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## TIME TO DEAL WITH AMERICA'S PRISON CRISIS

### INTRODUCTION

Increasingly in America, crime does not lead to punishment. While reported crime rates have risen by more than 24 percent over the last decade, many convicted criminals serve only a small portion of their prison sentence behind bars or do not go to prison at all. Even those convicted of violent crimes typically serve only half their sentence in prison. And although as many as 83 percent of all Americans will be victims of a violent crime during their lifetime, some 55 percent of these crimes currently go unreported, and only 48 percent of reported crimes result in an arrest.<sup>1</sup>

Drugs have been the most important factor in the rising crime rate. From 1980 to 1986, the number of Americans convicted of federal drug law violations, including manufacturing, use, or distribution of drugs, jumped by 134 percent. In 1986, drug violations accounted for the sentences almost half of all state prison inmates. And over one-third of all state prison inmates were using drugs when they committed their crimes.<sup>2</sup>

**Failing to Meet Demand.** In short, America is experiencing a national crime emergency. The rapid increase in crime, fueled by the proliferation of drugs, is overloading the correctional system. The number of inmates in

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1 U.S. Department of Justice, Bureau of Justice Statistics, *Report to the Nation on Crime and Justice*, Second Edition, March 1988.

2 U.S. Department of Justice, *Bureau of Justice Statistics Special Report*, "Drug Use and Crime: State Prison Inmate Survey, 1986," July 1988. See also Jeffrey A. Eisenach, "Winning the Drug War: What the States Can Do," *The Heritage Foundation State Backgrounder*, No. 715/S, July 7, 1989.

federal and state prisons has almost doubled over the last decade and stands at 673,565<sup>3</sup> according to the most recent figures. Despite the public's get-tough-on-crime attitude and insistence on harsh, punitive sentences, the criminal justice system simply cannot meet the demand for swift and certain penalties.

**Releasing Dangerous Criminals.** Faced with an overpopulated prison system, officials increasingly are forced to release inmates long before they complete their sentence. In many cases, however, these officials have no choice, since federal district court judges have placed state facilities under court order to reduce the population, declaring that crowded conditions inflict "cruel and unusual punishment." These orders, based on the 8th Amendment to the Constitution, involve no formal definition of overcrowding, but are based instead on arbitrary standards, which differ from one judge to the next. The orders often force prison authorities to release dangerous criminals prematurely without considering the potential risk to the community.

An alarming number of prisoners released early go on to commit further crimes. In a special series on Florida's early-release program, the *Orlando Sentinel* reports that, from February 1987 to March 1989, one out of four prisoners released early was rearrested. A total of 2,180 crimes were committed by these prisoners, including eleven murders or murder attempts. "[These] inmates don't need to work for [early release]," explains the *Sentinel*, "or to perform heroic deeds. They get it simply because they are in a prison system that is forbidden by federal court order from crowding cells."<sup>4</sup> Similarly, Oklahoma City government officials attributed a three-month, 36 percent jump in the crime rate to the state's early-release program.<sup>5</sup>

**Small Dent.** The overcrowding problem will get worse in the future. While the 1988 federal and state prison population growth averaged 800 additional beds a week, this year's growth is running almost 1,800 additional beds a week.<sup>6</sup> This is placing enormous strains on the prison system, which will

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3 U.S. Department of Justice, Bureau of Justice Statistics, press release, "Prison Population Jumps 7.3 Percent in Six Months," September 10, 1989.

4 Sean Holton and Mark Vosburgh, "Special Report: Crime Before its Time," *The Orlando Sentinel*, August 13-16, 1989.

5 Susan Darst Williams, "Good Time/Early Release: Out Before Their Time," *Corrections Compendium*, July 1986.

6 U.S. Department of Justice, Bureau of Justice Statistics, press release, *op. cit.*

trigger more court orders. And studies indicate that the number of prisoners in the federal system alone will more than double over the next decade.<sup>7</sup> Moreover, although the Senate has thrown its support behind George Bush's anti-drug proposal and has approved his request for \$1 billion to finance federal prison construction for fiscal 1990,<sup>8</sup> Congress has not taken steps to provide prison space quickly and inexpensively. This means the new funds will make only a small dent in the overcrowding problem.

