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Laura Suzanne Farris

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COMMENTS

PRIVATE JAILS IN OKLAHOMA: AN UNCONSTITUTIONAL DELEGATION OF LEGISLATIVE AUTHORITY

I. INTRODUCTION

On September 4, 1997, the Tulsa County Jail Authority voted to privatize the new Tulsa County Jail, making Tulsa the largest privately operated jail in the country.¹ Tulsa thereby joined a growing number of cities and states that have chosen to privatize jail and prison operations under the guise of improving services and lowering costs. Presently, one hundred and twenty private jails and prison are operating in twenty-seven states.² The private prison industry in the United States has tripled in size since the early eighties, with eighty five thousand prison beds by the end of 1996.³ In Oklahoma alone, only months after private prisons were approved, the state was dependent on the bed space provided by private prisons.⁴

This unfettered growth has taken place despite warnings from the American Bar Association (ABA) that private prisons may face constitutional and public policy roadblocks.⁵ In fact, states have made little effort to examine the constitutional implications of handing over this basic government responsibility to a private party.⁶ "The ability to deprive citizens of their freedom, force them to live behind bars and totally regulate their lives, is unlike any other power the

1. See Tim Hoover, *Firm Wins Vote for Negotiations/County Moves a Step Closer to Privatizing the New Tulsa Jail*, TULSA WORLD, Sept. 5, 1997, at A1.

2. See *The Meyer's Report*, STATE J.-REG., Sept. 7, 1997, at 56.

3. See Andy Furillo, *Firms Eager to Build Private Prison in State*, SACRAMENTO BEE, Aug. 23, 1997, at A1.

4. See *Prison Inflation*, TULSA WORLD, Dec. 10, 1996, at A12.

5. See IRA P. ROBBINS, *THE LEGAL DIMENSIONS OF PRIVATE INCARCERATION* 6 (1988).

6. See David N. Wecht, *Breaking the Code of Judicial Deference: Judicial Review of Private Prisons*, 96 YALE L.J. 815 (1987).

government has."⁷ The mere scope of this power raises serious concerns as to whether it is constitutional or even wise to hand over such power to the lowest bidder.⁸

The same questions, which concerned the ABA in 1986, remain largely unanswered today.⁹ "No case law has yet addressed the constitutionality of delegating the provision of corrections to the private sector."¹⁰ Currently, lawsuits are pending against the Tulsa County Commissioners in an effort to prevent privatization of the Tulsa County Jail.¹¹ This may be the first opportunity for the federal and state courts to act on the constitutionality of private prisons.¹²

Certainly the courts have long been wary of delegating governmental authority to private entities.¹³ "Only in the narrow context of delegations of government functions to private, for-profit entities have both the federal and state courts effectively preserved the non-delegation principle."¹⁴ However, the non-delegation doctrine is rarely used in federal court, while state courts actively use the doctrine when reviewing delegations to private entities.¹⁵

The constitutional and public policy issues of prison privatization are dis-

7. Joseph E. Field, *Making Prisons Private: An Improper Delegation of a Governmental Power*, 15 HOFSTRA L. REV. 649, 669 (1987).

8. See Ira P. Robbins, *Privatization of Prisons: Privatization of Corrections: Defining the Issues*, 40 VAND. L. REV. 813, 816 (1987).

9. See generally Robbins, *supra* note 5, at 5. Questions that remain unanswered include not only the constitutionality of private prisons, but also:

- What standards will govern the operation of a private institution?
- Who will monitor implementation of the standards?
- How will the public and the media gain access to private prisons?
- What recourse will members of the public have if they disapprove of how the institution is being operated?
- Who will be responsible for using force in the institution?
- Who will be responsible for making quasi-judicial decisions like classification, transfer, discipline, and parole?
- Will the private company be able to refuse to accept certain inmates – such as those who have contracted AIDS?
- What options will be available to the government if the private company substantially raises its fees?
- What will happen if the company declares bankruptcy, or simply goes out of business because there is not enough profit?
- What safeguards will prevent private vendors, after gaining a foothold in the incarceration field, from lobbying for policy changes, such as mandatory sentences and no parole for their greater profit?

Id. Some of these questions are discussed *infra* on pp. 21-29.

10. Field, *supra* note 7, at 651.

11. See Tim Hoover, *Deputies' Suit Opposes Private Jail*, TULSA WORLD, Aug. 27, 1997, at A1.

12. Attorneys for Tulsa County Deputies, who have filed suit to stop the privatization of the Tulsa County Jail, say they may also challenge the state law that allows county jails to be privatized in federal court on constitutional grounds. See Barbara Hoberock and Tim Hoover, *State's High Court Hears Arguments in Tulsa Jail Suit*, TULSA WORLD, Nov. 18, 1997 at A-11.

13. For additional information about the applications of the delegation doctrine, see generally Alexander Dill, *Scope of Review of Rulemaking After Chada: A Case for the Delegation Doctrine?*, 33 EMORY L.J. 953 (1984); David Schoenbrod, *The Delegation Doctrine: Could the Supreme Court Give it Substance?*, 83 MICH. L. REV. 1223 (1985); Bruce Segal, *Administrative Law—the delegation doctrine and the imposition of criminal sanctions through agency regulations*, 29 WAYNE L. REV. 1317 (1983); Richard Stewart, *The Uneasy Constitutional Status of the Administrative Agencies*, 36 AM. U. L. REV. 323 (1987).

14. See Wecht, *supra* note 6, at 824.

15. See Ira P. Robbins, *The Impact of the Delegations Doctrine on Prisons Privatization*, 35 UCLA L. REV. 911, 913 (1988).

cussed in this comment. The comment begins with an explanation of the non-delegation doctrine at the federal level and its possible implications on prison privatization. In the next section, Oklahoma's strong non-delegation doctrine is examined and applied to prison privatization. In the final section, an overview of the public policy concerns is presented. These concerns include: 1) private prison corporations who promote their own self interest over society's interests; 2) illusive cost savings; 3) prison conditions which are difficult to monitor; and 4) implications of abandoning the state as an inefficient unit.

States, like Oklahoma, have prohibited delegation of legislative power to private entities because of the broad policy concerns that are associated with entrusting individuals with government power.¹⁶ In his suit to stop the privatization of the Tulsa County Jail, Professor James C. Thomas contended that "delegation of governmental authority to a private corporation, whose directors hold office totally independent of the people, is and has long been viewed as suspect."¹⁷ Placing a jail in the hands of a private corporation "will allow that corporation, removed from the reach of the people, to make decisions that equally affect 'the quantity, quality, and cost' of this essential public service."¹⁸ Consequently, because private jails and prisons violate Oklahoma's non-delegation standard and raise serious public policy concerns, the responsibility of detaining and/or incarcerating citizens should not be entrusted to corporate America.

