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SHOULD THE FEDERAL BUREAU OF PRISONS PHASE OUT CONTRACTED PRISONS? A Closer Look at the OIG's Findings



by Austill Stuart

Reason Foundation



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SHOULD THE FEDERAL BUREAU OF PRISONS PHASE OUT CONTRACTED PRISONS? A CLOSER LOOK AT THE OIG'S FINDINGS



BY AUSTILL STUART

EXECUTIVE SUMMARY

United States Attorney General Jeff Sessions recently pushed the debate over private prisons back into the spotlight with a February 21, 2017 memorandum rescinding a Department of Justice memorandum that had been issued in August 2016 calling for the eventual end of using private prisons within the federal Bureau of Prisons (BOP).

The August 2016 memo, which followed a report that had been released by the Department of Justice's Inspector General (OIG) on improving the monitoring of private prisons, included significant space dedicated to comparing various safety and security metrics between BOP-operated prisons and their private prison counterparts within the BOP system.

The August 2016 memo cited the OIG report as evidence that private prisons are less safe and are incapable of delivering inmate services on a level comparable to prisons the BOP operates itself. Sally Q. Yates, then-deputy attorney general, wrote:

Private prisons served an important role during a difficult period, but time has shown that they compare poorly to our own Bureau facilities. They simply do not provide the same level of correctional services, programs, and resources; they do not save substantially on costs; and as noted in a recent report by the Department's Office of Inspector General, they do not maintain the same level of safety and security. The rehabilitative services that the Bureau provides, such as educational programs and job training, have proved difficult to replicate and outsource—and these services are essential to reducing recidivism and improving public safety.

For all these reasons, I am eager to enlist your help in beginning the process of reducing—and ultimately ending—our use of privately operated prisons. As you know, all of the Bureau's existing contracts with private prison companies are term-limited and subject to renewal or termination. I am directing that, as each contract reaches the end of its term, the Bureau should either decline to renew that contract or substantially reduce its scope in a manner consistent with law and the overall decline of the Bureau's inmate population.

In contrast, the February 2017 memo says calling for the end of private BOP prisons has “impaired the Bureau's ability to meet the future needs of the federal correctional system.” Attorney General Sessions wrote:

I hereby rescind the memorandum dated August 18, 2016, sent to you by former Deputy Attorney General Sally Q. Yates, entitled “Reducing our Use of Private Prisons.” In that memorandum, former DAG Yates directed “that, as each contract reaches the end of its term, the Bureau should either decline to renew that contract or substantially reduce its scope in a manner consistent with law and the overall decline of the Bureau’s inmate population.” The memorandum changed long-standing policy and practice, and impaired the Bureau’s ability to meet the future needs of the federal correctional system. Therefore, I direct the Bureau to return to its previous approach.

Given Attorney General Sessions’ memo and the renewed debate over private prisons that will likely follow, it is important to get beyond conflicting memos and take a closer look at what the August 2016 Inspector General report did, and did not, conclude about private prisons.

While it is certainly true the OIG report shows a greater number of safety and security incidents being reported in privately run BOP prisons than government-operated ones over the period studied, the report also includes many statements by the OIG and BOP urging caution in making comparative statements about the findings. For example, the OIG said it lacked information needed to break down per inmate costs into specific categories (such as health costs, food costs, etc.), limiting the number and specificity of comparisons that could be made between the types of prisons.

Large differences in the inmate demographics of private and government-run prisons, which the OIG noted it could not fully or accurately account for, also made private-to-government comparisons of limited value. The Bureau of Prisons actually cites demographic differences as the cause of many safety and security incidents in private prisons.

Several of the metrics used for comparison, such as contraband seizures and grievances, have ambiguous interpretations. Others reflect on factors other than the operator of the prison itself; inmate guilty findings in disciplinary hearings and inmate assaults of prison staff provide two examples.

The OIG report also includes recommendations stemming from legitimate concerns over how monitoring is conducted at private prisons in the BOP system, but is also quick to note the shared responsibility between the BOP and contractors in implementing these changes.

The OIG report praised the quick responses by BOP monitors and private contractors when problems arise in private prisons. In contrast, recent work by the OIG strongly suggests that staff in government-run BOP prisons often resist OIG recommendations designed to improve monitoring and things like contraband interdiction. The consistent message of the OIG findings—that private contractors and BOP monitors charged with oversight of private prisons respond quickly and favorably to OIG recommendations—suggests that contracts can be designed to incentivize responsiveness and progress in privately managed prisons. Contracts that stress oversight, accountability and financial penalties for private prison operators that are underperforming encourage strong performance and serve as checks on any incentives a private operator might believe it has to underreport incidents at the prison.

With the federal government keeping the door open to private prisons, the agencies involved should look to improve monitoring and oversight in private prisons in the ways recommended by the OIG, including improving checklists that guide BOP private prison monitors and better understanding the reasons behind the OIG report’s findings.

It is also an opportunity to improve contracting within the Bureau of Prisons system. This brief includes a few additional suggestions to that end, such as recidivism-based contracting and adopting a broader “continuum of care” model that could ensure better services for inmates.

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INTRODUCTION

In February 2017, United States Attorney General Jeff Sessions issued a memorandum rescinding an August 2016 March memorandum calling for the federal Bureau of Prisons to phase out, and eventually end, its use of private prisons.

The August 2016 Department of Justice memo, written by then-Deputy U.S. Attorney General Sally Q. Yates, asserted:

(T)ime has shown that (contract prison facilities) compare poorly to our own Bureau facilities. They simply do not provide the same level of correctional services, programs, and resources; they do not save substantially on costs; and as noted in a recent report by the Department's Office of Inspector General, they do not maintain the same level of safety and security. The rehabilitative services that the Bureau provides, such as educational programs and job training, have proved difficult to replicate and outsource—and these services are essential to reducing recidivism and improving public safety.¹

For all these reasons, I am eager to enlist your help in beginning the process of reducing—and ultimately ending—our use of privately operated prisons. As you know, all of the Bureau's existing contracts with private prison companies are term-limited and subject to renewal or termination. I am directing that, as each contract reaches the end of its term, the Bureau should either decline to renew that contract or substantially reduce its scope in a manner consistent with law and the overall decline of the Bureau's inmate population.

In sharp contrast, Attorney General Sessions' February 2017 memo says the decision to end private prison contracting has “impaired” the Bureau of Prisons:

¹ Office of Deputy Attorney General Sally Q. Yates, “Memorandum for the Acting Director, Federal Bureau of Prisons, SUBJECT: Reducing our Use of Private Prisons,” U.S. Department of Justice. justice.gov. 18 Aug. 2016. <www.justice.gov/opa/file/886311/download> 30 Jan. 2017.

I hereby rescind the memorandum dated August 18, 2016, sent to you by former Deputy Attorney General Sally Q. Yates, entitled “Reducing our Use of Private Prisons.” In that memorandum, former DAG Yates directed “that, as each contract reaches the end of its term, the Bureau should either decline to renew that contract or substantially reduce its scope in a manner consistent with law and the overall decline of the Bureau's inmate population.” The memorandum changed long-standing policy and practice, and impaired the Bureau’s ability to meet the future needs of the federal correctional system. Therefore, I direct the Bureau to return to its previous approach.

The 2016 Yates memo references an Office of Inspector General (OIG) report, entitled “Review of the Federal Bureau of Prisons’ Monitoring of Contract Prisons.”² As suggested by the OIG report’s title, its chief purpose was to evaluate how the BOP oversees the prisons it contracts with. The report does not analyze whether or not the BOP should terminate, or reduce, its use of private prisons.

The August 2016 OIG report is focused on an examination of the regulatory and monitoring regime that private prison operators in the BOP system face. The report compares government-operated prisons to contracted-out prisons on a variety of metrics and finds there were a greater number of safety and security incidents occurring at private prisons during the period studied. The report, however, contains many disclaimers suggesting that readers should not draw overly strong conclusions from its comparisons, noting that a variety of factors ranging from different inmate population demographics in the types of prisons to the use of metrics that can have ambiguous interpretations limit the ability to make apples-to-apples comparisons.

The OIG report also gives praise to private prison operators and their BOP monitors for quickly responding to incidents and issues as they arise. It notes private operators sought to adopt OIG recommendations, suggesting that the monitoring regime that BOP private prison operators face, when balanced with an incentive-pay structure that includes myriad ways for contractors to lose money over lack of performance, overcomes the incentive contractors would face to underreport incidents that result in financial penalties. In contrast, recent OIG work suggests that staff in government-run BOP prisons resist recommendations related to greater monitoring and oversight.

² Office of the Inspector General, “Review of the Federal Bureau of Prisons’ Monitoring of Contract Prisons,” Department of Justice. [justice.gov](https://oig.justice.gov/reports/2016/e1606.pdf), August, 2016. <<https://oig.justice.gov/reports/2016/e1606.pdf>> 30 Jan. 2017.

With Attorney General Sessions' recent memo calling for private prison contracting to continue, the Bureau of Prisons has a great opportunity to improve oversight of private operators, to implement the OIG report's key recommendations, and introduce additional reforms that ensure even better oversight.

This policy brief highlights the Office of Inspector General's actual findings and examines what they actually tell us about the effectiveness of private prisons.



P A R T 1

COMPLICATING FACTORS IN COMPARING BOP-OPERATED AND CONTRACT PRISON COST

Many factors make comparing the cost and performance of public and private prisons in any prison system difficult. Vast differences in the demographics of inmate populations between BOP-operated and contracted BOP prisons provide an additional complicating factor more unique to the BOP system. This difficulty necessarily weakens the value of comparisons made between the two types of prisons.

Researchers and policy experts routinely urge caution in making strong statements concerning comparisons between public and private prisons, mostly in terms of costs. In the case of BOP facilities, the vast demographic concerns add an additional layer of difficulty that warrants even more care in making conclusive comparative statements.

1.1 THE OIG REPORT'S COST LIMITATIONS

The first factor that makes cost comparisons difficult between BOP-operated and its contracted-out prisons relates to differences in budgeting systems, both on the state and federal level.³ Specific to the August report, the OIG lacked information to break down per-inmate costs into more specific categories (such as health costs, food costs, etc.), limiting the number and specificity of comparisons that can be made. Not only did the “fixed-price” contracts prevent the BOP from knowing such information about the contractors, but both the Government Accountability Office and OIG note that the BOP could do more to provide transparency on its own costs.⁴

³ Kenny, Harris and Leonard Gilroy. *The Challenges of Comparing Public and Private Correctional Costs*. Reason Foundation, Policy Brief #112. December, 2013. <reason.org/files/comparing_correctional_costs.pdf> 30 Jan. 2017.

⁴ Office of the Inspector General. “Review of the Federal Bureau of Prisons’ Monitoring of Contract Prisons.” 11–13. <oig.justice.gov/reports/2016/e1606.pdf> 30 Jan. 2017; “Bureau of Prisons: Opportunities Exist to Enhance the Transparency of Annual Budget Justifications.” U.S. Government Accountability Office. GAO-14-121. *GAO.gov*, December, 2013. <www.gao.gov/products/GAO-14-121> 30 Jan. 2017.

The OIG concludes that the BOP's lack of ability to compare costs of different programs between types of prisons violates the *Government Performance and Results Act of 2010*, since, lacking such information, the BOP would be unable to create viable "efficiency measures" to assess program costs.⁵

Even with better information, many economic analyses for assessing privatization and outsourcing of corrections present a range of estimates for "avoidable costs"—that is, costs that no longer would be undertaken by the public sector if privatization or outsourcing commenced—which are vital to making cost comparisons. Recent research by two Temple University researchers finds that the literature on avoidable costs tends to understate some of the longer-term burdens endured by "in-house" prison operation, such as retiree health and pension liabilities, in determining avoidable cost.⁶

In the case of BOP facilities, the vast demographic concerns add an additional layer of difficulty that warrants even more care in making conclusive comparative statements.

Other factors affect the viability of cost comparisons between public and contracted-out prisons, but are generally considered too difficult to quantify for them to appear in most models that drive cost comparisons.⁷ The first is competition itself. When legitimate competition with the private sector exists in providing any government service—corrections or otherwise—savings and productivity often improve in "in-house" services, too.⁸ Other factors can drive privatization and savings outside of stated costs, most having some relation to the presence of competition, such as a greater ability to manage prison capacity and improve quality of services, greater control and accountability of operations to lawmakers, and increased ability to take advantage of specialized expertise to improve outcomes for inmates who are elderly, juvenile, suffer from mental health problems or are chronically ill.⁹

⁵ "(E)fficiency measure' means a ratio of a program activity's inputs (such as costs or hours worked by employees) to its outputs (amount of products or services delivered) or outcomes (the desired results of a program)." GPRA Modernization Act of 2010. Pub. L. 111-352, January 4, 2011. <www.congress.gov/bill/111th-congress/house-bill/2142/text> 30 Jan. 2017.

