



FROM THE DESK OF BENNY MAGNESS, CHAIRMAN  
**ARKANSAS BOARD OF CORRECTIONS**

P.O. BOX 20550  
WHITE HALL, AR 71612

November 20, 2023

Governor Sarah Huckabee Sanders  
Office of the Governor of Arkansas  
500 Woodlane Street  
Little Rock, AR 72201

Attorney General Tim Griffin  
Office of the Attorney General of Arkansas  
323 Center Street, Suite 200  
Little Rock, AR 72201

**RE: November 17, 2023 Press Conference, the Board of Corrections,  
and Amendment 33 to the Arkansas Constitution**

Dear Governor Sanders and Attorney General Tim Griffin,

As you know, I serve as Chair of the Arkansas Board of Corrections (Board). I have served on the Board since then-Governor Mike Huckabee first nominated me in 1999. For 19 of the 23 years that I have served on the Board of Corrections, I have had the privilege of serving as Chairman; and for 49 years, I have worked in law enforcement—as a sheriff, pilot, firefighter, and deputy. When I first entered public service, I—like you—swore an oath to “support the Constitution of the United States and the Constitution of the State of Arkansas” and to “faithfully discharge the duties of the office” to which I was appointed, confirmed, and ultimately approved by the members of the Board of Corrections. It was also my honor and privilege to be among those hand-selected by then-candidate Sanders for leadership on the Law Enforcement for Sarah Coalition. As my record demonstrates, public service has been my life’s passion, and in the spirit of duty and fidelity to the Constitution, I write in my capacity as Chair of the Board to respectfully address your recent remarks at the November 17, 2023 press conference.

Specifically, on November 17, 2023, Governor Sanders, Attorney General Griffin, and Secretary of Corrections Joe Profiri—surrounded by others who swore the same oath to protect the Arkansas Constitution as me—called on the Board to approve additional beds in existing facilities, alleging that a prior request had been denied without proper consideration. I fear that you may not be apprised of the actual facts that led to your press conference, and I fear that some of the sentiments conveyed overlook an important feature of Arkansas’s constitutional order.

As to the substance, the actual facts involving the request for additional bedspace are much different than what was conveyed at the November 17, 2023 press conference.

First, for years, the Board of Corrections has requested, supported, and advocated for additional facilities, rooms, and beds for inmates. These efforts were met with little success because prior administrations and legislatures were unwilling to authorize spending that was necessary to improve our corrections infrastructure. Second, the Board's highest priority is to properly manage the Division of Corrections—as required under the Arkansas Constitution—so that as many inmates as possible can be transferred from county jails into our facilities in a safe and efficient manner. Any suggestion to the contrary ignores the consistent position of the Board for at least the last 20 years.

But the Board is also responsible to ensure that our correctional facilities are adequate—both in terms of infrastructure as well as appropriate staffing. The Division of Corrections has an approved total capacity of 15,022 inmates. As of the date of this letter, the actual number of inmates being held in ADC facilities is 16,288, or 1,266 inmates over capacity, which does not include the approximately 2,000 ADC inmates held in county jail backup. Most of our facilities are in parts of the State that have experienced serious population decline over the last few decades. Whether as a matter of geography, willingness to commute, or interest in working as a corrections officer relative to compensation and benefits offered in a post-pandemic era, those factors have led to critical shortages in personnel. While the Division of Corrections is managing to house as many inmates as possible as best as it can under the circumstances, we cannot in good conscience put our officers, the inmates charged into our custody, or the general public at great but otherwise avoidable risk.

Relatedly, I, like you, must also consider the safety of our inmate population. While many of the inmates in our population are nonviolent offenders, we are responsible for some of the most dangerous among us. Placing inmates in gymnasiums, without regard for their offense category, is not safe and will undoubtedly result in additional litigation. We are regularly sued in federal court for alleged violations of the Eighth Amendment's prohibition against cruel and unusual punishment. The Eighth Amendment permits inmates to bring those claims where prison conditions or practices create an unreasonable risk of assault. Lack of staffing and poor infrastructure (*e.g.*, cell doors that do not lock) are among the most common forms of failure-to-protect lawsuits. While each case requires an individualized analysis, the Board is duty-bound to prevent otherwise avoidable unsafe conditions in our prison system, and our experience teaches us that safer prisons lead to safer communities within which our prisons operate.

