

Primer on the Assumption of Government Prerogatives by For-Profit Groups

States with private prisons:

Alabama, Alaska, Arizona, California, Colorado, Florida, Georgia, Hawaii, Idaho, Illinois, Indiana, Kentucky, Maryland, Mississippi, Montana, Nevada, New Jersey, New Mexico, North Carolina, North Dakota, Ohio, Oklahoma, Pennsylvania, South Carolina, South Dakota, Tennessee, Texas, Vermont, Virginia, Wyoming, (Federal)

Note that Biden signed an executive order in January to not renew Federal contracts with private prisons.

List of States:

<https://www.sentencingproject.org/publications/private-prisons-united-states/>

Biden's Executive Order:

<https://time.com/5934213/private-prisons-ban-joe-biden/>

On the lack of oversight over private prisons:

Public record law does not apply to private prisons since they are companies rather than government entities. Bills to change this have been repeatedly brought before Congress. Most recently, the Private Prison Information Act of 2019 was introduced by Senator Benjamin Cardin of Maryland and referred to the Committee on the Judiciary. This means information about the operation of private prisons cannot be garnered through FOIL requests.

In her 2005 article "State Punishment and Private Prisons," scholar Sharon Dolovich argued that the regulatory mechanisms that exist for Private Prisons lend significant latitude to prison administrators and are unlikely to ensure humane treatment of prisoners.

-The Courts

A culture of judicial deference to prison administrators, Dolovich argued, makes the threat of lawsuits unlikely to curtail abuses in private prisons. Private prisons motivated to save money are likely to provide inadequate training to guards, and abuses by these guards are unlikely to be penalized under the Eighth amendment unless prisoners can demonstrate they were willfully sadistic. Dolovich held that

because abuses in private prisons are traceable to inadequate training, guards are more likely to be able to attribute their actions to ignorance rather than sadism. A similar principle holds for claims about medical neglect, since for-profit medical services in prisons are likely to lack competent staff and be generally structured in a way that makes treatment difficult to obtain. Prisoners are unlikely to be able to demonstrate that medical personnel within this system knowingly and willfully neglected an issue. Richardson vs. McKnight (1986) does hold that prison guards in private prison do not enjoy the qualified immunity of guards in public prisons. However, Dolovich holds that this is unlikely to make much difference in practice because of the reluctance of courts to acknowledge prisoner rights.

-Accreditation

Accreditation is the responsibility of the American Correctional Association, the members of which often have professional ties to private prison officials. The ACA also depends on the money paid by private prisons for accreditation. It also bases review on written regulations rather than observations of daily practice. For all these reasons, Dolovich holds the accreditation process does little to exercise restraint on private prisons.

-Contractual Monitoring

Monitoring for contract compliance is likewise limited in its efficacy, Dolovich contends, partly because of the lack of adequate funding and partly because monitors are typically drawn from the same professional communities as private prison administrators and may seek employment in the private sector in the future.

Articles about the inapplicability of public record law to private prisons:

<https://www.themarshallproject.org/2014/12/18/everything-you-ever-wanted-to-know-about-private-prisons>

<https://repository.law.umich.edu/mjlr/vol28/iss2/2/>

Prison Information Act:

<https://www.congress.gov/bill/116th-congress/senate-bill/2773/text?r=9&s=1>

Dolovich's article:

https://heinonline.org/HOL/Page?handle=hein.journals/duklr55&div=21&g_sent=1&casa_token=IBZgusFzGloAAAAA:OFfnuo1ID1BAxP7I8yPDQnACmYsW9PX818jeTSRsP7OCabcYp4onbD_N1mSlg-TvuktrR8HzlQY

On the adjudicatory powers assumed by private firms:

-Private Prisons

In 1987, David N. Wecht noted,

Prison staff . . . exercise substantial effective control over the duration and terms of confinement through a broad range of adjudicative functions. Line officers' recommendations influence parole examiners' assessments of the likelihood that an inmate will violate parole conditions or the law upon release. At disciplinary hearings, prison personnel assess behavior, determine guilt or innocence, and impose sanctions.

Sharon Dolovich similarly contended in 2005, “in those jurisdictions that have retained parole and indeterminate sentencing, the precise amount of time a convicted offender actually serves is determined by judgements regarding the inmate’s behavior made by prison officials over the course of his or her assignment. Such judgments in turn influence decisions regarding the classification, discipline, and ultimate release date of the inmate.” Dolovich argued that in private prisons, where there is a profit motive for extending the duration of confinement, employees may be encouraged to use their prerogatives to lengthen inmate’s sentences.

-Diversion Programs

Private firms also exercise adjudicatory powers at the pre-trial stage. The American Bar Association’s 2020 report, “Privatization of Services in the Criminal Justice System,” raised concerns about for-profit diversion programs. Participation in these programs, and program administrator’s assessments, impact the legal consequences faced by individuals accused of minor crimes. They are also expensive. As the report reads, “people who enter a program and then cannot complete necessary payments may face punishment for the failure to pay, as well as reinstatement of criminal charges and ultimately a conviction and sentence.” Sometimes prosecutors receive a portion of the funds paid to these programs.

-Community Supervision

Also concerning are private community supervision companies, which charge individuals on parole directly for monitoring services. Like employees of private prisons and administrators of diversion programs, these companies exercise discretion in determining the legal fate of offenders.