It is time for Congress to acknowledge that a crime emergency exists — that there is a steadily rising crime rate<sup>9</sup> coupled with an acute shortage of prison space at both the federal and state levels. Instead of passively allowing the courts to shift the burden from the prisons back to the streets, lawmakers need to take decisive action to provide more prison space as quickly and economically as possible. Congress should, among other steps:

- ◆ ◆ Authorize the federal Bureau of Prisons (BOP) to use closed military bases, vacant dormitories, tent housing, and other low-cost space to house nonviolent prisoners.

- ◆ ◆ Authorize BOP to contract with private firms to build and manage facilities, to provide prison space faster and less expensively.

- ◆ ◆ Authorize BOP to finance the construction of prisons through lease or lease-purchase arrangements.

To address the problem of early release of prisoners, Congress should:

- ◆ ◆ Direct U.S. district courts to require an inmate to prove that crowded conditions do, in fact, inflict cruel and unusual punishment upon him.

- ◆ ◆ Hold federal district court judges accountable for all sentencing and early-release decisions by requiring that they maintain records available to the public specifying each offender's criminal background, prison sentence, and portion of sentence completed.

Senator Phil Gramm, the Texas Republican, and several other legislators are expected to introduce a number of these recommendations before the end of the year in a comprehensive anti-crime package. This legislation would be an important step forward, authorizing the federal government to provide additional prison space quickly and inexpensively — in some cases at no cost to the taxpayer. Without legislation of this kind, Americans face the prospect

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7 The U.S. Sentencing Commission estimates that the federal prison population will rise from 42,000 in 1987 to 92,000 in 1997. U.S. Department of Justice, Bureau of Justice Statistics, "Our Crowded Jails: A National Plight," June 1988. Joan Petersilia of Rand Corporation projects that the population in large state prisons alone will increase 25 percent to 98 percent over the next eight years. Todd Clear, *Research in Corrections*, National Institute of Corrections and Robert J. Kutak Foundation, March 1988.

8 This is a provision of H.R. 3015, the anti-drug spending bill.

9 While the crime rate decreased by 2 percent from 1975 to 1977, it rose by 24 percent from 1977 to 1987. U.S. Department of Justice, Federal Bureau of Investigation, *Crime in the United States*, 1988.

of more and more prisoners returning to the streets before their sentences are complete.

## JUDICIAL INTERVENTION IN THE PRISON SYSTEM

In 1970, there were no prison facilities under court order. Today, some forty states are under order to improve prison conditions in at least one of their facilities. Because of these court orders, many of these prisons are subject to population caps, which limit the number of inmates a facility legally can house. In 1985 alone, states were forced to release over 18,600 inmates before they completed their sentences, many of these because of orders to reduce the prison population.<sup>10</sup>

These judicial orders, however, extend far beyond what most Americans would consider such legitimate rights of prisoners as proper health care and safety.<sup>11</sup> Court orders can challenge every aspect of prison life from the quality of medical and food services to sanitation, education, recreation, availability of law libraries, staff training methods, and other alleged rights. Moreover, judicial sanctions imposed for "inhumane" conditions affecting a small number of inmates often are applied to the entire correctional facility. In other cases, court orders are placed on an entire state correctional system.<sup>12</sup>

**Testing the Limits.** The recent expansion of judicial intervention, aimed at protecting what courts deem certain rights of prisoners, followed a 1969 Supreme Court decision that upheld the legal right of state inmates to challenge prison conditions in a federal court.<sup>13</sup> Since that decision, prisoners and civil rights attorneys have tested the limits of inmate rights in the federal court system. The Bureau of National Affairs, a private company that publishes reports on the activities of the federal government, notes that in 1976, almost 20,000 petitions were filed in federal courts by inmates requesting improved conditions. By 1987, that number had increased to more than 37,000.<sup>14</sup>

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10 U.S. Department of Justice, National Institute of Justice and American Correctional Association, *National Directory of Corrections Construction*, Second Edition, April 1988.

