

THE BUSINESS OF IMMIGRATION: TRACKING PRISON PRIVATIZATION'S INFLUENCE ON IMMIGRATION POLICY

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I. INTRODUCTION: THE BIRTH OF PRIVATIZED IMMIGRATION SERVICES

The United States functions on a theory of Capitalism, wherein actors seek to maximize individual profits instead of ensuring social equality. Privatization and Capitalism go hand-in-hand, offering entrepreneurs opportunities to pull profits from traditionally public sectors. The privatization of

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homeland security and immigration enforcement has been a recent addition to this scheme. Although immigration enforcement appears to have broad goals of border security, civilian safety, and a desire for legal legitimacy, today's privatization of homeland security arose mainly in response to terrorism.¹ Prior to the Bush presidencies and 9/11, homeland security and border protection were controlled primarily by the government and profiteering was limited.² On September 10, 2001, then Secretary of Defense Donald Rumsfeld abruptly rejected the views of his mentor and founder of modern American Neoliberalism, Milton Friedman, who believed government intervention was harmful, and the best economy was a free-market economy,³ and declared privatization and outsourcing as the solution to government bureaucracy.⁴ Following the events the next day, Rumsfeld put his plan into action, privatizing the war in Iraq by replacing U.S. military personnel with private security services⁵ and creating the new Department of Homeland Security (DHS), expanding duties that had previously been covered by the Department of Justice (DOJ).⁶ Within DHS, the Bush administration began an extensive privatization of services in the name of combating the war on terror – particularly with respect to immigration.⁷

It may come as surprising that the largest detention and supervised release program in the country is now operated by DHS, and not DOJ.⁸ In December 2015, for instance, the Bureau of Prisons (BOP) had 200,000 people in custody while DHS detained approximately 400,000 that year.⁹ The privatization of immigrant detention is not brand new, and some trace its inception to the early 1980's when the government began experimenting with incarceration for profit by using immigrants as its test case.¹⁰ One story further traces the birth of the entire private prison system to a 1980 fundraiser in Nashville, Tennessee for then presidential candidate Ronald Reagan.¹¹ Soon after attending the fundraiser, the Chairman of the Tennessee Republican Party and the Corrections Commissioners of Virginia and Tennessee set up the Corrections Corporation of America (CCA) and in 1984, CCA signed its first

1. Robert Koulish, *Immigration and American Democracy: Subverting the Rule of Law* 75, 78-82 (2010).

2. *Id.* at 75.

3. Charles Goodhart, *Milton Friedman: Nobel-Prizewinning US Economist whose Monetarist Analysis Dented the Keynesian View but Proved Difficult to Implement*, *The Guardian* (Nov. 16, 2006), available at <https://www.theguardian.com/news/2006/nov/17/guardianobituaries.politics>.

4. Koulish, *supra* note 1, at 75.

5. Ian Traynor, *The Privatisation of War*, *The Guardian* (Dec. 9, 2003), available at <https://www.theguardian.com/world/2003/dec/10/politics.iraq>.

6. Koulish, *supra* note 1, at 75.

7. *Id.*

8. Sharita Gruberg, *How For-Profit Companies Are Driving Immigration Detention Policies*, *Center for American Progress* 1 (Dec. 2015), available at <https://cdn.americanprogress.org/wp-content/uploads/2015/12/17121556/ForProfitDetention-briefDec.pdf>.

9. *Id.*

10. Robert E. Koulish, *Blackwater and the Privatization of Immigration Control*, 20 *St. Thomas L. Rev.* 462, 476 (2008).

11. *Id.* at 476.

contract with the federal government to operate Immigration and Nationalization Service (INS) detention centers in Houston and Laredo, Texas.¹² During these early years, the scope of immigration incarceration – private or otherwise – was limited; there were only 4,062 available beds in 1980 and 5,532 in 1994.¹³ In 1996, Congress passed the Antiterrorism and Effective Death Penalty Act and the Illegal Immigration Reform and Immigrant Responsibility Act, which greatly expanded the categories of immigrants who were deportable and subject to mandatory detention. The expansion of these categories unsurprisingly expanded immigration detention capacity from 8,279 in 1996 to 14,000 in 1998.¹⁴

Even though bed-capacity increased rapidly from 1980 to 1998, for-profit prisons did not start receiving many of the government contracts until 2000 when the federal government began to bail out the private prison industry, which was teetering on the verge of bankruptcy.¹⁵ States which had relied on private prisons in the 1990's to deal with new increased sentencing guidelines¹⁶ and an influx of inmates convicted in the “War on Drugs” began to distance themselves from the private prison industry after a series of highly publicized escapes, riots and other scandals, including a “1996 videotape showing inmates in a now-defunct firm’s Texas prison being kicked by officers and attacked by dogs, which prompted an FBI investigation.”¹⁷ On the verge of bankruptcy, CCA contracted in 2000 with the federal government to run the Otay Detention Center near San Diego – a center with 1,000 beds for which the agency paid a per diem rate of \$89.50 for every person held.¹⁸ CCA called the agreement “one of the largest contracts ever to be awarded to the private corrections industry,”¹⁹ the earliest of many federal government bail-outs that likely saved the private prison industry.

Immigrant detention and deportation has risen dramatically since that bail-out. In fiscal year 2017, Immigrations and Customs Enforcement (ICE) jailed a daily average of nearly 40,500 people, up from approximately 14,000 in 1998.²⁰ In June of this year, ICE spokeswoman Danielle Bennett reported

12. *Id.*

13. Gruberg, *supra* note 8, at 2.

14. *Id.*

15. *Id.*

16. Patrice L. Fulcher, *Hustle and Flow: Prison Privatization Fueling the Prison Industrial Complex*, 51 Washburn L.J. 589, 591 (2012).

17. *Id.* at 591.

18. Leslie Berestein, *Detention Dollars: Tougher Immigration Laws Turn the Ailing Private Prison Sector Into A*

Revenue Maker, San Diego Union-Tribune (May 4, 2008), available at <http://www.november.org/stayinfo/breaking08/ToughImmigration.html>.

19. *Id.*

20. *ICE Lies: Public Deception, Private Profit*, Detention Watch Network & National Immigrant Justice Center 2 (2018), <https://www.immigrantjustice.org/index.php/research-items/report-ice-lies-public-deception-private-profit> [hereinafter, “DWN & NIJC”].

housing a daily average of 41,134 detainees in fiscal year 2018,²¹ despite the recently passed appropriations bill that states that ICE can have no more than 40,354 immigrants in detention by the time the fiscal year ends in September.²² The White House clearly wanted a sharp increase in beds as they requested increased funding for more than 51,000 beds; a 66% increase from the previous mandated capacity. Most importantly, under the bill, the Homeland Security secretary is granted discretion to transfer funds from other accounts “as necessary to ensure the detention of aliens prioritized for removal.”²³ This leaves the executive exceptional authority over immigrant detention and little guarantee that only 40,345 beds will be funded. Additionally, on April 6, 2018, President Trump issued a memorandum directing his administration to quickly bring an end to “catch and release,” a practice where immigrants presenting themselves at the border without authorization are released from detention while waiting for their cases to be processed.²⁴ The memo directs the Departments of Homeland Security, Defense, Justice and Health and Human Services to report how they will ensure those immigrants are detained, specifically requesting a list of steps taken to allocate money to build detention facilities near the borders, and the existing facilities, including military facilities, that could be used to detain those violating immigration law.²⁵ In response to the memo, U.S. Citizenship and Immigration Services, Customs and Border Protection, and Immigration and Customs Enforcement decided to prosecute adults with children, separating families and detaining thousands of children in the process, because it “would likely have the most effective impact” and be “the most effective method” of achieving the “administration’s goal of ending ‘catch and release.’”²⁶

Not all detained immigrants are deported, and what factors are used to target immigrants for deportation is an additional policy consideration. TRAC Reports, Inc. has compiled highly detailed data on ICE removals since 2003. In fiscal year (FY) 2003, ICE deported 159,331 people.²⁷ That number spiked to 407,821 in FY 2012, and fell to 240,074 in FY 2016. When the data is

21. Robert Moore, *Immigration Officials Taking Over 1,600 Beds in Federal Prison System*, Texas Monthly (Jun. 8, 2018), <https://www.texasmonthly.com/news/immigration-officials-taking-1600-beds-federal-prison-system/>.

