



Office of the Attorney General  
State of Texas

DAN MORALES  
ATTORNEY GENERAL

December 23, 1996

Mr. Jack E. Crump  
Executive Director  
Texas Commission on Jail Standards  
P.O. Box 12985  
Austin, Texas 78711

Letter Opinion No. 96-151

Re: Authority of the Texas Commission on Jail Standards to regulate private facility for incarceration of persons convicted by federal courts or courts of other states (ID# 39010)

Dear Mr. Crump:

On behalf of the Texas Commission on Jail Standards (the "commission"), you ask whether the commission has authority to regulate a private facility proposed for incarceration of convicted inmates. Your letter states as follows:

The Taylor Detention Center Corporation was established through a private non-profit entity to own and finance a facility proposed for incarceration of convicted inmates. The arrangement does not include city jurisdiction. It is further proposed that the facility be operated by a private corporation. Although no specific arrangement has been finalized, it is anticipated that the facility will incarcerate prisoners sentenced by jurisdiction[s] other than Texas courts, i.e. out-of-state and federal inmates.

The Taylor Detention Center is not yet in operation, and it appears that no contracts for housing prisoners have been entered into yet. In the absence of more information about the operations of this facility, we may not be able to answer your question definitively, but we can advise you of the relevant law.

The commission has regulatory authority over a "jail, detention center, work camp, or related facility" operated by a private vendor for a county or municipality.<sup>1</sup> You state that the private corporation<sup>2</sup> that will operate the facility questions whether the commission has any authority over

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<sup>1</sup>Local Gov't Code §§ 351.102, .103 (county), 361.061, .062 (municipality); see Attorney General Opinion DM-86 (1992).

<sup>2</sup>The Corrections Corporation of America.

it, but it has agreed to comply with minimum jail standards for the interim. You ask the following three questions:

Does the Commission have authority to regulate the facility?

Will the type of inmate incarcerated therein affect the regulatory authority[?]

[F]rom where is the authority to incarcerate derived since it is incorporated outside the authority of the [C]ity of Taylor[?]

We will answer your last question first, because it establishes the framework for addressing questions about government regulation of incarceration facilities. Penal institutions are public facilities, and are established by the government in the exercise of sovereign powers to incarcerate persons as a means of enforcing the criminal laws of the state.<sup>3</sup> “[D]etention is a power reserved to the government, and is an exclusive prerogative of the state.”<sup>4</sup> The incarceration of persons may thus be exercised only under the authority of law. The Texas Legislature has delegated to the Department of Criminal Justice the authority to govern state-level prisons<sup>5</sup> and, to the institutional division of the Department of Criminal Justice, the responsibility for confinement of adult felons.<sup>6</sup> Authority to establish jails and other local incarceration facilities has been delegated by the legislature to counties and municipalities.<sup>7</sup> The legislature has also authorized the Department of Criminal Justice<sup>8</sup> and cities and counties<sup>9</sup> to contract with private entities for the construction and operation of facilities to incarcerate persons. Facilities operated under contract with a city or county are subject to regulation by the Commission on Jail Standards, while those operated under contract with the Department of

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<sup>3</sup>60 AM. JUR. 2D *Penal and Correctional Institutions* § 8 (1987); see Letter Advisory No. 19 (1973) (membership on Texas Board of Corrections involves exercise of sovereign powers of state).

<sup>4</sup>*Medina v. O'Neill*, 589 F. Supp. 1028, 1038 (S.D. Tex. 1984) (detention of alien stowaways in private facility) modified on other grounds, 838 F.2d 800 (5th Cir. 1988).

<sup>5</sup>Gov't Code §§ 492.001, .013, 493.003, .004, .0051.

<sup>6</sup>*Id.* § 494.001.

<sup>7</sup>Local Gov't Code §§ 351.001 (commissioners court shall provide safe and suitable jails for county), 361.061.

<sup>8</sup>Gov't Code §§ 495.001-.002 (Board of Criminal Justice may contract with commissioners court or private vendor for “secure correctional facility” to confine minimum or medium security inmates), 507.001 (state jail division of Department of Criminal Justice may contract with various entities, including private vendor, for state jail facilities to confine certain inmates).

<sup>9</sup>Local Gov't Code §§ 351.102, .103 (county), 361.061, .062 (municipality); see Attorney General Opinion DM-86 (1992).