II. FEDERAL NON-DELEGATION DOCTRINE

Handing over the governmental authority to detain and incarcerate prisoners necessarily implicates both federal and state constitutional issues.¹⁹ While the Thirteenth and Fourteenth Amendments are implicated by prison privatization, the paramount constitutional question is whether or not assignment of this authority would be prohibited by the non-delegation doctrine at the federal or state level.²⁰

The non-delegation doctrine is derived from Article I of the United States Constitution and the due process clauses of the Fifth and Fourteenth Amendments.²¹ Article I states that "legislative powers herein granted shall be vested in a Congress of the United States."²² "Strictly interpreted, this clause prohibits

16. See *Southern Pac. Transp. Co. v. Public Utils. Comm'n.*, 556 P.2d 189, 292 (Cal. 1976) (Legislature may not confer unrestricted authority to private persons to make administrative decisions.); *Stewart v. Utah Pub. Serv. Comm'n.*, 885 P.2d 759 (Utah 1994) (Legislature can not delegate governmental powers to private parties to be used to further private interests.). See also, *Salt Lake City v. International Ass'n of Firefighters*, 563 P.2d 786, 789 (Utah 1977) (Private citizens can not make binding decisions that affect the quantity, quality, and cost of an essential public service.).

17. *Thomas v. Board of County Comm'rs.* No. CJ-97-00043 (Filed Mar. 3, 1997) (Plaintiff's Brief in Support of Motion for Summary Judgment).

18. *Id.* at 7.

19. See Robbins, *supra* note 5, at 9.

20. See *id.*

21. See *id.* at 12.

22. U.S. CONST. Art. I, §1.

Congress from delegating its legislative powers to any other institution."²³ The legislative powers are defined as "the lawmaking powers of a legislative body, whose functions include the power to make, alter, amend and repeal laws."²⁴ This power also includes the authority to define criminal offenses and to prescribe the punishments to be imposed.²⁵

There are two distinct types of delegation of legislative power: delegation to public agencies, and delegation to private entities. In determining the constitutionality of delegations to public agencies the Court generally has used an Article I separation of powers analysis, while the Court has used a due process analysis when considering delegations to private parties.²⁶

Statutes delegating authority to agencies and public bodies have generally been upheld.²⁷ Due to the rapid development of a complex society, strict adherence to the non-delegation doctrine of Article I is not possible.²⁸ "Thus, Congress-under the necessary and proper clause of the Constitution-can delegate authority sufficient to effect its purposes."²⁹ On this basis, the courts have upheld delegations to executive agencies. However, "[f]ew would deny that the non-delegation doctrine should be invoked in a situation involving a broad delegation of traditional government power which lacks satisfactory protections."³⁰

The Court did use the non-delegation doctrine to invalidate delegations of legislative authority to governmental bodies in two important cases during the Depression era: *A.L.A. Schechter Poultry Corp. v. United States*³¹ and *Panama*

23. Robbins, *supra* note 8, at 823.

24. BLACKS LAW DICTIONARY 625 (6th ed. 1990).

25. Whalen v. United States, 445 U.S. 684, 688 (1980) (The court held that this power "resides wholly with the Congress."). Cf. Loving v. United States, 116 S. Ct. 1737 (1996) (The Court held that there was no absolute bar on Congress's power to delegate the authority to define criminal punishments.).

26. See Robbins, *supra* note 5, at 12.

27. See generally *Loving*, 116 S. Ct. at 1737 (Congress can delegate its constitutional authority to the President to define aggravating factors that permit imposition of the statutory penalty of death in military capital cases.); *Lichter v. United States*, 334 U.S. 742, 785-86 (1948) (upholding delegation of authority to determine excessive profits); *American Power & Light Co. v. SEC*, 329 U.S. 90, 105 (1946) (upholding delegation of authority to SEC to prevent the unfair distribution of voting power among security holders); *Yakus v. United States*, 321 U.S. 414, 426 (1944) (upholding delegation to administrator to fix commodity prices to carry out the purposes of the Emergency Price Control Act of 1942); *Federal Power Comm'n v. Hope Natural Gas Co.*, 320 U.S. 591, 600 (1944) (upholding delegation to Federal Power Commission to determine just and reasonable rates); *National Broad. Co. v. United States*, 319 U.S. 190, 225-26 (1943) (upholding delegation of authority to the Federal Communications Commission to regulate broadcast licensing).

28. See Robbins, *supra* note 8, at 823.

29. *Id.* Cf. *Field v. Clark*, 143 U.S. 649, 693 (1892) (Congress may delegate the authority to execute laws); *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635 (1952) (The constitution separates the branches, but requires interdependence.); *Mistretta v. United States*, 488 U.S. 361, 380-381 (1989) (Separation of powers does not require that the three branches have no control over the acts of the other branch.).

30. *Field*, *supra* note 7, at 657. See also *Bowsher v. Synar*, 478 U.S. 714, 726 (1986) (Congress can not use retroactive legislation to reopen judgments of the court.); *INS v. Chadha*, 462 U.S. 919, 954-955 (1986) (Congress can not enact laws without presenting them to the president after passage by both houses of Congress.).

31. 295 U.S. 495 (1935) In this case the plaintiffs were indicted for allegedly violating the Code of Fair Competition for the Live Poultry Industry. See *id.* The Court found that "the statutory plan is not simply one for voluntary effort. It does not seek merely to endow voluntary trade or industrial associations or groups with privileges or immunities." *Id.* at 529. The Court, in reversing the convictions, found that the statute was coercive and that violations of the provisions would be punishable as a crime. See *id.* The Court held that Congress can not delegate its authority to trade associations where they are allowed to enact laws that they deem beneficial because this would be an impermissible delegation of legislative authority. See *id.*

Refining Co. v. Ryan.³² While the Supreme Court has not since used the non-delegation doctrine to invalidate delegations to governmental bodies, "[i]ntermittently, Supreme Court decisions have expressed concern with the breadth of such delegation."³³ As a result, the court has narrowly construed the statutes conferring power to the Executive, rather than requiring strict adherence to the non-delegation doctrine.³⁴

For example, in *Nat'l Cable Television Ass'n v. United States*,³⁵ representatives of community antenna television systems groups challenged a provision of the Independent Offices Appropriation Act³⁶ which required the Federal Communications Commission to establish a fee schedule based on the direct and indirect cost to the government, the value to the recipient, and the public policy to be served.³⁷ The appellants argued that this was the levying of taxes, which is the sole province of the legislature.³⁸ The Court, after addressing the *Schechter* and *Hampton* decisions, concluded that the "hurdles revealed in those decisions lead us to read the Act narrowly to avoid constitutional problems."³⁹

Although delegation to public bodies has generally been upheld, the Court viewed delegation to private-for-profit entities with skepticism. In the only Supreme Court case to review delegation to a private entity, the Court renounced the delegation in *Carter v. Carter Coal Co.*⁴⁰ The Court held, "[t]his

In setting out a standard by which to judge congressional delegation, the Court utilized the criterion of *clear congressional standards* in deciding whether the delegation was constitutional. *See id.*

[W]e look to the statute to see whether Congress has overstepped these limitations—whether Congress in authorizing "codes of fair competition" has itself established the standards of legal obligation, thus performing its essential legislative function, or, by the failure to enact such standards, has attempted to transfer that function to others.