22. Mike DeBonis, Ed O’Keefe & Erica Werner, *Here’s What Congress Is Stuffing Into Its \$1.3 Trillion Spending Bill*, Wash. Post (Mar. 22, 2018), https://www.washingtonpost.com/news/powerpost/wp/2018/03/22/heres-what-congress-is-stuffing-into-its-1-3-trillion-spending-bill/?utm_term=.9fd71e52a694.

23. *Id.*

24. Julie Hirschfeld Davis, *Trump Signs Memo Ordering End to ‘Catch and Release’ Immigration Policy*, N.Y. Times (Apr. 6, 2018), available at <https://www.nytimes.com/2018/04/06/us/politics/trump-immigration-policy.html>.

25. *Id.*

26. Cora Currier, *Prosecuting Parents — and Separating Families — Was Meant to Deter Migration, Signed Memo Confirms*, The Intercept (Sep. 25, 2018, 9:00 AM), <https://theintercept.com/2018/09/25/family-separation-border-crossings-zero-tolerance/>.

27. TRAC Immigration, http://trac.syr.edu/phptools/immigration/remove/about_data.html (last visited Sept. 28, 2018).

sorted to only include “illegal entry,” and not more serious offenses like assault, sexual offenses, or burglary, the data shows a different trend. In FY 2003, 7,331 people were deported, spiking to 50,515 in FY 2012, and dropping to 33,880 in FY 2016. In 2017, ICE reported it removed 226,119 illegal aliens, and a 40% increase of Enforcement and Removal (ERO) arrests (143,470 people).²⁸ ICE highlights one policy change in this increase: “ICE no longer exempts any class of removable aliens from potential enforcement activity.”²⁹ These numbers mean a few things: first, that the number of detained immigrants and available beds has been increasing significantly since 1998, but deportations have fallen since 2012; and second, that *any* illegal immigrants – even if they have no other offense apart from illegal status – are now being detained at a dramatically higher rate. More detainees and less deportations means that more facilities and beds are required. The big question is: who or what is driving this trend? Is it based on widespread popular policy preferences or something else? And what effect does this trend have on society?

II. PUBLIC OPINION

One possible argument for this increase is a shift in national opinion regarding immigration and illegal immigration. In theory, if a particular issue matters to the population, and they vote based on these issue positions, the policies that develop would roughly match those preferences. Gallup has tracked opinion on immigration and immigration policy since at least 2001, and several trends are notable.³⁰ For instance, on illegal immigration, Gallup asked: “Please tell me if you personally worry about this problem a great deal, a fair amount, only a little or not at all?” In March 2001, 28% worried about it a great deal, 24% a fair amount, 29% a little, 18% not at all, and 1% had no opinion.³¹ The worry spiked between 2006 and 2008, with March 2007 showing 45% worried a great deal, 23% a fair amount, 20% a little, 12% not at all, and 1% had no opinion.³² In the most recent polling of March 2017, 37% worried a great deal, 22% a fair amount, 22% a little, and 18% not at all.³³

Another relevant question Gallup tracked was:

Which comes closest to your view about what government policy should be toward illegal immigrants currently residing in the United States? Should the government – deport all illegal immigrants back to

28. *By the Numbers FY 2017*, Dep’t of Homeland Sec., Immigrations and Customs Enforcement, <https://www.ice.gov/topics/fy2017>.

29. *Id.*

30. *In-Depth: Topics A-Z: Immigration*, Gallup available at <http://news.gallup.com/poll/1660/inmigration.aspx> (last visited Apr. 30, 2018).

31. *Id.*

32. *Id.*

33. *Id.*

their home country, allow illegal immigrants to remain in the United States in order to work, but only for a limited amount of time, or allow illegal immigrants to remain in the United States and become U.S. citizens, but only if they meet certain requirements over a period of time?³⁴

In April 2006, 18% said deport all, 17% said remain in U.S. to work, 63% said remain to become a U.S. citizen, and 2% had no opinion. These numbers have not shifted that much since then, with “deport all” peaking at 24% in March 2007, and settling back at 19% in March 2015, with 65% selecting remain as U.S. citizen. Based on these polls, public opinion has not shifted towards an increased detention/deportation scheme since 2006, and “great deal of worry” about illegal immigration decreased from 2007 to 2017. Yet, an increased number of immigrants have been detained and deported as the years progressed, with ERO arrests rising 40% from 2016 to 2017.³⁵ Public opinion alone does not match the policy changes; something else is at play. The remainder of this paper will examine what effect, if any, private actors—particularly private prison companies—have had on directing immigration policy.

III. THE PRIVATE ACTORS

The privatization of immigration services goes beyond detention centers, and includes the privatization of border security, monitoring and bail, transportation, and legal services.³⁶ All-in-all, immigration privatization has become a very profitable business. Two of the biggest for-profit prison services are detention centers and monitoring/bail, so this paper will focus on what role, if any, these businesses had in driving immigration policy.

A. *Detention Centers*

The most visible aspects of immigration privatization are private immigration detention centers, but it is difficult to find consistent reports on how many and what percent of immigrants are detained in these private facilities. In December 2016, the Homeland Security Advisory Council released a comprehensive report entitled “Report of the Subcommittee on Privatized Immigration Detention Facilities.”³⁷ The report was commissioned after the BOP announced its intention to reduce and ultimately end its use of private

34. *Id.*

35. *ICE by the Numbers*, *supra* note 28.

36. *See, e.g.*, Jennifer M. Chacon, *Privatized Immigration Enforcement*, 52 Harv. C.R.-C.L. L. Rev. 1, 12-18 (2017).

