**Submission to the**

**UN Committee on the Protection of Migrant Workers and Their Families**

**on draft General Comment No. 5 (2020)**

**Urging revision of Paragraph 34 (use of private companies for migrant detention)**

**Submitted by**

**Center for International Human Rights of Northwestern Pritzker School of Law[[1]](#footnote-1)**

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The Center for International Human Rights (CIHR) of Northwestern Pritzker School of Law respectfully submits this statement to express its concern about paragraph 34 of the Committee’s Draft General Comment No. 5 on migrants’ rights to liberty and freedom from arbitrary detention. After noting in paragraph 33 that “some States resort to private personnel to guard migrant workers and members of their families who are deprived of their liberty,”[[2]](#footnote-2) the Committee writes in paragraph 34:

“In principle, security personnel in detention facilities must be from the public sector. However, States parties may use private security forces provided that a correct monitoring scheme is put in place, and that private security service personnel receive adequate training on human rights standards for the treatment of detainees, in accordance with international instruments on persons deprived of liberty.”[[3]](#footnote-3)

This language appears to accept the use of private security contractors in immigration detention and implies that this practice is permissible under certain circumstances. CIHR urges the Committee to reconsider this position for two reasons. First, the use of private contractors in immigration detention incentivizes contractors to attempt to shape public policy to favor increased detention. Second, experience shows that stated commitments to robust oversight and monitoring have not, in practice, prevented widespread abuse of the rights of migrants detained in privately operated detention facilities. The examples cited in this communication are specific to the United States, but CIHR believes them to reflect broader global trends. **We ask the Committee to revise paragraph 34 to uphold the stated principle that “security personnel in detention facilities must be from the public sector,”**[[4]](#footnote-4) **by calling upon States to phase out the use of private contractors in immigration detention as promptly as possible**.

**I. When an Industry’s Profits Depend on Detaining People, That Industry Will Seek to Influence Public Policy in Favor of Expanded Detention**

Private migrant detention companies profit from government policies that increase detention populations and minimize regulation and oversight of detention activities. In the United States, these companies expend vast resources on what can be seen as attempts to influence government officials to implement these types of policies. To impact public policy, companies use various techniques, including hiring former government officials, contributing to local and national political campaigns, and lobbying for – and sometimes directly drafting – legislation favorable to their interests. The United Nations Working Group on the Use of Mercenaries recently examined this phenomenon, concluding that “the considerable and growing corporate involvement in this sector has led to a commodification of immigration and border management services, with such services being seen primarily as economic, profit-making activities, rather than as an essential function of the state.”[[5]](#footnote-5) When a company’s profits depend on the detention of human beings, there is a clear risk that these companies will seek to affect public policy in order to expand detention.

***The Revolving Door Between Government and Industry***

High-level government officials often move to leadership positions at private companies and back, creating an environment rife with potential conflicts of interest.[[6]](#footnote-6) This phenomenon is known as the “revolving door” between government and industry.[[7]](#footnote-7) When a public servant moves into the private migrant detention sector and profits from policies that they promulgated, or when a corporate leader moves into government and promotes policies that benefit their former company, an observer may question their motives and impact. In an industry that earns its revenue from detaining human beings, the risk of abuse of the revolving door to the detriment of migrants’ life and liberty is particularly high.

One illustrative example of the fraught nature of the revolving door in the migrant detention sphere involves former Secretary of Homeland Security and White House Chief of Staff John Kelly. Prior to serving in the Trump Administration, Kelly worked at DC Capital Partners (DC Capital), a private investment firm.[[8]](#footnote-8) After moving into government service, Kelly helped establish and oversee the “zero tolerance” immigration policy, which separated nearly 3,000 migrant children from their parents.[[9]](#footnote-9) During Kelly’s tenure as White House Chief of Staff, DC Capital acquired Comprehensive Health Services (CHS), a company primarily focused on providing medical services,[[10]](#footnote-10) but which operated a large detention facility in Florida for migrant youth arriving at the U.S. border.[[11]](#footnote-11) After its acquisition by DC Capital, and still during Kelly’s government service, CHS received $272 million in government contracts for its operation of the Florida child migrant detention facility.[[12]](#footnote-12) Notably, CHS was the only for-profit company to house migrant children separated from their families during the zero tolerance policy.[[13]](#footnote-13)