Id. at 530. In distinguishing this case from the *Panama Refining Company*, the Court found that the object of the statute there was clearly defined. *Schechter Poultry Corp.*, 295 U.S. at 530. The court then pointed out the lack of certainty with the statute at issue in the present case.

What is meant by "fair competition" as the term is used in the act? Does it refer to a category established in the law, and is the authority to make codes limited accordingly? Or is it used as a convenient designation for whatever set of laws the formulators of a code for a particular trade or industry may propose and the President may approve (subject to certain restrictions), or the President may himself prescribe, as being wise and beneficent provisions for the government of the trade or industry in order to accomplish the broad purposes of rehabilitation, correction, and expansion which are stated in the first section of title 1?

Id. at 531. The Court concluded "that the attempt through the provisions of the code to fix the hours and wages of employees of defendants in their intrastate business was not a valid exercise of federal power." *Id.* at 550.

32. 293 U.S. 388 (1935); *see* Field, *supra* note 7, at 657.

33. Wecht, *supra* note 6, at 823.

34. *See id.*

35. *Nat'l Cable Television Ass'n v. United States*, 415 U.S. 336, 342 (1974).

36. Independent Offices Appropriation Act of 1952, 31 U.S.C. § 483a (1994).

37. *See Nat'l Cable Television*, 415 U.S. at 342.

38. *See id.*

39. *Hampton & Co. v. United States*, 276 U.S. 394 (1928). Congress enacted a flexible tariff law that authorized customs duties, on imported articles, which equaled the difference between the cost of producing them in a foreign country and of selling them here and the cost of producing and selling similar items here. The President, after being advised by the Tariff Commission, would increase or decrease the duty accordingly. The Court held that as long as Congress established an intelligible principle to guide the president or agency that legislation would not be a forbidden delegation of legislative power. *Id.* at 409.

40. *Carter v. Carter Coal Co.*, 298 U.S. 238 (1936). *C.f.* Robbins, *supra* note 5 at 18, note 48, for a listing of cases where the Court upheld delegations similar to *Carter*. The Court's delegation cases that followed *Carter* all upheld increasingly broad private delegations without ever questioning *Carter's* holding that Congress could not delegate legislative power to private parties. *Id.* at 20.

is legislative delegation in its most obnoxious form; for it is not even delegation to an official of an official body, presumptively disinterested, but to private persons whose interests may be and often are adverse to the interests of others. . . .⁴¹In *Carter*, the Court rejected the constitutionality of the Bituminous Coal Act of 1935⁴² when stockholders of the coal company sued to enjoin the company from paying the tax imposed by the Act or complying with any of its provisions.⁴³ The Court held that "a statute which attempts to confer such [legislative] power undertakes an intolerable and unconstitutional interference with personal liberty and private property."⁴⁴

Lower courts, relying on the *A.L.A. Schechter Poultry Corp.* and the *Panama Refining Co.* decisions, have developed a long-standing test for determining if a delegation is proper:⁴⁵ (1) Does the delegation of power involve private motives? (2) Does the statute contain clear standards and specific procedural requirements? (3) Has the legislature revealed a clear policy decision?⁴⁶

First, the Court is most likely to find a delegation of authority improper when a private interest is involved.⁴⁷

[T]he Supreme Court has long evinced a hostility toward the delegation of discretionary or adjudicative powers to financially interested parties, explicitly rejecting the argument that its review should focus only on actual bias and invalidating such delegations as per se violations of due process upon a finding of threatened abuse alone.⁴⁸

Indeed, even where the delegation may be for the public's welfare, the court may invalidate it because of the danger of private interests influencing decisions.⁴⁹

In *A.L.A. Schechter Poultry Corp.* the Court held that the delegation to a private group was "utterly inconsistent with the constitutional prerogatives and duties of Congress."⁵⁰ This holding indicates that the court is wary of private entities being able to implement state power in order to further their own finan-

41. 298 U.S. at 311.

42. Bituminous Coal Conservation Act of 1935, 15 U.S.C. § 801, 802 (1994) (repealed 1937).

43. 298 U.S. at 311.

44. *Id.*

45. See *North American Safety Valve Indus., Inc. v. Wolgast*, 672 F. Supp. 488, 491 (D. Kan. 1987) (adopting *Schechter*, 293 U.S. 495 and its three prong test as the appropriate standard for analyzing delegation cases).

46. See *Field*, *supra* note 7, at 661.

47. See generally *Field*, *supra* note 7, at 662. *Field* cites *Eubank v. City of Richmond*, 226 U.S. 137 (1912) and *Washington, Seattle Title Trust Co. v. Roberge*, 278 U.S. 116 (1928) as examples where the Supreme Court has upheld the non-delegation doctrine in areas where private interests were at stake. In *Eubanks* the Court was concerned that zoning ordinances which allowed property owners to make the zoning rules could be "exercised arbitrarily and capriciously." *Id.* In a similar factual situation, the Court struck down the zoning provision in *Washington*, 278 U.S. 116. The Court held that the delegation was repugnant to the fourteenth Amendment because without a review procedure established by the legislature it would allow a group to arbitrarily withhold zoning consent. See *id.* at 121.

48. *Wecht*, *supra* note 6, at 825.

49. See *Field*, *supra* note 7, at 657. See also *supra* note 42. (In *Carter* the court rejected the delegation of legislative powers to coal companies where the statute allowed the companies to set the price of coal for all mines in the United States.)

50. *A.L.A. Schechter Poultry Corp.*, 295 U.S. 495, 537 (1935).

cial interests.

Private prisons run directly afoul of the Court's concern that private interests may influence or override, policy decisions. Private prisons exist solely to generate a profit for their investors. Unlike traditional government prisons, private prisons depend on maximizing profits and minimizing losses.⁵¹ This need to make a profit may result in private prisons substituting society's interest in sound correctional policies with their own interest of maximizing profits.⁵²

As a result of this substitution of motives, the constitutional rights of prisoners may be compromised. "Prisons are 'total institutions' where guards determine, on an everyday basis, what inmates may and may not do."⁵³ This necessary control requires society to trust that prison guards will act within the boundaries of society's standards. But when private motives are introduced, prison staff will be compelled to act in the best interest of the company's investors.

Prison staff has the ability in many ways to influence the duration of a prisoner's detainment.⁵⁴ For example, prison guards testify at parole hearings, assess behavior at disciplinary proceedings and impose penalties.⁵⁵ As a result, prison guards can lengthen a prisoner's stay by not recommending parole and by taking away "good time credits" at disciplinary proceedings. Where private prisons are paid according to the number of prisoners they house, the obvious incentive would be for guards to routinely increase incarceration time in order to maximize profits.