⁶ Hakim, Simon and Erwin Blackstone. "Cost Analysis of Public and Contractor-Operated Prisons." Temple University Working Paper. April, 2013. <www.researchgate.net/publication/257780985_Cost-Analysis-of-Public-and-Contractor-Operated-Prisons-FINAL3> 30 Jan. 2017.

⁷ Kenny and Gilroy. *The Challenges of Comparing Public and Private Correctional Costs*.

⁸ Hakim and Blackstone. *Cost Analysis of Public and Contractor-Operated Prisons*. 30-31.

⁹ Segal, Geoffrey F. and Adrian T. Moore. *Weighing the Watchmen: Evaluating the Costs and Benefits of Outsourcing Correctional Services, Part I—Employing a Best-Value Approach to Procurement*. Reason Public Policy Institute. Policy Study 289. January, 2002. <reason.org/files/Aca7ce58f2a7b7a1529a21927459880a.pdf> 30 Jan. 2017.

Making a reliable cost comparison against two types of entities that differ in so many ways is difficult.¹⁰ The OIG’s lack of ability to assess comparative service costs is likely a major reason why the BOP, the GAO and the contractors have refrained from stating any conclusions remotely as drastic as those contained in the DOJ’s memo. The recension of the August DOJ memo, resulting in the continuation of BOP prison contracting, at least appears to be more consistent with the OIG’s findings, as those findings include no recommendation to curtail, much less end, the contracting out of BOP prisons.

1.2 INMATE POPULATION ASYMMETRIES AND COSTS

Accurate cost comparisons assume highly similar sample sizes of individuals, not just in terms of sheer numbers, which guided the OIG’s selection of BOP-operated prisons for the study, but with similar demographic characteristics. While the numbers of inmates in the two samples being compared are similar, their demographics are not. The OIG report, citing the BOP and the private companies themselves, notes major differences in inmate demographics between BOP-operated prisons and their contracted counterparts.¹¹ These differences affect costs and delivery of services to inmates, and the OIG notes that it cannot accurately account for these differences in their comparisons.¹²

For example, non-U.S. citizens make up the vast majority of the contract prison sample; Mexican nationals alone make up 72% of the inmate population in contracted out BOP prisons, with the balance of inmates mostly coming from other Central American countries. In sharp contrast, the majority of inmates (88%) at BOP-operated prisons were born in the United States.¹³ Such demographic differences result in a higher likelihood of safety and security incidents due to cultural and language differences among inmates and between inmates and staff, affecting the management of contract prisons. The DOJ notes that inmate

¹⁰ Ibid. 15.

¹¹ Office of the Inspector General, “Review of the Federal Bureau of Prisons’ Monitoring of Contract Prisons.” 11, 21, 70–77.

¹² Ibid. ii.

¹³ Ibid. 16 (footnote 29):

“In this review, we were not able to evaluate all of the factors that contributed to the underlying data. Where our interviews or document analyses provided explanations for the data findings, we note this. However, we also note a number of areas where we believe the BOP needs to examine the reasons behind our findings more thoroughly and identify corrective actions. The BOP indicated in response to a working draft of this report that a number of factors, including inmate demographics and facility location, may result in variance in the data reported in these categories. According to the BOP, as of January 2014 inmates incarcerated in private facilities were primarily non-U.S. citizens with 72.1 percent from Mexico, while the selected BOP institutions had an average of 11.8 percent non-U.S. citizens. See Appendix 1 for more information on our methodology, including our data analysis.”

programs have been “difficult to replicate and outsource” in contract prisons, but this is because the different inmate populations require different services.

For all inmate services, these differences affect costs, as managing non-English language speaking inmates requires translators or bilingual staff. Cultural differences also demand more-skilled staff and greater emphasis on communication. Accommodating these inmate characteristics costs more than managing prison populations comprised of mainly English speakers.

Since inmates in contract BOP prisons face a strong chance for eventual deportation to their home countries, providing services and skills that will serve those inmates in their destination countries needs to be ensured. Programs provided for the same purposes in BOP-operated prisons for inmates who mostly will stay in the U.S. after release will necessarily differ. The OIG and BOP avoid making any statements comparing services in the two types of prisons, with the BOP response to the OIG report draft memo stressing the *dissimilarity* of the services in the two types of prisons: “(W)e continue to caution against drawing comparisons of contract prisons to BOP operated facilities as the different nature of the inmate populations and programs offered in each facility limit such comparisons.”¹⁴ The August DOJ memo contains much more confident language in its assessment of inmate services in the two types of BOP prisons, but provides no evidence for that assessment, suggesting that the August memo’s recension is more consistent with the August 2016 OIG report’s findings than the policy recommendation to end the contracting out of BOP prisons included in the August DOJ memo.

“(W)e continue to caution against drawing comparisons of contract prisons to BOP operated facilities as the different nature of the inmate populations and programs offered in each facility limit such comparisons.” –*OIG Report, August 2016*

Differences in BOP prison populations also mean added risk from a health, safety and security standpoint for both inmates and staff. While the BOP is almost certain to have extensive background information (e.g., criminal, medical, dental, etc.) on inmates in facilities run by the BOP, both the contractors and their BOP monitors are more likely to lack such information for their inmate population.

¹⁴ Ibid. 68.

Lacking medical background information can make it more difficult to provide proper care and can increase contamination risks for inmates. The language barrier adds costs in terms of requiring translators or bilingual doctors and medical staff.

The lack of criminal background information on inmates can lead to myriad security problems, not just for contractors and their BOP monitor staff, but also (perhaps even more so) for other inmates. In their responses to an earlier draft of the August OIG report, two contractors (CoreCivic,¹⁵ GEO) claim that a high proportion of their inmates belong to, or are affiliated with, Security Threat Groups (STGs)—formal or informal groups of inmates that function as criminal organizations within prisons, while MTC notes the added difficulties of keeping various rival factions of STG-affiliated inmates away from each other when the inmate populations share so much in terms of ethnicity and culture.¹⁶

It's important to recognize that foreign-born inmates in contract facilities serve sentences related to crimes committed in the U.S., but if those inmates have engaged in violent crimes in their home countries unknown to staff, the potential for safety problems is much greater than for domestically born inmates in BOP-operated prisons whose criminal history will be better known to administrators—and who have been placed in low-security prisons in part because of that history.

Such lack of knowledge about non-U.S. citizen inmates, combined with cultural and language differences between inmates and staff and among various inmates, makes for higher risk across the board and more variables to consider for safe management, while also placing upward cost pressure on operations for contractors. The OIG report cites the BOP in saying these language and cultural factors—which exist in contracted BOP prisons, but not in BOP-operated ones—limit the ability to accurately compare BOP contract prisons to BOP-operated ones:

¹⁵ In August 2016, contractor “CCA” changed its name to “CoreCivic.” Their names are used interchangeably in this brief.

¹⁶ Ibid. 70–76.

CoreCivic's response:

“Our experience has been that the criminal alien population housed in contract prisons has a higher rate of Security Threat Group (STG) members and associates (including border, Mexican and Central American gangs) and groups of inmates that strongly define their identity by geographical areas, such as the Mexican state they are from, than U.S. citizen populations of the comparable security level housed in most BOP facilities.”

GEO Group's response:

“The CAR population comes with a high number of gang affiliations. That factor alone may result in increases in the level of violent incidents in the CAR (Criminal Alien Requirement, meaning private contracted BOP prisons) facilities.”

MTC's response:

“The normal practice is to disperse groups as much as practical to weaken any STG groups operating in a facility. Any difference in incident rates would be far more attributable to (the demographic differences in the BOP prison populations) than whether the prison is a contract prison or BOP facility.”

We acknowledge that inmates from different countries or who are incarcerated in various geographical regions may have different cultures, behaviors, and communication methods. The BOP stated that incidents in any prison are usually a result of a conflict of cultures, misinterpreting behaviors, or failing to communicate well. One difference within a prison housing a high percentage of non-U.S. citizens is the potential number of different languages and, within languages, different dialects. Without the BOP conducting an in-depth study into the influence of such demographic factors on prison incidents, it would not be possible to determine their impact.¹⁷

In contrast, the August DOJ memo’s language appears tone-deaf to such considerations, acting as though the same programs offered to mostly English-speaking U.S. citizens should be easily replicated, without additional cost, for mostly Spanish-speaking non-U.S. citizens, “The rehabilitative services that the Bureau provides, such as educational programs and job training, have proved difficult to replicate and outsource—and these services are essential to reducing recidivism and improving public safety.”¹⁸

1.3 OIG PER INMATE COST COMPARISONS

Putting the above asymmetries aside, whether contracting out prisons in the BOP “save(s) substantially on costs” depends on the definition of “substantially.”¹⁹ Notably, the per-inmate cost differential between BOP-operated and contract prisons has increased significantly since FY2011 when it stood at only 3.5%. On a dollar basis, Figure 1 shows a growing gap between annual per-inmate costs in each sector in recent years, with FY2014 costs totaling over \$25,000 per-inmate in BOP-operated facilities, compared to just over \$22,000 in contract prisons. This means that costs per inmate at contracted-out BOP prisons were 12.3% lower than in BOP-run prisons in FY2014 (see Figure 2), the latest year for which information is provided in the report.

While the term “substantial” is somewhat subjective, the 12% cost differential noted in the August OIG report would appear to meet most reasonable definitions. Several states have statutory standards in place defining what “significant” means in terms of costs savings. For

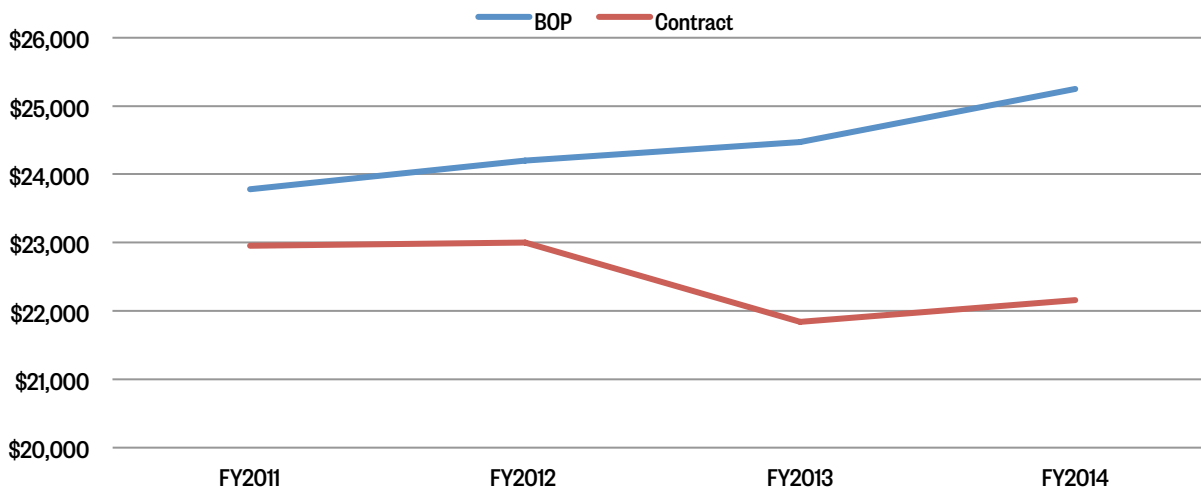
¹⁷ Ibid. 68.

¹⁸ Office of Deputy Attorney General Sally Q. Yates. “Memorandum for the Acting Director, Federal Bureau of Prisons. SUBJECT: Reducing our Use of Private Prisons.”

¹⁹ Ibid.