Criminal Justice are subject to standards established by statute and by the Board of Criminal Justice and to monitoring by the appropriate division of the Department of Criminal Justice.<sup>10</sup>

Federal law provides that “[n]o citizen shall be imprisoned or otherwise detained by the United States except pursuant to an Act of Congress.”<sup>11</sup> The Attorney General of the United States may contract with the “proper authorities of any State, Territory, or political subdivision thereof,” for the imprisonment of “persons held under authority of any enactment of Congress.”<sup>12</sup> The governmental entity with which the Attorney General contracts is regarded as an independent contractor.<sup>13</sup> Congress contemplated that “the day-to-day operations of the contractor’s facilities were to be in the hands of the contractor, with the Government’s role limited to the payment of sufficiently high rates to induce the contractor to do a good job.”<sup>14</sup> The Attorney General may also contract with a private entities for the housing, care, and security of persons held in custody of a United States marshal pursuant to federal law.<sup>15</sup> To be eligible for a contract for the housing, care, and security of prisoners, the private entity shall “comply with all applicable State and local laws and regulations,” among other requirements.<sup>16</sup> Thus, the federal government may house prisoners in Texas in federal, state, local, and private institutions. The state, local, and private institutions in which federal prisoners are housed are not necessarily thereby free from state regulation.<sup>17</sup>

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<sup>10</sup>See Gov’t Code chs. 495, 507. As well as being subject to regulation pursuant to statute, the governmental and private entities responsible for incarcerated inmates may be subject to liability or other consequences for depriving inmates of rights under the United States Constitution; see *Ancata v. Prison Health Servs., Inc.*, 769 F.2d 700, 705 (11th Cir. 1985) (county contract with private health care corporation to provide medical care to incarcerated inmates); see also *West v. Atkins*, 487 U.S. 42 (1988) (physician under contract with state to provide medical services to inmate at state prison acted under color of state law when he treated inmate); *Kansas v. Benoit*, 898 P.2d 653, 660 (Kan. Ct. App. 1995) (employees of privately operated correction facility were acting as law enforcement agents when questioning defendant).

<sup>11</sup>18 U.S.C. § 4001.

<sup>12</sup>*Id.* § 4002. A federal prison may be built in a state under 18 U.S.C. § 4003. Other federal statutes apply to the detention of aliens who have illegally entered the United States or who are awaiting deportation. See 8 U.S.C. §§ 1252(c) (Attorney General is directed to arrange for appropriate places of detention for aliens detained pending determination of deportability), 1357(a) (arrest for violation of laws relating to entering country); see also 8 U.S.C. § 1225(c) (detention of alien at port of arrival to determine admissibility); 8 C.F.R. § 235.3(f) (requirements for facility in which alien passengers on carrier are detained pending determination of admissibility). Since you refer only to persons who have been sentenced by a federal court, we will not separately address the provisions on detention of illegal aliens.

<sup>13</sup>*Logue v. United States*, 412 U.S. 521, 529 (1973).

<sup>14</sup>*Id.*

<sup>15</sup>18 U.S.C. § 4013(a)(3).

<sup>16</sup>*Id.* § 4013(b)(2).

<sup>17</sup>In Attorney General Opinion DM-404, this office concluded that the Commission on Jail Standards could not regulate the Eden Detention Center, because it housed only federal prisoners. Pursuant to an intergovernmental agreement with the federal Bureau of Prisons, the City of Eden agreed to provide custody, care, treatment, and subsistence of federal prisoners. In accordance with the agreement, the city leased the Eden Detention Center, owned by a nonprofit corporation and managed by a corporation specializing in prison management. We were informed that the federal Bureau of Prisons has monitored, inspected, and overseen the detention center’s operations since it opened in 1985, Attorney General Opinion DM-

To summarize our discussion thus far, the authority to incarcerate prisoners in Texas is derived from legislation of the State of Texas or of the United States. Prisoners may be housed in a privately owned and operated facility located in Texas only pursuant to a contract with a governmental entity that has statutory authority to incarcerate prisoners within the boundaries of this state.

It is anticipated that the Taylor Detention Center will incarcerate prisoners convicted by the courts of another state. Persons convicted of crimes by the courts of another state may be incarcerated in a privately owned and operated facility in Texas only pursuant to contract between the private facility and a governmental entity that has authority to incarcerate such persons in Texas. The power of a private corporation to house prisoners is, in this case as in every case, wholly derivative of the power of a governmental entity to incarcerate persons within the state. The corporation has no independent authority to incarcerate prisoners.