In April 2019, CHS received an additional $273 million government contract to continue running the Florida detention facility.[[14]](#footnote-14) By May 2019 (and possibly earlier), just months after stepping down from his position in the Trump administration, Kelly had joined the board of Caliburn,[[15]](#footnote-15) a company formed in 2018 by DC Capital Partners as the parent company of CHS.[[16]](#footnote-16) With Kelly on Caliburn’s board, CHS received contracts to operate new child detention facilities,[[17]](#footnote-17) including one in Texas that opened in September 2020.[[18]](#footnote-18) In addition to the financial benefits to CHS and Caliburn from these contracts, Kelly himself appears to have profited from the hardline immigration policies he spearheaded while in government, since “Caliburn’s compensation policy for board members appears to indicate that [board members receive] ‘an annual cash retainer of $100,000.’”[[19]](#footnote-19) One U.S. Senator described Kelly’s move from government service to the Caliburn board as “corruption at its absolute worst.”[[20]](#footnote-20)

The case of John Kelly is not an anomaly. Among other examples of the revolving door, Scott Sutterfield, the former head of the United States Immigration and Customs Enforcement (ICE) New Orleans field office, which coordinated migrant detention and removal operations throughout much of the American South, now works as a development executive for LaSalle Corrections (LaSalle).[[21]](#footnote-21) A Congressional report noted that “Sutterfield -- while at ICE -- may have been involved in decisions regarding detention of asylum seekers in the region while he was in negotiations for post-government employment with LaSalle.”[[22]](#footnote-22) Additionally, the former head of ICE, Julie M. Wood, sits on the board of GEO Group (GEO),[[23]](#footnote-23) one of the largest migrant detention companies in the United States.

The revolving door between government and industry creates an environment in which government figures and corporate executives face potentially insurmountable conflicts of interest, and reflects one way in which private detention companies may influence public policy in favor of increased detention.

***Campaign Donations and Patronage of Trump Properties***

Private migrant detention companies have increasingly donated large quantities of money to political campaigns and have also spent money at businesses owned by the U.S. President. At best, these donations and expenditures may be viewed as attempts to support candidates who espouse pro-detention policies; at worst, they may be viewed as attempts to directly curry favor with those in the highest echelons of government. Either way, they reflect the vast financial resources that these companies are able to mobilize to finance politicians who will support their interests and shape public policy.

Private detention companies have contributed large sums of money to political candidates who support increased immigration detention. The day after President Barack Obama announced, in August 2016, that his administration would phase out the use of private prisons for federal correctional inmates,[[24]](#footnote-24) a GEO subsidiary donated $100,000 to a political action committee (PAC) supporting Republican nominee Donald Trump,[[25]](#footnote-25) who promised to expand immigration enforcement (and who also has sought to continue and expand the practice of using private prisons for federal inmates).[[26]](#footnote-26) Over the course of that fall, GEO and its CEO gave hundreds of thousands of dollars to the Trump campaign and to Trump-supporting PACs.[[27]](#footnote-27) Following President Trump’s election, GEO donated an additional $250,000 to the Trump inaugural committee.[[28]](#footnote-28)

Donations by private detention companies to political candidates more than tripled between the 2014 and 2016 election cycles, and the 2018 and 2020 elections thus far have each set new records for election spending by companies operating private prisons and migrant detention facilities.[[29]](#footnote-29) Spending on Republican campaigns and Republican-promoting political action committees in the 2020 election thus far accounts for approximately 95 percent of private detention companies’ campaign contributions.[[30]](#footnote-30)