The courts are not alone in recognizing the dangers of delegating governmental authority to the private sector. Tulsa County Sheriff Stanley Glanz, in the ongoing debate over the privatization of the Tulsa County Jail, has addressed the possible conflicts that arise when private motives are involved.⁵⁶ Glanz stated that "[i]ntroducing a profit motive to the criminal justice system is immoral and, ultimately, unwise . . ."⁵⁷ The sheriff further argued that while his main duty is to protect the community, the main duty of the private corrections company officials would be to make a profit for their shareholders.⁵⁸

The second requirement of the Court's non-delegation doctrine is that there should be a clear and limited statute with specific procedural requirements that conveys the power to the private entity. In both the *A.L.A. Schechter Poultry Corp.* and *Panama Refining Co.* decisions, one of the requirements of a valid

51. See Field, *supra* note 7, at 662.

52. See *id.* (For example, a private prison may choose to cut educational programs and food service options in order to reduce costs. See *id.* at 663. Also private prisons may reduce costs by hiring fewer guards and requiring them to work longer hours even though it is in the best interest of the community and the prisoners to have higher guard to prisoner ratios.). See *id.*

53. Wecht, *supra* note 6, at 821.

54. See *id.*

55. See *id.*

56. See Tim Hoover, *Jail Operations Vote is Today/Authority to Decide if Sheriff's Department or Private Firm Will Run Facility*, TULSA WORLD, Sept. 4, 1997, at A1.

57. *Id.*

58. See *id.*

delegation is a statute that is clear in scope and definition.⁵⁹ A Louisiana District Court, in *United States v. Chambless*,⁶⁰ applied the requirement of a clear statute with specific procedural requirements, in a challenge to the Sentencing Reform Act.⁶¹ The defendant asked the court to invalidate the Sentencing Reform Act because it "unconstitutionally delegated to the Sentencing Commission [the] authority to fix criminal penalties."⁶² The court rejected this claim, finding that "[t]he statute outlines the policies which prompted establishment of the Commission, explains what the Commission should do and how it should do it, and sets out specific directives to govern particular situations."⁶³

In contrast, the Oklahoma statute that authorizes private jails and prisons contains no specific provisions limiting the scope of authority or defining the procedural rules that should be followed. The original statute authorizing private jails in Oklahoma contains only two sentences, which simply authorize counties to contract with private prison contractors.⁶⁴ The more recent private prison enabling statute⁶⁵ does include limited procedural requirements. These requirements, however, provide only that the private contractors must follow the "standards prescribed and established for county jails, including but not limited to standards concerning internal and perimeter security, discipline of inmates, employment of inmates, and proper food, clothing, housing, and medical care."⁶⁶ All other procedural requirements, except those involving financing are left to the discretion of the county. The statute provides that "[t]he county shall define the scope of a proposed project, determine the various project components, phases and timetables, and prepare detailed project descriptions to guide prospective contractors."⁶⁷

In fact, any statute authorizing private prisons will have a difficult time overcoming this hurdle to delegation.⁶⁸ "The very nature of prisons suggest that they 'cannot be run by procedures carefully detailed by' outsiders."⁶⁹ The legislature can only provide a skeletal outline of standard operating procedures.⁷⁰ The day-to-day rules which affect the lives of the prisoners must be determined by the correctional officers within the prison.⁷¹ Statutes, however, that confer broad, undefined powers to parties with private motives "do not lessen the fear of over-broad discretion manifested in the Court's decisions in

59. See Field, *supra* note 7, at 665. See generally Robbins, *supra* note 5, at 22.

60. *United States v. Chambless*, 680 F. Supp. 793 (E.D. La. 1988).

61. Sentencing Reform Act, 28 U.S.C. § 991 (1994).

62. *Chambless*, 680 F. Supp. at 795 (alteration in original).

63. *Id.* at 796. The Sentencing Reform Act, 28 U.S.C. § 994 requires that "guidelines should cover whether to impose a fine, a sentence, probation, or a prison term; the length of probation or imprisonment and the amount of the fine" *Id.*

64. See OKLA. STAT. tit. 57, § 41 (1991). See *infra* p. 20 for the full text of this statute.

65. See OKLA. STAT. tit. 19, § 744 (1991).

66. *Id.*

67. *Id.*

68. See generally, Field, *supra* note 7, at 665-667 (listing examples of private prison enabling statutes that have failed to clearly specify the delegated authority).

69. *Id.*

70. See *id.*

71. See *id.*

Panama and Schechter."⁷²

Some private prison proponents have argued that strict contractual provisions can be utilized to overcome the court's requirement of detailed legislation.⁷³ While strict contract provisions may be put into place, to "the extent that institutional discretion remains in private hands, either in the cellblock or in the boardroom, these safeguards will do little to alleviate the concerns surrounding private delegations."⁷⁴

The third requirement of the Court's non-delegation doctrine is that there be a clear policy decision by the legislature. The Court has reasoned that without a consensus on the policy reasons behind a delegation, political accountability would crumble.⁷⁵ In his concurring opinion in *Industrial Union Dep't. v. American Petroleum*, Justice Rehnquist wrote that Congress should not be allowed to pass off difficult policy decisions to those who are not politically accountable.⁷⁶ In this case, which challenged OSHA standards for permissible benzene exposure, Justice Rehnquist offered that "[i]t is difficult to imagine a more obvious example of Congress simply avoiding a choice which was both fundamental for purposes of the statute and yet politically so divisive that the necessary decision or compromise was difficult, if not impossible, to hammer out in the legislative forge."⁷⁷

In contrast, the district court in *Chambless* found that the requirement of a clear congressional policy was met when reviewing the Sentencing Reform Act.⁷⁸ The court found that Congress had clearly established its purposes for adopting the Sentencing Reform Act. The court declared that "[t]he Congressional policies underlying the Act are reflected in the purpose of the Commission, as set out in the statute."⁷⁹

Unfortunately, no language, which would indicate Congress's purpose for allowing private prisons, was included in either of Oklahoma's private prison

72. *Id.* (alteration in original).

73. See generally, Wecht, *supra* note 6, at 831. Wecht argues that there are three reasons that prevent contractual provisions from overcoming judicial hostility to private delegation. See *id.* First, contracts requiring government monitors inside private prisons does little to obviate judicial concerns and may well ruin the idea of saving money for the state. See *id.* at 831. Second, there is currently no legal principle which mandates strict contract requirements and thus there is no constitutional safeguard to ensure that all states will implement such contract terms. See *id.* at 832. Third, the promulgation of strict contract provisions does not ensure that the state will continue to enforce them when "legislative scrutiny may have weakened and when corporate control of the state's penal system may have reached the point that the government no longer has the expertise, personnel, facilities, or fiscal resources to run the prisons." *Id.* at 833.

74. Wecht, *supra* note 6, at 832.

75. See Field, *supra* note 7, at 667.

76. See 448 U.S. 607, 671. In *American Petroleum*, the Court held that an OSHA standard for permissible exposure to benzene was invalid because it was not supported by appropriate findings. See *id.*

77. *Id.* at 686.

78. See *Chambless*, 680 F. Supp. at 796.

79. *Id.* The court noted these requirements as evidence of a clear Congressional policy:

First the Commission is to set sentencing policies and practices that (1) satisfy the specified purposes of sentencing (just punishment, deterrence, incapacitation, rehabilitation), (2) avoid unwarranted sentencing disparities while maintaining flexibility, and (3) reflect advances in knowledge of human behavior. Second, the Commission is to "develop means of measuring the degree to which the sentencing, penal, and correctional practices are effective in meeting the purposes of sentencing."

