

**Testimony Before The House Appropriations Committee
Subcommittee On Commerce, Justice, Science, And Related Agencies For Fiscal Year 2023**

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Chairman Cartwright, Ranking Member Aderholt, and Members of the Subcommittee, thank you for the opportunity to submit testimony regarding the FY 2023 Commerce, Justice, Science, And Related Agencies Appropriations Bill. My organization, Citizens for Responsibility and Ethics in Washington (CREW), is a nonprofit, nonpartisan organization committed to protecting the rights of citizens to be informed about government actions and ensuring the integrity of government institutions through increased transparency and accountability. Today I offer proposed bill text and testimony regarding the need to close the transparency and accountability gap that currently exists between government-run detention facilities and government-funded, privately-operated detention centers.

As of September 2021, 79 percent of immigrants in federal custody were detained in private detention facilities.¹ In 2021, American taxpayers paid \$8.5 million per day for immigrant detention beds,² and the DHS “Budget in Brief” for FY 2022 shows \$4.9 million per day allotted for this purpose.³ Although private detention contractors perform governmental functions at a massive scale and at taxpayers’ expense, they are not held to the same standards of transparency and accountability as operators of government-run facilities. Relying on their status as private entities without regard for the governmental function they provide, private detention centers operate in the dark, bypassing information access laws like the Freedom of Information Act (FOIA), which establishes the public’s right to obtain information from government agencies.⁴

Congress established the FOIA to serve as the primary tool for the public to obtain information about activities that are funded by our government, regardless of whether the governmental activity is performed by government agencies or outsourced to private contractors. When the government is in business with a corporation, the American people are in business with that corporation, and they are owed the right to inspect relevant records and hold their government to account regarding the ethical operations and fiscal responsibility of those dealings. This is consistent with the spirit of the FOIA summarized in the floor speech given by its architect, Congressman John Moss, who began by recognizing that “our system of

¹ Eunice Cho, More of the Same: Private Prison Corporations and Immigration Detention Under the Biden Administration, ACLU, Oct. 5, 2021, *available at* https://www.aclu.org/sites/default/files/field_document/2021.10.07_private_prisons_and_ice_detention_blog-factsheet_003.pdf.

² FY 2021 Budget in Brief, U.S. Department of Homeland Security, 2021, *available at* https://www.dhs.gov/sites/default/files/publications/fy_2021_dhs_bib_0.pdf.

³ FY 2022 Budget in Brief, U.S. Department of Homeland Security, 2022, *available at* https://www.dhs.gov/sites/default/files/publications/dhs_bib_-_web_version_-_final_508.pdf.

⁴ Freedom of Information Act (FOIA), 5 U.S.C. § 552.

government is based on the participation of the governed.”⁵ At the core of the FOIA is the acknowledgment that this participation cannot happen in a meaningful way without an informed citizenry. As Congressman Moss went on to say in his floor speech: “[A]s our population grows in numbers it is essential that it also grow in knowledge and understanding. We must remove every barrier to information about — and understanding of — government activities...if the American public is to be adequately equipped to fulfill the...role of responsible citizenship.”⁶

Notably, Congressman Moss stressed the importance of accessing information in terms of the public’s need to understand government activities, which is not limited to those activities which have not been contracted out to private entities. Rather, it encompasses all activities that are ultimately performed under the power and purse of the federal government. For example, U.S. Immigration and Customs Enforcement (ICE) has not distinguished between its ICE owned-and-operated facilities and contractor-owned-and-operated facilities in describing its detention management services: “[ICE] Enforcement and Removal Operations (ERO) manages and oversees the nation’s civil immigration detention system, detaining individuals in furtherance of their removal proceedings or to effect their departure from the United States after a final order of removal from a federal immigration judge,” further providing that “ICE detainees are housed in a variety of facilities across the United States, including...ICE-owned-and-operated facilities...and contractor-owned-and-operated facilities.”⁷ The privatization of this quintessentially government function does not make it any less of a government activity.