11 Samuel Jan Brakel, "Prison Reform Litigation: Has the Revolution Gone Too Far," *Corrections Today*, August 1987.

12 Nine states are facing federal court orders over their entire prison systems.

13 *Johnson v. Avery*, 393 U.S. 483, 1969.

14 Allen F. Breed, "Special Masters Ease Prison Reform," *Corrections Today*, May-June 1979. See also, *Sourcebook of Criminal Justice Statistics*, *op. cit.*

**Color TV and Air Conditioning.** How do courts define “prison overcrowding?” Definitions vary considerably among jurisdictions. Many judges consider a cell holding two inmates overcrowding, despite the Supreme Court’s ruling that double bunking is not unconstitutional.<sup>15</sup> The cell may be as large as 80 square feet – more than twice the size of officers’ quarters on a nuclear submarine that accommodate two or three men – provide colored television and air conditioning, and hold inmates for less than ten consecutive hours a day (including sleeping time), yet a judge may issue an order based on overcrowding.<sup>16</sup>

Some courts consider only the population “density” of a cell and follow the guidelines set by the American Correctional Association (ACA), a private organization that accredits state prisons. ACA guidelines, as well as those of the Department of Justice, include the stipulation that a prisoner in an adult correctional facility should not be confined to a 60-square foot cell for more than ten hours a day.<sup>17</sup> Officials at ACA hoped that setting such guidelines would encourage correctional agencies to adopt these criteria, thereby reducing the number of federal court action suits. This has not happened. In many cases, the courts have used these unofficial criteria as the basis for a court order against states that have not adopted the standards.<sup>18</sup>

### ***The Perverse Effects of Court Orders on the Prison System***

John J. DiIulio, Jr., a professor of Political Science at Princeton University, argues that the issue is not so much whether the courts have the right to intervene in disputes over prison conditions, as whether they are able to improve prison conditions through such court action. DiIulio points out that, although judges want to dictate the way prisons are managed, in most cases they lack sufficient knowledge of prison operations to make wise decisions. Few judges understand such things as effective methods of maintaining order and instilling inmate discipline; fewer still actually visit the cells to observe conditions firsthand.<sup>19</sup>

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15 *Bell v. Wolfish*, 1979, and *Rhodes v. Chapman*, 1981, in U.S. Department of Justice, Bureau of Justice Statistics, “Our Crowded Jails,” *op. cit.*

16 John J. DiIulio, Jr., “Prison Overcrowding and Judicial Intervention,” unpublished.

17 American Correctional Association, *Manual of Standards for Adult Correctional Institutions*, August 1977, and the U.S. Department of Justice, *Federal Standards for Corrections*, 1980.

18 Malcolm M. Feeley and Roger A. Hanson, “The Impact of Jail and Prison Conditions Litigation: A Review Essay,” paper prepared for the Meeting of the American Political Science Association, Washington, D.C., September 1-5, 1988.

19 John J. DiIulio, Jr., “Prison Discipline and Prison Reform,” *The Public Interest*, Fall 1987.

Furthermore, judges often have unrealistic expectations of how quickly or inexpensively state officials can implement court-ordered reforms. Observes Samuel Jan Brakel, a research attorney for the American Bar Foundation, "The substantive legitimacy of the reform...may be undermined when court orders disregard the pace at which changes can realistically be made and absorbed."<sup>20</sup> Careless rulings can mean wasting millions of tax dollars, as money is spent to introduce court-ordered remedies and to pay for attorney fees and court costs.<sup>21</sup>