Id.

enabling statutes.⁸⁰ "Since prison privatization is a major policy decision, not only in terms of correctional policy, but also with regard to the role of the government in society, there might be grounds for striking down federal delegation . . . if Congress fails to specifically address this question."⁸¹

Delegation of the power to detain and incarcerate prisoners violates all three of the Court's requirements for a valid delegation. Private motives, lack of clear and limited statutes, and lack of policy decisions make the delegation of legislative authority to private prisons constitutionally suspect. While the non-delegation doctrine has been disfavored, "[t]he fact remains, however, that the delegation doctrine safeguards the integrity of the separation of powers principle upon which our tripartite system of government was designed, and cannot be allowed to slip irretrievably into obscurity."⁸²

III. OKLAHOMA'S NON-DELEGATION DOCTRINE

While the Supreme Court has not invalidated a statute based on the non-delegation doctrine since the New Deal Era, state courts have continued to use the doctrine.⁸³ Moreover, state courts have taken a much stricter approach when reviewing delegation of legislative power.⁸⁴

The Oklahoma non-delegation doctrine is based on Oklahoma's counterpart to Article I⁸⁵ of the United States Constitution and provides that the three departments of the government will be separate and will not exercise the powers belonging to the other branches.⁸⁶ In Oklahoma, the non-delegation doctrine has been used with relative frequency to invalidate legislation that delegated the police power of the state to private entities.⁸⁷ Prisons fall under this traditional police power. "A governmental power under which the care and control of prisons fall is the great one commonly called the 'police power.'"⁸⁸

The Oklahoma Supreme Court has long held that the police power of the

80. Compare OKLA. STAT. tit. 57, § 41 (1991) with OKLA. STAT. tit. 19, § 744 (1997).

81. Field, *supra* note 7, at 667.

82. Bernard Schwartz, *A Decade of Administrative Law: 1987-1996*, 32 TULSA L.J. 493, 503 (citations omitted).

83. See *id.* at 504.

84. See *id.*

85. U.S. CONST. Art. I, §1.

86. OKLA CONST. Art. 4, §1.

The powers of the government of the State of Oklahoma shall be divided into three separate departments: The Legislative, Executive, and Judicial; and except as provided in this Constitution, the Legislative, Executive, and Judicial departments of government shall be separate and distinct, and neither shall exercise the powers properly belonging to either of the others.

Id.

87. See Public Serv. Co. of Okla. v. Caddo Elec. Coop., 479 P.2d 572, 575 (Okla. 1971) ("[A] reasonable exercise of the police power of a state cannot be contracted away by contracting parties."); National Bank of Tulsa Bldg. v. Goldsmith, 226 P.2d 916, 921 (Okla. 1951) ("[P]olice power is an attribute of sovereignty or in effect is sovereignty, and the State and its police power cannot be separated."). See also Chicago R.R. & P. Ry. Co. v. Taylor, 192 P. 349, 354 (Okla. 1920); Ameson v. Shary, 32 S.W.2d 907, 910 (Tex. Civ. App. 1930); Schmitt v. F.W. Cook Brewing Co., 120 N.E. 19, 21 (Ind. 1918); and Banker v. Jefferson County Water Control & I. Dist., 277 S.W.2d 120, 122 (Tex. Crim. App. 1955).

88. Pritchett v. Board of Comm'rs of Knox County, 85 N.E. 32, 34 (Ind. App. 1908).

state cannot be delegated. In *National Bank of Tulsa Bldg. v. Goldsmith*⁸⁹ the Court held that "police power is an attribute of sovereignty or in effect is sovereignty, and the state and its police power cannot be separated."⁹⁰

In *Goldsmith*, the plaintiff challenged a provision of the Workmen's Compensation Act that conclusively deemed a person's employment as hazardous when the insurance company used that person's employment to determine the employer's compensation insurance premium.⁹¹ The court found that this was an invalid attempt to vest an employer with legislative authority.⁹² The court stated that it is "fundamental that the Legislature of a state may not part with any of its right to exercise the police power."⁹³

In 1996, the Oklahoma Supreme Court, in *City of Oklahoma City v. Oklahoma Dep't of Labor*, invalidated a prevailing wage statute because it violated the non-delegation doctrine.⁹⁴ The Little Davis-Bacon Act⁹⁵ required contractors with the state to pay the prevailing wage in the location where construction was to take place. The prevailing wage was determined by standards in the federally-mandated Davis-Bacon Act.⁹⁶ The court held that the statute was invalid because the Act provided no definite standards to follow in implementing the legislative policy.⁹⁷ The Court argued forcefully that delegations, which reduce accountability to the public, violate the non-delegation doctrine:

The current Act leaves an important determination to the unrestricted and standardless discretion of unelected bureaucrats. Worse, it delegates to an administrative arm of the federal government. As a result, the federal agency which actually determines the prevailing wage is less answerable to the will of the people of Oklahoma than is the Labor Commissioner who holds elected office. It leaves public entities with no Oklahoma forum in which to challenge the accuracy of the United States Department of Labor's wage determinations.⁹⁸

City of Oklahoma City v. Oklahoma Dep't of Labor demonstrates the court's willingness to use the delegation doctrine to invalidate relatively minor delegations.⁹⁹ In this case, the state legislature delegated their power to determine the prevailing wage to a federal agency. This delegation did not implicate the more complicated constitutional questions of delegation to a private prison company.¹⁰⁰

Oklahoma's Court of Criminal Appeals, the state's highest criminal court,

89. 226 P.2d 916 (1951).

90. *Id.* at 921.

91. *See id.* at 919.

92. *See id.* at 918.

93. *Id.* at 921.

94. *See* 918 P.2d 26 (1996).

95. Little Davis Bacon Act, OKLA. STAT. tit. 40, § 196.1 (1991).

96. Davis-Bacon Act, 40 U.S.C. § 276a (LEXIS through 1997 Sess.).

97. *See* 918 P.2d at 30.

98. *Id.*

99. *See generally* Schwartz, *supra* note 93, at 505 for a discussion of the Oklahoma non-delegation cases.