37. *Report of the Subcommittee on Privatized Immigration Detention Facilities*, Dep’t of Homeland Sec., Homeland Sec. Advisory Council (Dec. 1, 2016), <https://www.dhs.gov/sites/default/files/publications/DHS%20HSAC%20PIDF%20Final%20Report.pdf>.

prisons and was meant to determine whether ICE should follow suit.³⁸ BOP had been contracting with private prisons for the previous decade, but a series of changed policies on drug sentencing decreased the federal prison population from 220,000 in 2013 to 195,000 at the release of the report in 2016.³⁹ Only 15 percent of BOP inmates were housed in private facilities.⁴⁰ The declining population meant that DOJ could close several facilities, and planned to target private prisons in that process. ICE detainment, in contrast, depended largely on private facilities.⁴¹ The report noted how immigration detention had evolved in recent years into a mixed public-private system where only 10 percent of detainees were housed in Immigration and Customs Enforcement (ICE) owned facilities, while 65 percent of detainees were housed in facilities operated by private, for-profit contractors, and the last 25 percent were housed in facilities operated by county jails or other local or state government entities.⁴² Ultimately, the report concluded that the sporadic nature of immigration enforcement and detainment made it unrealistic and costly to phase out the use of private prisons, but that higher standards and oversight should be practiced at those facilities.⁴³

Another report released in 2016 by the American Civil Liberties Union (ACLU) put the percentages even higher, noting by summer 2016, the average daily immigration detainee population exceeded 37,000, with 73 percent detained in privately run facilities, about 15 percent in county jails, and only 12 percent are in federally-owned facilities.⁴⁴ The inconsistency of these numbers stems from an overall lack of oversight and transparency in immigration detention, particularly with respect to private prisons.⁴⁵ Unlike federally-run facilities, privately contracted prisons are not required to provide Congress or DHS with information about detention operations.⁴⁶ Further, private contractors are also exempt from complying with Freedom of Information Act (FOIA) requests, are protected in litigation by complex contractor immunity doctrines, and are not subject to notice and comment procedures under the Administrative Procedure Act (APA).⁴⁷ Notably, even DHS criticized the private detention facility program in 2016 for its reliance on no-bid contracts, a lack of accountability in its solicitations, and “an imbalance of power that sometimes allows contractors to dictate or unduly influence

38. *Id.* at 1.

39. *Id.* at 7.

40. *Id.*

41. *Id.*

42. *Id.* at 5-6.

43. *Id.*

44. *Shutting Down The Profiteers: Why and How the Department of Homeland Security Should Stop Using Private Prisons*, American Civil Liberties Union 1, (Sept. 2016), https://www.aclu.org/sites/default/files/field_document/white_paper_09-30-16_released_for_web-v1-opt.pdf (hereinafter “ACLU”).

45. *Id.*

46. *Id.* at 2.

47. DWN & NIJC, *supra* note 20, at 2; Koulish, *supra* note 10, at 14.

conditions of care, population management, and other practices.”⁴⁸ The end result of these policies is that the public lacks a way to track the accountability of these facilities and leaves private prison companies free to choose profits over people. Both DHS and DOJ enter into these questionable contracts, so they alone do not explain the huge discrepancy between percentage of private prison use. One reason for the difference appears to be the actions (and dollars) of the private prisons themselves.

Currently, the two largest for-profit prison companies with which the United States contracts to detain immigrants are CoreCivic⁴⁹ and GEO Group Inc.⁵⁰ It is worth noting that these two companies claim to control at least three quarters of the private prison industry, a feat achieved by buying most of their competitors.⁵¹ GEO, for instance, spent \$2 billion from 2005 to 2015 to acquire nine companies in the industry.⁵² CoreCivic (then CCA) spent \$229 million to acquire three companies from 2013-2016.⁵³ In the midst of these expansions, both companies changed names in the past twenty years; CCA changed its name to CoreCivic in 2016 in a move some saw as an attempt to rebrand itself amidst criticisms of corruption,⁵⁴ and Wackenhut became GEO in 2003.⁵⁵

Both companies have made hefty profits as immigrant detention numbers skyrocketed from an estimated 26,500 daily in 2007⁵⁶ to more than 40,000 in 2017. At a glance, CCA made \$133,373,000 in 2007, skyrocketed profits to \$304,590,000 in 2013, and pulled in a respectable \$178,040,000 in 2017.⁵⁷ GEO experienced an even more dramatic profit increase of from \$41,845,000 in 2007 to \$117,460,000 in 2013 and making \$146,020,000 in 2017; a 248% increase over ten years.⁵⁸ A considerable amount of the profit comes from ICE. In 2008, these two companies received a combined \$307 million in

48. *Report of the DHS Advisory Committee on Family Residential Centers*, Dep’t of Homeland Sec. 34 (2016).

49. In 2016, CCA changed its name to CoreCivic, but as most sources still cite to CCA, so will this paper.

50. ACLU, *supra* note 44, at 10.

51. Ryan Katz, *Why Two Companies Dominate the Private Prison Industry*, Marketplace (Mar. 4, 2015, 5:00 AM), <https://www.marketplace.org/2015/03/04/economy/why-two-companies-dominate-private-prison-industry>.

52. *GEO Group and Corrections Corporation of America Spend Billions of Taxpayer Dollars Purchasing Smaller Companies*, In the Public Interest 1 (Sept. 2016), <https://www.inthepublicinterest.org/fact-sheet-geo-group-and-corrections-corporation-of-america-spend-billions-of-taxpayer-dollars-purchasing-smaller-companies/>.

53. *Id.* at 2.

54. See, e.g., Richard “RJ” Eskow, “CoreCivic”: New Name, Same For-Profit Prison Greed, HuffPost (Nov. 3, 2016, 11:12 AM), https://www.huffingtonpost.com/rj-eskow/corecivic-new-name-same-f_b_12785934.html.

55. *GEO Group History Timeline*, GEO Group (last visited Apr. 28, 2018), https://www.geogroup.com/history_timeline.

56. Sylvia Moreno, *Detention Facility for Immigrants Criticized* (Feb. 22, 2007), <http://www.washingtonpost.com/wp-dyn/content/article/2007/02/21/AR2007022101661.html>.

57. *Annual Financials for CoreCivic Inc.*, MarketWatch.com (last visited Apr. 29, 2018), <https://www.marketwatch.com/investing/stock/cxw/financials>.

58. *Annual Financials for Geo Group, Inc.*, MarketWatch.com (last visited Apr. 29, 2018), <https://www.marketwatch.com/investing/stock/geo/financials>.

revenue from ICE detention contracts. By 2015, that number had more than doubled, to more than \$765 million.⁵⁹ In fiscal year 2017, ICE spent \$2.6 billion on immigrant detention and nearly \$2 billion went to private detention facilities.⁶⁰ This trend of relying on private detention isn't stopping this fiscal year. Despite the 2016 HSAC report outlining deficiencies in using private facilities and reaffirming an intention to decrease the BOP use of private prisons, the Trump Administration reversed the plan in February 2017.⁶¹ Additionally, late last year, ICE proposed building five new private detention centers in Detroit, Chicago, St. Paul, Salt Lake City and south Texas.⁶² Numerous private contracts have been extended in the meantime.⁶³

In order to understand what these numbers mean, it is crucial to understand how the contracts operate. Contracts between ICE and for-profit facilities typically include a guaranteed minimum number of beds that must be paid for each day. In addition to these minimums, the “contracts stipulated a tiered pricing structure, meaning that ICE actually receives a discounted per-diem rate for each person detained in excess of the guaranteed minimum.”⁶⁴ This creates a perverse incentive for prisons to maximize their profits by detaining more people – more immigrants – without regard to whether the person has a criminal history or is considered a flight risk.⁶⁵ In 2015, it was reported that nearly two-thirds of private prison contracts mandate that state and local governments maintain a certain occupancy rate – usually 90 percent – or require taxpayers to pay for empty beds. At that time in Arizona, three private prisons were even operating with a 100 percent occupancy guarantee.⁶⁶ With this structure in mind, it's not hard to see why these companies would be interested in influencing policy to ensure that they can detain the maximum numbers of immigrants. In fact, the companies have been vocal about this process. CCA, for instance, was founded on the principle that you could sell prisons “just like you were selling cars, or real estate, or hamburgers,”⁶⁷ and in a 2005 SEC filing stated: “Our industry benefits from significant economies of scale. . . . Our management team is pursuing a number of initiatives intended to increase occupancy through obtaining new contracts.”⁶⁸ In the same filing, CCA also noted that a decrease in occupancy rates would “cause

59. *Id.*

60. *Immigration Detention 101*, Detention Watch Network (last visited Apr. 30, 2018), <https://www.detentionwatchnetwork.org/issues/detention-101>.

