



June 1, 2020

Senator Lindsey Graham
Chair, Senate Judiciary Committee
290 Russell Senate Office Building
Washington, DC 20510

Senator Dianne Feinstein
Ranking Member, Senate Judiciary Committee
331 Hart Senate Office Building
Washington, DC 2051

RE: Amnesty International Statement for the Record for June 2 Hearing on “Examining Best Practices for Incarceration and Detention During COVID-19”

Dear Chairman Graham, Ranking Member Feinstein, and Members of the Senate Judiciary Committee:

On behalf of Amnesty International USA and our members and supporters in the United States, we hereby submit this statement for the record on the urgent human rights crisis in Immigration and Customs Enforcement (“ICE”) detention centers and Bureau of Prisons (“BOP”) facilities across the country.

Amnesty International is the world’s largest grassroots human rights movement, comprising a global support base of millions of individual members, supporters, and activists in more than 150 countries and territories.

In response to the COVID-19 pandemic, Amnesty International is urgently calling on governments across the globe to release people detained for solely migratory-related reasons and to reduce jail and prison populations worldwide in the name of human rights and public health. From Lebanon, whose prisons are full of people who should not be there,¹ to Russia, where half a million people are detained and imprisoned in hazardous conditions,² and from Madagascar, where tens of thousands of people – including children – are being held in unlawful pretrial detention,³ to China, where up to one million Uyghurs are arbitrarily detained,⁴ people in detention facilities,

¹ Amnesty International, “Lebanon Government Must Urgently Release More Prisoners to Prevent Spread of COVID-19,” April 2020, <https://www.amnesty.org/en/latest/news/2020/04/lebanon-government-must-urgently-release-more-prisoners-to-prevent-spread-of-covid19/>.

² Amnesty International, “Russia Authorities Urged to Protect Half a Million Prison Population in Face of COVID-19,” March 2020, <https://www.amnesty.org/en/latest/news/2020/03/russia-authorities-urged-to-protect-half-a-million-prison-population-in-face-of-covid-19/>.

³ Amnesty International, “Protect Detainees at Risk of COVID-19, Unclog Prisons and Release Prisoners,” April 2020, <https://www.amnesty.org/en/latest/news/2020/04/subsaharanafrica-protect-detainees-at-risk-of-covid-unclog-prisons-and-release-prisoners/>.

⁴ Amnesty International, “In China, Up to One Million Detained,” Sept. 2018, <https://www.amnesty.org/en/latest/news/2018/09/china-up-to-one-million-detained/>.

jails, and prisons across the globe who have already often suffered violations of their rights are now at increased risk because of the virus. Nowhere is the depopulation of detention and prison facilities more imperative than in the United States, which has one of the largest incarcerated populations in the world and which has just exceeded 100,000 COVID deaths, representing 30% of the world's fatalities from the virus.

The U.S. section of Amnesty International has launched "RightsNow," a campaign calling on President Trump and Congress to center human rights in the United States' COVID-19 response. Two urgent demands of this campaign include freeing people in the United States at risk of COVID-19 in immigration detention and ensuring that those in danger of contracting the virus in prisons and jails are protected. This statement for the record is based on Amnesty's extensive advocacy, research, and public education on these issues as well as our expertise in the international human rights framework governing detention, including the rights to freedom from arbitrary detention and nondiscrimination and the guarantees states must provide those it deprives of their liberty – including access to the same standard of healthcare as is available in the community.

COVID-19 is a ticking time bomb for people deprived of their liberty: as of this writing, close to 1,400 people in the custody of Immigration and Customs Enforcement (ICE), and over 5,000 people in the custody of Bureau of Prisons (BOP), have tested positive for the virus.⁵ At least three people detained by ICE, and 67 people in BOP custody, have died of it.⁶ As the pandemic ravages the nation, it is critical for U.S. leaders to take steps to save lives and protect health. Releasing people in detention, jails, and prisons is one such clear, evidence-based step. Congress must direct ICE to free all people in immigration detention and call on BOP to take immediate steps to release all who are eligible and protect those who remain in federal criminal custody. It must also ensure that U.S. authorities guarantee the right to health for all people who are deprived of their liberty.

Immigration Detention

Currently, over 26,000 people, including hundreds of families and thousands of asylum-seekers, are languishing in tinderbox-like conditions in ICE detention facilities, where social distancing is impossible and soap and sanitizer come at a steep premium.