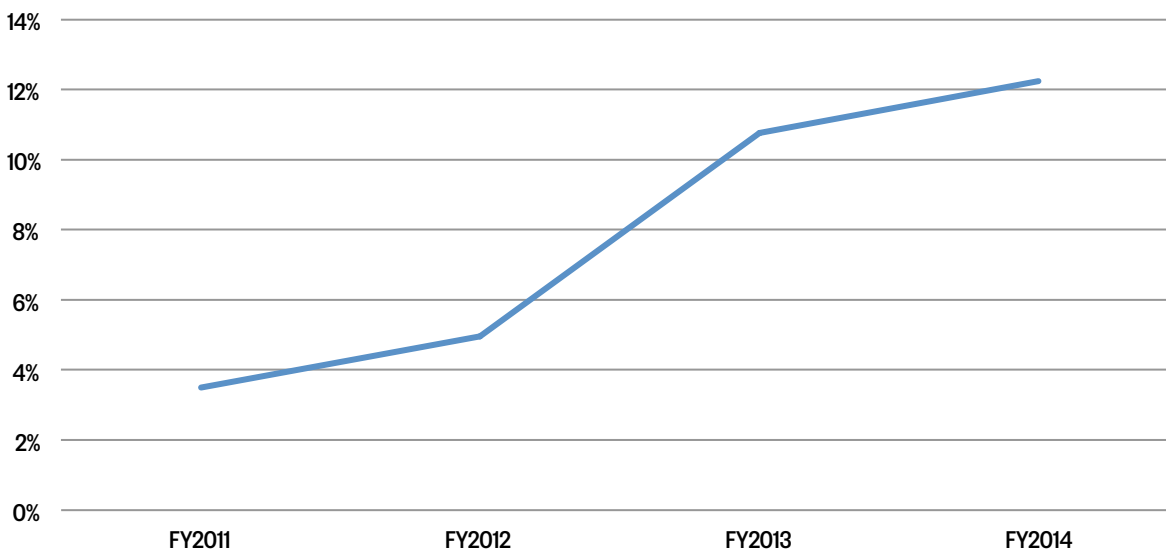
example, Florida requires any private prison contract to save the state at least 7% relative to in-house operation; similarly, Michigan requires a 10% savings. Hence, the 12% savings in the BOP system seems “substantial,” with the caveat that it is certainly possible that the widening cost gap between the two sectors could begin to close in the future.

FIGURE 1: ANNUAL PER-INMATE COSTS BETWEEN BOP-OPERATED AND CONTRACTED BOP PRISONS, FY2011-2014



Source: OIG, Department of Justice. “Review of the Federal Bureau of Prisons’ Monitoring of Contract Prisons.” August 2016. p. 12 (Figures 2 and 3).

FIGURE 2: ANNUAL PER-INMATE COST DIFFERENTIAL BETWEEN BOP-OPERATED AND CONTRACTED BOP PRISONS, FY2011-2014



Source: OIG, Department of Justice. “Review of the Federal Bureau of Prisons’ Monitoring of Contract Prisons.” August 2016. p. 12 (Figures 2 and 3).

The OIG warns against making strong conclusions on cost comparisons between the two types of prisons since other factors affecting costs cannot be accounted for adequately in the comparisons. If anything, citing the OIG report as evidence that contracting out in the BOP prison system does not save substantially on costs appears inappropriate, given the per-inmate cost savings the OIG report shows.

P A R T 2

CONTRACT PRISON VISITS, MONITORING AND OVERSIGHT

Two sections of the August OIG report include observations from on-site visits of contract prisons and a discussion of ways the BOP can better monitor contract prisons. Although these two sections combined make up the majority of the body of the OIG report—and better monitoring of contract prisons is the main focus of the report—they have mostly been avoided by media outlets.

This is unfortunate, as these two sections offer evidence suggesting that contract prisons respond quickly to problems when they happen and verifying that they are subject to an array of accreditation, monitoring, and auditing procedures as part of the BOP's contract requirements and oversight protocols. Given the February 2017 decision to continue the use of private prisons in the BOP system, these sections have added relevance, since the gradual ending of BOP prison contracting would also mean the gradual ending of contractor monitoring, and thus the need to improve said monitoring.

2.1 CONTRACT PRISON VISITS

When the OIG visited three BOP contract prisons, it found a total of 12 deficiencies related to security and safety in those prisons:

- uses of force (2)
- report of an incident
- a positive inmate drug test
- a sexual assault
- inmate disciplinary hearings (2)
- contraband seizures (3), and
- suicides (2).

The BOP monitors also found a failure by contractors to initiate disciplinary action in the incidents the monitors studied. During the visits, however, the OIG noted that the prisons maintained compliance, and also stated the contractor's willingness, in each case, to respond to all incidents (the 12 ones cited by the OIG, as well as ones the BOP found separately) with corrective actions: "We determined that for each of the safety and security related deficiencies that BOP onsite monitors identified during our study period, the contractor responded to the BOP and took corrective actions to ensure the prison was in compliance with policies and the contract."²⁰ The OIG does recommend that the BOP improve its oversight in response to the deficiencies.²¹

The other major issue identified by the inspector general involves "Special Housing Units," or SHUs. Prison staff use SHUs to isolate inmates from the general population, and policy prohibits their use except as a consequence for inmates who are cited for behavioral problems and other transgressions.

"We determined that for each of the safety and security related deficiencies that BOP onsite monitors identified during our study period, the contractor responded to the BOP and took corrective actions to ensure the prison was in compliance with policies and the contract."

—OIG Report, August 2016

Two of the three contract prisons the OIG visited were found to be using the SHUs as a temporary means to house inmates until space in the general population became available, a violation resulting from both the contractors and their BOP monitors misinterpreting policy to conclude that empty space in the SHU is equivalent to bed space among the general prison population.²² Since the contractors have no right of refusal—when the BOP sends inmates to them, the contractors must take them—the BOP monitors are generally in a better position to bring up such concerns than the contractors. All that aside, here too the contractors and monitors responded quickly to the problem of placing inmates in the SHU as a temporary measure, and the issue no longer appears to be an active concern.²³

²⁰ Office of the Inspector General. "Review of the Federal Bureau of Prisons' Monitoring of Contract Prisons." 29.

²¹ Ibid. ii.

²² Ibid. 30.

²³ Ibid. 30–31: "The BOP Director further stated that the onsite monitors and Contracting Officers would ensure contract compliance, especially regarding placement of inmates in the SHU."

As the title of the August OIG report would imply (“Review of the Federal Bureau of Prisons’ Monitoring of Contract Prisons”), the OIG offered recommendations to the BOP monitors to improve their performance, including enhancing monitor checklists and assuring better health care delivery. From all indications given by the August OIG report, the BOP monitoring staff at their contract prisons concurred with every OIG recommendation, and the OIG is apparently satisfied with their responses, labeling all recommendations “resolved.”²⁴ The quick responses by BOP monitors and contractors to address issues and adopt new procedures recommended by the OIG should not be discounted. While problems occur at public and private prisons alike, responses to those problems should carry weight on whether any prison’s operators are capable of the task.

2.2 OVERSIGHT

Another lengthy discussion in the OIG report that has been neglected in the media coverage describes how BOP contract prisons are regulated. This section shows that contract prisons are subject to a great deal of oversight and monitoring. Further, anecdotal evidence in the August 2016 OIG report and a June 2016 report on contraband interdiction in BOP-operated prisons suggest that staff in BOP-operated prisons resist attempts to increase outside oversight.

Some key points of contractor monitoring, compliance and regulation include:

- The BOP monitors all aspects of contract prison operation, has contract monitors on site at the private facilities, and audits contract prisons at least every other month.
- In its contracts with private prison operators, the BOP includes performance measures covering 29 vital functions across eight categories. If there is underperformance in any of these areas, payment to the contractor can be reduced or withheld.
- Both contractors and the BOP have internal quality control programs tied to the 29 vital functions.²⁵
- Private prisons in the BOP system are required to obtain and maintain third-party accreditation from the American Correctional Association.

The BOP’s Quality Assurance Plan, which is based on contract requirements and includes monitoring and other oversight guidelines, requires the work of three different BOP units:

²⁴ Ibid. 78–79.

²⁵ Office of the Inspector General. “Review of the Federal Bureau of Prisons’ Contraband Interdiction Efforts.” Department of Justice. justice.gov. June 2016. 4–13. <oig.justice.gov/reports/2016/e1605.pdf> 30 Jan. 2017.

- the Privatization Management Branch (PMB), which includes on-site monitors and their managers;
- the Contract Facility Monitoring Branch (CFM), which serves to audit the prisons and the contactors' internal processes; and
- the Privatized Corrections Contracting Section (PCC), which addresses contract procurement and administration.²⁶

Each of these units possesses the ability to recommend financial penalties or corrective actions based on deficiencies they find. Too many deficiencies can lead to a “Cure Notice,” which serves as a sort of a last warning to a contractor before the contract is terminated.²⁷

The checklist that PMB on-site monitors follow to conduct monthly reviews contains 70 steps alone, and contract monitors also keep written logs that track required internal audits and issue regular written evaluations of the prisons. The CFM audits all prison operations annually and on an ad-hoc basis, except health administration, which it audits at least every six months, and for which it enlists the services of a physician, physician's assistant, and industry expert. The PCC additionally monitors all aspects of contract compliance, and it is responsible for issuing cure notices when major problems do arise.²⁸

While the August OIG report confines its focus to contract prisons, its discussion of the monitoring and regulatory regime that contractors in the BOP system face includes multiple layers of regulation and oversight. While the on-site visits to some of the contract prisons by the OIG discussed in the August 2016 report included the observation of multiple security incidents, the OIG also noted an appropriate response by contractors and their BOP monitors to such incidents. A lack of information in the August OIG report prevents one from concluding that these layers of oversight result in a more open, transparent and effective means of prison operation than the BOP provides in managing its own prisons. The section in the August report that discusses contractor oversight and OIG on-site visits to contractors does show contractors and their BOP monitor staff responsive to problems, a quality that should be sought in any prison operator.

²⁶ Ibid. 6–11.

²⁷ Ibid. 11.

²⁸ Ibid. 6–11. To their credit, MTC claims in their response to the draft (p. 76) that the incentive to report incidents, grievances, etc. is stronger in contract prisons than in BOP-operated ones:

“MTC has wardens that have worked in contract prisons after careers in the BOP. They report that contractors bend over backwards to fully disclose any incident. BOP wardens have more discretion in reporting. The OIG should go back and interview these wardens for themselves to test our assertion.”

P A R T 3

SAFETY AND SECURITY INCIDENTS

The August OIG report compared data from 14 active contract prisons to 14 BOP-operated prisons chosen by the OIG across eight different safety and security categories: (1) contraband, (2) reports of incidents, (3) lockdowns, (4) inmate discipline, (5) telephone monitoring, (6) selected grievances, (7) urinalysis drug testing, and (8) sexual misconduct.²⁹

The August 2016 OIG report cites the BOP, stating the demographic differences in inmate populations at the two types of BOP prisons means that one should expect more safety and security incidents at contract prisons: “The BOP stated that incidents in any prison are usually a result of a conflict of cultures, misinterpreting behaviors, or failing to communicate well.”

Hence, it would be reasonable to expect more average safety and security incidents at contract prisons, which manage a vastly larger ratio of inmates from other cultures. At an aggregate level, more incidents were indeed reported within each of these OIG-selected eight categories at contract prisons than at BOP-operated prisons. However, examining the aggregates yields a very incomplete picture, as there are other factors at play that should be considered within each of these categories.³⁰

3.1 CONTRABAND

Fundamental questions about contraband confiscations present immediate problems with trying to establish conclusions. As the OIG notes in its August report:

We were unable to evaluate whether higher rates of contraband finds actually indicated more contraband present in either a contract prison or a BOP institution, a more

²⁹ OIG, “Review of the Federal Bureau of Prisons’ Monitoring of Contract Prisons.” August, 2016.

³⁰ Ibid.

*aggressive or effective program for discovering and confiscating contraband, or some combination of those or other factors.*³¹

Even so, the contraband figures warrant a closer look, with the June OIG report providing additional context.

CONTRABAND	BOP TOTAL	CONTRACT TOTAL	BOP ANNUAL AVERAGE/10K INMATES	CONTRACT ANNUAL AVERAGE/10K INMATES
Cell Phones	400	4898	38.3	317.1
Drugs	330	220	3	1.8
Tobacco	214	397	1.9	2.5
Weapons	206	418	1.8	3.2

Source: OIG. Department of Justice. "Review of the Federal Bureau of Prisons' Monitoring of Contract Prisons." August 2016. Table 7: "Comparison of Security Indicators among Contractors, FY 2011 – FY 2014" and Table 8: "Comparison of Security Indicators between Contract Prisons and BOP Institutions, FY 2011 – FY 2014"

As Table 1 shows, contracted BOP prisons averaged around one and a half times more confiscations of tobacco and weapons per 10,000 inmates than BOP-operated prisons did over the period reviewed, and around eight times as many cell phone confiscations. Drug confiscations were considerably lower in contract prisons than in BOP-operated ones. Importantly, the June report from the OIG raises significant questions on accuracy of the numbers provided from BOP-operated prisons.³²

The June 2016 OIG report, entitled *Review of the Federal Bureau of Prisons' Contraband Interdiction Efforts*, focuses only on BOP-operated prisons, and shows problems with staff implementing changes recommended to improve contraband interdiction efforts.³³ From the onset, the OIG states that the BOP "does not have a comprehensive data collection capability that reliably accounts for all contraband recovered" for the prisons it manages and "does not accurately track recovered contraband items within its institutions."³⁴ At a minimum, this suggests that the contraband figure comparisons in contracted and BOP-operated prisons in the August 2016 OIG report need to be taken lightly.