**Special Masters.** While the ability of judges to make wise decisions is limited, their power to enforce decisions on prison managers has increased. One reason for this is the increased role of "special masters." The function of a special master is to provide a judge with background information on the operations of the particular prison under scrutiny. Viewed as the expert in prison management, the special master was intended to be the court's neutral adjunct to the prison system. But in practice, court-appointed special masters have evolved into significant players in the court bureaucracy. Rather than performing their original neutral function, special masters today are quasi-executive officials serving as extensions of the court, carrying out a judge's agenda for reform.<sup>22</sup>

A number of studies find that recent judicial intervention in prison operations has led to more prison violence, since court orders can undermine the state's authority over inmates, weaken prison staff morale, and trigger a breakdown in the system's method of enforcing inmate discipline.<sup>23</sup> *The*

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20 Samuel Jan Brakel, "Prison Reform Litigation: Has the Revolution Gone Too Far?" *Corrections Today*, August 1987.

21 See "Inside America's Toughest Prison," *Newsweek*, October 6, 1986: "(Ruiz v. Estelle plaintiff attorney) William Bennett Turner keeps winning in court. He's received a (Judge) Justice-ordered \$1.2 million fee and he's proud of his achievements." The costs for special masters and monitors in court orders issued against the Texas Department of Corrections have amounted to a range of \$500,000 to \$750,000 per year (Samuel Jan Brakel, *op. cit.*).

22 *Ibid.*

23 Malcolm M. Feeley and Roger A. Hanson, *op. cit.* See also Kathleen Engel and Stanley Rothman, "The Paradox of Prison Reform: Rehabilitation, Prisoners' Rights, and Violence," *Harvard Journal of Law and Public Policy*, 1984; John J. DiIulio, *Governing Prisons: A Comparative Study of Correctional Management* (New York: Free Press, 1987); and Bradley Chilton, *Guthrie v. Evans: Civil Rights, Prison Reform, and Institutional Reform Litigation*, Ph.D. thesis, University of Georgia, 1988.

*famous* 1972 *Ruiz v. Estelle* case in Texas is an example of how sweeping reforms can lead to alarming results. In this case, the Texas Department of Corrections (TDC) was required by federal district court judge William Wayne Justice to introduce major changes, despite the warnings of correction officials that the measures could provoke inmate violence.<sup>24</sup> Prior to the federal court decrees, TDC was considered one of the best managed systems in the nation.<sup>25</sup>

Following Judge Justice's order, requiring wide-ranging changes carried out between 1974 and 1978, the Texas system began to fall apart. The rate of staff turnover escalated; the number of homicides and assaults reached all-time highs; and prison gang leaders replaced the pro-administration "building tender" inmates who previously had helped prison officials maintain discipline and order.<sup>26</sup> Judge Justice and his staff had told TDC that his court would not merely reform the state's prison system, but would revolutionize it. They were right.

**No Correlation.** Despite the Texas episode, many courts continue to limit crowding because they assume it leads to violence.<sup>27</sup> However, a number of studies strongly dispute this. For instance, an analysis of the Texas prison system in 1983 found no correlation between crowding and cases of violence.<sup>28</sup> The Bureau of Justice Statistics comes to the same conclusion, based on a survey conducted between 1983 and 1984. In fact, the survey found that violence was more prevalent in less crowded prisons.<sup>29</sup>

John DiIulio also finds that facilities with higher inmate densities have a lower rate of inmate violence. Men's Colony, a maximum-security prison in California, is one of the most overcrowded facilities in the country. Yet there has been a decline in violence as the population has risen. DiIulio attributes

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24 Among the multitude of changes required by Judge Justice, TDC had to terminate the use of building tenders, a system where inmate leaders were chosen by prison officials to maintain order by influencing and disciplining the rest of the inmates; overhaul the inmate classification system and hold fewer prisoners in maximum security; provide inmates with access to state-of-the-art medical care; and provide single-cell housing for all prisoners. See DiIulio, "Prison Discipline and Prison Reform," *op. cit.*