Of course, the Board has substantial expertise in the area of corrections administration and oversight. Whenever our collective knowledge, experience, and wisdom has been requested during prior administrations, we have always enjoyed sharing that expertise with the Governor, Attorney General, and General Assembly in an open and collaborative manner. That is why I was so surprised by your November 17, 2023 press conference. Since taking office, neither the Governor's Office nor the Attorney General have contacted the Board to discuss or address any concerns—whether about bedspace, staffing, or any other topics addressed during the press conference. I hope to foster an open and collegial dialogue with your offices and would invite the

opportunity to collaborate in a more productive manner. In the future, I would welcome the opportunity to speak with your offices directly, rather than hearing your concerns after the fact from news reports. At the very least, I could have explained that what the Board really needs on an emergent basis is adequate funding to recruit, attract, and retain top talent within our prison system so that safe and sufficient staffing can be maintained. Certainly, I think an open dialogue would help your offices gain a better appreciation for the Board's deliberative processes, which in turn could have avoided some misstatements during your press conference.

For instance, Governor Sanders alleged that Secretary Profiri made a "thoughtful, informed, and desperately needed request" to add 622 beds to the Department of Corrections and suggested that while "[w]e have the space, we have the resources, [and] we have the personnel[,] [a]ll that stands between us and a safer, stronger Arkansas is bureaucratic red tape." If Secretary Profiri's proposal was "thoughtful," he failed to share those thoughts the with Board. Indeed, Secretary Profiri did not attend the November 6, 2023 Board Meeting, and the request for additional beds was first provided to me just minutes before our meeting began. Despite Secretary Profiri's failure to communicate what you alleged was a critical request of the Board, the Board nevertheless suspended the rules and added this new item to the agenda.

Similarly, Attorney General Griffin alleged at the press conference that the shortage of bedspace is not a "new" problem. I do not disagree with that generality; however, we are currently experiencing staffing deficits unlike any other time in our history. In some facilities, over one-third of our open positions are unfilled. Given my deep history in law enforcement, I shudder to think about what would happen in the case of a riot in any of our extremely understaffed facilities. Overcrowded and understaffed prisons are a recipe for catastrophe.

For context, the vacancy percentages at Ouachita River, McPherson, and the Maximum-Security Correctional Units are approximately 38.76%, 38.57%, and 33.33%, respectively. Of the 622 additional beds proposed by Secretary Profiri just minutes before our November 6 Board Meeting, 428 were requested for these understaffed Units. In other words, nearly 69% of the additional beds were proposed for areas with critical staffing shortages. Although the Board approved a temporary increase for Ouachita River and North Central (7.29% shortage) based on the information presented, the Board had additional questions and concerns that we expect will be addressed by Division leadership at our next meeting. But Secretary Profiri failed to provide *any* information necessary for the Board's ability to consider the propriety of the full request for 622 additional beds, and in some cases, I believe that Secretary Profiri transferred inmates before ever seeking Board approval. Notably, he failed to supply information as to the steps taken to increase the number of officers needed to provide security; he failed to submit any information regarding the infrastructure changes that would be implemented in furtherance of his last-minute, unsupported request; and he failed to provide any information regarding the budgetary impact of his proposal. The Division lacks the resources to overcrowd prisons, and to do otherwise would place our officers, inmates, and the public at risk. Taking these actions, without a fully informed and vetted plan, would be unethical, dangerous, and reckless; and, in addition to the human harm

that dangerous prison situations can create, I am concerned that taking such actions without appropriate consideration will lead to additional litigation and potentially federal supervision.<sup>1</sup> The Division must abide by governing federal standards, and Secretary Profiri simply failed to supply the information needed for the Board to perform its appropriate constitutional oversight.<sup>2</sup>

This leads to my second and broader concern. In calling on the Board to “do what is needed to protect our people,” it was suggested at the press conference that the Board’s “bureaucratic red tape” is the only impediment to a “safer, stronger Arkansas.” With the utmost respect, the “red tape” that you reference is the Arkansas Constitution, and I vehemently disagree that the Arkansas Constitution is “bureaucratic red tape.” Some history involving Amendment 33 is important.