In addition to campaign contributions, migrant detention companies have patronized businesses belonging to President Trump. Because President Trump has refused to sever ties to his companies or to put his assets in a blind trust, *The Washington Post* has described the patronage of Trump properties as “a potential avenue of influence that is unique to Trump: the chance for the corporation to engage in a private business transaction with the president.”[[31]](#footnote-31) In 2017, GEO held its annual leadership conference at the Trump National Doral Miami resort.[[32]](#footnote-32) Caliburn also planned to host a 2019 holiday party at the Trump National Golf Club in Virginia, but relocated to a different venue after facing public criticism.[[33]](#footnote-33)

Private security companies increasingly contribute to political campaigns of candidates who support continuing, if not expanding, the use of private immigration detention. Additionally, they have actively patronized the incumbent President’s businesses, spending significant sums of money. This financial support could be viewed as an attempt to garner favor with politicians who will shape public policy to their benefit.

***Lobbying***

Private detention companies actively lobby for legislation that promotes increasing migrant detention. As noted by the UN Working Group on the Use of Mercenaries, “Profit making provides a strong incentive to push for repressive immigration laws and practices, such as further criminalization of migration and increased use of immigration detention.”[[34]](#footnote-34) Although lax lobbying disclosure requirements in the United States often make it difficult to discern for which piece of legislation or issue a company lobbied,[[35]](#footnote-35) private migrant detention companies have spent millions of dollars on lobbying in recent years.

In 2019 (the most recent year for which complete data are available), CoreCivic, one of the largest players in the private migrant detention sector, spent $1.6 million on lobbying at the state and federal levels;[[36]](#footnote-36) GEO spent $1.52 million;[[37]](#footnote-37) and Management and Training Corporation (MTC), another corporation engaged in migrant detention, spent $820,000.[[38]](#footnote-38) The lobbyists working for these companies and several other migrant detention companies have connections at the highest levels of government.[[39]](#footnote-39)

Lobbying by private detention companies has paid off in several notable instances. In 2015, CoreCivic (operating under a previous name) successfully lobbied against the Justice Is Not for Sale Act in the United States Congress, which would have banned the use of private prisons.[[40]](#footnote-40) It also successfully lobbied that same year against the Private Prison Information Act, which would have required increased disclosure of contract information and other details about private detention facilities.[[41]](#footnote-41)

The most direct way in which private migrant detention companies have sought to influence public policy is by drafting legislation for lawmakers. In 2016, GEO – which operates one of the largest family detention centers in Texas – wrote a bill for the Texas state legislature that would have granted childcare licenses to family detention centers.[[42]](#footnote-42) This would have allowed GEO to detain children in its family detention center indefinitely, circumventing a federal court settlement that does not permit migrant children to be held more than twenty days in facilities that are not licensed childcare shelters.[[43]](#footnote-43) This is not an isolated example. The Deputy Director of Programs at Common Cause, a nonpartisan civil society government watchdog group, has noted that private detention companies have a history of working with the American Legislative Exchange Council, a conservative group that drafts and shares model legislation, to write and promote anti-immigration, pro-detention bills in state legislatures.[[44]](#footnote-44)

The issue of private security companies impacting public policy through lobbying and other means is not unique to the United States. As noted by the UN Working Group on the Use of Mercenaries, “These companies are actively involved in setting the research, policy and regulatory agendas of States and regional organizations and institutions, notably the European Union.”[[45]](#footnote-45)

There are many ways that private migrant detention companies use their resources in ways that can influence public policy, including lobbying, campaign contributions, and benefiting from the “revolving door” between industry and government. When an industry’s profits are linked to maintaining or expanding immigration detention, it will likely advocate for policies that adversely affect migrants’ life and liberty. For this reason, we encourage the Committee to revise paragraph 34 of Draft Comment number 5 to urge states to promptly phase out the use of private migrant detention companies.

**II. Experience shows that in practice, monitoring and inspection systems do not provide effective oversight of private migrant detention facilities**

The United States’ experience with privately operated migrant detention facilities demonstrates that stated commitments to effective monitoring and oversight are no guarantee that the rights of detained migrants will be adequately protected. Policies, programs and promises of effective oversight that look good on paper have proven to be wholly insufficient.