61. Samantha Michaels, *Leaked Memo Reveals Trump's Gift to Private Prison Companies*, Mother Jones (Jan. 30, 2018, 8:00 AM), <https://www.motherjones.com/crime-justice/2018/01/leaked-memo-reveals-trumps-gift-to-private-prison-companies/>.

62. *Id.*

63. *See, e.g.*, DHS HSAC Report, *supra* note 37, at 33-34.

64. Gruberg, *supra* note 8, at 5.

65. *Id.*

66. *Id.*

67. *The Dirty Thirty: Nothing to Celebrate About 30 Years of Corrections Corporation of America*, Grassroots Leadership 1 (Jun. 2013), available at <https://grassrootsleadership.org/cca-dirty-30>.

68. Gruberg, *supra* note 8, at 3.

a decrease in revenue and profitability” and seemed to lament that it “cannot control occupancy levels at our managed facilities.”⁶⁹

Although GEO has stated that “as a matter of long-standing policy, GEO Group does not take a position on or advocate for or against any immigration policies, such as the basis for an individual’s detention or the length of detention,”⁷⁰ its (and CCA’s) lobbying expenditures and active participation in drafting legislation suggest otherwise. According to a comprehensive report done by Grassroots Leadership in 2015,⁷¹ between 2008-2014 CCA and GEO spent more than \$11 million in quarters when they lobbied on immigration issues and CCA spent nearly \$10 million during the same time period in quarters when they lobbied on the DHS Appropriations Committee, the body maintaining the bed quota.⁷² Further, CCA spent more than \$8.7 million and GEO spent \$1.3 million to lobby Congress solely on Homeland Security appropriations between 2006 and 2015.⁷³ Notably, the same Grassroots Leadership report noted that both CCA and GEO’s lobbying disclosure documents stated that they engaged in direct lobbying on “issues related to comprehensive immigration reform,” “issues relating to housing of ICE prison inmates,” and DHS appropriations for ICE detention facilities.⁷⁴ The next section will examine where these funds went, whether or not the lobbied-for policies were implemented, and whether for-profit prisons used any other avenues in an attempt to influence policy.

B. *Monitoring/Bail*

The privatization of alternatives to immigrant detention, such as electronic monitoring and bail bond services, has also thrived in recent years. Around-the-clock GPS monitoring of undocumented individuals was introduced as an alternative in 2004 by ICE as a way to monitor and control the movement of illegal immigrants who were not detained.⁷⁵ Initially, DHS described its alternatives to detention as “community-based supervision strategies” that served to ensure people showed up at court without being locked up, and were adjusted based on an immigrant’s “assessed risk.”⁷⁶ In 2009, all of DHS’s alternative supervision programs included some form of location tracking and

69. *Id.*

70. *See, e.g.,* John Burnett, *Big Money as Private Immigrant Jails Boom*, NPR (Nov. 21, 2017, 5:00AM), <https://www.npr.org/2017/11/21/565318778/big-money-as-private-immigrant-jails-boom>.

71. *Payoff: How Congress Ensures Private Prison Profit with an Immigration Detention Quota*, Grassroots Leadership 6 (Apr. 2015), available at http://grassrootsleadership.org/sites/default/files/reports/quota_report_final_digital.pdf.

72. *Id.*

73. *Id.*

74. ACLU, *supra* note 44, at 11.

75. Eileen Townsend, *Private Contractor Makes Millions Off GPS Trackers for Immigrants*, Mem. Flyer (Apr. 7, 2016), <https://www.memphisflyer.com/memphis/the-shackle/Content?oid=4573743>.

76. Jason Fernandes, *Alternatives to Detention and the For-Profit Immigration System*, Ctr. for Am. Progress (Jun. 9, 2017, 11:00 AM), <https://www.americanprogress.org/issues/immigration/news/2017/06/09/433975/alternatives-detention-profit-immigration-system/>.

phone or in-person check-ins. The most restrictive program was the Intensive Supervision Appearance Program (ISAP), which included ankle monitors, employment verification, and curfew checks. ISAP was expanded in 2009, renewed in 2014, and by 2015, appeared to be DHS' only alternative to detention; the DHS report "U.S. Immigration and Customs Enforcement's Alternatives to Detention" mentions ISAP alone.

While there could be significant benefits to well-executed "community-based supervision strategies" as alternatives to detention, such as reducing costs to taxpayers, keeping families together, and sparing immigrants from physical and psychological harm,⁷⁷ ISAP is not one of these strategies. ISAP is run by BI Incorporated – not DHS – and in 2011, BI Incorporated was bought by the aforementioned Geo Group. GEO Care, the Geo Group subsidiary that operates ISAP, made more than \$302 million for the company in 2015.⁷⁸ Like its detention budget, ICE's alternatives to detention budget has also skyrocketed in the last decade, going from \$28 million in 2006 to more than \$114 million in 2016. As Geo Group is profiting from the expansion of both "alternatives to detention" and detention itself – and there have been sharp increases in profits for both – it is difficult to consider ISAP as an alternative to detention at all, and rather just detention with an expanded radius. People that wouldn't have been detained in a GEO facility for cost or policy reasons are now tracked and controlled by the GEO bracelets, and according to one ISAP participant: "Everybody knows somebody who was just living their life on ISAP and then got picked up, for something as little as '[the ankle monitor] ran out of batteries,' or 'the thing stopped working.'"⁷⁹ In this way, GEO's ISAP program helps fill GEO and other's detention facilities. GEO's purchase of other competitors, such as Protocol Criminal Justice, Inc. in 2013 and Soberlink, Inc. in 2015, has further expanded its hold over electronic and alcohol monitoring.⁸⁰ GEO has lived up to its promise of treating immigrants like a product, profiting off multiple stages in the immigration enforcement "manufacturing" process.

GEO and CoreCivic have not absorbed every competitor, and one disrupter in the privatization of alternatives to detention might be Libre by Nexus. The company, launched in 2014, now boasts a yearly revenue of over \$30 million⁸¹ and "helps secure immigration bonds through indemnifying bonds and by using GPS technology."⁸² Libre contracts with the bail bond company used to actually post the immigration bond, sets up a schedule of payments,

77. *Id.*

78. *Id.*

79. *Id.*

80. In the Public Interest, *supra* note 52, at 1.

81. Michael E. Miller, *This Company Is Making Millions From America's Broken Immigration System*, Wash. Post, (Mar. 9, 2017), https://www.washingtonpost.com/local/this-company-is-making-millions-from-americas-broken-immigration-system/2017/03/08/43abce9e-f881-11e6-be05-1a3817ac21a5_story.html?utm_term=.283aeaf78a84.