Detaining people is an activity that costs American taxpayers billions of dollars and has, in recent years, raised serious concerns about the safety of those whose federal custody is managed by profit-driven corporations that are shielded from public accountability.⁸ In a 2016 report on the adequacy of monitoring private prisons, the U.S. Department of Justice’s Inspector General’s (DOJ IG) office acknowledged its inability to analyze and compare the overall costs of incarceration between government-run prisons and private prisons, further noting that the Bureau of Prisons does not receive a breakdown of costs under their fixed-price contracts.⁹ The report also included cautionary language against drawing the conclusion that contract prisons are run at a lower cost than government-run prisons. This is particularly noteworthy because, for years, proponents of privatizing prisons have relied on the argument that contracting these services will allow for them to be provided at a lower cost, saving American taxpayers’ money.¹⁰ Yet, it is very

⁵ The Freedom of Information Act, U.S. House of Representatives: History, Art & Archives, March 23, 2020, available at https://history.house.gov/Historical-Highlights/1951-2000/hh_1966_07_04_FOIA/; 112 Cong. Rec. 13007, 1966 Source Book, available at [https://nsarchive2.gwu.edu/nsa/foialeghistory/112%20Cong.%20Rec.%2013007%20\(1966%20Source%20Book\).pdf](https://nsarchive2.gwu.edu/nsa/foialeghistory/112%20Cong.%20Rec.%2013007%20(1966%20Source%20Book).pdf).

⁶ *Id.*

⁷ Detention Management, U.S. Immigration And Customs Enforcement, May 4, 2022, available at <https://www.ice.gov/detain/detention-management>.

⁸ See, e.g., Rep. Tlaib *et. al.*, Letter to H.E. Michelle Bachelet, United Nations High Commissioner for Human Rights, Oct. 23, 2020, available at <https://tlaib.house.gov/sites/tlaib.house.gov/files/Final%20Final%20-%20-%20Letter%20to%20OHCHR%20on%20DHS%20Human%20Rights%20Abuses.pdf>.

⁹ Review of the Federal Bureau of Prisons’ Monitoring of Contract Prisons, Department of Justice OIG: Evaluations and Inspections Division 16-06, August 2016, available at <https://oig.justice.gov/reports/2016/e1606.pdf>.

¹⁰ Megan Mumford *et. al.*, The Economics of Private Prisons, The Hamilton Project, 2016, available at https://www.brookings.edu/wp-content/uploads/2016/10/es_20161021_private_prisons_economics.pdf.

difficult to know for certain whether this is actually true — not without access to key data that would allow the American public to demand an accounting for this claim.

The inability to verify claims of cost-efficiency has been an ongoing issue with the private prison industry. In 2007, the Government Accountability Office determined that it was infeasible to conduct a sound cost comparison due to a lack of comparable data.¹¹ The Bureau of Prisons justified its inability to provide the necessary data by pointing out that there were no federal laws or regulations mandating that they maintain that information for selecting among competing contractors.¹² They also claimed that collecting the data could drive up the cost of the contracts themselves.¹³

Ongoing concerns regarding private prisons prompted the federal government to reassess their use at the end of the Obama administration. In August of 2016, with questions surrounding costs still unresolved, the DOJ IG's report found that private prisons also incurred more safety and security incidents per capita than government-run facilities.¹⁴ Thereafter, the Department announced that it would begin phasing out the use of private prisons.¹⁵ As the members of this subcommittee are well-aware, this phase-out plan was never implemented. Within the first 60 days of the Trump Administration, DOJ reversed its plan to phase out private prisons,¹⁶ President Trump signed an executive order calling for resources to build immigration detention facilities,¹⁷ and DHS released a policy stepping up targeted immigration detentions.¹⁸ As a result, the total for obligated spending dedicated to GEO Group in fiscal year 2019 alone was more than double the amount the U.S. Government obligated to the GEO Group in 2014.¹⁹