100. *See infra* at p. 4 for a discussion of the federal constitutional implications of delegations to private entities.

has also invalidated delegations to private parties. In *Potter v. State*,¹⁰¹ the Court of Criminal Appeals held that "the general rule has become fixed that the legislature may not delegate legislative functions to private persons."¹⁰²

In *Potter*, the defendant was convicted of selling and delivering motion pictures showing persons engaged in acts of sexual intercourse. The statute under which he was convicted exempted films which the Motion Picture Association or the United States Customs Office approved.¹⁰³ The court found that this was "a grant of power unfettered by guides, restrictions, or standards."¹⁰⁴ The court held that "[a]ttempted delegation of legislative powers to private persons is repugnant to the due process requirement where it permits arbitrary exercise of powers by such individuals and therefore violates the constitutional requirement of reasonableness."¹⁰⁵

The Oklahoma Court of Criminal Appeals established three criteria for judging delegations to private bodies. Where the legislature delegates the right to prescribe a rule governing the conduct for the future, the delegation will be rejected if it "fails to provide any standard or condition as to the necessity of the act, provides for no hearing or safeguards, and is not subject to review."¹⁰⁶ In other words, the statute must be narrowly drawn, reasonable, and must have definite standards.¹⁰⁷

A cursory look at the Oklahoma statutes which allow for private jails demonstrates that these statutes could not pass the constitutional test required by the state courts, or perhaps even the less stringent standard of the United States Supreme Court.¹⁰⁸ Oklahoma's original private prison enabling statute simply states:

Every county, by authority of the board of county commissioners and at the expense of the county, shall have a jail or access to a jail in another county for the safekeeping of prisoners lawfully committed. A county may enter into contracts with *private prison contractors* to provide and operate jail facilities for the county.¹⁰⁹

This statute, along with a more recent statute, has been used as the statutory authority for the Tulsa County Jail Authority to contract with a private prison corporation.¹¹⁰ However, this statute does not meet the non-delegation requirements established by the court.

First, there must be narrow tailoring that clearly states the necessity of the act.¹¹¹ However, both statutes simply state that a county may enter into a con-

101. 509 P.2d. 933 (1973).

102. *Id.* at 935.

103. *See* OKLA. STAT. tit. 21, § 1040.51 (1971).

104. 509 P.2d at 935.

105. *Id.* (citations omitted).

106. *Id.*

107. *See id.*

108. *See infra* at p. 4 for a discussion of the United States Supreme Court's requirements for a valid delegation to private entities.

109. OKLA. STAT. tit. 57, § 41 (LEXIS through 1997 Sess.) (emphasis added).

110. *See generally* Tulsa County Dist. Att'y. Op. No. 96-3 (1996).

111. *See Potter*, 509 P.2d. at 935.

tract with a private prison contractor.¹¹² There are no statutory requirements limiting the use of private contractors or proscribing the standards the prison contractors must follow. The statute delegates all of the authority for establishing standards to the county commissioners.¹¹³ Therefore, the statute does not meet the first requirement of narrow tailoring as established by the state judiciary.

Second, the statute must be reasonable and provide for hearings and safeguards.¹¹⁴ The Oklahoma statutes are silent on this issue. Under these statutes,¹¹⁵ when voters do not pass a bond election for a new jail they may nevertheless be forced to pay for one if the county officials contract with a private prison.¹¹⁶ For example, the county could encourage a private prison firm to build a jail within the county at the firm's expense. The county could then enter into a contract with the private prison firm for services and then transfer the cost to the voters by reallocating current tax dollars. The statute does not provide for any safeguards to protect the voters from such behavior. Therefore, the statute fails to meet the court's requirement of reasonableness and also fails to provide for hearings and safeguards.

Third, the statute must have definite standards.¹¹⁷ Again, Oklahoma private prison statutes¹¹⁸ fail to meet this requirement. The most recent statute requires only that the prisons meet "any standards prescribed and established for county jails."¹¹⁹ No specific powers have been enumerated and no limitations have been placed on the powers to be conferred to the private prison contractors.

With these enabling statutes the legislature has delegated the right to prescribe rules to a private, for-profit entity without establishing any policy that shows the necessity of the delegation. Also, the statutes do not provide for hearings or safeguards, and the acts of the county are not subject to review. Consequently, the Oklahoma Supreme Court should follow its well-established non-delegation doctrine and reject the establishment of privately run jails as a violation of that doctrine.

IV. PUBLIC POLICY CONCERNS

In addition to the constitutional violations, the broad public policy concerns implicated by the delegation of such a fundamental government power

112. Compare OKLA. STAT. tit. 57, § 41 (LEXIS through 1997 Sess.) with OKLA. STAT. tit. 19, § 744 (LEXIS through 1997 Sess.).

113. OKLA. STAT. tit. 19, § 744 (LEXIS through 1997 Sess.).

114. *Potter*, 509 P.2d at 935.

115. Compare OKLA. STAT. tit. 57, § 41 (LEXIS through 1997 Sess.) with OKLA. STAT. tit. 19, § 744 (LEXIS through 1991 Sess.).

116. See *infra* at p. 19 for a discussion on abandoning the democratic process to finance prison construction.

117. See *Potter*, 509 P.2d at 935.

118. OKLA. STAT. tit. 57, § 41 (1991).

119. OKLA. STAT. tit. 19, § 744 (LEXIS through 1997 Sess.).

should weigh heavily against the use of private prisons in all but the most unusual circumstances. "[W]e should not permit the purported benefits of privatization to thwart consideration of the broad, difficult policy questions that are involved."¹²⁰ Policy concerns include: (1) private prison corporations who promote their own interests even when they are adverse to society's interest, (2) illusive cost savings, (3) prison conditions which are difficult to monitor, and (4) the detrimental effect of abandoning the state.

A. Promotion of Self Interests

Like any other corporation, private prisons are driven by the need for profit. As one program development director stated, "We'll hopefully make a buck at it. I'm not going to kid any of you and say that we are in this for humanitarian reasons."¹²¹ In order to sustain their profit margins, corporations may make decisions that are "repugnant to the public interest to further their own pecuniary . . . gain."¹²²

There can be no doubt that private prisons are profitable. The industry's gross revenues exceeded five hundred million dollars in 1996.¹²³

The two giants of the private prison industry are Nashville, Tenn. – based Corrections Corp. of America [awarded the Tulsa contract] and Palm Beach Gardens, Fla.-based, Wackenhut Corp. These companies are booming. Common stock for Corrections Corp. currently sells for 97-times earning, while Wackenhut shares are selling at 71-times earning. (For comparison, Microsoft is selling at 57-times earnings while the average stock in the Standard & Poors 500 is selling at 23-times earnings).¹²⁴

Additionally, half of the wardens of Corrections Corporation of America are millionaires, according to William Archambeault, a criminologist who studies private prisons.¹²⁵ But as this industry continues to grow, so also will the corporate desire to ensure a growing clientele.

Private companies, in order to remain profitable, will need to fill their prisons to capacity. Because of this need, private prisons will likely discourage parole, probation and community based programs.¹²⁶ "[I]n order to protect their investment, they will likely lobby for longer sentences and reduced use of probation and parole."¹²⁷

Discouraging alternatives to incarceration may be the most costly long-term effect of privatization. "[A]lternatives to incarceration are far less expensive to implement than the construction and management of prisons and jails.

120. Robbins, *supra* note 8, at 813.

121. *Id.* at 816 (citation omitted).

122. Robbins, *supra* note 14, at 936.

123. See Furillo, *supra* note 3.

124. *The Meyers Report*, *supra* note 2, at 56.

