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# SENATE COMMITTEE ON PUBLIC SAFETY

Senator Nancy Skinner, Chair  
2019 - 2020 Regular

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**Bill No:** AB 32                      **Hearing Date:** July 9, 2019  
**Author:** Bonta  
**Version:** June 25, 2019  
**Urgency:** No                                      **Fiscal:** Yes  
**Consultant:** SC

**Subject:** *Detention Facilities: Private, For-Profit Administration Services*

## HISTORY

**Source:** Immigrant Legal Resource Center  
Riverside Sheriffs' Association

**Prior Legislation:** SB 29 (Lara), Ch. 494, Stats. 2017  
AB 1320 (Bonta), 2017, Vetoed  
AB 103 (Committee on Budget), Ch. 17, Stats. 2017.  
SB 1289 (Lara), 2016, Vetoed  
SB 843 (Committee on Budget), Ch. 43, Stats. 2016  
SB 105 (Steinberg), Ch. 310, Stats. 2013

**Support:** Alianza, Sacramento; American Federation of State, County, and Municipal Employees, AFL-CIO (AFSCME); Amigos de Guadalupe Center for Justice and Empowerment; Asian Americans Advancing Justice – California; Berkeley/Oakland YWCA; ADEM District 41; California Alliance for Youth & Community Justice; California Alliance for Retired Americans; California Collaborative for Immigrant Justice; California Civil Liberties Advocacy; California Correctional Peace Officers Association; California Faculty Association; California For Progress; California Immigrant Youth Justice Alliance; California Rural Legal Assistance Foundation; California Immigrant Policy Center; California Public Defenders Association; California Sanctuary Campaign; California State Superintendent of Public Instruction, Tony Thurmond; Central American Resource Center of Northern California; Central Valley Immigrant Integration Collaborative (CVIIC); Centro Legal de la Raza; Coalition for Humane Immigrant Rights; Community Legal Services in East Palo Alto; Council on American-Islamic Relations – Sacramento Valley/Central California; Courage Campaign; Disability Rights California; Dolores Huerta Foundation; Dolores Street Community Services; Faith In The Valley; Freedom for Immigrant; Greater Long Beach Interfaith Community Organization; Haitian Bridge Alliance; Hand in Hand: The Domestic Employers Network; Human Impact Partners; Human Rights Defense Center; Immigrant Legal Defense; Immigration Task Force of Monterey County; Indivisible CA: State Strong; Indivisible CA-7; Indivisible Sacramento; Inland Empire Immigrant Youth Collective; Interfaith Council of Contra Costa County; Interfaith Movement for Human Integrity; La Raza Centro Legal; Legal Aid Society of San Mateo County; Legal Services for Children; LGBT Center OC; Long Beach Immigrant Rights Coalition; Long Beach Sacred Resistance; Los Angeles County Professional

Peace Officers Association; Mi Familia Vota; Mujeres Unidas y Activas; National Lawyers Guild – San Francisco; National Lawyers Guild SF Bay Area Chapter; NextGen California; Oakland Community Law Office; Oakland Privacy; Open Immigration Legal Services; Orange County Rapid Response Network; Organizing For Action - Contra Costa; Pacifica Social Justice; Pajaro Valley Rapid Response; Peace and Freedom Party of California; PICO California; Resilience Orange County; Root & Rebound; Saint John of God Church; San Diego Rapid Response Network; San Mateo Faith Leaders Solidarity Cohort; Secure Justice; Service Employees International Union (SEIU) California State Council; Service Employees International Union (SEIU) Local 1000; SIREN (Services, Immigrant Rights and Education Network); Simi Valley Democratic Club; Sisters of Mercy of the Americas; Social Action Committee, Unitarian Universalist Fellowship of Redwood City; Social Justice Collaborative; Social Justice Ministry, St. Jerome Catholic Church; St. MARY the Virgin Episcopal Church; Step Up! Sacramento; Time for Change Foundation; UC Irvine School of Law Immigrant Rights Clinic; UDW/AFSCME Local 3930; Unitarian Universalists of San Mateo; Wellstone Democratic Renewal Club

Opposition: California State Sheriffs' Association

Assembly Floor Vote: 61 - 13

### PURPOSE

***The purpose of this bill is to prohibit the California Department of Correction and Rehabilitation (CDCR) from entering into, or renewing contracts with for-profit private prisons after January 1, 2020, and eliminates their use by January 1, 2028; and prohibits the operation of a private detention facility within the state.***

*Existing law* authorizes the Secretary of CDCR to enter into agreements with private entities to obtain secure housing capacity within California. Sunsets this authority on January 1, 2020. (Pen. Code, § 2915 (a) & (d).)