25 Compared with other state prison systems of a similar size, Texas had one of the lowest rates of violence. The cost per inmate in Texas was well below the national average, and Texas was the only state to have a fully accredited education program within its penal system. See DiIulio, *The Public Interest*, *op. cit.*

26 *Ibid.*

27 There have, in fact, been very few studies on the impact of crowding on inmate disturbances. See Paul B. Paulus, *Prison Crowding: A Psychological Perspective* (New York: Springer-Verlag, 1988).

28 Study conducted by Sheldon Eklund-Olson, in Robert G. Leger, "Perceptions of Crowding, Racial Antagonism, and Aggression in a Custodial Prison," *Journal of Criminal Justice*, 1988.

29 U.S. Department of Justice, Bureau of Justice Statistics, "Population Density in State Prisons," *op. cit.*



this inverse relationship to improvements in management and discipline as the facility took in more prisoners.<sup>30</sup>

### **The Supreme Court's "Hands-off" Approach**

Despite the federal district courts' affinity for judicial intrusion, the Supreme Court has in fact ruled that it is not the role of the judicial system to administer prisons. As the Court declared in a 1976 case, "...the problems of prisons in America are complex and intractable, and, more to the point, they are not readily susceptible of resolution by decree. Most require expertise, comprehensive planning, and the commitment of resources, all of which are peculiarly within the province of the legislative and executive branches of government."<sup>31</sup>

Similarly, in a 1988 case concerning Occoquan Prison, a facility operated by Washington, D.C., the U.S. Court of Appeals reversed a U.S. District Court's decision to impose caps on the number of inmates admitted to the prison. Writing for the majority, Judges Kenneth Starr and Laurence Silberman wrote that a population cap "[carries] with it the high danger of judicially intruding...into the most fundamental arenas for decision-making reserved in a democratic society to the political branches."<sup>32</sup> The Supreme Court also has declared that "lawful incarceration brings about the necessary withdrawal or limitation of many privileges and rights, a retraction justified by the considerations underlying our penal system."<sup>33</sup>

Despite these declarations, the Supreme Court has not taken steps to dissuade federal judges from such orders. Federal district court judges generally have not hesitated to require prisons to provide various privileges and amenities for their inmates, such as serving hot meals at a specific temperature or providing comfortable meeting rooms and recreation facilities.

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30 John J. DiIulio, Jr., *Governing Prisons: A Comparative Study of Correctional Management* (New York: Free Press, 1987).

31 *Procunier v. Martinez*, 416 U.S. 396, 404-05, 1974.

32 Rick Glaser, "Singing the D.C. Prison Blues," *Legal Times*, August 8, 1988.

33 *Jones v. North Carolina Prisoners' Union, Inc.*, 433 U.S. 119, 125, 1977.

## HOW TO PROVIDE EMERGENCY PRISON SPACE

Although the courts use poor judgment in trying to solve overcrowding, often handing down orders that frustrate prison authorities, there still is no question that America faces an underlying shortage of prison space. The court orders simply turn an acute problem into a crisis. At the end of 1987, more than 40,000 prisoners were held in federal prisons designed to hold 29,000, and there were 533,000 inmates in state prisons designed to hold no more than 500,000 prisoners.<sup>34</sup>

If criminals are to receive swift and certain penalties, more prisons need to be built. And while state spending has risen faster for prisons than for any other major program in the 1980s, construction has not kept pace with the influx of prisoners.<sup>35</sup> The only way many jurisdictions can find space for new inmates is to place some current inmates on probation. Some offenders never make it to prison at all. In the District of Columbia earlier this year, the police were forced to drop plans to make a mass arrest of drug dealers when they learned there was no prison space available to house them.<sup>36</sup>