In 1939, Roberta W. Fulbright—the publisher of the *Northwest Arkansas Times*—supported Governor Carl E. Bailey’s reelection campaign and criticized then-candidate Homer M. Adkins. After the then-current President of the University of Arkansas died unexpectedly in a car accident, Governor Bailey suggested that J. William Fulbright—a law professor and football legend—take the vacant post. The University’s trustees appointed Fulbright in 1939. In 1940, after Adkins defeated Governor Bailey’s reelection bid, Governor Adkins set out to settle political scores. Despite his promise to “take the University out of politics,” Governor Adkins pressured the legislature to change the law to allow him to appoint anew all members of the Board of Trustees. The leadership of the legislature balked but promised they would secure enough resignations to assure him a majority of supporters on the Board. After that occurred, Governor Adkins prevailed upon the new Board to fire Fulbright and various other Bailey supporters. These politically motivated firings generated loud protest both on campus and in the press, and the Dean of the University of Arkansas School of Law—Robert A.

---

<sup>1</sup> Arizona presents a good case study for comparison. See Molly Rothschild, *Cruel and Unusual Prison Healthcare: A Look at the Arizona Class Action Litigation of Parsons v. Ryan and Systemic Deficiencies of Private Health Services in Prison*, 61 *Ariz. L. Rev.* 945, 945 (2019), for a comprehensive discussion of *Parsons v. Ryan*, 2:12-cv-601 (D. Ariz. April 7, 2023) (later styled as *Jensen v. Shinn* and *Jensen v. Thornell*), a class action that eventually resulted in a sweeping injunction against the Arizona Department of Corrections, Rehabilitation, and Reentry on April 7, 2023. Specifically, after a decade of litigation and the imposition of over \$1.4 million in fines for violating a settlement agreement, Arizona was ordered to make substantial changes to staffing and confinement conditions. Arizona remains under federal supervision due to its poor prison conditions to this day. Arkansas should choose a better path.

<sup>2</sup> Notably, despite your request for the Board to call an emergency meeting, Secretary Profiri has not contacted the Board to make that request. In fact, Secretary Profiri has not asked the Board to consider the issue of additional bedspace at our upcoming meeting on December 8, 2023. And Secretary Profiri has certainly failed to supply any information regarding staffing, security, facility enhancement, or budgetary impact related to his proposal to open additional beds.

Leflar—began writing what would ultimately be ratified as Amendment 33 to the Arkansas Constitution.

Amendment 33 was designed to shield educational, charitable, penal, and correctional boards and commissions from political interference. It specifically prohibits the Governor and the Arkansas General Assembly from reducing the powers of these institutions or meddling with their governing boards by prematurely dismissing members or altering board sizes. The Amendment laid out the procedure for removing a Board Member only for cause and restricted any transfer of its vested powers.

This background is instructive in that it reflects that the people adopted Amendment 33 in reaction to both executive and legislative intrusion into the affairs of an independent board or commission. The voters, in prohibiting the “transfer” of the Board’s powers, intended to preclude any conveyance of the Board’s substantive policymaking authority to any other entity, be it another board, an administrative agency, the governor, or even the legislature itself. Amendment 33’s entire purpose is perhaps best explained by James Madison:

No political truth is of greater intrinsic value or is stamped with the authority of more enlightened patrons of liberty, than that . . . the accumulation of all powers legislative, executive and judiciary in the same hands, whether of one, a few or many, and whether hereditary, self appointed, or elective, may justly be pronounced the very definition of tyranny.

James Madison, *The Federalist*, No. 47. When the framers intended to create a Constitutional board or commission, they made their intention perfectly clear: to insulate the Board of Corrections from the political tides of the day. The genius of the Arkansas Constitution’s form of separation of powers is illustrated by a non-unified structure of executive branch authority, and for the same reasons why the Attorney General cannot usurp the Governor’s powers, neither the Governor nor the Attorney General may usurp the power of the Board of Corrections.