Public health experts predict that, unless ICE drastically reduces the numbers of detained immigrants in its care, anywhere from 72 percent to nearly 100 percent of detained people in many ICE facilities could contract COVID-19, endangering their lives, overwhelming local hospital capacity, and potentially devastating the health of entire communities.⁷ Already, over 50% of the small fraction of detained people who have received testing have been positive for COVID-19, and the virus has led to the tragic, preventable deaths of at least three individuals who were detained by ICE, including two men who died while detained and another who died

⁵ Immigration and Customs Enforcement (ICE), "ICE Guidance on COVID-19," <https://www.ice.gov/coronavirus> (last visited May 29, 2020); Bureau of Prisons (BOP), "COVID-19," <https://www.bop.gov/coronavirus/> (last visited May 29, 2020).

⁶ *Id.*

⁷ Government Accountability Project, "Study Projects Significant Impact on Immigrants and Local Health Care If ICE Detention Populations Are Not Reduced," Apr. 27, 2020, <https://whistleblower.org/press/study-projects-significant-impact-on-immigrants-and-local-health-care-if-ice-detention-populations-are-not-decreased/>.

shortly after being discharged.⁸ Detention staff and community members are also at risk: two guards working for the private prison company operating an ICE detention center in Louisiana died in April after likely contracting the virus in the facility.⁹

Even before COVID-19, this fiscal year was already one of the deadliest in ICE detention.¹⁰ ICE's history of medical and mental health neglect and abuse is well-documented: a recent study concluded that more than half of all recent deaths in ICE custody were linked to "neglectful medical care of immigrants – including delays, substandard care, and botched emergency response," as well as "inappropriate use of solitary confinement and inadequate mental health care."¹¹ At the same time, ICE has weakened its investigatory and oversight capacity and provided increasingly less transparency about the circumstances of deaths in detention.¹²

Since the onset of the pandemic, conditions in ICE facilities are growing deadlier. An Amnesty International investigation in April 2020 revealed that even as the threat of COVID-19 grew, many detention facilities – including those with documented histories of outbreaks of infectious diseases – had no plans in place to address a potential viral outbreak.¹³ Detention facilities are still failing to provide people with sanitizer, face masks, free soap, or even basic information about the virus, driving many to hunger strikes.¹⁴ ICE has also reportedly employed solitary confinement during the COVID-19 pandemic, a practice that in some circumstances amounts to torture,¹⁵ including in retaliation for publicizing or protesting of conditions.¹⁶ Conditions are so dangerous that even guards at ICE facilities operated by private prison corporations have been driven to sue their employers for failing to provide even basic safety precautions, including masks, sanitizer, and adequate social distancing.¹⁷

Furthermore, the steps ICE is taking in response to COVID-19 threaten to exacerbate an existing crisis. These practices include "cohorting," or group quarantine of individuals who may have been exposed to the virus, in contravention of CDC standards, which advise that detention facilities avoid this practice precisely because it risks spreading the virus from infected to

⁸ AILA, "Deaths at Adult Detention Centers," May 26, 2020, <https://www.aila.org/infonet/deaths-at-adult-detention-centers>.

⁹ Nomaan Merchant, "2 guards at ICE jail die after contracting coronavirus," Apr. 29, 2020, ABC News, <https://abcnews.go.com/Health/wireStory/guards-ice-jail-die-contracting-coronavirus-70412840>.

¹⁰ *Id.*

¹¹ ACLU, Human Rights Watch, National Immigrant Justice Center, "Justice-Free Zones: U.S. Immigration Detention Under the Trump Administration," April 2020,

https://www.hrw.org/sites/default/files/supporting_resources/justice_free_zones_immigrant_detention.pdf, at 31.

¹² *Id.*

¹³ Amnesty International, "We Are Adrift, About to Sink," April 2020,

<https://www.amnesty.org/download/Documents/AMR5120952020ENGLISH.PDF>, at 8-9.

¹⁴ *Id.*

¹⁵ "Interim report of the Special Rapporteur of the Human Rights Council on torture and other cruel, inhuman or degrading treatment or punishment," Oct. 2011, available at

<http://solitaryconfinement.org/uploads/SpecRapTortureAug2011.pdf>, at 19.