***ICE claims to operate a robust oversight system that ensures compliance with detention standards***

According to its public website, U.S. Immigration and Customs Enforcement (ICE), which has responsibility for overseeing migrant detention, maintains a robust and effective monitoring system to ensure the humane treatment of detained migrants.[[46]](#footnote-46) Core components of this system are the written standards governing the operation of detention centers and the inspection process designed to ensure consistent compliance with those standards.

There is indeed no shortage of detention standards. Since 2000, ICE has developed and periodically revised very long and detailed sets of standards to govern every aspect of migrant detention.[[47]](#footnote-47) For example, ICE’s 2011 Performance-Based National Detention Standards, revised in 2016, consists of 475 pages of detailed standards.[[48]](#footnote-48) The stated goal of these standards is unassailable. According to ICE, these standards “were created to ensure that all individuals in ICE custody are treated with dignity and respect, and provided the best possible care.”[[49]](#footnote-49) These standards, ICE believes, have “established consistency of program operations and management expectations, accountability for compliance and a culture of professionalism.”[[50]](#footnote-50)

To ensure compliance with these standards, ICE has committed, on paper, to operating a robust, independent and effective monitoring system that will promptly identify and immediately address any deficiencies noted at any detention facility. ICE describes its inspections program as an “aggressive” one,[[51]](#footnote-51) and claims that through its “robust inspections program ICE *ensures* detention facilities used to house ICE detainees do so in accordance with ICE national detention standards.”[[52]](#footnote-52) Per ICE, whenever an inspection discloses any deficiency, that deficiency is corrected “immediately:”

“The annual detention inspection, conducted by an independent third-party contractor, ensures that facilities remain in compliance with ICE’s standards and that any deficiencies noted are immediately resolved by facility management.[[53]](#footnote-53)

On paper, it is hard to fault any of this – a detailed set of detention standards designed to ensure that migrants “are treated with dignity and respect, and provided the best possible care,”[[54]](#footnote-54) combined with a “robust” and “aggressive” inspection system that “ensures” compliance with the standards and, when deficiencies are noted, results in immediate corrective action.[[55]](#footnote-55) Unfortunately, the experience in practice paints a very different picture.

***In practice, ICE’s oversight system has proven incapable of protecting the rights of detained migrants***

ICE’s actual record of monitoring and remediation is strikingly at odds with the agency’s description of the robustness of its oversight system. Complaints about the failures of ICE oversight of detention facilities go back many years. For example, in October 2015, the National Immigrant Justice Center (NIJC) and Detention Watch Network (DWN) released a report entitled “Lives in Peril: How Ineffective Inspections Make ICE Complicit in Immigration Detention Abuse.”[[56]](#footnote-56) Based on a review of five years of ICE inspections at 105 of the largest migrant detention facilities, the report found systemic deficiencies in ICE’s oversight practices:

“[T]he inspections process remains a ‘checklist culture,’ in which inspectors—employed by ICE directly or via subcontracts—engage in pre-planned, perfunctory reviews of detention facilities that are designed to result in passing ratings and to ensure local counties and private prison corporations continue to receive government funds.”[[57]](#footnote-57)

Three years later, in 2018, NIJC found no improvement in ICE’s oversight practices:

“Every ‘authorized’ ICE facility has passed every inspection since 2012, even those where multiple people have died, some later reported to be as a result of medical neglect. This pattern continues one which NIJC found in our 2015 analysis of ICE inspections reports, which revealed that only one out of 100 facilities was given a deficient rating on an annual inspection after 2009 . . .. As in 2015, the new data suggests that facilities have an opportunity to have their final rating adjusted after an inspector finds it deficient.”[[58]](#footnote-58)

Civil society organizations are not alone in lodging criticisms of ICE’s oversight practices. The U.S. government’s own Office of the Inspector General (OIG) for the Department of Homeland Security has reached similar conclusions, following a comprehensive review designed “to determine whether ICE’s immigration detention inspections ensure adequate oversight and compliance with detention standards” and “whether ICE’s post-inspection follow-up processes result in correction of identified deficiencies.”[[59]](#footnote-59)