82. *Frequently Asked Questions*, Libre by Nexus, <https://www.librebynexus.com/faq> (last visited Apr. 27, 2018).

and provides clients with GPS trackers to wear when they're released.⁸³ Although Libre has been criticized for failing to tell clients of the \$240 monthly GPS costs, inadequately explaining the bond repayment policy, and exploiting the current immigration system,⁸⁴ Libre founder Michael Donovan has been outspoken about his desire to use his company to try and reform the immigration system for the better. They have refused to turn over private information to the government regarding Nexus clients and their families, vowing to protect the life and safety of their clients,⁸⁵ have hired lobbyists to fight for immigration reform⁸⁶, and invested "hundreds of thousands of dollars into a Civil Rights division, housing for felons, and pro bono lawyers to adequately represent clients in court."⁸⁷ Unlike GEO's ISAP expanded immigrant monitoring program, Libre's profits come from getting and keeping its clients out of detention. Further, a spokesperson for Libre stated in 2017 that: "We've never sent anybody back to jail."⁸⁸ It's clearly not a perfect system – Libre is profiting from strict immigration enforcement and no matter how many immigrants enter into one of these bail/monitoring programs, the underlying bed quota policies and high occupancy contracts still remain. Unlike GEO and CoreCivic, Libre appears to be fighting for reform instead of stricter immigration enforcement in a blatant attempt to profit off the system.

IV. LOBBYING, POLICIES, AND PROFITS

In examining whether for-profit prisons and services influenced immigration policy, there are several routes to examine. First, did private prison companies lobby for certain bills that influenced immigration policy? And second, did representatives of the private prisons draft, or participate in drafting, any legislation regulating the industry? In looking at the two largest private prison providers, CCA and GEO, the answer to both these questions is a clear 'yes.'

1. *Drafting Legislation*

CCA and GEO's history with lobbying and legislation is ample, and understanding its full role in the industry requires an explanation of the American Legislative Exchange Council (ALEC), a non-profit organization that seeks

83. *Id.*

84. David Leveille, *Private Prisons Aren't the Only Companies Making A Fortune Off Immigration Detention*, Pub. Radio Int'l (Mar. 16, 2017, 5:15 PM), <https://www.pri.org/stories/2017-03-16/private-prisons-aren-t-only-companies-making-fortune-immigration-detention>.

85. The Virginia Pilot, *Nexus Services Takes on NY & VA To Protect Immigrant Privacy Rights*, (Apr. 20, 2018), https://pilotonline.com/business/consumer/article_8b1df0bf-80f7-5e99-9bb2-5169ca14fd59.html

86. Leveille, *supra* note 84.

87. *Id.*

88. Curtis Bunn, *Controversial Libre By Nexus Is Taking On Immigration System. . . And Winning*, Seattle Medium (Sep. 22, 2017, 7:15 AM), <http://seattlemedium.com/controversial-libre-nexus-taking-immigration-system-winning/>.

“to advance the Jeffersonian principles of free markets, limited government, federalism, and individual liberty, through a nonpartisan public-private partnership of America’s state legislators, members of the private sector, the federal government, and general public.”⁸⁹ ALEC has played a significant role in developing state policies, and in particular, immigration and crime policy. As a general matter, ALEC frequently sought stricter criminal laws which increased detention populations, and then backed for-profit “solutions” to address the detention overflow. They helped create tougher sentencing laws, including mandatory minimums for non-violent drug offenders, “three strikes” laws, and “truth in sentencing” laws. The “solutions” to address the newly overcrowded prisons included privatizing the parole process through “the proven success of the private bail bond industry” and working to pass state laws to create private for-profit prisons.⁹⁰

In 2013, Brookings did a comprehensive investigation into the scope of ALEC’s policy influence and made several striking findings: “ALEC model bills are, word-for-word, introduced in our state legislatures at a non-trivial rate,” “they have a good chance – better than most legislation – of being enacted into law,” and “the bills that pass are most often linked to controversial social and economic issues.”⁹¹ Brookings noted that determining the breadth of ALEC bills and policy was tricky because the ALEC board reviews its model legislation every five years and periodically adds and removes model bills from its website.⁹² Notably, the Castle Doctrine (“Stand Your Ground”) was removed after heightened public scrutiny that arose during the Trayvon Martin trial.⁹³ Brookings tallied bills drafted by ALEC from 2010-2013 and compared them to bills introduced in the 2011-2012 legislation session.⁹⁴ From the 169 bills ALEC drafted, 132 were introduced with identical ALEC language.⁹⁵ More than 90 percent of the bills were sponsored by Republicans, and the most often introduced bill subjects were Immigration (24 bills), Environment, Energy, Agriculture (24 bills), Guns, Prisons, Crime, and Immigration (17 bills).⁹⁶ Of the bills proposed, 9% (12 bills) were enacted; notably higher than the overall passage rate of less than 2% during that period.⁹⁷ Although only Alabama passed the No Sanctuary Cities for Illegal Immigrants Act, which closely resembled Arizona’s SB

89. Suzanne Merkelson, *Exposed: The Corporations Behind the Law That May Let Trayvon Martin’s Killer Go Free*, Huffington Post (Mar. 23, 2012, 12:47 PM), https://www.huffingtonpost.com/suzanne-merkelson/alec-stand-your-ground_b_1375247.html/.

90. Mike Elk & Bob Sloan, *The Hidden History of ALEC and Prison Labor*, The Nation (Aug. 1, 2011), <https://www.thenation.com/article/hidden-history-alec-and-prison-labor/>.

91. Molly Jackson, *ALEC’s Influence over Lawmaking in State Legislatures*, Brookings Institution (Dec. 6, 2013), <https://www.brookings.edu/articles/alecs-influence-over-lawmaking-in-state-legislatures/>.

92. *Id.*

93. *Id.*

94. *Id.*

95. *Id.*

96. *Id.*

97. *Id.*

1070, the ALEC written bill was introduced in 22 other states that session.⁹⁸

Even though Brookings studied numerous ALEC bills, it is hard to know the full scope of ALEC's influence on policy because the group is incredibly secretive about its model bills and drafting process, releasing key information only to paying members. However, the Center for Media and Democracy's "Alec Exposed" website documented ALEC bills that, for instance, benefited the for-profit bail bond industry by expanding the list of offenses for which a person must pay a for-profit bail-bondsman for their release and also advanced the for-profit prison industry by creating barriers to alternatives to prison such as community-based corrections programs and treated juvenile offenders as adults.⁹⁹

It is clear to see how CCA and GEO would benefit from these state laws and policies, so it is not surprising that they played key roles in creating them. ALEC membership includes Congressmen, Senators, and representatives from major companies. For over twenty years (allegedly concluding in 2010), CCA was a member of ALEC. In the early '90s, the ALEC's Criminal Justice Task Force (later known as the Public Safety and Elections Task Force) was even *co-chaired* by CCA.¹⁰⁰ It was during these years that a significant amount of the "tough-on-crime" legislation was pushed, and passed, by ALEC and the aforementioned for-profit prison solutions were championed. One of the biggest moves by CCA and ALEC was in 2010, when ALEC arranged secret meetings between Arizona's state legislators and CCA to draft what became SB 1070, a bill designed to keep CCA prisons flush with immigrant detainees by requiring police to determine the immigration status of someone arrested or detained when there is "reasonable suspicion" they are not in the U.S. legally.¹⁰¹ GEO, BI Incorporated, who was recently acquired by GEO, and Sodexo Marriott, the nation's leading food services provider to private correctional institutions, also help draft ALEC policies.¹⁰²

There are concerns surrounding the legality of this legislation process. ALEC is comprised of task forces that are responsible for developing "model legislation" which ALEC member lawmakers then sponsor and introduce in their home states.¹⁰³ Federal tax law, however, explicitly forbids 501(c)(3) organizations such as ALEC from taking part in the formation of legislation.¹⁰⁴ In 2010, ALEC stated that each year member legislators typically

98. *Id.*

99. The Ctr. for Media and Democracy, *ALEC Exposed*, https://www.alecexposed.org/wiki/Guns,_Prisons,_Crime,_and_Immigration. (last visited Apr. 30, 2018).

