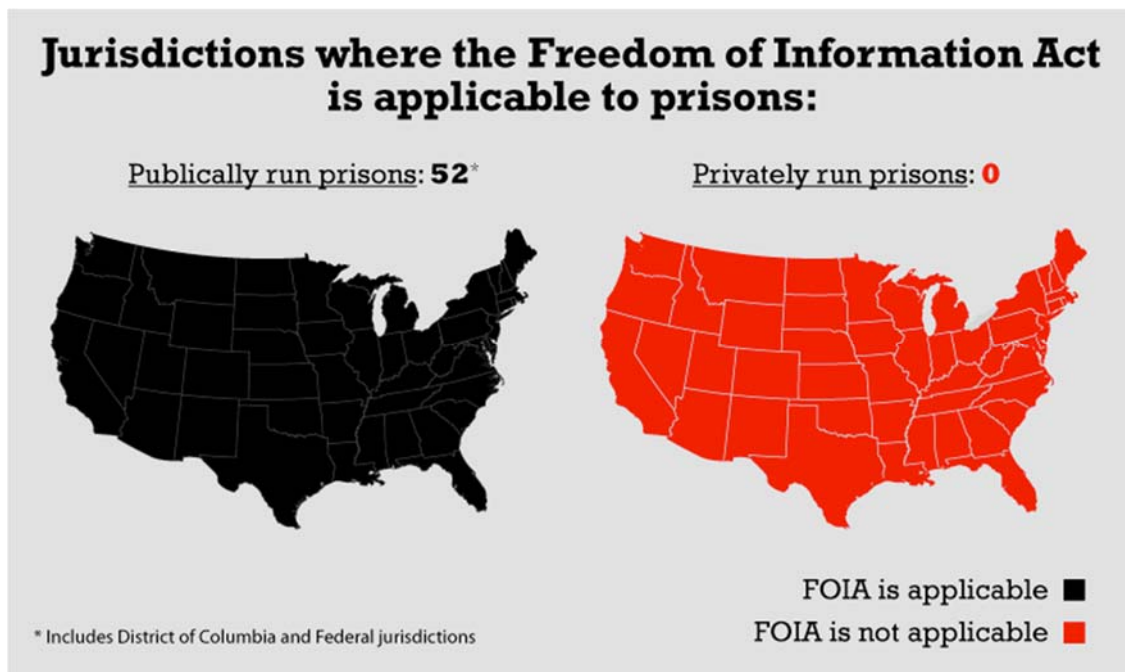
⁵² *Prison Legal News v. Corrections Corporation of America*, Docket No. 332-5-13 WNCV (State of Vt., Superior Ct.), available at http://acluvt.org/legal/docket/files/pln_v_cca/.

⁵³ *Id.*

⁵⁴ See Press Release, Human Rights Defense Center, Corrections Corp. of America Loses Another TN Court of Appeals Ruling, March 2, 2013, available at <http://tnreport.com/2013/03/02/cca-again-ruled-against-in-public-records-suit-by-tn-court-of-appeals/>. *Prison Legal News* brought a similar lawsuit against GEO Group in Florida state court, arguing Florida's public records statute required GEO Group to respond to *Prison Legal News*' information request. While the lawsuit was pending, GEO Group agreed to produce the requested records.

This is not to say the FOIA is of no utility. As DOJ, BOP, and DHS records are subject to the FOIA, records in their possession regarding private prisons are accessible under the federal law. The vast majority of records that would prove useful in evaluating the efficacy of and conditions in private prisons, however, reside only with the prisons themselves or the private corporations that run them, and therefore are not accessible.

From a policy perspective, this presents a disturbing dilemma. Private prisons are funded in large part by taxpayer funds funneled through federal contracts. Private prisons perform a function historically performed by the federal government – the housing of federal prisoners. Nevertheless, although performing uniquely governmental functions, private prisons avoid public accountability. When the FOIA and its definition of “agency” were first enacted, private entities rarely, if ever, performed government functions, so the need to apply the FOIA more broadly did not arise. Yet now, in the absence of an applicable federal open records law, neither the federal government nor the public has any effective way to garner information that would reveal whether or not private prisons are a good idea.