The title of the OIG’s 2018 report sums it up: *ICE’s Inspections and Monitoring of Detention Facilities Do Not Lead to Sustained Compliance or Systemic Improvements*. OIG found that inspections carried out by a private contractor “do not fully examine actual conditions or identify all deficiencies,” and those carried out by ICE itself “are too infrequent to ensure the facilities implement all deficiency corrections.”[[60]](#footnote-60) OIG further found that “ICE does not adequately follow up on identified deficiencies or consistently hold facilities accountable for correcting them, which further diminishes the usefulness of inspections.”[[61]](#footnote-61) As a result, “ICE’s inspections, follow-up processes, and onsite monitoring of facilities . . . do not ensure adequate oversight or systemic improvements in detention conditions, with some deficiencies remaining unaddressed for years.”[[62]](#footnote-62)

OIG was particularly critical of ICE’s repeated failure to take remedial action in response to findings of non-compliance with its own detention standards:

“ICE does not consistently enforce compliance with detention standards. . . . The frequency of repeat deficiencies in the same facilities, and the high number of deficiencies inspectors identify at facilities expose the problems associated with ICE’s inability to consistently follow up on corrective actions. Even well documented deficiencies that facilities commit to fixing routinely remain uncorrected for years.”[[63]](#footnote-63)

OIG noted that failings documented in its 2018 report were not new ones:

“ICE’s difficulties with monitoring and enforcing compliance with detention standards stretch back many years and continue today. In 2006, [OIG] identified issues related to ICE detention facility inspections and implementation of corrective actions. In our 2006 report, we recommended that ICE ‘improve the inspection process and ensure that all non-compliance deficiencies are identified and corrected.’ In a December 2017 report . . . we identified problems in some of the same areas noted in the 2006 report.”[[64]](#footnote-64)

ICE’s inability to carry out effective oversight has had its predictable consequences. In the absence of effective oversight, ICE-contracted private detention facilities are failing to respect the most basic human rights of the migrants in detention.[[65]](#footnote-65) Migrants detained in these privately operated facilities have been subjected to a host of abuses that are both frequent and severe. These include inadequate medical care, squalid and unsanitary conditions, excessive use of force, sexual abuse, solitary confinement, forced labor, discrimination on the basis of race, religion, sexual orientation and gender identity, and failure to take appropriate protective measures in response to the COVID-19 pandemic.[[66]](#footnote-66)

This experience demonstrates, we submit, that in practice, neither elaborate detention standards nor State commitments to exercise robust oversight can be trusted to safeguard the rights of migrants detained in privately operated detention facilities.

**III. Conclusion**

The Committee rightly notes in paragraph 33 of its draft comment that in principle, only state actors should engage in migrant detention. In the United States and around the world, migrant rights advocates and non-governmental organizations have been working tirelessly to push governments to respect this principle. As a result of these efforts, one major-party candidate for President of the United States – now the President-Elect – has vowed to end the use of private facilities “for any detention, including detention of undocumented immigrants.”[[67]](#footnote-67) If this plan to phase out private migrant detention moves forward, well-monied detention industry actors can be expected to push back.

The current language of paragraph 34 risks undercutting the efforts of migrant rights advocates by providing private detention companies and their allies in government with a license for the continued use of private detention contractors. That would be unfortunate. Both because of the inappropriate influence that profit-motivated detention companies can have on public policy and because of the demonstrated failure of monitoring regimens to safeguard the rights of detained migrants in private detention facilities in the U.S. context, we urge the Committee to revise paragraph 34 of the Draft General Comment to clarify that the use of private contractors for migrant detention is not acceptable. We encourage the Committee to state unequivocally that only State actors should engage in migrant detention. States should be called upon to phase out private migrant detention as promptly as possible.

1. The Center for International Human Rights (CIHR) of Northwestern University’s Pritzker School of Law (Chicago, USA) is dedicated to human rights education and legal and policy-focused human rights advocacy within the United States and worldwide. CIHR is in special consultative status with the United Nations Economic and Social Council (ECOSOC). [↑](#footnote-ref-1)
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