¹⁶ Debbie Nathan, "Women in ICE Detention Face Reprisals for Speaking up about Fears of Covid-19," The Intercept, April 28, 2020, <https://theintercept.com/2020/04/28/ice-detention-coronavirus-videos/>.

¹⁷ Plaintiff's Complaint, Gregory Arnold v. CoreCivic Tennessee (C.D. Cal. April 29, 2020), Case No. 3:20-cv-00809-BEN-RBB.

uninfected persons.¹⁸ One medical expert has described the practice of cohorting as “cruel and unusual,” noting the “anxiety” and “stress” it causes.¹⁹

ICE has also persisted in transferring detained people between facilities and from local jails and prisons *into* ICE facilities, violating the CDC’s exhortation that such transfers be minimized.²⁰ In Mississippi, after ICE transferred hundreds of people to the Adams County Detention Center in rural Natchez, COVID-19 cases in the town began to soar, and Adams County soon became one of the hardest-hit regions in the nation.²¹ In Texas, COVID-19 cases in immigration detention quadrupled in just two weeks after individuals were transferred from out of state.²² ICE’s reckless practice of transfers is thus imperiling detained people and the communities that surround them.

Meanwhile, the agency has steadily neglected to undertake the one measure that public health experts universally agree could mitigate this steadily growing crisis: releasing people. While the detention population has recently decreased to about 26,000 people, the decrease is likely due to a drop in detentions following border apprehensions – given that tens of thousands of people are now being summarily and unlawfully expelled without access to an asylum procedure – and not to widespread releases of people in ICE detention.

In April, Acting ICE Director Matthew Albence claimed to Congress that the agency had conducted a review of the detained population to identify all medically vulnerable individuals, and in May, the agency stated that it had released approximately 900 people – just 3% of the detained population – considered to be vulnerable to COVID-19.²³ Yet, despite this claim, the agency was unable to furnish basic information about its review during a recent court hearing, casting doubt on the scope and extent of the review.²⁴ Furthermore, medically vulnerable people remain in detention throughout the country: for example, Karla and Katherine, a mother and child from Honduras who suffer from severe medical conditions that put them at heightened risk of COVID-19, remain detained together at the Dilley Family Residential Center in Texas.²⁵ Appallingly, not only is ICE failing to use its discretion to release people, it has used the pandemic to visit new threats of family separation on detained families, forcing parents to choose

¹⁸ CDC Interim Guidance on Management of COVID-19 in Detention Facilities, Mar. 23, 2020, <https://www.cdc.gov/coronavirus/2019-ncov/downloads/guidance-correctional-detention.pdf>, at 6.

¹⁹ Fernanda Echevarri & Noah Lanard, “A Doctor on ICE’s Response to the Pandemic: “You Could Call It COVID-19 Torture,” Mother Jones, Apr. 13, 2020, <https://www.motherjones.com/politics/2020/04/a-doctor-on-ices-response-to-the-pandemic-you-could-call-it-covid-19-torture/>.

²⁰ CDC Guidance, *supra* note 14, at 9.

²¹ Gaby del Valle & Jack Herrera, “‘Like Petri Dishes for the Virus’: ICE Detention Centers Threaten the Rural South,” POLITICO Magazine, May 5, 2020, <https://www.politico.com/news/magazine/2020/05/05/coronavirus-ice-detention-rural-communities-186688>.

²² <https://www.houstonpublicmedia.org/articles/news/health-science/coronavirus/2020/05/07/368941/texas-covid-19-cases-in-immigrant-detention-quadruple-in-two-weeks-as-ice-transfers-continue/>

²³ Camilo Montoya-Galvez, “‘My son is in danger’: Fear mounts over largest coronavirus outbreak in ICE detention,” CBS News, May 15, 2020, <https://www.cbsnews.com/news/coronavirus-outbreak-ice-detention-center-immigrants/>.

²⁴ See Letter from Chair Maloney, House Committee on Oversight and Reform, and Chair Raskin, Subcommittee on Civil Rights and Civil Liberties, to Acting Secretary Wolf and Acting Director Albence, May 14, 2020, available at <https://oversight.house.gov/sites/democrats.oversight.house.gov/files/2020-05-14.CBM%20JR%20to%20Wolf-%20DHS%20Albence-ICE%20re%20Coronavirus%20in%20Detention%20Centers.pdf>, at 5-6.