100. Elk & Sloan, *supra* note 90.

101. *Id.*; *Arizona's SB 1070*, ACLU, <https://web.archive.org/web/20180428102138/https://www.aclu.org/issues/immigrants-rights/state-and-local-immigration-laws/arizonas-sb-1070?redirect=feature/arizonas-sb-1070>.

102. The Ctr. for Media and Democracy, *supra* note 99.

103. Beau Hodai, *Corporate Con Game: How the private prison industry helped shape Arizona's anti-immigrant law*, (Jun. 21, 2010), http://inthesetimes.com/article/6084/corporate_con_game.

104. *Id.*

carry 1,000 pieces of legislation back to their home states, 20 percent of which is passed into law.¹⁰⁵ In recent years, it appears ALEC has become even more secretive about its model legislation and bill passage, perhaps a response to the backlash it received following the leak of the SB 1070 process. This makes it hard to know what influence ALEC bills are currently playing, but they certainly helped shaped the rise of the prison industrial complex in the 90's and 00's that led to sharp rises in prison population and immigrant detention.

2. Lobbying

CCA and GEO have engaged in extensive lobbying on policies that affect prison and immigration policies. Although CCA has stated the company doesn't lobby on policies that affect "the basis for or duration of an individual's incarceration or detention," reports show they indirectly supported such policies by donating to politicians who support them, attending meetings with officials who back them, and lobbying for funding for Immigration and Customs Enforcement.¹⁰⁶

a. Bills

Although CCA has not lobbied to DHS directly since 2010, it has lobbied Congress each year on the homeland security annual appropriations bill, targeting increased funding for the Bureau of Prisons, the Office of the Federal Detention Trustee, and Immigration and Customs Enforcement.¹⁰⁷ CCA has also spent a great deal of money in an attempt to block bills that would have directly affected private prison policies. This ranged from spending lobbying against the Justice Is Not for Sale Act of 2015, a bill pushed by Sen. Bernie Sanders (I-Vt.) that would have banned private prisons, and the Private Prison Information Act of 2015, which would have subjected private prison records to Freedom of Information Act requests. Neither bill exited the committee.¹⁰⁸ CCA lobbied hard on both bills; in 2016, it paid Akin Gump Strauss Hauer & Feld \$240,000 to lobby H.R. 2470 - The Private Prison Information Act of 2015, on "all provisions" and H.R. 3543/S. 2054 - The Justice is Not For Sale Act of 2015 "only with respect to provisions related to government use of private corrections facilities and issues pertaining to the construction and management of private prisons and detention facilities." In looking specifically at these bills, two policy pushes emerge: bed quotas and non-reporting requirements of private prisons. While increases in detention

105. *Id.*

106. Michael Cohen, *How For-Profit Prisons Have Become the Biggest Lobby No One Is Talking About* Wash. Post (Apr. 28, 2015), https://www.washingtonpost.com/posteverything/wp/2015/04/28/how-for-profit-prisons-have-become-the-biggest-lobby-no-one-is-talking-about/?utm_term=.4827b88a8e32.

107. Emma Baccellieri, *Spotlight On Private Prisons: Lobbying And Otherwise* (Aug. 23, 2016, 12:38 PM), https://www.huffingtonpost.com/opensecrets-blog/spotlight-on-private-pris_b_11663348.html.

108. *Id.*

capacity have increased over the past decade, the bed quota is a more recent development. As already noted, the Intelligence Reform and Terrorism Prevention Act of 2004 directed DHS to increase the immigration detention capacity by at least 8,000 beds each year from fiscal years 2006 to 2010; the DHS Appropriations Act for 2007 even added an additional 6,500 beds (providing for a total of 27,500 beds).¹⁰⁹ In 2009, Sen. Robert Byrd (D-WV) introduced language in the Department of Homeland Security Appropriations Act of 2010 mandating that DHS “maintain a level of not less than 33,400 detention beds,” a provision that is a known bed mandate or bed quota.¹¹⁰ This quota was raised to 34,000 in the Consolidated Appropriations Act of 2012 and remained at that level through several continuing resolutions.¹¹¹ Although “maintain” has been interpreted publicly by DHS as a requirement to “maintain the capability for 34,000 detainees” and not that DHS “must maintain 34,000 detainees at any one time,” a report released by the Government Accountability Office (GAO) stated that ICE monitors the percentage of capacity filled daily, and if it notices that a facility with guaranteed minimums has open space, officials “can call the field office director to find out why the guaranteed minimum is not being met.”¹¹² Further, the DHS’ public interpretation has received pushback from Congress, most notably from Rep. John Culberson (R-TX), a member of the House Committee on Appropriations’ Homeland Security Subcommittee, who proposed changing the language from “maintain” to “fill.”¹¹³ Even if DHS doesn’t actually interpret the bill to require 34,000 filled beds, they have nonetheless kept them filled since the quota’s inception and actually increased detention numbers. In 2017, DHS filled approximately 44,050 beds each day.¹¹⁴ Although several bills and amendments have been introduced to eliminate the quota, including the comprehensive Justice is Not for Sale Act of 2015 in the Senate, none have passed, or even come to a vote.¹¹⁵ Both CCA and GEO have lobbied extensively in support of the Homeland Security Appropriations Bills – the Bill continues to include this quota - and against the Justice is Not for Sale Act which sought to eliminate it.¹¹⁶

A second significant policy that has helped maintain the use of high private prison immigrant detention has been the inability to request information on private prisons through FOIA. The Private Prison Information Act has been

109. Jennifer Chen, Nat’l Immigrant Just. Ctr., “*Immigration Detention Bed Quota Timeline*,” <https://www.immigrantjustice.org/staff/blog/immigration-detention-bed-quota-timeline>. (last visited Apr. 30, 2018).

110. *Id.*

111. *Id.*

112. Gruberg, *supra* note 8, at 6.

113. Chen, *supra* note 109.

114. *United States Immigration Detention*, Global Detention Project, <https://www.globaldetentionproject.org/countries/americas/united-states>. (last visited Apr. 30, 2018).