³¹ Ibid. 18.

³² Office of the Inspector General. "Review of the Federal Bureau of Prisons' Contraband Interdiction Efforts." It should be noted that this report contains a fair number of redactions, and many at least appear to be related to specific security lapses in BOP-operated prisons.

³³ Ibid.

³⁴ Ibid. 12.

A litany of employee policies governing workers in BOP-operated prisons that were noted in the June 2016 report allow greater chance for the successful introduction of prohibited items. For example, although BOP workers entering a facility do have to walk through metal detectors, they can choose to have their belongings sent through an X-ray scanner or a metal detector. Further, unlike in contract prisons, workers can return some types of contraband to their vehicles, and the BOP does not even attempt to track staff in BOP-operated facilities that try to introduce contraband repeatedly. All of this combines to form little deterrent to the introduction of contraband in BOP-operated facilities.³⁵

The June OIG report also finds that the BOP has trouble adopting recommendations with respect to improving contraband elimination. For over a decade, BOP-operated prisons have failed to adopt staff search techniques recommended by the OIG. In response to a 2003 OIG policy recommendation on increasing pat-down searches of staff to provide a more effective deterrent to the introduction of contraband, the BOP issued a May 2006 memorandum stating:

*On at least on a monthly basis, at all facilities, staff entering on each shift will be randomly selected and searched, while failure to adequately adhere to established policies of pat-down searches of BOP workers also incentivizes the introduction of contraband. We anticipate searching 5 percent of the staff on each shift.*³⁶

The BOP never actually implemented its own policy recommendation due to concerns raised by the union that represents employees in BOP-operated prisons, and in 2013 a new search policy gave wardens the ability to use their own discretion in establishing their own policies with respect to pat-down searches of prison staff.³⁷ From the OIG's analysis of available data in the June report, from January-September 2014, only 1% of all shifts in BOP-operated prisons under study had any pat-down searches at all, with a great deal of variation in the durations of search events (one minute³⁸ to several hours, with many less than 30 or even 15 minutes).³⁹

³⁵ Ibid. 28.

³⁶ Ibid. 16–17. Quote is from: Michael W. Garrett, "Memorandum to Paul A. Price, Assistant Inspector General for Evaluation and Inspections, OIG, Update Regarding Recommendation 6 in OIG's 'Final Report: The Federal Bureau of Prison's Drug Interdiction Activities.'" May 8, 2006.

³⁷ Ibid. 16–17.

³⁸ Ibid. 18. According to the BOP's own instructional video for conducting pat-down searches, a search of each BOP officer should last two minutes.

³⁹ Ibid. 18–21. As the report notes, low security prisons (such as the BOP prisons used for the August report) actually performed best in average frequency of pat-down searches, conducting them in 0.57% of worker shifts.

For their part, staff in BOP-run prisons told the OIG that they had never recovered any contraband from pat-down searches of staff, but the OIG concludes that the infrequency of searches and other factors outlined above make the BOP's self-assessment of little value:

(I)n light of the BOP's infrequent application of random pat search events and other related issues described in this report, the absence of contraband recoveries may not constitute an accurate performance measure.⁴⁰

Other findings in the June 2016 report speak more to technical problems in how the BOP manages contraband confiscations, including:

- Classification of the contraband as “hard” (dangerous) or “nuisance” often plays a large part in determining whether the confiscation will be reported at all, while BOP workers were also found to have categorized multiple types of contraband under single categories when recovered from the same incident, leading to severe misclassification problems. According to the June report:

For example, an officer who finds a cell phone charger, subscriber identity module (SIM) card, sharp metal stake, and tobacco product at the same location may combine them as one entry into any one of the several item types and sub-types. Therefore, in this example, the BOP would not have an accurate accounting of all contraband recovered by type.⁴¹

- For cell phone confiscations, the BOP conducts forensic studies on seized phones, generating reports on their findings to help inform BOP staff on how phones are being used and which inmates are gaining access to them. However, these reports were found to often be repetitive and filled with information that the OIG found to be of no use for these stated purposes, despite their length (often 500+ pages):⁴²

In reviewing a sample of Lab reports, we found them to be in excess of hundreds, and sometimes thousands, of pages that contain technical language and substantial duplication... In one (931-page) Lab Extraction Report containing the contents of a

⁴⁰ Ibid. 22. Union officials, for their part, claim random pat-down searches subject their workers to “harassment, intimidation, and coercion by institution management.” (p. 22). In contrast, the representatives from the OIG conducted interviews with state prison officers, who all said the practice is effective, even though only the Florida prisons they visited had minimum guidelines for pat-down searches—25% of their staff every month, often exceeding that minimum (p. 23).

⁴¹ Ibid. 14.

⁴² Ibid. 42.

contraband cell phone, we found 701 pages (75%) that contained information an investigator could use to further an investigation; [REDACTED]. However, within these 701 pages, we found that 529 pages (76 percent) of the useful information contained technical language or included photos and images —such as commercial pornographic material—that would not assist in an investigation. Additionally, within these 701 pages, we found 164 pages (23 percent) that essentially duplicated previously presented data.

A closer look at the figures provided in the August OIG report shows a more nuanced picture in terms of making comparisons between the contract and government-run prison in the BOP system. While the August OIG report makes little mention of the individual contractor performance in the body of the safety and security metrics section, the report does provide such information in its appendices. When combined with the data provided above, the results show individual contractors often reporting fewer average contraband seizures than the BOP-operated ones. Table 2 displays the contraband data for each of the three BOP prison contractors— Corrections CoreCivic (CC), the GEO Group (GEO), and the Management and Training Corporation (MTC)—in addition to the sample of BOP-operated prisons used in the sample.

TABLE 2: ANNUAL AVERAGE CONTRABAND CONFISCATIONS (PER 10,000 INMATES) IN BOP-OPERATED PRISONS AND CONTRACTED PRISONS, BY TYPE AND CONTRACTOR

CONTRABAND TYPE	BOP	CC (CONTRACTOR)	GEO (CONTRACTOR)	MTC (CONTRACTOR)
Cell Phones	38.3	314.6	462.1	31.3
Drugs	3.0	1.4	2.4	1.3
Tobacco	1.9	2.3	3.2	5.0
Weapons	1.8	0.8	4.8	0.7

Source: OIG, Department of Justice. “Review of the Federal Bureau of Prisons’ Monitoring of Contract Prisons.” August 2016. Table 7: “Comparison of Security Indicators among Contractors, FY 2011 – FY 2014” and Table 8: “Comparison of Security Indicators between Contract Prisons and BOP Institutions, FY 2011 – FY 2014”

Overall, while the contract prisons as a whole reported more average confiscations of cell phones, tobacco and weapons than BOP-operated prisons included in the sample, two of the contractors (CC and MTC), reported less than half as many weapons confiscations at their prisons, while MTC had fewer average cell phone confiscations than did BOP-run prisons.

Other findings by the OIG show the role outliers play in the cell phone confiscation figures: 82% of cell phone confiscations (3,981 of 4,849) at contracted-out BOP prisons occurred at just two of the 14 contract prisons over FY2011–FY2014: Big Springs and Adams County. The OIG

attributes those high numbers to location and heightened security measures, respectively, and notes Big Springs' response to remedy the situation.⁴³

Keeping weapons, communication devices and other contraband out of inmate hands plays a vital role in keeping prison facilities secure. While preventing contraband from even entering prisons in the first place is the best way to ensure that security, items do make their way to inmates occasionally, and how those types of prisons respond to contraband problems may reveal a contrast in behavior between the types of BOP prisons.

The August OIG report shows contract prisons in the BOP responding to contraband problems in ways recommended and deemed acceptable by the OIG, and a report from the OIG in June shows resistance by BOP prison staff to adopt procedures recommended by the OIG. While these findings lack the standing to make definitive conclusions, the contractor responses at the very least show that staff and monitors in contract BOP prisons can be relied upon to adapt and change when problems occur, an approach that any entity operating prisons should take, public or private sector.

While preventing contraband from even entering prisons in the first place is the best way to ensure that security, items do make their way to inmates occasionally, and how those types of prisons respond to contraband problems may reveal a contrast in behavior between the types of BOP prisons.

3.2 REPORTS OF SAFETY AND SECURITY INCIDENTS

The August OIG report included data on 10 types of security and safety incidents in both BOP-operated and contract prisons (see Table 3).

While the data show more of these incidents occurring at the contract prisons than at BOP-run prisons in almost all of the categories, here, too, additional context is needed. The

⁴³ The report notes that Big Springs installed a giant net around the perimeter to help eliminate the practice of people pulling off a nearby highway and throwing the phones over the fence to where inmates could grab them. The net, combined with improved relations with local law enforcement, resulted in a sharp two-year drop in confiscations—from 1,068 in FY2012 to 331 in FY 2014. The heightened security measures at Adams were the result of a riot in 2012, and if anything, reflect that staff at that prison want to improve safety and security, even if the high confiscation rate hurts them in the court of public opinion.

demographic issues noted earlier are certainly applicable here, so it would be reasonable to expect contracted BOP prisons to have more of these security and safety incidents.

INCIDENT TYPE	BOP TOTAL	CONTRACT TOTAL	BOP MO. AVG. PER 10K INMATES	CONTRACT MO. AVG. PER 10K INMATES
Inmate-on-inmate assault	289	423	2.5	3.3
Inmate-on-staff assault	184	526	1.6	4.2
Inmate-on-staff sexual assault	2	13	0.02	0.10
Death	127	54	1.2	0.4
Fights	465	459	4	3.9
Setting fires	5	20	0.04	0.10
Suicide attempts or self harm	89	125	0.8	0.9
Suicide	4	4	0.03	0.03
Disruptive behavior	274	256	2.4	1.8
Immediate, calculated uses of force	455	548	3.8	4.5

Source: OIG, Department of Justice. "Review of the Federal Bureau of Prisons' Monitoring of Contract Prisons." August 2016, p. 64. Table 8: "Comparison of Security Indicators between Contract Prisons and BOP Institutions, FY 2011 – FY 2014"

Further, just as with contraband, when broken down by contractor a different picture on safety and security performance emerges relative to the aggregated contract prison incident totals (see Table 4). For all categories except two of the much rarer ones—starting fires and inmate-on-staff sexual assaults—at least one private contractor reported fewer average incidents than did the BOP-operated prisons. Far from showing that private BOP prisons perform “poorly” compared to BOP-operated prisons, the OIG’s findings show that contractors report incidents at roughly similar frequencies as staff in BOP-operated prisons—sometimes higher, sometimes lower.

INCIDENT TYPE	BOP	CC (CONTRACTOR)	GEO (CONTRACTOR)	MTC (CONTRACTOR)
Inmate-on-inmate assault	2.5	4.1	3.6	1.5
Inmate-on-staff assault	1.6	3.7	6	1.3
Inmate-on-staff sexual assault	0.02	0.15	0.07	0.11
Death	1.2	0.3	0.4	0.5
Fights	4	5.4	3.7	1.7
Setting fires	0.04	0.1	0.2	0.1
Suicide attempts or self harm	0.8	1.1	1	0.5
Suicide	0.03	0.055	0	0.0064
Disruptive behavior	2.4	1.1	1	0.5
Uses of force	3.8	4.3	5.9	1.8

Source: OIG. Department of Justice. "Review of the Federal Bureau of Prisons' Monitoring of Contract Prisons." August 2016. Table 7: "Comparison of Security Indicators among Contractors, FY 2011 - FY 2014" and Table 8: "Comparison of Security Indicators between Contract Prisons and BOP Institutions, FY 2011 - FY 2014"

All contractors reported fewer average deaths and disruptive behavior incidents than their BOP-operated counterparts, while two of three contractors reported fewer fights and suicides. Staff uses of force against inmates were higher in contract prisons overall, but on average, MTC reported less than half as many uses of force by staff as did the BOP.⁴⁴

After breaking down by contractor, it is difficult to conclude if BOP-operated prisons performed better than their contracted-out counterparts. In addition to subcategories of these metrics and by-contractor figures revealing a less clear picture on the relative performance between the two types of prisons in the reporting of incidents, the OIG and BOP already accept that contracted BOP prisons should have higher numbers of these incidents, due to communication challenges that BOP-operated prisons do not face. The fact that individual contractors reported fewer incidents in many of these metrics is notable and points toward exercising caution in drawing conclusions over the relative safety in the two types of prisons.

3.3 LOCKDOWNS

Lockdowns may be the metric that has the biggest discrepancy between BOP-run and contract prisons, but one more plagued by uncertainty than most others, given the lack of information provided in the OIG report. Table 5 shows that there were nearly 10 times as many reported lockdowns (full and partial) in contracted BOP prisons as in BOP-operated prisons over the period covered. A total of 86% of contracted BOP prisons (12 of 14) reported at least one full or partial lockdown, while only 43% percent of BOP-operated prisons (6 of 14) did so.