*Existing law* authorizes the Secretary of CDCR to enter into agreements with private entities to obtain secure housing capacity in another state. (Pen. Code, § 2915 (b) & (d).)

*Existing law* prohibits CDCR from operating its own facility outside of California. (Pen. Code, § 2915 (b).)

*Existing law* allows the Secretary of CDCR to enter into an agreement with a city, county, or city and county, to permit the transfer of prisoners in the custody of the secretary to a jail or other adult correctional facility. Sunsets this authority on January 1, 2020. (Pen. Code, § 2010 (a) & (h).)

*Existing law* anticipates, as outlined in the Budget Act of 2018, that all California inmates will be returned from out-of-state contract correctional facilities by February 2019. (Pen. Code, § 2067 (a).)

*Existing law* requires CDCR, to the extent that the adult offender population continues to decline, to begin reducing private in-state male contract correctional facilities in a manner that maintains sufficient flexibility to comply with the federal court order to maintain the prison population at or below 137.5 percent of design capacity. The private in-state male contract correctional facilities that are primarily staffed by non-Department of Corrections and Rehabilitation personnel shall be prioritized for reduction over other in-state contract correctional facilities. (Pen. Code, § 2067 (a).)

*Existing law* requires CDCR to consider the following factors in reducing the capacity of state-owned and operated prisons or in-state leased or contract correctional facilities:

- 1) The cost to operate at the capacity;
- 2) Workforce impacts;
- 3) Subpopulation and gender-specific housing needs;
- 4) Long-term investment in state-owned and operated correctional facilities, including previous investments;
- 5) Public safety and rehabilitation; and,
- 6) The durability of the state's solution to prison overcrowding. (Pen. Code, § 2067 (b).)

*This bill* prohibits CDCR from entering into a contract with any private, for-profit prison, on or after January 1, 2020. Applies to both in-state and out-of-state facilities.

*This bill* prohibits CDCR from renewing contracts with any private, for-profit prison on or after January 1, 2020. Applies to both in-state and out-of-state facilities.

*This bill* requires all state prison inmates under the jurisdiction of CDCR to be removed from private, for-profit prison facilities on or before January 1, 2028.

*This bill* provides that, except as otherwise specified, a person shall not operate a private detention facility within the state.

*This bill* provides the following definitions:

- 1) "Detention facility" means any facility in which persons are incarcerated or otherwise involuntarily confined for purposes of execution of a punitive sentence imposed by a court or detention pending a trial, hearing, or other judicial or administrative proceeding.
- 2) "Private detention facility" means a detention facility that is owned and operated by a private, nongovernmental, for-profit entity, and operating pursuant to a contract or agreement with a governmental entity.

*This bill* specifies that the prohibition on the operation of a private detention facility does not apply to any of the following:

- 1) Any facility providing rehabilitative, counseling, treatment, mental health, educational, or medical services to a juvenile that is under the jurisdiction of the juvenile court, as specified;
- 2) Any facility providing evaluation or treatment services to a person who has been detained, or is subject to an order of commitment by a court, as specified;
- 3) Any facility providing educational, vocational, medical, or other ancillary services to an inmate in the custody of, and under the direct supervision of, CDCR or a county sheriff or other law enforcement agency;
- 4) A residential care facility, as specified;
- 5) Any school facility used for the disciplinary detention of a pupil;
- 6) Any facility used for the quarantine or isolation of persons for public health reasons, as specified; or,
- 7) Any facility used for the temporary detention of a person detained or arrested by a merchant, private security guard, or other private person, as specified.

*This bill* provides that this prohibition does not apply to any privately owned property or facility that is leased and operated by CDCR or a county sheriff or other law enforcement agency.

*This bill* provides that this prohibition shall not apply to any private detention facility that is operating pursuant to a valid contract with a governmental entity that was in effect before January 1, 2020, for the duration of that contract, not to include any extensions made to or authorized by that contract.