We find no authority for the view that one state may send its prisoners to another state without the consent of the receiving state.<sup>18</sup> Texas is a party to the Interstate Corrections Compact, which authorizes each party state to enter into contracts with other party states to confine inmates on its behalf.<sup>19</sup> It provides in part: "Each party state may make one or more contracts with any one or more of the other party states for the confinement of inmates on behalf of a sending state in institutions situated within receiving states."<sup>20</sup> The compact defines the duties of the sending state and the receiving state in some detail and provides that the director of the Texas Department of Corrections "is authorized and directed to do all things necessary or incidental to the carrying out of the compact in every particular."<sup>21</sup> Section 351.043(e) of the Local Government Code impliedly authorizes a county to house out-of-state inmates in the county jail, subject to numerical limits established by the Board of Criminal Justice: "The Texas Board of Criminal Justice may adopt rules regulating the number of federal prisoners and prisoners from jurisdictions other than Texas in a county jail."

We find one other statute that permits the incarceration in Texas of prisoners from another state under very narrow circumstances. Subchapter B of chapter 361, Local Government Code, authorizes the construction and operation of a justice center on the Texas-Arkansas state line in

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<sup>17</sup>(...continued)

404 (1996) at 2, and in reliance on this premise, and certain provisions of federal law, we concluded that federal regulatory authority preempted state regulatory authority. This conclusion now appears inconsistent with the federal statutes and cases relied upon in this ruling, and for that reason, we are withdrawing Attorney General Opinion DM-404 to permit additional study of these federal provisions and their relationship with state law.

<sup>18</sup>See generally *Tafflin v. Levitt*, 493 U.S. 455, 458 (1990) (under federal system, states possess sovereignty concurrent with that of federal government, subject only to limitations imposed by supremacy clause); *World-Wide Volkswagen Corp., v. Woodson*, 444 U.S. 286, 294 (1980) (sovereignty of each state implies limitation on sovereignty of all of its sister states); *Maryland v. Barry*, 604 F. Supp. 495, 499 (D.D.C. 1985) (state, as sovereign, has power to condition or refuse entry of peace officers of another state for any purpose having to do with execution of official duties).

<sup>19</sup>Code Crim. Proc. art. 42.19.

<sup>20</sup>*Id.* art. 42.19, art. III(a).

<sup>21</sup>*Id.* art. 42.19, art. X(b).

Texarkana<sup>22</sup> through the joint efforts of the Texas and Arkansas counties and cities on each side of the state line.<sup>23</sup> The statute contains detailed provisions allowing persons incarcerated under the authority of the political subdivisions in one of the states to be jailed in the part of the justice center located in the other state.<sup>24</sup> The sheriffs of the two counties are jointly responsible for the operation of the detention facility in the justice center and for the treatment of persons in custody in that facility.<sup>25</sup> The provisions on housing prisoners from one state on the side of the building in the other state address matters of extradition, service of process, arrests within the justice center and transfer of prisoners across the state line within the center.<sup>26</sup> Finally, the authority of the Texas county and city to participate in building and operating the justice center is made contingent on Arkansas' enactment of legislation that duplicated certain provisions of the Texas legislation.<sup>27</sup>

We find no other statutes authorizing the incarceration in Texas of persons in the custody of another state. A privately operated incarceration facility could have authority to receive and incarcerate prisoners convicted in another state only pursuant to a contract with the board of criminal justice as receiving entity for prisoners transferred to this state under the Interstate Corrections Compact or pursuant to a contract with a county subject to section 351.043(e) of the Local Government Code. Aside from these two possibilities, we find no authority for a private incarceration facility to house persons who are prisoners of another state.

We believe our discussion of the source of authority to incarcerate persons is relevant to your second question, that is, whether the type of inmate incarcerated in a privately operated facility would affect the regulatory authority applicable to it. Certainly, the identity of the prisoners, in terms of the governmental entity with custody of them, is relevant to questions of regulatory authority. For example, this office has determined that the Commission on Jail Standards "has statutory authority to regulate the conditions of confinement for inmates in a county's custody wherever they are confined."<sup>28</sup> The source of regulatory authority can ordinarily be determined by examining the statutes that authorize the private facility to operate, the statutes that authorize a governmental entity, whether it is the federal government, the Texas Department of Criminal Justice, a city, or a county, to place prisoners in the private facility, and the contract between the private corporation and the governmental entity entered into pursuant to these statutes. Each question of regulatory authority over a privately operated incarceration facility must be examined on the basis of the relevant law.