TABLE 5: LOCKDOWNS IN BOP-OPERATED AND CONTRACT BOP PRISONS, FY 2011-2014					
LOCKDOWNS	BOP	ALL CONTRACTORS	CC (CONTRACTOR)	GEO (CONTRACTOR)	MTC (CONTRACTOR)
Total	11	101			
Average per prison			7.6	9.5	2

Source: OIG. Department of Justice. "Review of the Federal Bureau of Prisons' Monitoring of Contract Prisons." August 2016. Table 7: "Comparison of Security Indicators among Contractors, FY 2011 - FY 2014" and Table 8: "Comparison of Security Indicators between Contract Prisons and BOP Institutions, FY 2011 - FY 2014"

⁴⁴ One must note that death arises from many issues, and only so many of them are under the control of the entity running the prison (public or private). The contrast with deaths is pretty remarkable—well over twice as many deaths occurred in the selected BOP prisons as in contract ones (127 versus 54- Table 8, p. 65). Given the circumstances surrounding the majority of inmates in contract prisons (non-U.S. citizens in the U.S. unlawfully), one wonders if the BOP-run prison population is significantly older, which would suggest a greater likelihood of death in BOP-run prisons.

While little information is given about the specifics of the lockdowns, some cited causes in contract prisons included fights and assaults on staff as well as dissatisfaction with medical treatment, food and TV stations. Given the differences in their occurrences in the two types of prisons, one question seems to be: Are there sets of circumstances that trigger lockdowns more frequently in contract prisons than in BOP-run ones? The August OIG report quotes the BOP in saying lockdowns are often precautionary, undertaken to ensure inmate and staff safety before a problem can escalate, which would seem to warrant praise more than admonishment:

*The purpose of a lockdown of a correctional facility is to ensure the security of the institution, maintain control of the inmate population, and ascertain the concerns of the inmate population. Lockdowns are often a precautionary measure used to maintain control during a period of inmate dissention. During each lockdown, oversight staff monitors the contractor's actions and progress to return the institution to normal operations as quickly as possible.*⁴⁵

Far short from making strong conclusions about the level of safety in contracted BOP prisons compared to BOP-operated ones based on lockdown occurrences, the OIG notes the uncertainty surrounding the discrepancy in the August report:

*While we could not review the basis for lockdowns in the context of this review, the greater number of such incidents at contract prisons suggests a need for the BOP to examine and address the issue.*⁴⁶

The differences in the prison populations also likely play a role here. Communication problems can make problems escalate quickly.

The great discrepancy in lockdowns between contracted and government-run prisons within the BOP system deserves attention, but knowing the limitations of the data provided should also be considered. The OIG shows care in avoiding strong conclusions about the lockdown figures until the issue can be better examined by the BOP. Lacking information about what happened, who (if anyone) was injured, what caused the incident, etc. limit the reader further. Whether or not the OIG lacked such information, its assessment of the lockdown

⁴⁵ Office of the Inspector General. "Review of the Federal Bureau of Prisons' Contraband Interdiction Efforts." 21. (quote is from an unnamed BOP source)

⁴⁶ Office of the Inspector General. "Review of the Federal Bureau of Prisons' Monitoring of Contract Prisons." 22.

figures should signal to the reader that making strong conclusions in terms of relative safety between the two types of prisons lacks basis.

3.4 INMATE DISCIPLINE

As with lockdowns, little information is given in the August OIG report about how inmate disciplinary issues are handled at BOP-operated and BOP-contracted prisons, but both track the number of guilty findings on serious offenses. The average rate of reported guilty findings was significantly higher in contract BOP prisons than in BOP-operated prisons (78 per month vs. 65 per month, a 20% difference). As with contraband and most types of incidents reported, breaking down by contractor shows a more mixed picture of comparative performance, as shown in Table 6.

TABLE 6: GUILTY FINDINGS OF INMATES FROM SERIOUS DISCIPLINARY ISSUES IN BOP-OPERATED AND CONTRACT BOP PRISONS

	BOP	CONTRACTOR TOTAL	CC	GEO	MTC
Total	7,439	10,089			
Monthly Average per 10,000 Inmates	64.7	77.9	70.7	92.1	60.2

Source: OIG, Department of Justice. "Review of the Federal Bureau of Prisons' Monitoring of Contract Prisons." August 2016. Table 7: "Comparison of Security Indicators among Contractors, FY 2011 – FY 2014" and Table 8: "Comparison of Security Indicators between Contract Prisons and BOP Institutions, FY 2011 – FY 2014"

Rather than faulting the contractors for these results, the OIG merely speculates that, "a higher incidence of substantiated misconduct may be an indication of greater inmate behavioral challenges in contract facilities," and the problem "merits further analysis and action by the BOP."⁴⁷

Another issue with this metric is the interpretation of more guilty findings as a bad thing. If prison staff were to bring charges against inmates, one would want them to be charges that have merit. More "not guilty" findings, relative to total charges against inmates while in prisons, would seem to be a more negative outcome than more relative "guilty" findings, as the former indicates that those operating the prison do a poor job of either managing evidence collected against inmates or determining whether charges should be filed against inmates in the first place.

⁴⁷ Ibid. 22. The issue of inmate discipline will be further discussed below in the context of inmate grievances (see "Inmate Grievances").

Inmate behavior largely drives the metric of inmate discipline, limiting the degree to which blame can be assigned to the prison operator. A high incidence of guilty findings, assuming a credible disciplinary system within the prisons, seems to reflect more on the inmates than staff, regardless of employer. The OIG quote appears to reflect this sentiment. The OIG only considered guilty findings when the charges were for transgressions deemed serious, which further supports the view that, while an important measure, guilty findings in inmate disciplinary proceedings indicate a problem of inmate more than operator.⁴⁸

3.5 TELEPHONE MONITORING

The extent to which staff in BOP-run prisons and contracted BOP prisons monitor their inmates' phone conversations provides perhaps the clearest discrepancy of how contract BOP prisons face an asymmetrical cost regime when compared to their BOP-operated counterparts. As indicated below (Table 7), BOP-operated prisons monitored a much greater percentage of inmate calls than their private sector counterparts, in total, and when broken down by contractor. Even so, each contractor exceeded the level of monitoring recommended in their guidelines (5%).

TABLE 7: MONITORING OF INMATE CALLS IN BOP-OPERATED AND CONTRACT BOP PRISONS (MONTHLY AVERAGE PERCENTAGE)

	BOP	CONTRACTOR TOTAL	CC (CONTRACTOR)	GEO (CONTRACTOR)	MTC (CONTRACTOR)
Calls Monitored	21.1%	7.6%	8.7%	7.6%	5.8%

Source: OIG, Department of Justice. "Review of the Federal Bureau of Prisons' Monitoring of Contract Prisons." August 2016. Table 7: "Comparison of Security Indicators among Contractors, FY 2011 - FY 2014" and Table 8: "Comparison of Security Indicators between Contract Prisons and BOP Institutions, FY 2011 - FY 2014"

A couple of factors provide a good explanation of the discrepancy. First, since the BOP contract prison population consists almost exclusively of individuals who are native Spanish speakers, monitoring calls requires both the monitoring equipment and bilingual staff, while inmates in BOP-operated prisons overwhelmingly speak English as a first language.

As for the equipment itself, the OIG notes that contract prisons are not allowed to use the TRUINTEL system that BOP-operated prisons use, which would make monitoring a greater number of calls easier, as TRUINTEL allows multiple staff in different locations and departments to simultaneously monitor calls. Recognizing this asymmetry, the OIG leaves

⁴⁸ Ibid. 22: "murder, assault, sexual assault, possession of weapons or drugs, setting fires, fighting, and participating in riots or demonstrations."

the burden to the BOP to address the issue, “we believe that the lower monitoring rate at contract prisons and the personnel and technological hurdles faced there are issues that the BOP should consider and address.”⁴⁹

Monitoring telephone calls presents added difficulties for contract facilities in the BOP prison system. The contactors are not allowed to use the best monitoring technology, and their inmate populations mostly speak a different native language, requiring additional costs. That being said, the OIG found contractors to exceed their required monitoring rates, so if the OIG feels the monitoring rate by contactors is too low, it should look to raise the minimum standard. Granting contractors access to TRUINTEL likely will make monitoring easier for contactors, too.

3.6 GRIEVANCES

Grievances are unique in that they are the one metric given in the August OIG report that provides an assessment of the opinions of the inmates themselves. As with many of the metrics outlined above, there is a wide variation in how the individual contractors performed that is obscured when presenting the figures in aggregate (see Tables 8 and 9). Communication, cultural and language issues also affect many of these categories (especially complaints about staff), so more grievances should be expected when one adds the fact that grievances can be filed in Spanish.⁵⁰ Over the period studied, however, 60% more grievances were filed by inmates from BOP-operated prisons than from contracted-out BOP prisons.⁵¹

Table 8 includes categories that the OIG felt “particularly relevant to safety and security,” which receive more attention in the August OIG report, in terms of discussion, and in terms of data provided.⁵² For these categories, BOP-run prisons reported fewer average grievances than contracted BOP prisons, with an exception of grievances over the Special Housing Unit (SHU), which is discussed in greater detail above in Section 2.1.

⁴⁹ Ibid. 25.

⁵⁰ Communications with representatives from the contract companies confirmed this.

⁵¹ Ibid. 22.

⁵² Two exceptions excluded are categories of grievances labeled “Safety and Security Issues” and “Sexual Abuse or Assault,” since for both of these categories, only one type of prison (BOP-operated or contracted) submitted data. “Food” might seem to be a bit of a head-scratcher in terms of safety and security, but the OIG included it since complaints about food were found to have triggered lockdowns, including a deadly one for which the report provides an account:

“In May 2012, a Correctional Officer was killed and 20 people were injured during a riot at the Adams County Correctional Center. The disturbance involved approximately 250 inmates who, according to contemporaneous media reports, were angry about low-quality food and medical care, as well as about Correctional Officers the inmates believed were disrespectful.” (p. 2 of the August OIG report)

TABLE 8: OIG SELECTED INMATE GRIEVANCES IN BOP-OPERATED AND ALL CONTRACT BOP PRISONS (TOTALS AND MONTHLY AVERAGES SUBMITTED PER 10,000 INMATES)

INDICATOR		BOP	ALL CONTRACTORS
All Grievances	Total	14098	8756
	Monthly Average	121.5	72.6
	% Granted	5.2%	8.1%
Selected Safety/Security Categories	Total	2883	3969
	Monthly Average	25.3	32.2
Complaints about Staff	Total	719	1538
	Monthly Average	6.2	12.9
Conditions of Confinement	Total	134	161
	Monthly Average	1.2	1.5
Food	Total	133	247
	Monthly Average	1.2	2.1
Institutional Operations	Total	20	171
	Monthly Average	0.2	1.1
Medical and Dental	Total	1609	1800
	Monthly Average	14.1	14.3
Special Housing Unit	Total	259	27
	Monthly Average	2.4	0.2

Source: OIG, Department of Justice, "Review of the Federal Bureau of Prisons' Monitoring of Contract Prisons," August 2016. Table 7: "Comparison of Security Indicators among Contractors, FY 2011 – FY 2014" and Table 8: "Comparison of Security Indicators between Contract Prisons and BOP Institutions, FY 2011 – FY 2014"

Over twice as many grievances about prison staff were submitted per month at contract prisons (12.9 per 10,000 inmates) as at BOP ones (6.2), but given the language and cultural barriers of the contract inmate populations and staff already discussed, one should expect this. Secondly, the relationship between inmates and staff makes interpreting grievances about staff a challenge. A low number of grievances about staff can mean a lack of problems or an inmate population fearful of retaliation from saying negative things about staff, just as a high number of grievances can represent many problems or a very open grievance process where little-to-no such fear exists.

Of the remaining categories stressed by the BOP, the totals were typically closer, except for institutional operations, a category in which contracted BOP prisons had over eight times as many grievances filed against them on average. The OIG admits that "because the contract prisons sometimes used different descriptions for the same types of grievances and some descriptions were more detailed than necessary for the level of our analysis, we consolidated and standardized the grievance categories." Without more information about the actual grievances themselves, especially for broad categories such as "institutional operations," it is difficult to draw definitive conclusions.

Breaking down the grievance data by contractor reveals statistical outliers (see Table 9). Grievances about staff serve to exemplify this: while staff at two of the contractors were fairly

close to the BOP level— GEO averaged 9.6 such grievances and CoreCivic had 7.1—MTC’s level was much higher (30.3). Institutional operations saw a similar dynamic. Medical and dental grievances were lower at two contractors’ prisons, but slightly higher overall.