115. Chen, *supra* note 109.

116. *Id.*

introduced several times from 2009 to the present, but has never made it out of committee.¹¹⁷ The Act would require:

non-Federal prisons and detention facilities holding Federal prisoners under a contract with the Federal Government to make available to the public the same information pertaining to facility operations and to prisoners held in such facilities that Federal prisons and detention facilities are required to make available.¹¹⁸

FOIA requests are a crucial part of our government system and are often used to uncover corruption, scandals, and mismanagement. While there have been inconsistent reports on the difference in conditions and treatment of immigrant detainees in private facilities versus government owned facilities,¹¹⁹ one thing is clear; expanding FOIA to the private prisons would uncover any deficiencies that do exist and could lessen public or political support for the continued widespread use. Unsurprisingly, CCA has voiced staunch opposition to the bill, and has lobbied against passage each time it has been introduced.¹²⁰ While multiple organizations registered to lobby on prior versions of the bill,¹²¹ it is interesting to note that the *only* clients registered to lobby on the current Private Prison Act of 2015 were CoreCivic, Inc in 2016 and Corrections Corporation of America in 2015; the same, renamed company.¹²² Although it is difficult to show when a particular lobbyist made the difference in a vote, the singularity of this bill's lobbyists suggest CCA has played a role in preventing the bill's passage.

b. Candidates

CCA and GEO have also donated significant amounts of money to candidates supporting stricter immigration detention policies. At the Presidential level, GEO and CCA (by then, CoreCivic) made their 2016 preferences clear through their donations. GEO donated \$250,000 to support Trump's inaugural festivities, and a GEO Group company subsidiary donated \$225,000 to a super PAC that spent some \$22 million to help elect Trump. CoreCivic also

117. *H.R. 1980: Private Prison Information Act of 2017*, GovTrack.us <https://www.govtrack.us/congress/bills/115/hr1980>. (last visited Apr. 30, 2018).

118. *Id.*

119. See 2016 Inspector General Report *Review of the Federal Bureau of Prisons' Monitoring of Contract Prisons*

Evaluation, <https://oig.justice.gov/reports/2016/e1606.pdf> (finding that private prisons had higher rates of assaults, confiscated eight times as many contraband cell phones and endangered inmates' security and rights); *but see*, Chacon, *supra* note 36, at 43.

120. *Corrections Corporation of America Bills Lobbied*, OpenSecrets.org, <https://www.opensecrets.org/lobby/clientbills.php?id=D000021940&year=2009>; <https://www.opensecrets.org/lobby/clientsum.php?id=D000021940&year=2011>; <https://www.opensecrets.org/lobby/clientbills.php?id=D000021940&year=2015>.

121. OpenSecrets.org, *supra* note 120.

122. *Clients lobbying on H.R.2470: Private Prison Information Act of 2015*, OpenSecrets.org, <https://www.opensecrets.org/lobby/billsum.php?id=hr2470-114>.

gave \$250,000 to support Trump's inauguration.¹²³ A report¹²⁴ released in 2015 tracked CCA and GEO's disclosed¹²⁵ Congressional donations from 1989 to 2014 and found, for instance: \$62,300 from GEO Group to Sen. Marco Rubio (R-FL) who supports repealing Deferred Action for Parental Accountability (DAPA); \$71,450 from CCA to Senator Lamar Alexander (R-TN), who led the push for several anti-immigrant policies, including expanding immigration detention facilities; \$67,400 from CCA and GEO Group to Rep. Hal Rogers (R-KY-5), who co-sponsored legislation that would result in undocumented workers being subjected to detention; and \$23,600 from CCA to Rep. Marsha Blackburn (R-TN-7), who introduced a bill permitting local law enforcement to detain undocumented immigrants and brought forth an amendment ending temporary legal status for immigrant youth.¹²⁶

Immigration policy is also shaped by the Court, and it is worth examining whether the for-profit prison industry played any role in key cases. One of the most recent Supreme Court decisions affecting immigration detention was *Jennings v. Rodriguez*, 138 S.Ct. 830 (2018). At issue was whether aliens could be detained during immigration proceedings for more than six months without bond hearings.¹²⁷ The Court held that neither the Immigration and Nationality Act (INA) provisions applicable primarily to detention of aliens seeking entry to United States, nor the INA provision that carves out narrow conditions under which Attorney General may release on bond aliens detained pending their removal based on criminal offenses or terrorist activities, could not be plausibly interpreted as implicitly placing a six-month limit on detention or requiring periodic bond hearings. This effectively allows detainees in immigration proceedings to be detained indefinitely. Neither CCA nor GEO filed an amicus brief in the matter, but a brief opposed to the periodic bond review was filed by 29 Representatives and 2 Senators.¹²⁸ CCA donated directly to signees Chairman of the House Judiciary Committee Bob Goodlatte, Diane Black, Marsha Blackburn, Scott DesJarlais, Paul Anthony Gosar, Steven King, Doug Lamalfa, Douglas Lamborn, Tom McClintock, and Chuck Grassley.¹²⁹ Information pertaining to donations made to these 31 members after the vote (i.e. the 2018 election cycle) is not complete, but it would not be surprising to see a pattern of donations to the members who

123. Fredreka Schouten, *Private Prisons Back Trump and Could See Big Payoffs With New Policies*, USA Today (Feb. 23, 2017, 1:10 PM), <https://www.usatoday.com/story/news/politics/2017/02/23/private-prisons-back-trump-and-could-see-big-payoffs-new-policies/98300394>.

124. *The Role Of For-Profit Prison Corporations In Shaping U.S. Immigrant Detention & Deportation Policies*, Am. Friends Serv. Committee (Dec. 2015), <https://www.afsc.org/sites/afsc.civicactions.net/files/documents/Bed%20Quota%20White%20Paper-final.pdf>. (hereinafter, "AFSC").

125. *Id.* (highlighting how these numbers are not an exhaustive list because federal law exempts certain types of campaign contributions from disclosure.)

126. AFSC, *supra* note 123, at 6.

127. *Jennings v. Rodriguez*, 138 S.Ct. 830 (2018).

128. *Id.*

129. *CoreCivic FKA Corrections Corporation of America*, FollowTheMoney.org, <https://www.followthemoney.org/entity-details?eid=695#> (last visited Apr. 30, 2018).

filed this brief and supported a policy that reduced the likelihood that immigration detainees would be released from private prison custody, given CCA and GEO's aforementioned history of donating to candidates who supported stricter immigration policies. Of those CCA had donated to prior to the 2018 cycle, only Blackburn, Gosar, King, Lamalfa, Lamborn, and McClintock are on the ballot in 2018. Thus far, CCA has donated \$10,000 to the election campaign of Marsha Blackburn.¹³⁰

There are several cases related to President Trump's Executive Order revoking the Obama-implemented Deferred Action for Childhood Arrivals (DACA) program pending in the Courts.¹³¹ If DACA is revoked, and after all current extensions expire, more than 800,000 recipients would lose status and be eligible for deportation. If the government expressed concern that recipients would hide or fail to appear at hearings, some of these recipients could be detained pending deportation proceedings – now with no requirement for periodic bail hearings – which would require even more immigration detention beds and facilities. The revocation is not particularly surprising. During his candidacy, Trump made several claims contrasting his immigration positions with Hilary Clinton, one of which set his position on DACA. Trump's campaign website noted:

Hillary Clinton will protect and expand President Obama's illegal and unconstitutional DACA and DAPA executive actions that give millions of illegal immigrants social security numbers, work authorization, travel authorization, eligibility for benefits, and tax credits in violation of the United States law.¹³²

In addition to supporting DACA, Clinton raised concerns about the private prison industry at a Las Vegas campaign stop in May 2015, stating "I'm not sure a lot of Americans know that a lot of the detention facilities for immigrants are run by private companies and that they have a built-in incentive to fill them up."¹³³ That October, her campaign announced it would no longer accept money from private prisons, and went a step further in releasing an official statement denouncing private prisons: "Hillary Clinton has said we must end the era of mass incarceration, and as president, she will end private prisons and private immigrant detention centers."¹³⁴ Given the contrast, it is clear to see how the private prison industry would benefit from this revocation and yet another reason why GEO and CCA donated big money to Trump's Presidential campaign and inauguration; they were donating to the

130. *Id.*

131. *See* Regents of University of California v. United States Department of Homeland Security, 279 F. Supp. 3d 1011 (N.D. Cal. 2018); Batalla Vidal v. Nielsen, 279 F. Supp. 3d 401 (E.D.N.Y. 2018).