Yet, there are quick, inexpensive ways to obtain badly needed prison space. For example, existing facilities, such as closed military bases and vacant dormitories, can be used to hold nonviolent offenders, thereby freeing prisons for inmates convicted of violent crimes. Many states, and to a lesser extent the federal government, are exploring ways to convert existing buildings to prison use and to use innovative short-term solutions. Among the approaches:

### 1) Closed military bases.

The Commission on Base Realignment and Closure targeted 145 military facilities for closure or contraction.<sup>37</sup> Barracks, brigs, and other existing facilities, serving no other useful purpose on closed bases, could be converted easily into minimum or nonsecurity prisons for minor drug offenders and other nonviolent criminals. Besides providing the badly needed space, the prisons would create new jobs in the district and boost the local economy. Using closed military facilities to hold prisoners is not new. Maxwell Air Force Base in Montgomery, Alabama, has been used as a federal prison since

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<sup>34</sup>Richard B. Abell, "Beyond Willie Horton," *Policy Review*, No. 47, Winter 1989.

<sup>35</sup>Thomas B. Edsall, "States' Prison Programs Are Fastest-Growing Cost," *Washington Post*, August 8, 1989. States collectively spend about \$65 million a week on prison construction, alone: Scott Ticer, "The Search for Ways to Break Out of the Prison Crisis," *Business Week*, May 5, 1989. Also, the states collectively have proposed close to \$3 billion for fiscal 1990 to build and expand prisons. Al Pagel, "Military Bases — Sites for Prisons?" *Corrections Compendium*, January-February 1989.

<sup>36</sup>Michael Isikoff, "Bennett's Anti-Drug Initiative Making Little Headway in D.C.," *The Washington Post*, October 17, 1989.

<sup>37</sup>U.S. Senate Republican Policy Committee, "Bursting at the Beams: America's Overcrowded Prisons," April 19, 1989.

the 1930s. In addition, there are two converted bases in Florida: an 800-bed minimum security prison camp at Elgin Air Force Base and a 120-bed facility at Tyndall Air Force Base. Officials revamped a dormitory and administration building into prisons at Tyndall at a total cost of only \$75,000.<sup>38</sup> Senator Jesse Helms, the North Carolina Republican, has proposed an amendment (H.R. 3072) to the defense appropriations bill, that the Commission on Alternative Utilization of Military Facilities give top priority to converting closed bases into minimum security prisons.

**2) Closed dormitories, hospitals, warehouses, and other vacant buildings.**

One of the greatest advantages to converting closed buildings, besides saving taxpayer dollar, is that the structures are already in place and comply with zoning regulations. Several jurisdictions already are converting closed buildings into prisons. Harns County, Texas, is revamping a 63-year-old warehouse in Houston into a 4,200-bed detention center. The facility is scheduled for completion next year and will cost the county a total of \$78 million.<sup>39</sup>

**3) Tent facilities.**

Facing crowded jail conditions, state officials in Hudson County, New Jersey, held 100 inmates last August in tents placed next to the County Jail Annex, while additional cells were being built.<sup>40</sup> A number of states, including Florida and Texas, have tried to set up tent housing on prison grounds but were prevented from doing so by federal court orders declaring that such conditions were "inhumane."<sup>41</sup>

**4) Prefabricated or modular facilities.**

Prefabricated construction also may be a source of at least temporary prison space. Modulares are manufactured, standardized units that can be assembled on concrete flooring.<sup>42</sup> An increasing number of private businesses are entering the prefab prison construction market, providing a wide range of designs that vary in size, level of security, and materials used for construction.