These concepts are not controversial. Amendment 33’s limitations are referenced throughout the Arkansas Code. For instance, Section 2 of the Transformation and Efficiencies Act of 2019, amended Ark. Code Ann. §§ 25-43-401 and -111 to fit the framework of cabinet-level departments. The General Assembly made clear, however, that the Board of Corrections’ power was defined by Amendment 33, and that nothing in that law would “abridge, diminish, or curtail, in any respect, the authority vested in the Board to govern and supervise the administration of the Board’s responsibilities[.]” For that reason, the Transformation and Efficiencies Act recognized that the Secretary of Corrections served at the pleasure of the Board. This makes sense because while the Governor nominates a Secretary, and while the Senate confirms the Secretary, the Board has ultimate authority to appoint the Secretary. Notably, to respect Amendment 33’s prohibitive restrictions, Ark. Code Ann. § 25-43-403(b)(2)(B) makes explicit that “[t]he Board is not required to appoint the nominee” who the Governor nominated and confirmed.

As a “Constitutional board or commission,” Ark. Code Ann. § 25–1–106(a)(1), I believe that it is my duty to defend the Constitution’s non-unified form of executive branch authority. Unfortunately, recent legislative maneuvering has undermined the separation of powers required by Amendment 33. For instance, the General Assembly passed Acts 185 and 659 of 2023, which purport to amend various statutes relating to the Board’s powers of hiring, firing, and supervising. Specifically, Act 185 purports to require the Secretary of Corrections to “serve at the pleasure of the Governor,” and Act 659—which is not yet effective—would transfer supervision of the Directors of Corrections, Community Corrections, and the Arkansas Sentencing Commission to the Secretary of Corrections, rather than the Board. While I vigorously supported the Protect Act and testified in its favor, my only opposition to that law was based on Amendment 33’s explicit and important separation of powers. The Attorney General’s remarks to the contrary were objectively false.

The Board of Corrections is responsible, pursuant to Amendment 33 and by statute, to manage the correctional resources of Arkansas. Ark. Code Ann. § 12–27–105(a). In fulfilling this constitutional duty, the Board has “[g]eneral supervisory power and control over the Division of Correction and the Division of Community Correction and shall perform all functions with respect to the management and control of the adult correctional institutions and community correction options of this state contemplated by Arkansas Constitution, Amendment 33.” *Id.* at § 12–27–105(b)(1). The Board is also responsible for establishing and prescribing “minimum standards for supervision, contact, programming, housing, and employee hiring within the parameters of those divisions encompassed under its control,” “a code of ethics for all employees, both institutional and community correction,” and “the duties of all personnel of the Division of Correction and the Division of Community Correction and the rules governing the transfer of employees within each division and between divisions,” among several other responsibilities. *Id.* at § 12–27–105(b)(12), (13), and (15).

I believe the attempted alteration of Secretary Profiri’s duties to the Board has dealt incredible damage to the safety and security of Arkansans. Secretary Profiri has taken the erroneous position that he is unaccountable to the Board. Indeed, since his appointment was approved by the Board, he has failed to adequately communicate with us despite repeated requests for a more open, honest, and effective dialogue. He has directly told members of the Board that he only “works for the governor.” This situation is untenable. As the Bible teaches, “No one can serve two masters.” *Matthew*, 6:24. Following that wisdom, portions of Acts 185 and 659 of 2023 are incompatible with Amendment 33’s preservation of the Board’s powers.

Governor Sanders and Attorney General Griffin, I swore an oath before God to support the Arkansas Constitution. I take no joy in making the simple observation that we find ourselves standing at a constitutional crossroads, and this letter reflects my solemn commitment to faithfully discharge the duties of my office. While we might disagree about the proper separation of powers in our non-unified form of executive government, I reject the premise that our respective constitutional offices should be

adversarial. The Board seeks open communication with your offices, and we invite the opportunity to engage more directly to rectify the void of communication.

Finally, while it is your prerogative to hold press conferences, I personally believe that more work can be accomplished in a conference room than in a press hall. Otherwise, given your stated support for protecting Arkansans, I trust that your administration will support a robust funding measure at our next fiscal session—regardless of who occupies the position of Secretary of Corrections—to provide the Board with the necessary resources to house the inmates committed into our custody. I look forward to working with you on an appropriate funding measure to fulfill the needs of our expanding corrections system.

Ultimately, I know the Board shares your stated goal of reducing the population of inmates housed in county facilities, and I believe that we can accomplish this objective if we work together. Please consider this an open invitation to meet with the Board.

Respectfully,

A handwritten signature in blue ink that reads "Benny Magness". The signature is fluid and cursive, with a large, sweeping flourish at the end.

Benny Magness, Chairman  
Arkansas Board of Corrections