TABLE 9: INMATE GRIEVANCES IN BOP-OPERATED PRISONS AND BY INDIVIDUAL BOP CONTRACTOR (MONTHLY AVERAGE PER 10,000 INMATES)

	BOP	CC (CONTRACTOR)	GEO (CONTRACTOR)	MTC (CONTRACTOR)
OIG selected safety / security categories	25.3	18.4	28.2	65.6
Complaints about staff	6.2	7.1	9.6	30.3
Confinement conditions	1.2	0.2	1.8	3.2
Food	1.2	1.0	1.9	4.5
Institutional operations	0.2	0	0.9	3.6
Medical and dental	14.1	9.6	13.9	23.5
Special housing unit	2.4	0.03	0.1	0.5

Source: OIG. Department of Justice. “Review of the Federal Bureau of Prisons’ Monitoring of Contract Prisons.” August 2016. Table 7: “Comparison of Security Indicators among Contractors, FY 2011 – FY 2014” and Table 8: “Comparison of Security Indicators between Contract Prisons and BOP Institutions, FY 2011 – FY 2014”

Beyond complaints about staff, a similar pattern exists with all the other grievance categories chosen by the OIG as critical (except the SHU, where all contractors reported fewer grievances):

1. CC reported fewer average grievances than BOP prisons in every category.
2. GEO and MTC both reported greater rates of grievances than the BOP in those same categories (except GEO slightly outperformed BOP on health care), though GEO’s performance in each category was comparable with BOP.

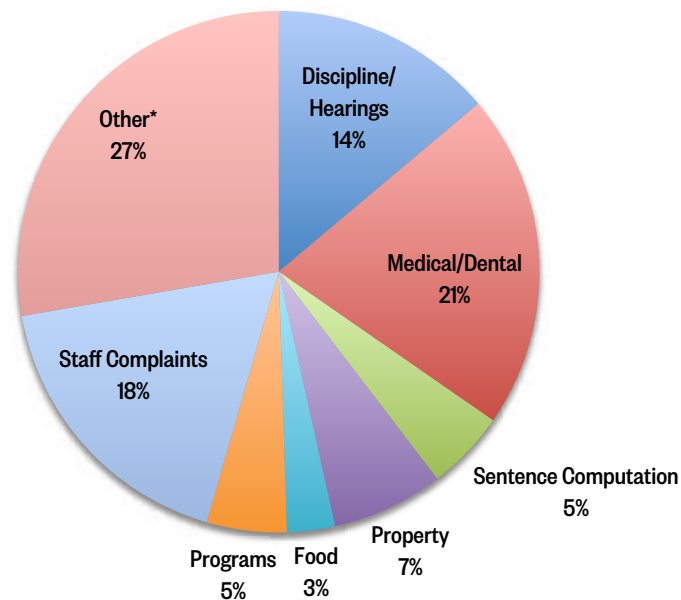
The original draft of the OIG report assigned negative connotations to an outcome of more reported grievances. In its response in the August 2016 OIG report, MTC points out that such a perspective makes a lot of assumptions, and that an open grievance process can prevent more dangerous occurrences:

The Inference that grievances represent a prison with higher safety concerns is wrong. Grievances are an integral part of conflict resolution in a positive way. Lack of grievances can indicate an Inmate’s lack of trust of the prison’s problem resolution process. The fact that Inmates are widely using the system can show it’s working and resolving concerns before they become Incidents...

As mentioned in Section 2.1, Special Housing Units (SHUs) provide a means to segregate problematic inmates from the general population. Inmates in BOP-managed prisons filed, on average, 12 times as many grievances about SHUs (2.4 per 10,000 inmates, 259 total) as they did in all contract prisons (0.2, 27 total), which is 80 times more than CC (0.03 per 10,000) and 24 times as many as GEO (0.1 per 10,000).⁵³ So while the OIG noted in its visits that contractors violated policy by placing inmates as SHUs as a temporary housing solution, the inmates appear to see bigger problems with SHUs in BOP-managed prisons.

Although the OIG finds that the total number of grievances at BOP-run prisons was much higher than contract prisons—14,098 compared to 8,756, or 62% of all grievances—the report goes on to mostly discuss this not in terms of the total numbers, but rather the percentage of grievances in each category relative to all grievances for that particular type of prison, with the report’s Figures 7 and 8 (reproduced below and on the next page as Figures 3 and 4) providing illustration of that approach.

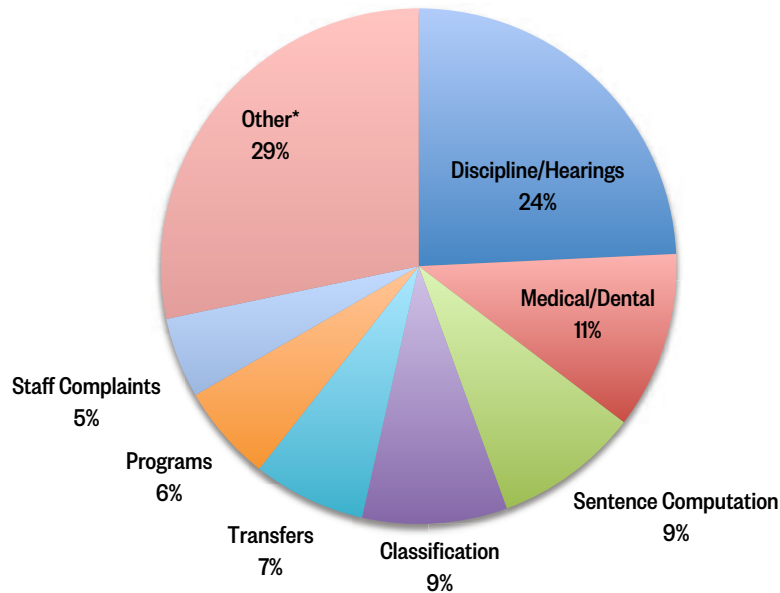
FIGURE 3: GRIEVANCE TYPES IN CONTRACTOR-OPERATED PRISONS



Note: Less common types of grievances included in the “Other” category (mauve) included transfers, classification, telephone and mail, institutional operations, conditions of confinement, alleged violations of federal or state laws and regulations

⁵³ See Table 10 on page 31 and Tables 7 and 8 in the August IG report (63, 67).

FIGURE 4: GRIEVANCE TYPES IN BOP-OPERATED PRISONS



*Note: Less common types of grievances included in the “Other” category (mauve) included residual reentry centers, telephone and mail, work assignments, SHUs, and legal access issues. Source: OIG analysis of BOP and contractor data.

This focus diverts attention away from the differences in grievance totals. For instance, while grievances about medical and dental treatment make up a larger percentage of total grievances at contract prisons (21%) than at BOP-operated ones (11%), the totals for each type of institution were much closer—1,609 total medical and dental grievances at BOP prisons, compared to 1,800 in contract prisons, or 47% and 53% percent of all medical and dental grievances, respectively.⁵⁴ While a casual reader may just see the 21% and 11% numbers and conclude that medical and dental care appear to be a much greater problem in contract BOP prisons, the actual numbers are much closer.

While a casual reader may just see the 21% and 11% numbers and conclude that medical and dental care appear to be a much greater problem in contract BOP prisons, the actual numbers are much closer.

⁵⁴ Ibid. 62, 67.

**TABLE 10: SELECTED GRIEVANCES IN BOP-OPERATED AND CONTRACT BOP PRISONS
TOTALS AND PERCENTAGES BY GRIEVANCE TYPE AND PRISON TYPE, FY 2011-2014**

GRIEVANCE TYPE	BOP	CONTRACTOR TOTAL
All Grievances	14,098	8,756
• Percent Total	61.7%	38.3%
Discipline	3,451	1,186
• Percent Total	74.4%	25.6%
• Percent Provider Total	24.5%	13.5%
Medical / Dental	1,609	1,800
• Percent Total	47.2%	52.8%
• Percent Provider Total	11.4%	20.6%
Sentence Computation	1,332	438
• Percent Total	75.3%	24.7%
• Percent Provider Total	9.4%	5.0%
Staff	705	1,538
• Percent Total	31.4%	68.6%
• Percent Provider Total	5.0%	17.6%
Programs	846	438
• Percent Total	65.9%	34.1%
• Percent Provider Total	6.0%	5.0%
Confinement Conditions	134	161
• Percent Total	45.4%	54.6%
• Percent Provider Total	1.0%	1.8%
Special Housing Unit	259	27
• Percent Total	90.6%	9.4%
• Percent Provider Total	1.8%	0.3%
Institutional Operations	20	171
• Percent Total	10.5%	89.5%
• Percent Provider Total	0.1%	2.0%

Source: OIG. Department of Justice. "Review of the Federal Bureau of Prisons' Monitoring of Contract Prisons." August 2016. Table 7: "Comparison of Security Indicators among Contractors, FY 2011 - FY 2014" and Table 8: "Comparison of Security Indicators between Contract Prisons and BOP Institutions, FY 2011 - FY 2014," as well as Figures 7 and 8 (pp. 23-24). Note: Italicized values in the table indicate a value estimated based on other given figures from the OIG report (see footnote 44).

The great discrepancy in the totals of grievances at the two classifications of prisons suggests that contract prisons do a better job of serving inmates than BOP prisons do. While it's theoretically possible that filing grievances at contract prisons could simply involve a much more difficult process—whether through red tape or intimidation by prison staff—than in BOP-operated prisons, there is no evidence provided in the OIG report to suggest that this is the case. The strict monitoring and oversight of contract prisons, when compared to the greater discretion given officers in BOP-operated prisons, suggests that, if anything, there is a greater chance of such intimidation being a factor in BOP-operated prisons.

The report also underplays a few crucial categories of grievances that suggest that private prisons do a significantly better job of serving their inmates in terms of guiding them through the criminal justice system. “Discipline/Hearings/Appeals,” “Sentence Computation,” “Classification,” “Transfers,” “Programs,” “Property,” and “Legal access issues,” all are categories that have a direct connection either to the external, broad legal criminal justice system, or the disciplinary system provided for inmates within the prisons themselves, though. The “Discipline” category of grievances concerns the system that the “Guilty Findings” metric draws from; “Sentence Computation” concerns whether inmates are held for the appropriate amount of time; “Classification” concerns how inmates are labeled in terms of their security level. The other categories are pretty self-explanatory. For each of these categories, except property, inmates in BOP-operated prisons filed many more grievances than inmates in contracted BOP prisons.⁵⁵

From the info provided by the OIG, we can determine that inmates in BOP-run prisons filed 74% of grievances related to their prison’s internal disciplinary system and 75% of the grievances over sentence computation over the period studied by the OIG (see Table 10).⁵⁶ The actual percentage of grievances in contract prisons over inmate classification is not given, but is the subject of 9% of grievance totals for BOP prisons, suggesting a similar discrepancy.⁵⁷ Grievances over transfers operate similarly: 7% of grievances in BOP-operated institutions, with no percentage given for contracted-out prisons, which, when combined with the greater

⁵⁵ Ibid. All of the numbers that follow can be found in Table 10, and are derived from Figures 7 and 8 (pp. 23-24, reproduced as Figures 3 and 4 of this report) and Tables 7 and 8 of the August Report (pp. 60-67).

For grievances with disciplinary hearings, the report gives the totals, making derivation of the percentages easy. For sentence computation, the total is given for BOP-operated prisons (1332), but for contracted-out prisons, the August OIG report only provides the percentage of grievances compared to all grievances originating from inmates in contracted-out prisons (5%). Since the OIG report provides the total number of grievances originating from inmates in contracted-out prisons (8,756), one can conclude that the 5% factor corresponds to a number between 392 (4.5%) and 473 (5.4%), meaning that inmates in BOP-operated prisons produced somewhere between 74% and 78% of grievances relating to sentence computation.

⁵⁶ See also: Office of the Inspector General, “Review of the Federal Bureau of Prisons’ Untimely Releases of Inmates,” Department of Justice. *justice.gov*. May, 2016. <<https://oig.justice.gov/reports/2016/e1603.pdf>> 30 Jan. 2017.

In addition to concerns about how infrequently staff errors were reported as the cause of untimely inmate releases, of those cases that do cite staff error as a problem, 60% had inmates that were released early by a year or more, while 40% of late releases were for a month or more. While this sentence computation report—unlike the June OIG Contraband report—studies both BOP-operated and BOP contract prisons, the large discrepancy with inmate grievances over sentence computation at least suggests that contract BOP prisons do a better job of ensuring their inmates serve the correct sentence length.