Costs of these prefabricated units vary from \$4,000 to \$30,000 per bed, compared with prison construction costs of about \$90,000 per bed. Loudon County, Virginia, for instance, paid construction costs of only \$98,000, or \$4,000 per bed, for a prefabricated work release jail. The facility was built by

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38 Pagel, *op. cit.*

39 Andrew H. Malcolm, "Aged Inmates Pose Problem for Prisons," *New York Times*, February 24, 1988.

40 Associated Press, "100 Inmates Moving to Tents," *New York Times*, August 8, 1989.

41 Conversation with Stan Czerniak, Security Administrator, Florida Department of Corrections, September 12, 1989.

42 In some cases, flooring is also pre-manufactured.

Surfside "6" Industries of McLean, Virginia, out of steel and concrete shipping containers, and the 23-bed facility was completed in only two weeks.<sup>43</sup>

## PRIVATIZATION OF PRISON OPERATIONS

Faced with pressures to provide more permanent prison space both to comply with court orders and to respond to citizen pressures, state and local governments have been examining ways to build and manage facilities at lower cost. One such approach that seems to be paying off is privatization. States and localities increasingly are granting correctional agencies much broader authority to contract out to nonprofit organizations in the private sector. In addition, over two dozen for-profit organizations now provide some form of correctional service.<sup>44</sup>

These private organizations can achieve significant savings for governments facing tight budgets. In a 1989 study comparing the costs of managing a public and a private prison, Charles H. Logan, Associate Professor of Sociology at the University of Connecticut, and Bill W. McGriff, County Auditor for Hamilton County, Tennessee, estimate that the privately operated prison in Hamilton County costs the county between 4 percent and 8 percent less to operate than the cost would be if the county operated it.<sup>45</sup> Similarly, private corrections firms, such as Corrections Corporation of America (CCA), U.S. Corrections Corp., and Wackenhut Services, Inc., claim to be able to save the government between 5 percent and 10 percent in operational costs.<sup>46</sup> One major reason for the savings is that private firms are not burdened by bureaucratic red tape and cumbersome government restrictions, so they can be innovative and flexible and thereby stretch dollars further.

**Contracting Out.** Besides using private organizations to manage prison facilities, a rising number of state and local governments are contracting out to the private sector for the design, financing, and construction of prisons. These arrangements often involve a consortium of firms who are able to take

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43 Richard Abell, "Office of Justice Programs Review: Conference Address Highlights NSA Partnership," *The National Sheriff*, August-September 1989.

44 Keon S. Chi, "Prison Overcrowding and Privatization: Models and Opportunities," *The Journal of State Government*, The Council of State Governments, March/April 1989.

45 Because of the hidden costs of government-run prisons and the fact that costs incurred by public prisons are different from those incurred by private and not easily compared, underestimating government costs is likely. Logan and McGriff conclude the actual cost savings under private operation is more likely between 5 and 15 percent. See Charles H. Logan and Bill W. McGriff, "Comparing Costs of Public and Private Prisons: A Case Study," *NIJ Reports*, U.S. Department of Justice, National Institute of Justice, September/October 1989.

46 Scott Ticer, *Business Week*, *op. cit.*

advantage of design innovations and creative financing packages to build facilities faster and less expensively. For example, Colorado has contracted with a group of for-profit firms to provide the state with a \$40 million medium-secure prison. American Correctional Systems, Inc., will design and manage the facility; Bechtel Group, Inc., will construct the prison; Daewoo International Corp. of South Korea will handle the financing; and Shearson Lehman Brothers, Inc., will underwrite the enterprise.<sup>47</sup>

## WHAT CONGRESS SHOULD DO TO DEFUSE THE PRISON CRISIS

The combination of a rising crime rate and a shortage of prison space constitutes a national crime emergency. Congress needs to take swift action to deal with this emergency. In addition to the pending anti-crime spending bill, Congress should take swift action on a package of measures being readied by Senator Phil Gramm, the Texas Republican. The legislation, to be introduced soon, should help put an end to the current revolving-door process by which convicted criminals reappear legally on the streets long before their sentences are complete.