125. See *Going Private: The Promise, the Problems; in Favor of Private Prisons*, WISC. STATE J., Feb. 16, 1997, at 8A.

126. See Field, *supra* note 7, at 671.

127. *Id.*

Moreover, less than half of the incarcerated population is considered violent. Therefore, other means of dealing with offenders aside from incarceration would seem to be appropriate."¹²⁸

Another concern is that as states grow dependent on private prison space, corporate agents will be unable to avoid the temptation to raise the price and encourage bidding wars between states for the limited bed space. "It has been very easy for the state to slip into using private prisons and it will similarly be very easy to become overly reliant on them."¹²⁹ Mary Botkin, political coordinator for the American Federation of State, County and Municipal Employees "charged that private prison companies enter markets by offering lowball bids, then slowly jack up prices until states no longer save money."¹³⁰

Corrections Corporation of America admitted as much after its bid was accepted for the Tulsa County Jail.¹³¹ Although Corrections Corporation of America claims that losses on the Tulsa County Jail would be offset by the marketing value, some question how long Corrections Corporation of America would be willing to absorb the loss.¹³² Sheriff Glanz stated that "I'm sure CCA will be here as long as they see a financial benefit. As soon as it's gone, they'll leave town."¹³³

Once states are committed to the use of private prisons their options will be limited should a private prison plan to raise the rent.¹³⁴ As one commentator noted, when the government contracts out the entire corrections system (like the Tulsa County Jail), the government "will more likely pay higher fees and ignore potential problems rather than cancel the contract and be left without anyone to manage its correctional institutions."¹³⁵

B. Illusive Cost Comparisons

Without exception, private prisons have been given state contracts because of the promise that they can save the state a substantial amount of money. But has the promise been fulfilled? Conflicting studies have made this a difficult question to answer.¹³⁶ For example, "[i]n 1984, Hamilton County, Tennessee,

128. *Id.* at 670 (citations omitted).

129. *Prison Inflation*, *supra* note 4.

130. Steve Law, *Kitzhaber to Consider Prison Privatization*, BUS. J. of PORTLAND, Feb. 14, 1997, at 1.

131. See Tim Hoover, *Jail Operations Vote is Today! Authority to Decide if Sheriff's Department or Private Firm Will Run Facility*, TULSA WORLD, Sept. 4, 1997, at A1.

132. See Tim Hoover, *Glanz Mulls Future*, TULSA WORLD, Sept. 23, 1997, at A1.

133. *Id.*

134. See *Prison Inflation*, *supra* note 4.

135. Field, *supra* note 7, at 672.

136. Various studies have been performed to determine whether or not private prisons save money. These studies have rendered conflicting results. Louisiana State University conducted a study comparing the cost of private prisons with the cost of similar state-run prisons. This study found that private prisons were "significantly more cost efficient." *The Meyers Report*, *supra* note 2. However, the United States General Accounting Office concluded that "there is insufficient evidence to say whether or not private jail and prison operations save money or improve quality." *Id.* Richard Stalder, secretary of the Louisiana Department of Public Safety and Corrections also disagreed with the LSU report. "He noted that his state has three identical, six-year-old prisons one run by Wackenhut and one run by CCA. The cost of all three prisons is 'virtually the same after six years.'" Mark Oswald, *Officials differ on private prison costs*, SANTA FE NEW MEXICAN, Aug. 30, 1996,

turned over its jail to a private company in an effort to save money. Due to unanticipated costs, the county wound up spending \$200,000 more than it expected under its contract."¹³⁷ This is not an isolated incident.

In 1982, when a private company took over the Okeechobee Reform School in Florida, the company believed it could do a better job for less money. The company quickly discovered that in order to live up to its contract, it would have to expend more money than the state had spent, not less.¹³⁸

Moreover, even advocates of private prisons agree that there is no sure way to measure cost savings of private prisons.¹³⁹ Hidden costs to local governments do not make it into the cost equation. "[S]ome local governments are claiming that private prisons should pay property taxes"¹⁴⁰ Currently, private prisons do not pay property tax in most locations, even though they are operating at a profit.¹⁴¹ If states required them to pay property taxes like any other corporation, it is doubtful that the prison could ever be more profitable than their state run counterparts.¹⁴² Also, local governments have to absorb the cost of law enforcement backup that is frequently needed when problems erupt at private jails and prisons.¹⁴³

Another hidden cost includes the expense of monitoring the contracts with private prisons. "Virtually all the experts say private contracts have to be carefully written, and the companies carefully monitored. 'You're stupid if you look at these based on costs alone,' says the University of Florida's Charles Thomas, one of the nation's leading private prison experts."¹⁴⁴

Perhaps the most significant hidden cost resulting from the privatization of jails and prisons is the resulting waiver of sovereign immunity in negligence actions.¹⁴⁵ "[P]rivatization of prisons and jails may cost the government more than public ownership and operation of the facilities would cost because, by delegating the incarceration function, the state may waive the defense of sovereign immunity in ordinary-negligence actions."¹⁴⁶ The Supreme Court refused to grant governmental immunity to private prison guards in *Richardson v. McKnight*.¹⁴⁷ In his dissent, Justice Scalia predicted that this decision would

at B1 (citations omitted).

137. Field, *supra* note 7, at 654.

138. *Id.* at 654-55.

139. See Dana Peck, *Prisons*, FLA. TIMES-UNION, Mar. 2, 1997, at F-1.

140. Lloyd Dunkelberger, *Private Prison Tax Issue Fuels Debate*, THE LEDGER, Jan. 20, 1997, at A1.

141. *See id.*

142. *See id.*

143. *See generally*, Tim Hoover, *Sheriff Makes A Final Bid for Jail Job*, TULSA WORLD, Aug. 9, 1997, at A-19.

144. *Going Private: The Promise, The Problems; in Favor of Private Prisons*, WIS. ST. J., Feb. 16, 1997, at 8A.

145. *See* Robbins, *supra* note 8, at 825.

146. *Id.*

147. 117 S. Ct. 2100 (1997). *McKnight*, an inmate in a private prison in Tennessee brought a section 1983 action against two prison guards. *See id.* *McKnight* alleged that he was injured by restraints used on him by the guards and that he required hospitalization as a result of the injuries. The lower court found that the guards were not entitled to qualified immunity and the guards appealed. *See id.* The Court of Appeals for the

"artificially raise the cost of privatizing prisons."¹⁴⁸ However, private prisons counter that this would not affect their costs "because it simply denied them a protection they never had."¹⁴⁹

C. Controls on Prison Conditions

Possibly the most difficult public policy issue to address is the state's ability to control conditions in private prisons. "When the government transfers correction facilities to the private sector, it will have greater difficulty in monitoring what actually goes on inside."¹⁵⁰ Functions such as the disciplining of inmates, the use of deadly force, and the ability to make recommendations to the parole board are traditional areas of responsibility that will be difficult to monitor.¹⁵¹

A recent episode of recorded violence in a Texas private prison illustrates this oversight problem. "The private-prison industry has come under increased scrutiny in recent months. Federal authorities are investigating a privately run county jail in Brazoria County, Texas, where a camera caught acts of alleged officer mistreatment on videotape."¹⁵² There are other dramatic examples

Sixth Circuit, 88 F.3d 417, affirmed, and guards petitioned for certiorari. *See id.* The Supreme Court held that prison guards who are employees of a private prisons are not entitled to qualified immunity from suit by prisoners charging a violation of section 1983. *See id.* The court reasoned that the immunity doctrine's purposes did not justify immunity for private prison guards because the "mere performance of a governmental function does not support immunity for a private person, especially one who performs a job without government supervision or direction." *Id.* at 2101. The Court found that there were important differences between private and public employees. *See id.* "[T]he most important special government immunity-producing concern-protecting the public from unwarranted timidity on the part of public officials-is less likely present when a private company subject to competitive market pressures operates a prison." *Id.*

A firm whose guards are too aggressive will face damages that raise costs, thereby threatening its replacement by another contractor, but a firm whose guards are too timid will face replacement by firms with safer and more effective job records. Such marketplace pressures are present here, where the firm is systematically organized, performs independently, is statutorily obligated to carry insurance, and must renew its first contract after three years. And they provide the private firm with incentives to avoid overly-timid job performance. To this extent, the employees differ from government employees, who act within a system that is responsible through elected officials to the voters and that is often characterized by civil service rules providing employee security but limiting the government departments' flexibility to reward or punish individual employees.