*This bill* states that its provisions are severable; if any provision of this act or its application is held invalid, that invalidity shall not affect other provisions or applications that can be given effect without the invalid provision or application.

## COMMENTS

### 1. Need for This Bill

According to the author:

Current law authorizes the California Department of Corrections and Rehabilitation (CDCR) to contract with for-profit, private prison corporations to house Californians both in and out-of-state. This authority sunsets on January 1, 2020. Private prison corporations have not limited their business ventures to CDCR, but have expanded their profiteering to other populations as well.

Regarding CDCR, contracting with for-profit, private prisons was a temporary solution to address the severe problem of overcrowding, to comply with a federal

court order to reduce the prison population to 137.5% of design capacity, and avoid the early release of Californians that pose a risk to public safety. On February 10, 2014 the Court also ordered the state to seek ways to reduce the number of inmates housed in for-profit state prisons to the extent feasible.

Regardless of the population, human rights abuses are inhering in any facility operated by the private prison industry. For-profit prison companies benefit from incarcerating Californians and have no incentive to invest in their rehabilitation. Their fiduciary duty, as a for-profit corporation, and mission is to maximize profits for their investors. They are able to accomplish this by increasing their inmate population and cutting operational costs, which is dangerous and detrimental to the prisoners and staff. Private prison corporations have incentives to drive up reliance on incarceration, often lobbying to drive up policies which increase incarceration in order to drive up demand for their business. This presents a concerning conflict of interest with the state's goals to invest in the rehabilitation and reintegration of people.

Private prisons in California have faced numerous lawsuits over substandard medical treatment of inmates. A 2016 report from the Justice Department found that private prisons regularly failed to ensure adequate medical care for inmates, and reported more than twice as many inmate-on-staff assaults as in state-run prisons.

As of May 2019, the State's prison population is in compliance with the order at approximately 134.8 percent of design capacity. Now that we are under the court ordered cap and will continue to see inmate reductions due to Proposition 57, Prop 47, Prop 64, and other measures, it is time to establish a timeline to phase out the use of for-profit, private prisons.

AB 32 will begin to redirect our criminal justice system to invest in and prioritize effective rehabilitative programs, which will minimize recidivism rates and maximize successes for Californians upon their reentry into society.

Our state's commitment to pushing back on this harmful industry should not be limited just to CDCR. The problems inherent in the private prison industry apply to any population they currently house or could house in the future. AB 32 will thus ensure that in California, private prison companies will not simply shift their focus from CDCR to other populations.

AB 32 specifically will prohibit the renewal of contracts between the department and for-profit prisons by January 1, 2020 and will completely phase out their use by 2028. AB 32 additionally prohibits the operation of all other types of private detention facilities, with some exceptions. Private detention facilities operating under a valid contract in effect before January 1, 2020, will only be able to operate lawfully for the remainder of that contract's duration.

## 2. Private For-Profit Prisons

After the war on drugs in the 1980's, the United States began to use private prisons to house those affected by mandatory sentencing. There were not enough beds for people. Between 2000 and 2016, the number of people in private prisons rose 47%. (Lacey, *Private prisons are archaic and cruel. California needs to stop using them*, Los Angeles Times (Mar. 19, 2019)

<<https://www.latimes.com/opinion/op-ed/la-oe-lacey-private-prisons-california-20190319-story.html>> [as of June 27, 2019].)

In 2016, the U.S. Department of Justice's Office of the Inspector General conducted an investigation of private prisons and issued a report. The investigation found that private prisons were less safe than federal prisons, poorly administered, and provided limited long-term savings for the federal government. For example, the contract prisons confiscated eight times as many contraband cell phones annually on average as the federal institutions. Private prisons also had higher rates of assaults, both by inmates on other inmates and by inmates on staff. Additionally, two of the three contract prisons inspected by the Inspector General's Office discovered they were improperly housing new inmates in Special Housing Units (SHU), which are normally used for disciplinary or administrative segregation, until beds became available in general population housing. (*Review of the Federal Bureau of Prisons' Monitoring of Contract Prisons*, Office of the Inspector General, U.S. Department of Justice (Aug. 2016).)