When considering the Gramm proposals or any prison legislation introduced by other lawmakers, Congress should make sure that final legislation will at the very least:

**1) Direct the federal district courts to refrain from requiring prisons to release dangerous inmates because of prison population caps.**

Courts today base orders on the "totality of conditions" or general conditions affecting inmates as a class, not on specific conditions affecting inmates individually. Before issuing orders for "inhumane" conditions, judges should require proof from a plaintiff in prison that he or she was, in fact, subjected to cruel and unusual punishment. When unacceptable conditions are found, judges should be instructed to consider alternative measures to immediate early release as a way of rectifying the problem. A prisoner should be released only as a last resort and after a judge is convinced that no alternative remedy exists and that the inmate creates no danger to the community.

**2) Authorize the U.S. Attorney General to limit the special master's authority in the federal district court.**

The role of special master should be limited to providing the federal court with background information on the prison facility under scrutiny. Special masters should not have the authority to interfere in the management or operation of a prison.

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<sup>47</sup>See Dana C. Joel, "A Guide to Prison Privatization," Heritage Foundation *State Background*, No. 650/S, May 24, 1988.

**3) Authorize the U.S. Attorney General to require that public records be maintained on all federal prisoners.**

To hold federal judges accountable to the public for their decisions on sentences and early releases, records should be kept detailing each offender's criminal history, court-ordered sentence, and portion of sentence completed. All records should be available to the public upon request.

**4) Authorize the General Services Administration, in consultation with the U.S. Attorney General, to identify at least twenty parcels of federal surplus land that can be sold to state and local governments for building state prisons and county jails.**

One of the greatest challenges for states and localities is finding suitable sites for prisons. Impediments, such as obtaining voter approval to build a prison in a particular district or finding available land away from a large population center, can slow down the construction process considerably. The federal government should identify suitable parcels of federal surplus land that could be sold to those states and localities wishing to purchase the land for prison use.

**5) Authorize the Commission on Alternative Utilization of Military Facilities to give top priority to converting the facilities into minimum security prisons.**

If the amendment pending in the Senate defense appropriations bill does not become law, Congress should reintroduce the provision as part of the anti-crime package.

**6) Authorize the federal Bureau of Prisons (BOP) to use easily available, inexpensive forms of housing to hold nonviolent offenders, in order to free existing prison space for more dangerous inmates.**

BOP should be instructed to identify and convert appropriate vacant government facilities into prisons to hold nondangerous offenders. BOP also should be expressly permitted to make greater use of temporary structures, such as tents and modular units, to hold nonviolent inmates awaiting available prison space.

**7) Direct the federal courts to allow states to hold non-violent prisoners in tents, while permanent facilities are under construction.**

Tents have been used successfully by a few states. Other states, such as Florida and Texas, also would use tents if officials were assured that the courts would not issue orders prohibiting their use.

**8) Authorize BOP to contract out to the private sector the design, financing, building, and management of secure, as well as nonsecure, prison facilities.**

BOP contracts out most of its nonsecure Community Treatment Centers, or halfway houses, as well as a number of detention centers, but has not received authorization from Congress to contract out the management of more secure

adult facilities. The federal government should follow the lead of many states and counties, which benefit from greater efficiency and potential cost savings through prison privatization.

## CONCLUSION

The crime rate in America has been rising steadily over the last decade, yet offenders today are spending less time behind bars than ever before. The reasons: available prison space has not kept pace with the growing number of felons, and judges are forcing prisons to release inmates to reduce overcrowding.

**Comprehensive Package.** Releasing dangerous offenders to make more prison space available is not the solution to America's crime epidemic. The anti-drug bill now before Congress will appropriate \$1 billion for prison construction, but the bill does little to assure that prison space will be provided quickly and inexpensively.

Congress instead should send the President a comprehensive anti-crime package that will restrain judges from ordering the early release of inmates on questionable grounds and also will permit all levels of government to use innovative, less costly techniques to provide short-term and long-term prison space. If Congress fails to do this, legislation introducing tougher penalties for lawbreakers will be meaningless.

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