Despite this significant increase in spending and continued concerns about conditions, however, contractor-owned-and-operated detention facilities continue to circumvent transparency laws like the FOIA, leaving appropriators and the public largely in the dark about the efficiency and safety of their operations. This issue remains even as President Biden recently signed Executive Order 14006, 86 FR 7483 (2021) that reinstates the Obama-era policy to phase out DOJ's use of private prisons by declining to renew existing contracts. Moreover, even for the

¹¹ Cost of Prisons: Bureau of Prisons Needs better Data to Assess Alternatives for Acquiring Low and Minimum Security Facilities, GAO-08-6, Oct. 2007, available at <https://www.gao.gov/assets/270/267839.pdf>.

¹² *Id.* at 13.

¹³ *Id.*

¹⁴ Review of the Federal Bureau of Prisons' Monitoring of Contract Prisons, Department of Justice OIG: Evaluations and Inspections Division 16-06, August 2016, available at <https://oig.justice.gov/reports/2016/e1606.pdf>.

¹⁵ Phasing Out the Use of Private Prisons, Department of Justice, Aug. 18, 2016, available at <https://www.justice.gov/archives/opa/blog/phasing-out-our-use-private-prisons>.

¹⁶ Memorandum on Use of Private Prisons Rescinded, Federal Bureau of Prisons, Feb. 24, 2017, available at https://www.bop.gov/resources/news/20170224_doj_memo.jsp.

¹⁷ Exec. Order No. 13767, 82 F.R. 8793, 2017, available at <https://trumpwhitehouse.archives.gov/presidential-actions/executive-order-border-security-immigration-enforcement-improvements/>.

¹⁸ Implementing the President's Border Security and Immigration Enforcement Improvement Policies, Department of Homeland Security, Feb. 20, 2017, available at <https://www.dhs.gov/publication/implementing-presidents-border-security-and-immigration-enforcement-improvement-policies>.

¹⁹ Chantal Da Silva, Trump Administration Has Doubled Private Prison Spending With Most Money Spent on Detaining Immigrants, Newsweek, Sept. 25, 2019, available at <https://www.newsweek.com/u-s-spending-private-prisons-geo-group-increase-immigration-detention-1461067>.

DOJ contracts to which the order applies, the refusal to renew contracts in the future does not extinguish the current and ongoing need for transparency and fiscal accountability for existing contracts.

Congress has already exercised its power to impose certain transparency requirements related to ICE's detention management function, including making public data related to detained populations, arrest rates and lengths of stay.²⁰ In light of ongoing and broader concerns regarding cost-efficiency and health and safety conditions of federally funded, privately operated detention facilities, CREW recommends inclusion of the following FOIA-related text in the FY 2023 Appropriations Bill:

No agency may expend funds to enter into a contract or agreement with a non-governmental entity or state or local government entity for the purposes of incarcerating or detaining Federal prisoners or detainees in a non-Federal prison, jail, correctional or detention facility, unless a material term in any contract, agreement, or renewal of a contract or agreement with any non-governmental or governmental entity regarding the incarceration or detention of Federal prisoners or detainees in a non-Federal prison, jail, correctional, or detention facility directs – (1) that the Agency shall be deemed to have control over all information of the contractor entity related to: A) the incarceration, detention, treatment or condition of federal prisoners or detainees, B) any costs or the expenditure of any funds related to the contract or agreement, and (C) any other information related to the performance of the contract or agreement; (2) that the information identified in paragraph (1) is subject to disclosure pursuant to 5 U.S.C. 552; and (3) that the contractor shall provide access to the information identified in paragraph (1) to any person upon request made pursuant to 5 U.S.C. 552(a)(3)(A).

Thank you for the opportunity to address the Subcommittee.

²⁰ Detention Statistics, U.S. Immigration and Customs Enforcement, June 9, 2021, *available at* <https://www.ice.gov/detain/detention-management>.