The Budget Act of 2018 required all out-of-state inmates to be returned to California. CDCR has informed this committee, as of June 21, 2019, that all inmates have been removed from out-of-state facilities. CDCR has four in-state contracts to house inmates in private prisons.

As of June 21, 2019, in-state private correctional facility numbers are as follows:

Facility and Location	Population as of 6/21/2019
Central Valley (MCCF) (McFarland, CA)	660
Desert View MCCF (Adelanto, CA)	660
Golden State MCCF (McFarland, CA)	655
McFarland Female Community Reentry Facility (McFarland, CA)	247
<b>Total</b>	<b>2,222</b>

These contracts are set to expire June 30, 2023. This bill prohibits the renewal of contracts between CDCR and for-profit prisons by January 1, 2020 and will require the use of these private facilities to end by January 1, 2028.

## 3. Prison Overcrowding

After continued litigation, on February 10, 2014, the federal court ordered California to reduce its in-state adult institution population to 137.5% of design capacity by February 28, 2016, as follows: 143% of design bed capacity by June 30, 2014; 141.5% of design bed capacity by February 28, 2015; and, 137.5% of design bed capacity by February 28, 2016. (*Brown v. Plata* (2011) 131 S.Ct. 1910, 1939; 179 L.Ed.2d 969, 999.) CDCR is currently in compliance with the three-judge panel's order on the prison population. CDCR's January 2019 monthly report on the prison population notes that the in-state adult institution population is currently 113,861 inmates, which amounts to 133.8% of design capacity.

This is in part due to California's Public Safety Realignment, which shifted many correctional responsibilities for lower-level felons from the state to counties. And it was not until the passage of Proposition 47 in November 2014, which reduced penalties for many drug and property offenses, that California saw its biggest decline in the prison population. These pieces of legislation signified a switch in California from incarceration to rehabilitation. (Public Policy Institute of California (PPIC), *Public Safety Realignment: Impacts So Far* (Sept. 2015) <<https://www.ppic.org/publication/public-safety-realignment-impacts-so-far/>> [as of June 27, 2019].)

Although California continues to reduce its prison population, with this migration of incarcerated peoples into CDCR after 2028, we cannot predict how AB 32 will impact California's prison overcrowding problem. However, in a recent report from PPIC, recidivism rates have decreased for felony offenders. (Bird et al., *Recidivism of Felony Offenders in California*, PPIC (June 2019) <<https://www.ppic.org/publication/recidivism-of-felony-offenders-in-california/>> [as of June 27, 2019].) Meaning that the prison population could continue to decline. Yet, PPIC admits to not fully understanding this decrease in recidivism. Without more information it is hard to know what the future holds for California's prison population.

#### 4. Attorney General's Review of Civil Detention Centers

This bill prohibits the operation of any private detention facilities within the state, with specified exceptions. Private detention facilities would include civil detention centers housing immigrant detainees. A 2019 report by the California Attorney General (AG) reviewed the ten facilities that housed immigration detainees pursuant to AB 103 (Committee on Budget), Ch. 17, Stats. 2017. Four of these facilities are private.

The AG's report found the following common issues among a number of the facilities are the following:

- Restrictions on liberty: Some detainees were confined to cells for 22 hours a day and the facilities' use of force and search policies and disciplinary practices resulted in restrictions that were unnecessarily severe in relation to a detainee's background or the purpose of detainment.
- Language barriers: There was a lack of bilingual staff and failure to access alternative language services which often compromised detainees' confidentiality because they must rely on other detainees to communicate with staff.
- Issues with Access to Medical and Mental Health Care: Common issues were found involving medical record accuracy and accessibility, nurses practicing outside of their legal scope of practice, superficial medical examinations, delayed or inadequate medical care, inadequate mental health staffing and services, and unsafe suicide watch and disciplinary isolation practices.
- Obstacles to Contacting Family and Other Support Systems: Many of the facilities housing immigrants are located far from city centers, with limited access by public transportation. None of the facilities permit contact visits with family or friends. Contact via telephone was limited and subject to other barriers.

- **Barriers to Adequate Representation:** Detainees faced several challenges to obtaining counsel or adequately representing themselves. Many facilities do not facilitate confidential legal phone calls and legal materials provided to detainees are difficult to access, are rarely offered in languages other than English and Spanish and may be out of date.