Weicht's article:

<https://www.jstor.org/stable/796363?origin=crossref>

American Bar Association report:

https://www.americanbar.org/groups/legal_aid_indigent_defense/indigent_defense_systems_improvement/publications/privatization-of-services-in-the-criminal-justice-system/

On the use of private firms by the Department of Defense

Use of Mercenaries

According to a report by Sean McFate, published by the National Defense University Press in 2019, the wars in Iraq and Afghanistan were responsible for reviving mercenaryism. Policymakers turned to contractors rather than instituting a politically unpopular draft. In 2018, the Department of Defense employed 50,000 contractors, 2,002 of which were armed mercenaries. The US also indirectly supports mercenaries by requiring some contractors to provide their own security forces, which are culled from the ranks of regional warlords. Putting the scale of security contracting into perspective, McFate writes, "DOD spent about \$160 billion on private security contractors from 2007-2012, worth almost four times the United Kingdom's entire defense budget." McFate concludes his discussion of the development of US reliance on contractors writing, "Contracting is now a part of the American way of war . . . the United States has grown strategically dependent on the private sector to sustain wars."

US Central Command compiles a quarterly census of contractors employed by the Department of Defense. The latest report, released in April of 2021, shows 37,597 contractors employed by the DOD within Central Command's "Area of Responsibility," furthering a trend of significant decline since 2011, in the fourth quarter of which the DOD employed more than 160,000 contractors. Some demographic elements stand out in the report. In Iraq and Syria, only 1.4% of contractors are involved in "security" but in Afghanistan this is the second-largest category of contractor, at 16% of all contractors. 1,520 of these contractors are armed personnel, essentially mercenaries. Particularly shocking is the fact that the

“Vendor Threat Mitigation Branch” of Central Command determined that 24.8% of the groups the DOD contracted with in the second quarter of 2021 are “Unacceptable Without Mitigation” meaning that they present some kind of risk to US interests. The board determined that 6 groups were actually providing material and/or services to enemy forces.

-Lack of Oversight and Assumption of Inherently Governmental Functions

Oversight has been frustrated by the poor compliance of the DOD with 10 USC § 2330a, which requires the DOD to give a quarterly inventory of its contracts and use this to ensure, among other things, that contractors are not assuming “inherently governmental functions.” The Government Accountability Office has repeatedly found issues in the way that the DOD uses its inventory to make planning decisions. For instance, in 2016, the GAO found “DOD components . . . may continue to underreport contractors providing services that are closely associated with governmental functions.” GAO has apparently identified 17 categories of service associated with inherently governmental functions, but I am unable to find a comprehensive list of these. Examples given are “professional and management support services.” The latest GAO report, issued in 2021, noted

In fiscal year 2019, DOD obligated more than \$18 billion on contracts for professional engineering and technical services, more than on any other type of contracted services. Our past work has found that professional and management support service contracts such as these frequently included services that closely support inherently governmental activities, which are defined as those activities whose nature mandates performance by government employees. The use of contracts for these types of support activities increases the risk that contractors may inappropriately influence government authority, control, and accountability for decision-making.

Sean McFate’s article for the National Defense University Press:

<https://ndupress.ndu.edu/Media/News/Article/2031922/mercenaries-and-war-understanding-private-armies-today/>

US Central Command Census:

https://www.acq.osd.mil/log/ps/.CENTCOM_reports.html/FY21_2Q_5A_Apr2021.pdf

Most Recent GAO Report:

<https://www.gao.gov/products/gao-21-267r>

On the use of private firms to detain immigrants

ICE and Customs and Border Protection Detention Centers

President Biden's executive order phasing out federal use of private prisons does not apply to the Department of Homeland Security, which operates ICE and CBP detention centers. In 2020, 81 percent of ICE detainees were held in privately operated facilities. ICE has stated its intent in its 2021 budget justification to expand detention facilities to accommodate enhanced interior enforcement. The Department of Homeland Security is known for signing long contracts with private prison companies and may continue to be an important source of support to the industry in the wake of Biden's executive order. However, political opposition to both the detention of migrants and the operation of prisons for profit is mounting, and following COVID the number of migrants held by ICE is lower than it has been for a sustained period in the 21st century, 15,387 in January down from a 2019 high of 510,848, making the future of immigrant-detention for profit uncertain.

US Marshals Service Facilities and Criminal Alien Requirement Prisons

Criminal Alien Requirement prisons, or "shadow prisons" get less press than ICE detention centers but are an important component in the privatized detention of migrants. These are managed by the Bureau of Prisons but operated *exclusively* by private firms and are used to detain immigrants convicted of federal crimes including unlawful border crossing. These facilities have a reputation for high levels of abuse, lack of programming, and inmate unrest. Another significant population of undocumented immigrants is held in US Marshals facilities. The USMS is responsible for pre-trial detention of individuals suspected of federal crimes, including illegal border-crossing, and contracts (partly) with private facilities for this purpose. Because private prisons contracted by the Bureau of Prisons and the US Marshals Service to detain immigrants are for federal offenders, it seems they will be among those closed under Biden's executive order.

On private detention by the DHS in the wake of Biden's Executive Order:

<https://immigrantjustice.org/staff/blog/phase-out-private-prisons-must-extend-immigration-detention-system>

<https://www.npr.org/2021/04/20/987808302/immigrant-detention-for-profit-faces-growing-resistance-after-big-expansion-unde>

On Shadow Prisons and US Marshals Detention Centers:

<http://crimmigration.com/2021/02/05/private-prison-policy-excludes-dhs-but-impacts-migrants/>

<https://www.detentionwatchnetwork.org/issues/shadow-prisons>