To fill in this gap, legislation has been proposed to make private prisons subject to the FOIA. Since 2005, there have been five versions of the Private Prison Information Act introduced in Congress, most with bipartisan support.⁵⁵ The bill was last introduced in 2011, by Rep. Sheila Jackson Lee (D-TX). Under that proposal, all non-federal prisons or correctional facilities that incarcerate or detain federal prisoners pursuant to contracts or intergovernmental service agreements with the BOP, Immigration and Customs Enforcement, or any other federal agency would be subject to the FOIA to the same extent as a federal agency operating a federal prison or correctional facility. The 2011 bill defines a “non-federal facility” as either a privately owned prison or correctional facility, or a state or local prison, jail, or other correctional facility.⁵⁶

This legislation has never been voted out of committee in the House of Representatives, and has been the target of heavy lobbying by the private prison industry.⁵⁷ The three organizations registered to lobby on this bill include CCA,⁵⁸ which has spent more than \$7 million lobbying against the various versions of the Private Prison Information Act introduced since 2007.⁵⁹ The legislation has not even been re-introduced during the 113th Congress.

Each of the 50 states and the District of Columbia have their own open records law, independent of all other state open records laws and the federal FOIA. State departments of

⁵⁵ Press Release, Human Rights Defense Center, Organizations Urge U.S. Rep. Sheila Jackson Lee to Reintroduce Private Prison Information Act, December 19, 2012, *available at* <http://privateprisoninformationactof2013.blogspot.com/>.

⁵⁶ *Private Prison Information Act of 2011*, H.R. 74, 112th Congress, January 5, 2011.

⁵⁷ The Dirty Thirty. Those versions include H.R. 1806, S. 4031, H.R. 1889, H.R. 2450, and the most recent bill, H.R. 74. See Petrella, *Nation of Change*, Sept. 25, 2012.

⁵⁸ Open Secrets, Clients Lobbying On H.R. 74: Private Prison Information Act of 2011, *available at* <http://www.opensecrets.org/lobby/billsum.php?id=hr74-112>. The other two organizations are the American Bar Association and the American Federation of State, County, and Municipal Employees. *Id.*

⁵⁹ The Dirty Thirty.

corrections (“DOC”) generally are subject to state open records laws, which can be used to request any records maintained by the state’s DOC. Like the federal FOIA, however, with limited exceptions those private prisons that contract with the states are not subject to that state’s open records law, and the only records pertaining to the private prisons that may become public are those reported to the state DOC or another state agency.

There have been legislative efforts to expand the reach of state laws to include private prisons, but none has succeeded to date. For example, Arizona State Representative Krysten Sinema introduced a bill in 2010, H.B. 2674, that would have required private prisons to make public information regarding their costs, staff, inmates, and operations – just as Arizona state operated prisons must do. The private prison industry successfully blocked this and related bills.⁶⁰ Lawsuits at the state level have sought to subject private prisons to state open records laws. So far, only the Tennessee appellate court has extended a state open records law to private prisons. As a result, the records of private prisons in nearly all states and the District of Columbia remain out of reach.

Solutions

There are legislative, administrative, and grass-roots solutions to the lack of transparency and accountability in private prisons.

Legislative Solutions

Without question, transparency of private prisons would be increased exponentially by enactment of a statute like the Private Prison Information Act, and similar state legislation, to make records at private prisons subject to the same disclosure requirements as are the records at publicly run prisons. There are numerous obstacles to overcome, however. The bill has not been

⁶⁰ Press Release, Arizona House Democrats, GOP Lets Special Interest Friends Make Decisions, Money on Major Ariz. Issues, October 28, 2010, available at http://www.azhousedemocrats.com/2010_10_01_archive.html.

introduced in the 113th Congress, had only one co-sponsor in the 112th Congress, and does not appear to have companion legislation in the Senate. Moreover, to date, the private prison industry has fought this law and likely will continue to do so. As a result, it is imperative to secure co-sponsors, particularly representatives on the relevant committees, such as Judiciary and Government Reform. Reaching out to leading Republicans in the House and members of both parties in the Senate also will be especially important.