(*The California Department of Justice's Review of Immigration Detention in California* (Feb. 2019) <<https://oag.ca.gov/sites/all/files/agweb/pdfs/publications/immigration-detention-2019.pdf>> [as of June 27, 2019].)

## 5. Constitutional Considerations

### a. Commerce Clause

Whenever a state regulates activity that could economic activity or the flow of commerce, the Commerce Clause of the U.S. Constitution is implicated.

The Commerce Clause grants Congress the power to regulate commerce “with foreign nations, and among the several states, and with the Indian Tribes.” (U.S. Const., art. 1, Sec. 8, cl. 3.) The dormant Commerce Clause is inferred from that clause under the theory that this grant of power implies a negative converse—a restriction prohibiting a state from passing legislation that improperly burdens or discriminates against interstate commerce. While there is no constitutional amendment that expressly makes this declaration, the Supreme Court has inferred this principle from the grant of power to Congress to regulate commerce among the states under Article I, Section 8 of the U.S. Constitution. The modern approach to the clause gives the court significant discretion and involves a balancing of the benefits of the law against the burdens it imposes on interstate commerce. How the balancing is done, however, depends on whether the law discriminates against out-of-staters or treats in-staters and out-of-staters alike. (Chemerinsky, *Constitutional Law Principles and Policies* (2011) 4th Edition, p.439-440.)

Accordingly, the dormant Commerce Clause usually involves the following analysis: First, does the state law discriminate against interstate commerce by treating out-of-staters differently than in-staters, and thus burden interstate commerce? Second, if the law does not discriminate, then the presumption is in favor of upholding the law and it will be invalidated only if it is shown that the burden on interstate commerce outweighs the benefits of the law. Third, if the law is discriminatory, then there is a strong presumption against the law and a court will uphold it only if it is necessary to achieve an important governmental purpose. The court will also look at whether there were alternative nondiscriminatory means available. (*Id.* at 441.)

This bill does not discriminate by treating out-of-state private prisons differently than in-state private prisons (both would be prohibited), thus the issue would hinge upon whether the bill’s burden on interstate commerce outweighs the benefits of the law. The burden on interstate commerce is the prohibition on sending inmates to out-of-state private facilities as well as the prohibition on businesses that are based in other states’ ability to operate such a facility within California. The stated benefit of the bill is an overall increase in the safety of inmates as well as safety of the community because inmates housed in private prisons tend to experience more abuse and are afforded less rehabilitative programming. The benefit is arguably an important one, but whether or not this bill’s benefits outweighs its burden on interstate commerce is ultimately a question for the courts.



### **b. Takings Clause**

Both the Federal Government and the states have the authority to take private property when necessary for government activities. But there is a limitation on this power. The Fifth Amendment to the federal constitution states "nor shall private property be taken for public use without just compensation." For a legal analysis under the takings clause one must consider the following: Is there a taking of property; if so, is it for public use; if so, is "just compensation" paid?

A taking occurs when the government confiscates, physically occupies property or deprives a property owner of all beneficial use of the property. The term "public use" has been expansively defined. A taking is for public use so long as the government acts out of a reasonable belief that the taking will benefit the public.

As applied to this bill, the third type of taking seems to be the most relevant – depriving an owner of all beneficial use of the property. An owner of in-state detention facility that is currently used for the housing of detainees would be negatively affected by this bill in that the facility would no longer be able to be used for such purposes. Whether the facility could be repurposed for another use or whether the property value would be affected by this law are factual questions that would depend on the circumstances. Again, a challenge brought on such grounds would ultimately be a question for the courts.

### **c. Contracts Clause**

The U.S. Constitution provides that no state shall pass any law impairing the obligation of contracts (U.S. Const. art. 1, § 10.), and the California Constitution specifies that a law impairing the obligation of contracts may not be passed. (Cal. Const. art. 1, § 9.)