⁵⁷ See Figures 3 and 4, above, reproduced from Figures 7 and 8 on pages 23–24 of the August OIG report. The 9% figure produces a range between 1198 (8.5%) and 1325 (9.4%) of such grievances in BOP-operated prisons. For contracted-out prisons, the category is listed in Figure 7, but no percentage is given. Figures 3 and 4 list percentage amounts of as low as 3% for grievance categories, but for BOP-operated prisons, the lowest total provided is 5%. Even using 5.4% as the basis yields 473 grievances (given the total of 14,098 grievances filed, from Table 10 on page 31 of this brief and Table 8 on page 66 of the August OIG report), and combining it with a figure of 8.5% for BOP-operated prisons means, even under very generous assumptions, inmates in contracted-out BOP prisons only filed 28% of such grievances.

overall frequency of grievances at BOP-operated prisons, strongly suggests that contracted-out prisons have fewer problems with inmate transfers.

Legal access appears only as a type of grievance in BOP-operated prisons, suggesting a similar discrepancy between originating grievances in the two types of prisons, but with no percentage factor provided, actual estimates are likely to be highly speculative. Property is the only category of grievance that does not appear for one type of prison at all (BOP-run), yet comprises a significant percentage of grievances of the other (7% of contract BOP prison grievances), but the August OIG report provides no other additional details to make more definitive conclusions.

Lastly, contracted BOP prisons also performed better in *responding to grievances* than BOP-operated prisons in terms of percentage of grievances granted (8.1% in contract prisons, 5.2 in BOP-operated ones); staff in BOP-managed prisons did respond to slightly more grievances (733) than staff in contracted BOP prisons (709).⁵⁸

The inmate grievance metric provides an important factor when assessing prison performance. Unlike the other metrics presented, it reflects inmate opinion, and is one of the few ways prison operators can address inmate concerns. Inmates in contract prisons filed significantly fewer total grievances over the time studied—more in most OIG-selected categories, but less in rarer, though still significant, categories. Given the BOP's opinion with respect to language and cultural barriers leading to more incidents, applying that idea to grievances—especially ones about staff, where language issues would seem to come most into play out of all categories—does not seem unreasonable. As with other areas of the report, the OIG avoids making sweeping conclusions, and calls on the BOP to investigate grievance areas that appear to be problematic.

3.7 DRUG TESTING AND SEXUAL ASSAULT

The remaining categories analyzed in the August OIG report relate to drug testing on inmates and sexual misconduct among inmates, as well as accusations against staff by inmates, for which data is summarized in Table 11. BOP-operated prisons drug-tested more of their inmates (8.1%) than did contract BOP prisons (7.1%), but far exceed contractors in positive test results (2.1 in contract prisons vs. 3.4 in BOP-run prisons). The higher rate of positive tests in

⁵⁸ Ibid. 23.

BOP-operated prisons does seem consistent with the higher rate of drug seizures provided above in Section 3.1, and may suggest problems with keeping drugs out of BOP-operated prisons, an assessment the OIG isn't likely to find surprising, given the OIG's contraband report released last June.⁵⁹

TABLE 11: DRUG TESTING AND SEXUAL MISCONDUCT FIGURES IN BOP-OPERATED AND CONTRACT PRISONS (TOTAL AND MONTHLY AVERAGE PER 10,000 INMATES)

	BOP	CONTRACTOR TOTAL	CC	GEO	MTC
Percent Inmates Tested	8.1%	7.1%	7.5%	7.0%	6.4%
Positive Drug Tests (Total)	376	263			
Positive Drug Tests (Monthly Average per 10,000 Inmates)	3.4	2.1	2.0	2.3	1.6
Guilty Findings: inmate-on-inmate sexual misconduct (Total)	175	156			
Guilty Findings: inmate-on-inmate sexual misconduct (Monthly Average per 10,000 Inmates)	18.1	16.6	10.4	24.3	11.7
Allegations of staff sexual misconduct against inmates (Total)	139	97			
Allegations of staff sexual misconduct against inmates (Monthly Average per 10,000 Inmates)	14.5	8.7	7.3	10.3	11.7

Source: OIG. Department of Justice. "Review of the Federal Bureau of Prisons' Monitoring of Contract Prisons." August 2016. Table 7: "Comparison of Security Indicators among Contractors, FY 2011 - FY 2014" and Table 8: "Comparison of Security Indicators between Contract Prisons and BOP Institutions, FY 2011 - FY 2014"

With the sexual misconduct categories, the OIG is quick to note problems in maintaining figures from both BOP-operated and contract prisons:

(W)e found that some of the data on inmate-on-inmate sexual misconduct was recorded inconsistently, for both the contract prisons and the BOP institutions. BOP Intelligence Specialists produce monthly intelligence reports on the contract prisons with the number of reported sexual assault incidents, as well as a breakdown of categories of inmate-on-inmate sexual misconduct allegations.

A PMB Intelligence Specialist told us these two types of data should be consistent with each other; however, we determined that the overall number of incidents and the number of incidents by category were frequently inconsistent. In addition, data on inmate discipline cases with sexual misconduct guilty findings indicated more inmate-on-inmate misconduct in contract prisons than was recorded in the monthly intelligence reports. Further, the BOP institutions reported no inmate-on-inmate sexual misconduct incidents, even though the data on inmate discipline in the BOP institutions also showed

⁵⁹ Office of the Inspector General. "Review of the Federal Bureau of Prisons' Contraband Interdiction Efforts." 22. (quoted in Section 4.1):

"(I)n light of the BOP's infrequent application of random pat search events and other related issues described in this report, the absence of contraband recoveries may not constitute an accurate performance measure."

guilty findings on sexual misconduct charges. The BOP’s contract prisons are currently subject to Prison Rape Elimination Act of 2012 (PREA) reporting requirements in their contracts, as are the BOP’s noncontract institutions by statute.⁴⁸ However, since the rules for PREA took effect in August 2012, as part of this review we did not evaluate the contract prisons’ compliance with PREA or how it may have affected the contract prisons’ sexual misconduct incident reporting.

What is provided shows sexual misconduct concerning staff to be more a factor in BOP-operated prisons than in contracted BOP prisons over the time studied. For inmate-on-inmate allegations, the numbers are relatively similar (annual averages of 16.6 allegations in contract prisons and 18.1 in BOP-operated prisons per 10,000 inmates), but allegations of staff sexual misconduct against inmates were much lower in contract prisons than in BOP-operated ones (annual averages of 8.7 and 14.5, respectively). While this metric concerns allegations, not convictions, one would hope that inmates aren’t filing such grievances out of spite.

3.8 SUMMARY: SAFETY AND SECURITY COMPARISON

Critics of private prisons cite the August OIG report as evidence of a need to end the contracted management of BOP prisons. In spite of the OIG report never making any recommendation to do so, the DOJ announced last August that it would eventually stop the practice of contracting out prisons within the BOP system, citing private prisons’ poor performance with security and safety issues compared to BOP-operated prisons, a policy decision recently rescinded by the new attorney general.

After more closely examining the data provided in the OIG report, even the inspector general’s technically true—but misleading when used to title a subsection of a report—claim that “Contract Prisons Had More Safety and Security-related Incidents per Capita than BOP Institutions for Most of the Indicators We Analyzed,” is found wanting.⁶⁰ Greater numbers of such incidents do not necessarily indicate poorer performance by the prison operator per se, as the discussions of contraband interdiction, grievances filed, and lockdowns show. Some categories involve incidents that are initiated by inmates, and say just as much about the violent tendencies of the inmates as the entity operating the particular prison, while other metrics leave too much open to interpretation to assume that better or poorer performance

⁶⁰ Office of the Inspector General. “Review of the Federal Bureau of Prisons’ Monitoring of Contract Prisons.” 14.

can be defined solely by a metric's type or its count being lower or higher in one prison compared to another.⁶¹

Differences in demographic characteristics in the inmate populations make strong comparisons difficult and mostly put upward pressure on the frequency of incidents in contracted-out BOP prisons, but even so, individual contractors mostly performed similarly compared to the BOP in managing prisons on almost every security and safety category examined by the OIG in its August report. Additionally, a June OIG report on contraband interdiction in BOP-operated prisons further suggests that many of the figures for contraband in BOP-operated prisons are inaccurate and likely underreported significantly.

Finally, while every contract BOP prison was used as a part of the sample, the OIG selected a portion of BOP-operated prisons for comparison purposes, focusing mostly on keeping inmate capacities similar. In addition to the highly dissimilar inmate samples in terms of demographics, not having a comparison of the contracted BOP prisons to all BOP-managed prisons further limits the degree to which performance comparisons between the two types of prisons can be made.

The DOJ's August 2016 memo recommends ending the use of private prisons by the BOP, citing the August report as proof of the inferiority of contract prisons in terms of safety and security. But by taking better account of statistical outliers hidden within data aggregates within the OIG's figures, as well as differences in how the BOP and private contractors manage their inmate populations, and in the inmate populations themselves, a more nuanced and mixed picture of relative performance between the two types of prisons emerges. Such considerations should drive any analysis of the OIG's work, as they drove the OIG in reporting its work. Given the care the OIG takes in making conclusions from its findings, rescinding the August 2016 DOJ memo and continuing private prison contracting in the BOP prison system seems much more cognizant of those considerations than going forward with ending contracting.

⁶¹ In addition to the examples provided in Section 3, above, MTC included the following in their response to the draft of the August OIG report:

"Page 16 and 24 to 26 (of the August OIG report). *The Inference that grievances represent a prison with higher safety concerns is wrong. Grievances are an integral part of conflict resolution in a positive way. Lack of grievances can indicate an Inmate's lack of trust of the prison's problem resolution process. The fact that Inmates are widely using the system can show it's working and resolving concerns before they become Incidents...*"

"Page 16, last paragraph. *Confiscations of more cell phones, or more contraband, doesn't necessarily mean that there is more contraband coming into the facility. It can also mean that the prison has a more effective system of detecting and removing contraband.*"

P A R T 4

THE FUTURE ROLE OF PRIVATE PRISONS IN THE BOP SYSTEM

Assistant Attorney General Sally Yates' memorandum in August 2016 clearly showed a desire by the Obama administration's Department of Justice to phase out the practice of using contracted prison facilities, generating cries from some major media publications and various nonprofit organizations to phase out the use of private prisons by additional federal agencies beyond the BOP, as well as the states. In addition to the unsubstantiated claims in the memorandum about contract prisons not providing the same level of service as government-run prisons, Yates specifically cites the OIG's August 2016 report on contract prisons as evidence that contract prisons underperform with respect to safety and security.

Reading the OIG report as evidence that contract BOP prisons are inferior to BOP-operated prisons assumes that the two types of prisons face similar oversight, while also housing similar inmate populations. The OIG's August report on contractor monitoring and other recent reports show such similarity lacking, and lacking often in a way that affects the contract prisons negatively compared to their BOP-operated counterparts.

Reading the OIG report as evidence that contract BOP prisons are inferior to BOP-operated prisons assumes that the two types of prisons face similar oversight, while also housing similar inmate populations.

4.1 THE MEDIA RESPONSE VERSUS THE OIG RESPONSE

Nonetheless, various media organizations and nonprofits have misrepresented the OIG report, suggesting that it provides a basis for ending contracted prisons, not just within the BOP itself, but across all federal agencies and even state governments. "Private federal prisons—less safe, less secure," reads a *Washington Post* headline penned alongside the

August OIG report release, which notes the OIG report “adds to a growing effort to take the profit out of penitentiaries.”⁶² *Salon* praised the DOJ decision as “a step in the right direction,” while noting the U.S. “has miles to go in ending private prisons.”⁶³ “Time to take private profit out of Texas prisons,” read an op-ed published in the *Austin American-Statesman*, written by two criminal justice nonprofit experts.⁶⁴

Headlines such as those above indicate that opposition to private prisons often, if not mostly, stems from the fact that a private, for-profit company is managing them. While it is true that most private companies that manage correctional facilities are for-profit entities, the absence of profit as a line item implies neither the absence of self-interest nor assures greater accountability at government-run prisons. In fact, private prisons face several layers of accountability, including contractual requirements, government monitoring, accreditation, oversight by elected officials (e.g., legislative committees, agency audits, etc.), internal audits, and shareholders.⁶⁵ Critics in the media mostly treat the concept of contracting out prisons as a problem in itself, an approach that denies the possibility that a decision to contract a prison out could ever be a good one, seeking to win the debate on private prisons by avoiding debating in the first place.

4.2 THE CASE AGAINST PHASING OUT CONTRACT PRISONS

Beyond the issues cited in the August 2016 OIG report, it’s worth exploring the claim made by then-Assistant Attorney General Yates in the August DOJ memo that private prison contracting on the federal level initially began as a response to an overcrowding issue that is much less of an issue today, as federal inmate populations have declined. She cites a decline of 25,000 in the number of federal inmates—from 220,000 in 2013 to 195,000 in 2016—which is roughly the same amount cited in the August OIG report as the total number of inmates being housed in contracted BOP prisons as of December 2015.