132. <https://www.donaldjtrump.com/policies/immigration> (no longer active)

133. Jorge Rivas, *Hillary Clinton To Stop Accepting Money from Private Prison Lobbyists*, Splinter (Oct. 23, 2015, 2:22 AM), <https://splinternews.com/hillary-clinton-to-stop-accepting-money-from-private-pr-1793852158>.

134. *Id.*

only nominee who could implement their policy goals and effectively “pay-to-play.”

V. IMPACT AND AUTHORITY

Immigration privatization has been a profitable and expanding sector over the last several decades and this paper has shown how these companies have used their profit and influence to try and impact policy. Correlation does not always mean causation, but at least with respect to detention, GEO and CCA’s immigration policy lobbying, drafting, and donating have coincided with increased immigrant detention capability and immigrant detention, and continued exemption from FOIA oversight.

So where does that leave us with respect to the role of private prisons and immigration policy? To start, it’s unclear that private prisons have lived up to their promise of “solutions” to overcrowding given the continued push for bed quotas and high occupancy contracts. It’s even murkier as to whether detainees are better off in a private prison. As noted earlier, both companies have been vocal about seeking increased profits and selling bed space like any other commodity. Some have argued that perverse profit motivation has led to private prisons cutting corners with respect to the adequacy of some services, including medical care, nutrition, and hygiene¹³⁵ - the extent of which has been difficult to prove based on current reporting requirements – but statements by former corrections officers and nurses support such claims. One former corrections officer, for example, recalled: “They gave us a run-down saying two slices of bread per inmate costs this much. . . If you cut corners here, it would mean a possible raise for us.”¹³⁶ And a former nurse recalled policies aimed at cost-cutting which included: dosing adult detainees with hepatitis B with pediatric doses of medication because it was cheaper, claiming an inmate was “faking” a seizure disorder because they needed to justify denying him the necessary treatment, and pulling teeth instead of fixing them. Significantly, one warden told her nurses: “If it’s costing you money, put ‘em on a list.” Profits were the priority, and deportation was preferable to treatment.¹³⁷ There is no justice in a system that puts profits before people. Unfortunately, there are few studies comparing the strengths and weaknesses of public and private facilities, so it is challenging to point to the “better” alternative.¹³⁸

Lastly, regardless of the impact of private prisons, there are questions as to whether DHS even has the *authority* to contract directly with for-profit prison companies for people in administrative detention.¹³⁹ To start, the statute that

135. See, e.g., Gruberg, *supra* note 8, at 9; ACLU, *supra* note 43, at 12.

136. Mark Dow, *American Gulag: Inside U.S. Immigration Prisons* 97 (2004).

137. *Id.* at 103.

138. Chacon, *supra* note 36, at 43.

139. See, e.g., DHS HSAC Report, *supra* note 37, at 71.

governs persons in administrative detention in non-Federal institutions, 8 U.S.C. § 1103(11), grants the Attorney General the power:

(A) to make payments from funds appropriated for the administration and enforcement of the laws relating to immigration, naturalization, and alien registration for necessary clothing, medical care, necessary guard hire, and the housing, care, and security of persons detained by the Service pursuant to Federal law *under an agreement with a State or political subdivision of a State*; and

(B) *to enter into a cooperative agreement with any State, territory, or political subdivision thereof*, for the necessary construction, physical renovation, acquisition of equipment, supplies or materials required to establish acceptable conditions of confinement and detention services in any State or unit of local government which agrees to provide guaranteed bed space for persons detained by the Service.¹⁴⁰ (emphasis added)

In contrast, the statute pertaining to persons in criminal custody, 18 U.S.C. §4013(a), specifically references contracts with private entities, stating:

(a) The Attorney General, in support of United States prisoners in non-Federal institutions, is authorized to make payments from funds appropriated for Federal prisoner detention for—

- (1) necessary clothing;
- (2) medical care and necessary guard hire; and
- (3) the housing, care, and security of persons held in custody of a United States marshal pursuant to Federal law *under agreements with State or local units of government or contracts with private entities.*¹⁴¹ (emphasis added)

It seems notable that private entities are explicitly written into the contract scheme for persons in criminal custody, but left out of the administrative detention scheme. Ultimately, because Congress has continued to provide ample funding for DHS and ICE detentions without mandating a different contract scheme, this distinction is effectively ignored. Plus, should Congress raise the distinction, it could issue a revised rule with the added language.

One final question is whether the State can ever contract out one of its core responsibilities. In his piece *An Unconvincing Case Against Private Prisons*, Malcolm Feeley examines the theory of state monopoly with respect to prison administration, arguably one of those core responsibilities. One Israeli

140. 8 U.S.C. § 1103(11)(A).

141. 18 U.S.C. § 4013(a).

court has held delegation from this responsibility to “violate an inmate’s dignity and liberty and as well subvert the state’s sovereignty.”¹⁴² In line with this sovereignty principle is the theory that “only the state that has the authority to impose punishments has the authority to administer those punishments.”¹⁴³ Feeley concludes by suggesting that arguments against privatization of the prison industry are ultimately based on the theory of state monopoly, and are unnecessarily overbroad to include “many arrangements that are widely regarded as sensible and dignity enhancing, or even exemplary, by human-rights groups.”¹⁴⁴ I disagree with his argument that movements against private prisons are rooted in the theory of state monopoly, largely because it ignores the ample criticism of treating people as products or “hamburgers,” but affirm his warnings. Feeley hesitates to denounce the entire system, but ends with a call to be wary of “private corporations putting profits before people,” and to “beware of lack of oversight and clear operating standards.”¹⁴⁵

VI. CONCLUSION

Ultimately, the theory of state monopoly, while backed by prominent philosophers like Kant, Hobbes, and Locke, is utopic: envisioning a system where the State provides security and punishes based on desert and rehabilitation. The immigration enforcement system today matches neither of those principles, and is helmed largely by private companies like CCA and GEO that epitomize the warnings that Feeley issues. We need to stop treating people as goods to be bought and sold, demand oversight and accountability, and ultimately, reform the immigration enforcement system to align with *public* opinion, not private company opinion. This path forward will depend on uprooting a system that perpetuates perverse incentives like bed quotas, ending round-up and detention of non-violent immigrants, and increasing accountability and reporting requirements for private immigration enforcement companies.

142. Malcolm M. Feeley, *The Unconvincing Case Against Private Prisons*, 89 Ind. L.J. 1401, 1406 (2014).

143. *Id.*

144. *Id.* at 1435.

145. *Id.*