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<sup>22</sup>Attorney General Opinion JM-272 (1984).

<sup>23</sup>Local Gov't Code § 361.022.

<sup>24</sup>*Id.* § 361.029.

<sup>25</sup>*Id.* § 361.026.

<sup>26</sup>*Id.* § 361.029.

<sup>27</sup>*Id.* § 361.023.

<sup>28</sup>Attorney General Opinions MW-559 (1982) (holding cells in county facilities, even though they are separate from county jail, must comply with minimum jail standards), MW-328 (1981) (city jail holding county prisoners under contract is "county jail" for purposes of certification of employees); *see also* Attorney General Opinion JM-272 (1984) (Commission on Jail Standards may inspect jail facilities on Arkansas side of justice center built on state line, assuming that Arkansas has adopted authorizing legislation and adjacent political subdivisions have contracted as required by statute).

Your remaining question is whether the commission has authority to regulate the facility. We understand from your letter that the City of Taylor did not contract with a private vendor to build and operate the Taylor Detention Center and we assume from your questions that Williamson County, in which Taylor is located, did not do so either. Assuming these premises are correct, the commission has no present authority to regulate the facility. A change of circumstances, for example, if the private vendor at some time in the future contracts with the city or the county to operate the detention center on its behalf, could raise a new question about the commission's authority to regulate the facility. If that happens, you may wish to seek the advice of this office at that time.

As we have said, a private vendor may operate an incarceration facility in this state only pursuant to a contractual arrangement with the federal government, the State of Texas, a county or a city. We must know which of the governmental bodies authorized to incarcerate prisoners within this state has contracted with the private corporation to place its prisoners in the Taylor Detention Center in order to determine which agency of this state or of the federal government will have regulatory authority over the facility and its inmates. Since prisoners may be incarcerated in Texas only pursuant to legislation adopted by the Texas Legislature or by the United States Congress, it is clear that a privately operated entity may not house any class of prisoners in this state free of regulation by this state or the federal government.<sup>29</sup>

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<sup>29</sup>See note 18 (regulatory authority with respect to institutions in Texas in which federal prisoners are incarcerated). Even though a private prison corporation may be housing out-of-state prisoners in Texas without legal authority, the prisoners are not for that reason entitled to be released into the population of Texas. The out-of-state prisoners are held, albeit in the wrong state, pursuant to a conviction of the courts of another state, and the unauthorized activities of the private corporation that brought them here do not affect the validity of their sentences. Habeas corpus may be used to review jurisdictional defects or denials of fundamental or constitutional rights. *Waley v. Johnston*, 316 U.S. 101, 104-05 (1942); *Ex parte Tovar*, 901 S.W.2d 484, 485 (Tex. Crim. App. 1995). It has been denied when the judgment sentenced the prisoner to a place different from that authorized by law. 39 AM. JUR. 2D *Habeas Corpus* § 70 at 230. See generally *Hammer v. Meachum*, 691 F.2d 958, 961 (10th Cir. 1982) (transfer of prisoner from one state correctional institutional to another); *Tavarez v. U.S. Attorney General*, 668 F.2d 805, 809 (5th Cir. 1982) (sovereign does not lose power to keep convict in custody by turning him over to another sovereignty for service of sentence). A suit for habeas corpus at most might gain the prisoner a transfer to a prison of his state of conviction.

S U M M A R Y

The authority to incarcerate prisoners in Texas is derived from legislation of the State of Texas or of the United States. Prisoners may be housed in a privately owned and operated facility located in Texas only pursuant to a contract with a governmental entity that has statutory authority to incarcerate prisoners within the boundaries of this state. Persons convicted of crimes by the courts of another state may be incarcerated in a privately owned and operated facility in Texas only pursuant to contract between the private facility and a governmental entity that has authority to incarcerate such persons in Texas.

The Commission on Jail Standards has regulatory authority over a jail, detention center, work camp, or related facility operated by a private vendor on behalf of a county or municipality. If the Taylor Detention Center is not operated on behalf of a county or municipality, the commission does not have authority to regulate it. The appropriate regulatory authority will ultimately have to be established from the statutes authorizing the Taylor Detention Center to incarcerate prisoners on behalf of a particular governmental entity and the contract or contracts entered into pursuant to those statutes.

Yours very truly,



Susan L. Garrison  
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Opinion Committee