Moreover, in this era of fiscal austerity, bill supporters should focus on the significant sums of money the federal government pays to the private prison industry to perform a historically governmental function, the complete lack of accountability for how that money is being spent, and whether private prisons are, in fact, a good investment. Questions must also be raised regarding why the major players in the private prison industry, including CCA and the GEO Group, are fighting so hard to defeat this legislation and what they are trying to hide.

Although the federal government spends billions of dollars each year on private prisons, there have been no oversight hearings on this issue. Hearings with witnesses from GAO and groups that attempt to monitor private prisons could establish a factual record for the value of the missing data, highlight the gross disparity in publicly available data between federally and privately run prisons, and help pave the way for legislation.

Legislative fixes other than amendment of the FOIA should also be considered that require prisons to provide more information to the agencies with which prisons contract – DOJ and DHS – and mandate the agencies issue reports compiling this data. For example, requiring private prisons to provide the information sought by the GAO in 2007 for accurate cost comparisons between private and public prisons would be logical, and clarify the cost effectiveness of these institutions. Congress could mandate any contract between a federal

agency and a private prison concerning the housing of federal prisoners or detainees include reporting on issues ranging from staffing ratios, staff training, prison conditions, illness and death of inmates, dollars spent per inmate, and other important information. For state-run contract prisons, conditions could be placed on federal funds to the states requiring this kind of disclosure. Beyond amending the FOIA, legislation could also mandate disclosure of all records held by private prisons and the corporations that run them with the exception of, *inter alia*: (1) personal information related to prison staff; (2) records that, if disclosed would present a legitimate security or public safety risk; (3) staff and prisoner medical records, with the exception of aggregate statistical data; and (4) records related to ongoing internal affairs investigations until the investigation concludes.

Congress also could authorize BJS to collect data from private prisons, making it clear the private prison industry has a corresponding duty to satisfy any data request from BJS, and could include additional information gathering and reporting requirements in either the annual Criminal Justice appropriations bills or other new affirmative legislation. By conditioning the receipt of federal dollars on the provision of data bearing on how federal dollars are spent, Congress could bring a greater level of transparency to private prisons.

Congressional Oversight

Members of Congress often use oversight as a means to develop the record to support legislation, as well as to release information to the public. A congressional committee often will send questionnaires and interrogatories to organizations under investigation, and require witnesses to testify under oath and then respond in writing to unanswered questions. This could be an effective method of obtaining greater information on the operation of private prisons, and provide additional pressure for increased transparency.

Further, members of Congress often send letters to federal agencies on topics of interest. Certain members could solicit the views of BOP, DOJ, and DHS on the limits on their authority to gather information and the information they believe should be supplied by such prisons.

Investigations And Studies

Federal government agencies can and should conduct intensive investigations of private prisons and their uses by federal agencies. The GAO, which has in the past attempted to study private prisons, should continue to examine their use and cost effectiveness by not only BOP, but also ICE, which tripled its reliance on private prisons between 1996 and 2011.⁶¹

The Offices of Inspector Generals (OIG) at DOJ and DHS should investigate issues involving private prisons. DOJ's OIG has done this in the past,⁶² but has not published any reports on private prison issues since 2001. DHS's OIG does not appear to have been conducted any investigations. OIG investigations spotlight issues both within and outside agencies, and OIGs clearly have jurisdiction to investigate how contracts the agency has entered with private entities are being implemented. OIG investigations into private prison contracts would assist the public to learn about the operations of private prisons, likely leading to decreased abuses at these facilities.

Other legislative support agencies, such as the Congressional Research Service, and semi-private entities, such as the Administrative Conference of the United States and the

⁶¹ Detention Watch Network, *The Influence of the Private Prison Industry in the Immigration Detention Business*, May 2011, available at <https://afsc.org/sites/afsc.civicaactions.net/files/documents/PrivatePrisonPDF-FINAL205-11-11.pdf>.