⁶² Davidson, Joe. “Federal Insider: Private federal prisons—less safe, less secure.” *Washington Post*. 12 Aug. 2016. <www.washingtonpost.com/news/powerpost/wp/2016/08/12/private-federal-prisons-less-safe-less-secure/?utm_term=.4d3a08698822> 30 Jan. 2017.

⁶³ Norton, Ben. “Incarceration nation: U.S. has miles to go in ending private prisons, legal advocates warn.” *salon.com*. September 7, 2016. <www.salon.com/2016/09/07/incarceration-nation-the-u-s-has-miles-to-go-in-fixing-private-prisons-legal-advocates-warn/> 30 Jan. 2017.

⁶⁴ Libal, Bob and Nicole D. Porter. “Commentary: Time to take profit out of Texas prisons.” *Austin American-Statesman*. September 20, 2016. <<http://www.sentencingproject.org/news/time-take-private-profit-texas-prisons/>> 30 Jan. 2017. (Note: The *Austin American-Statesman* has since removed the post from its website, but the full text of the op-ed is provided in the link above.)

⁶⁵ See discussion in Gilroy, Leonard C., Adam B. Summers, Anthony Randazzo and Harris Kenny. *Public-Private Partnerships for Corrections in California: Bridging the Gap Between Crisis and Reform*. Reason Foundation. Policy Study #381, April 2011. <http://reason.org/files/private_prisons_california.pdf> 30 Jan. 2017.

While the DOJ is correct in noting that the fall in inmates in federal prisons matches, and even exceeds, the amount contained in contracted BOP-run prisons, to conclude that one can therefore just end all BOP prison contracts without system-wide consequences assumes that the inmate population will continue to fall and will never increase again. Even assuming that there is enough excess space in BOP-operated prisons to accommodate all inmates currently in BOP contract prisons, almost any increase in BOP prison inmates would lead to the organization having to find space from some type of contract prison—public or private.

The fact that the BOP has already renewed two of its prison contracts *since the DOJ announcement to wind down the use of BOP contracting* provides further evidence that contracting out remains a vital tool for the agency, while also providing support for the new attorney general’s decisions to rescind the August 2016 memo. In September 2016, the BOP renewed a contract with GEO for the D. Ray James Correctional Institution in Georgia, and in November, a BOP contract was renewed with CCA (now “CoreCivic”) for its McRae Correctional Facility, also in Georgia.⁶⁶ These renewals suggest that DOJ’s announcement last August was at least hasty, and likely made with little-to-no input from the BOP itself.

The fact that the BOP has already renewed two of its prison contracts *since the DOJ announcement to wind down the use of BOP contracting* provides further evidence that contracting out remains a vital tool for the agency, while also providing support for the new attorney general’s decisions to rescind the August 2016 memo.

Contracting often involves a transfer of risk normally borne by agencies to the outside contractors, and BOP prisons are no exception. As mentioned above, there are myriad ways in which contractors that fall short of performance metrics receive payment deductions. By contrast, it would be hard to find any instance of a government agency receiving a financial penalty for lack of performance; indeed, the opposite is more often the case: a lack of performance leads agencies to ask for *more* money.⁶⁷

⁶⁶ “PRESS RELEASE: The GEO Group Provides Update on Contract Renewal for the D. Ray James Correctional Facility.” The GEO Group. September 30, 2016. <investors.geogroup.com/file/Index?KeyFile=36080511> 30 Jan. 2017; McGee, Jamie. “CoreCivic renews contract with Bureau of Prisons. *The Tennessean*. November 15, 2016. <<http://www.tennessean.com/story/money/2016/11/15/corecivic-renews-contract-bureau-prisons/93918540/>> 30 Jan. 2017.

⁶⁷ This is not to say that there aren’t instances in which agencies do need more funding to improve performance, or that agencies aren’t subject to fluctuations in their funding (though not as much at the federal level as at the state and local levels). The point here is to show the greater amount of control the agencies have over performance when contracting out, as the terms of the BOP contracts strongly incentivize performance, as does the threat of competition.

A new approach to managing costs, operations, management and service delivery of corrections would take even greater advantage of competition by tying compensation to a service provider’s performance at reducing recidivism levels among inmates within their facilities. For example, in Pennsylvania a few years ago, all contracts with private community corrections centers were replaced with contracts that reward private sector partners for reducing recidivism, as was reported in Reason Foundation’s *Annual Privatization Report 2014: Criminal Justice and Corrections*.⁶⁸

Performance-based contracts such as these would provide key building blocks for a “Corrections 2.0” approach to competitive contracting in corrections in which state departments of correction could seek public-private partnerships (PPP) to provide most or all correctional services—from operations to inmate health care to inmate programming—using a “continuum of care” model.”⁶⁹ While this nascent concept currently lacks precedent in the U.S., several key factors—some of which the OIG report cites as functions the BOP system does not do well, such as well-defined cost and performance metrics—lend themselves to further exploration by BOP and other correctional agencies.⁷⁰

A new approach to managing costs, operations, management and service delivery of corrections would take even greater advantage of competition by tying compensation to a service provider’s performance at reducing recidivism levels among inmates within their facilities.

Combining these factors creates a strong rationale for the recent decision to continue the contracting out of prisons. Contractor prison companies offer employees health care and retirement benefits out of their revenues. But since governments only pay contractors while the contract is in operation, taxpayers are not on the hook for additional post-employment pension and health care costs. By contrast, government employees are promised retirement benefits that then bind taxpayers for the whole life of the employee, and oftentimes, the spouse of the employee.

⁶⁸ Galik, Lauren, Leonard Gilroy and Alexander Volokh. *Annual Privatization Report 2014: Criminal Justice and Corrections*. Reason Foundation. June 2014. 19–20. <reason.org/files/apr-2014-criminal-justice.pdf>

⁶⁹ Gilroy, Leonard C. and Adrian T. Moore. *Corrections 2.0: A Proposal to Create a Continuum of Care in Corrections through Public-Private Partnerships*. Reason Foundation. Policy Brief 94. January, 2011. <http://reason.org/files/reason_ftaxwatch_corrections_continuum_of_care.pdf> 30 Jan. 2017.

⁷⁰ Ibid. 11–13.

Overall, a review of the recent OIG reports suggests that there are five key reasons why the decision to rescind the August 2016 DOJ memo calling for the end of private prisons in the BOP system was a prudent one:

1. In response to reduced demand, it is much easier to reduce the supply of privately run prisons than government-run ones.
2. By virtue of being rooted in a contract that specifies desired outcomes, practices and penalties for underperformance, contracting of prisons is likely the best way to address the problem of accountability.
3. Since competition has been shown to be beneficial to reducing costs and improving efficiency whether or not private or public management and operations are ultimately selected, ending all private competition will, at best, severely curtail that benefit.⁷¹
4. Contractors in BOP prisons, as well as their BOP monitors, appear willing and eager to implement changes to improve outcomes in areas of safety and security, while the OIG notes concerns with how staff in BOP-operated prisons govern themselves with respect to searching their staff.
5. Contracting out shields taxpayers by transferring risks and liabilities away from taxpayers that are inherent in government provision of services, and for which taxpayers are thus liable.

Contracting also offers a potential risk mitigation benefit by shielding taxpayers from open-ended commitments to pensions and retiree health care that consume vast amounts of already-limited funding from taxpayers.

Combining these factors creates a strong rationale for the recent decision to continue the contracting out of prisons, not ending it. If federal prison populations continue to drop, or even fluctuate, contracting provides a means of hedging a great deal of that risk by transferring it to the contractor.

⁷¹ State governments could potentially compete, but the presence of three private providers for private operations and management of correctional facilities undoubtedly results in much greater benefit from competition, than if all private competition were prohibited within the BOP.

CONCLUSION

The August 2016 DOJ memo decision to eventually end the use of private prisons cited an OIG report released in the same month to back the decision. Not only did the OIG make no recommendation or findings that could be construed as providing evidence the BOP should end its use of contract prisons, or even curtail their use, the title of that report seems to indicate that the OIG and BOP expected the BOP's use of private prisons to continue, as ending private prison use in the BOP would obviously mean ending the need for monitors of private prisons.

The OIG notes that dissimilar inmate populations severely limit the value of the comparisons made in the August OIG report between BOP-operated and private BOP prisons. The inmate population of private prisons in the BOP system, mostly derived of individuals who do not speak English as a first language, presents added challenges and costs that prisons operated "in-house" by the BOP do not face.

The DOJ's conclusion that contracted-out BOP prisons "simply do not provide the same level of correctional services, programs, and resources" assumes a confidence level much higher than any claim made by the BOP, the OIG, the contractors, or the GAO concerning private prison programs.⁷² In contrast, the August OIG report shows the BOP and companies that operate the BOP's contracted-out prisons agreeing that service comparisons cannot accurately be made between the two types of prisons.⁷³ With costs, academic studies comparing public and private prisons also avoid such bold statements, even when carefully accounting for as many complicating factors as possible.⁷⁴

⁷² Office of Deputy Attorney General Sally Q. Yates. "Memorandum for the Acting Director, Federal Bureau of Prisons, SUBJECT: Reducing our Use of Private Prisons."

⁷³ Office of the Inspector General. "Review of the Federal Bureau of Prisons' Monitoring of Contract Prisons." 11, 21, 68-77.

⁷⁴ Nelson, Julianne. "Competition in Corrections: Comparing Public and Private Sector Operations." Federal Bureau of Prisons, Contract # GS-23F-8096H, December, 2005. <https://www.bop.gov/resources/research_projects/published_reports/pub_vs_priv/cnanelson.pdf> 30 Jan. 2017.

The OIG quotes the BOP in saying that those same language and cultural barriers serve as root causes for many safety and security incidents in its prisons, so the OIG's finding that private prisons reported more safety and security incidents over the period they studied should be expected. Even still, the metrics provided by the OIG are due to its own problems of interpretation. Having more guilty findings from inmate disciplinary hearings appears to be little fault of the prison operator, and, if anything, a greater number of such findings means that the operators do a better job of making sure accusations against inmates have basis. Breaking figures down by contractor muddles performance more. Grievances can be said to prevent safety and security incidents, while a lack of grievances could indicate fear of retaliation against the inmate. Lockdowns are undoubtedly incidents, but if a lockdown prevents a riot, how much fault should the prison operator receive?

One can interpret contraband seizures in multiple ways—not finding contraband does not mean that it is not there; it could just mean poor search techniques. Other recent work by the OIG shows a failure in government-run BOP prisons to implement effective staff search policies to interdict contraband, even after over a decade of OIG recommendations.

In contrast, contractor staff and BOP monitors in private BOP prisons appear eager and willing to make changes to policy to more effectively operate their prisons, a consistent theme of the OIG report. The OIG reported favorable responses to the OIG staff visits after problems were found, and the OIG also notes favorable responses to its specific recommendations to improve monitoring in private prisons.

The August DOJ memo noted that a fall in BOP prison populations played a major factor in the decision to end privately operated BOP prisons, but facing uncertainty over fluctuations in inmate levels is a risk better transferred to the private sector. In contrast, ending the option of private prisons in the BOP would deny flexibility to the BOP in responding to inmate fluctuations, while also denying other benefits contracting provides in terms of shielding taxpayers from financial risk.

The DOJ's conclusion that contracted-out BOP prisons "simply do not provide the same level of correctional services, programs, and resources" assumes a confidence level much higher than any claim made by the BOP, the OIG, the contractors, or the GAO concerning this report.

Given that the OIG produced its August 2016 report with expectation of improving the monitoring of the BOP's private prisons, the February 2017 memo by Attorney General Jeff Sessions that rescinded the decision to end privately operated BOP facilities appears to better reflect the needs and expectations of the BOP. The OIG's monitoring report from last August does show room for improvement in monitoring private prisons; continuing private prison use in the BOP allows greater opportunity to carry out those improvements. Still other changes in contract structure could work to improve inmate services and programs by ensuring accountability for the parties responsible for delivering those services and programs. Such improvements seek to make prison operation more consistent with rehabilitating the inmate to society, and are likely to work best when prison operators and service providers face outside competition. Without the option of private prisons, the BOP would erase most any threat of competition in the operation of its prisons. Attorney General Sessions' memo ensuring private prisons will continue provides greater opportunity for such improvements to be achieved.

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Leonard Gilroy and Adrian Moore, “Corrections 2.0: A Proposal to Create a Continuum of Care in Corrections through Public-Private Partnerships,” January, 2011.



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