This bill does not interfere with any contract in effect prior to the enactment date of this bill which is January 1, 2020. The bill provides that the prohibition of the operation of a for-profit detention facility within the state does not apply to those that operate pursuant to a valid contract with a government entity that was in effect before January 1, 2020, for the duration of that contract, not to include any extensions made to or authorized by the contract. (See proposed Penal Code § 9505.) In other words, a contract that was in effect before January 1, 2020, cannot be extended after January 1, 2020, even if the extension is authorized in the contract. The bill also provides that on or after January 1, 2020, the CDCR: shall not enter into a contract with a private, for-profit prison facility located in or outside of the state to provide housing for state prison inmates; and shall not renew an existing contract with a private, for-profit prison facility located in or outside of the state to incarcerate state prison inmates. Again, this prohibition on contracting does not impair an obligation in a contract. Rather, it prohibits a renewal of a contract after January 1, 2020. Further, it prohibits for-profit run prison facilities from entering into a new contract to incarcerate Californians on or after January 1, 2020. To the extent that the provision that prohibits extensions made to or authorized by a contract is challenged in court, it is important to understand that courts have not interpreted the Contracts Clause as imposing an absolute bar to the enactment of legislation that interferes with contracts (*Home Building & Loan Association v. Blaisdel* (1934) 290 U.S. 398, 428). Instead, courts examine "whether the state law is drawn in an "appropriate" and "reasonable" way to advance "a significant and legitimate public purpose." (*Sveen v. Melin* (2018) \_\_\_ U.S. \_\_\_ [138 S.Ct. 1815]. Internal citations omitted.)

However, the bill's provisions would prohibit parties from renewing a contract and extending a contract after January 1, 2020, even if the extension was specifically authorized in a contract that was enacted prior to December 31, 2019. If challenged and a court interprets this prohibition of a renewal and extension, as interference with an existing contractual obligation, the interference would be subject to the test described above.

#### **d. Severability Clause**

This bill contains a severability clause, thus if this bill is challenged in the courts and a provision is found to be unconstitutional, any remaining provisions may still be enacted.

### **6. Argument in Support**

According to Immigrant Legal Resource Center, a co-sponsor of this bill:

AB 32 will end the renewal of contracts with for-profit prisons and detention facilities by phasing out their use in a responsible manner. AB 32 will also help to redirect our criminal justice system to value and prioritize effective rehabilitative programs, which will ideally reduce recidivism rates and maximize opportunities for success for inmates upon their re-entry into society.

AB 32 will also end the use of for-profit facilities to detain and house other individuals subject to civil detention and confined in for-profit facilities. The abuses perpetrated by the private prison industry are not unique to criminal custody and we must ensure that these abuses are checked, wherever they occur. These facilities are rife with human rights abuses and lack proper oversight or transparency.

For-profit prison companies benefit from incarcerating and detaining California residents through government contracts. Our state is home to multiple facilities affiliated with two of the largest firms in the private-prison industry, GEO Group and Core Civic. Both of these firms have faced numerous lawsuits over the years for substandard medical care and conditions. GEO Group is currently being sued for human trafficking, wage theft and forced labor for its treatment of detainees in facilities across the United States.

For-profit prisons and facilities lack the oversight, transparency and accountability needed when depriving individuals of liberty. Human rights abuses are inhering in any facility operated by the private prison industry.

Their fiduciary duty, as a for-profit corporation, and mission is to maximize profits for their investors. They are able to accomplish this by increasing their inmate population and cutting operational costs, which is dangerous and detrimental to the prisoners and staff. Private prison corporations have incentives to drive up reliance on incarceration, often lobbying to drive up policies which increase incarceration in order to drive up demand for their business. This presents a concerning conflict of interest with the state's goals to invest in the rehabilitation and reintegration of people.

## 7. Argument in Opposition

According to the California State Sheriffs' Association:

Many different tools and approaches are included in California's efforts to eliminate overcrowding in the state prison system. Over the past few years, private prisons have been but one part of a multipronged approach to reduce overcrowding, promote better outcomes, and protect public safety.

While there has been a significant reduction in state prison population since Realignment, it remains a challenge to continue to meet the federal three-judge panel mandate to relieve prison overcrowding. Removing CDCR's authority to contract with private prisons takes away a tool and increases the likelihood of releases of dangerous inmates from state prison and heightens pressure to have county jails take on more custodial capacity that would otherwise be housed in state prison. Given the significant responsibilities and challenges already assumed by local entities under Realignment and the great pressure on local systems that would surely occur in the wake of an influx of new, serious, offenders in local custody, we are exceedingly concerned about hamstringing state prison officials.

-- END --