⁶² U.S. Department of Justice, Office of Inspector General, *The Department Of Justice's Reliance On Private Contractors For Prison Services*, Audit Report 01-16, July 2001, available at <http://www.justice.gov/oig/reports/plus/a0116/final.pdf>.

National Academy of Public Administration, could conduct further research and investigations, with the 2007 GAO report as a starting point.

Grass Roots Efforts

To date, public interest organizations and other groups have not done enough to use the tools they possess to shine a light on private prisons. This is not to say they have ignored the problems of private prisons. The ACLU has written extensively on the abuses in private prisons, and *Prison Legal News* and its associate editor, Alex Friedmann, have fought hard for greater transparency in the private prison systems and litigated in efforts to extend state information laws to private prisons. While there have been many reports on the private prison industry, there has been very little use of the Freedom of Information Act to access at least the records BOP and ICE have concerning private prisons. This data clearly has limits but, as discussed, it may shed at least some light on the private prison industry. Potentially available information includes contracts these agencies have with the private prisons, communications with the private prisons, and reports and other items submitted to the federal agencies by the private prisons and their corporate parents.

Just as importantly, information requests must be initiated at the state level. The federal FOIA provides an exemption for much of the information in proposals submitted for contracts, protecting from compelled disclosure “trade secrets and commercial or financial information obtained from a person [that is] privileged or confidential.”⁶³ Courts have construed the term “commercial or financial information” very broadly as including information relating to business or trade and covering records in which the submitter has a commercial interest. Pricing

⁶³ 5 U.S.C. §552(b)(4).

information contained in bids typically also is covered. By contrast, many state open records laws do not protect this kind of information from disclosure.

Other ways to continue drawing attention to the issues include shareholder proposals to impose disclosure on private prisons, publicizing the role of members of the boards of private prison companies in working to help private prisons evade accountability – such as Sen. DeConcini and Mr. Marshall – and tracking more closely the activities of lobbyists for private prisons, and making that information publicly available on an ongoing basis.

Conclusion

While detention facilities have long been one of the realities of our society, the relatively recent trend of contracting out to private companies the responsibility to run these facilities has created an entire industry, eager to take advantage of the billions of dollars of federal funds available through government contracts to run these private prisons.

Unfortunately, with this move toward private prison facilities, transparency and public accountability have suffered. As private companies more and more frequently bear the responsibility for prisoners convicted under federal, state, and local laws, information about how their facilities are run and how federal dollars are being spent is hidden while the same information is publicly available for government run prisons. Legislative efforts to expand the reach of the FOIA to sweep in private prisons have been met by resistance from private prison companies and their allies.

The lack of public information is clearly detrimental. It is impossible to determine if private prisons are actually more economically efficient than government run prison facilities. Thus, it is impossible to test or verify the fundamental argument in favor of private prisons.

Less publicly available information also makes it much harder to detect waste, fraud, and abuse in the private prison system. Without the same reporting and record keeping requirements of public prisons, private prisons have inadequately staffed their facilities and abused prisoners in their care. Some particularly egregious reports, which arguably would have come to light much sooner had private prisons been required to be as transparent as their public counterparts, have become public only after law enforcement investigated the institutions or the institutions have been sued.

While much about private prisons and their operations remains opaque, there are a number of options available to shine light on these activities. Placing private prisons under the same open records laws as traditional government-run institutions would allow the public and the federal government to gain much needed knowledge about private prisons and to monitor the actual practices of the prisons themselves. Government oversight of the institutions and reports resulting from these activities, tools already in the government arsenal, also would provide more information about how taxpayer dollars are being spent, and would shed light on the wisdom of the federal government continuing to invest in the private prison enterprise. Public interest groups, shareholders, and other citizen based groups also could make use of open records at the grass roots level to request information from public bodies about these institutions and their allies and to press for changes at the institutional level.

The private prison industry developed over a number of years, and did so without much attention paid to it. Only by bringing greater transparency to the industry will taxpayers be able to learn if private prisons are worth the cost, and if they are equal to the responsibilities of traditional public prisons.