Id. at 2105-2108. The Court also reasoned that immunity is not needed because privatization helps to ensure that talented candidates are not deterred by the threat of damage suits because liability insurance is generally available and the risk of distraction caused by frivolous lawsuits alone cannot be sufficient grounds for immunity. Tennessee, which has decided not to extend sovereign immunity to private prison operators, can, moreover, be understood to have anticipated a certain amount of distraction. *See id.* at 2107.

The Court found that the history of qualified immunity "does not reveal a 'firmly rooted' tradition of immunity applicable to privately employed prison guards," and that the purposes of the immunity doctrine do not warrant immunity for private prison guards. *Id.* at 2104, 2107-8.

148. *Richardson*, 117 S. Ct. at 2112. Scalia, in his dissent, argued that the decision establishes that "two sets of prison guards" who are indistinguishable in the ultimate source of their authority over prisoners, indistinguishable in the powers that they possess over prisoners, and indistinguishable in the duties that they owe towards prisoners, are to be treated quite differently in the matter of their financial liability." *Id.* at 2113. Justice Scalia further asserted that "neither our precedent, nor the historical foundations of § 1983, nor the policies underlying § 1983, support this result." *Id.* at 2113.

149. Margaret Talev, *Private Prison Guards Left Open to Suit*, TAMPA TRIB., June 24, 1997, at Florida/Metro 4.

150. *Field*, *supra* note 7, at 671.

151. *See id.*

152. *Furillo*, *supra* note 3.

where the state was unable to provide proper oversight of private facilities. In a private Ohio prison, inmates have been stabbed and guards have used tear gas to put down uprisings.¹⁵³ Local law enforcement reported that in some cases, they were not informed that stabbings had occurred.¹⁵⁴

Technical statutory language defining crimes involving escape from detention facilities, written before private prisons were in use, can also cause problems for law enforcement. "They learned that in Texas, when out-of-state inmates escaped from a private prison, the state could not prosecute them. Texas also found itself paying to round up escapees and clean up after disturbances at unregulated private prisons."¹⁵⁵ Texas eventually changed its local laws to cover these situations, but this illustrates the difficulty in overseeing private prisons.¹⁵⁶

These differences in prison regulations can also swing in favor of the inmates. Prisoners in Oregon are required to work, but no such requirement exists in Arizona. Consequently, Oregon prisoners housed in private prisons in Arizona do not have to comply with the work requirement.¹⁵⁷ Private prisons allow some services that are forbidden in state prisons, such as air conditioning, television, weight rooms, and basketball courts. This could encourage prisoners in state run institutions to sue the state to provide similar privileges.

D. Abandoning the State

"Prison privatization represents the government's abdication of one of its most basic responsibilities."¹⁵⁸ Government's interests are substituted for the motives of private corporations.¹⁵⁹ This substitution undercuts the democratic process by removing the people's right to approve of new prison construction through bond elections.¹⁶⁰ "With the introduction of private financing . . . the will of the people can be totally ignored."¹⁶¹ Private companies can build their prison where they choose and then contract with the state. This forces the taxpayers to finance the prison even when they would have refused to fund it through a bond election.¹⁶²

Also, private prisons may decrease the voter's ability to control prison policy. In government run prisons, voters have the right to review the prison's budget and performance records.¹⁶³ "[T]here is no guarantee that [voters] will

153. See Mark Tatge, *Private Prison Worries Officials; More State Control Sought for Lock-up*, PLAIN DEALER, Aug. 1, 1997, at 5B.

154. See *id.*

155. Betzy Z. Russell, *Idaho Allows Importing of Inmates; Legislators Consider Laws for Private Facilities; That May Want to House Out-Of-State Prisoners*, SPOKESMAN REV, Sept. 26, 1997, at A1.

156. See *id.*

157. See Law, *supra* note 130.

158. Field, *supra* note 7, at 668.

159. See *id.*

160. See *id.* at 669.

161. *Id.* at 670.

162. See *id.*

163. Field, *supra* note 7, at 670.

be able to do so once the prison is run by a private company.”¹⁶⁴ Additionally, because private prison officers are not elected officials, public pressure may not be effective in forcing needed change.¹⁶⁵ Private prison officers are accountable only to their employer, not to the people.¹⁶⁶

Also, if state run prisons are abandoned only because of the alleged cost savings, is it not preferable to follow the private prison’s lead and lower state costs? “If private companies can cut costs by getting out of state purchasing rules and other requirements, maybe those rules should be reconsidered for the state”¹⁶⁷ It would be unnecessary to turn over this most basic state function to private entities if the state could operate on the same playing field. But those purchasing rules often serve higher public goals. Many of these rules are in place to promote local and minority businesses and to ensure fair competition. Before these goals are abandoned, or circumvented by private prisons, the ultimate goals of the legislature should be clarified.

V. CONCLUSION

This comment contends that the constitutional and public policy issues surrounding the privatization of prisons remain unanswered. The non-delegation doctrine at both the federal and state level mandates constitutional limitations to the powers that can be granted to private entities. The police power, which is abdicated to private prison companies, necessarily reaches the limits and goes beyond the non-delegation doctrine. Beyond the constitutional limitations, public policy concerns, including: (1) private prisons that promote their own interest over that of society, (2) illusive cost savings, (3) unequal prison conditions, and (4) a policy that abandons the state as an inefficient unit, make private prisons an unacceptable risk.

Private jails and prisons violate both the federal non-delegation doctrine and Oklahoma’s non-delegation doctrine and raise grave public policy concerns. The responsibility of detaining or incarcerating citizens should not be entrusted to corporate America because the delegation of such a fundamental police power should not be given to an organization with private motives. The risk that these motives will influence public policy and affect prisoner’s rights is too great to take for a chance at saving a few dollars. “It may be a sad truth, but it is a truth nonetheless: in a democracy, the prisons belong to the people.”¹⁶⁸

Laura Suzanne Farris

164. *Id.*

165. *See id.*

166. *See id.*

167. Law, *supra* note 130.

168. Field, *supra* note 7, at 674 (citation omitted).