²⁵ Amnesty International, “Free Families in ICE Detention and Protect Them During the COVID-19 Pandemic,” <https://act.amnestyusa.org/page/59764/action/1>.

between remaining detained with their children in the middle of a pandemic or separating from them.²⁶

There is simply no excuse for ICE's failure to release people in detention at dire risk of contracting COVID-19. Under U.S. law, ICE has broad discretion to parole detained immigrants using a spectrum of release options, including where such parole is in the public interest – as it unquestionably is during a global pandemic, when our collective public health depends on it.²⁷ Nothing prevents ICE from releasing people subject to “mandatory detention” under INA § 236(c): ICE has released people subject to this provision in the past, and numerous courts have ordered the agency to release people falling under this provision, demonstrating their understanding that this provision does not constrain ICE's ability to release people.²⁸ International standards also strongly counsel in favor of releasing detained immigrants: lead UN agencies on human rights, global health, and refugees and migrants have called on *all* governments to urgently release immigrants and asylum-seekers from detention centers.²⁹

Just as detention practices risk spreading COVID-19 to surrounding communities, deportation practices risk spreading the virus to neighboring countries whose health systems will be devastated by it. Already, well over 100 people who have been deported – often after surviving tinderbox-like conditions in ICE detention – have tested positive for the virus, and individuals deported from the United States make up 15% of COVID cases in Guatemala.³⁰ Deportations are not an appropriate alternative to detention and should not be employed in place of detention. Individuals in detention facilities who currently have removal orders should be released – as ICE has the discretion to do – and allowed to shelter in place with families and loved ones during the pandemic.³¹

Given ICE's failure to act to address the public health emergency in its detention facilities, Senators must direct ICE to release detained immigrants in the name of public health and human rights. Amnesty International USA calls on the Senate to pass the Federal Immigrant Release for Safety and Security Together (FIRST) Act (sponsored by Senator Cory Booker), which provides critical restrictions on immigration detention and enforcement during this unprecedented national public health emergency. Specifically, Amnesty urges that the Senate:

- Mandate the release of all people detained for migratory-related reasons (including people subject to mandatory detention) and ensure detained families are released together;
- Direct ICE to limit enforcement actions, including at sensitive locations;

²⁶ Amnesty International, “Family Separation 2.0: ‘You Aren’t Going to Separate Me From My Only Child,’” May 22, 2020, <https://www.amnestyusa.org/wp-content/uploads/2020/04/Amnesty-International-USA-Family-Separation-2.0-May-21-2020-.pdf>.

²⁷ INA § 212(d)(5)(A), 8 U.S.C. § 1182(d)(5)(A); 8 C.F.R. § 212.5.

²⁸ See, e.g., Order Granting Plaintiffs’ Motion for Preliminary Injunction, *Fraihat v. ICE* (C.D. Cal. April 20, 2020), https://www.splcenter.org/sites/default/files/documents/fraihat_pi_grant1.pdf.

²⁹ UNHCR, IOM, OHCHR and WHO, “The rights and health of refugees, migrants and stateless must be protected in COVID-19 response,” March 31, 2020, available at <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=25762&LangID=E>.

³⁰ Cindy Carcamo & Molly O’Toole, “Migrants deported by U.S. make up more than 15% of Guatemala’s coronavirus cases,” *LA Times*, May 4, 2020, <https://www.latimes.com/world-nation/story/2020-05-04/u-s-deportation-flights-to-guatemala-resume-with-assurances-of-coronavirus-testing>.

³¹ See, e.g., Congressional Research Service, “Immigration Detention: A Legal Overview,” available at <https://fas.org/sgp/crs/homsec/R45915.pdf#page=34>, at 34.

- Mandate free provision of soap, sanitizer, and telephonic communications in ICE detention while individuals remain detained;
- Prohibit ICE’s reckless transfers of detained individuals from facility to facility, including transfers from jails and prisons to ICE custody;
- Call on DHS to immediately issue a temporary moratorium on deportations during COVID-19, which risk exporting the effects of ICE’s negligent detention practices and spreading the virus to regional neighbors.

BOP Detention

There are currently 136,610 people detained in BOP prisons and jails across the country.³² While BOP reports that several thousand have tested positive for COVID-19, it is impossible to know the extent of the virus’s spread in the federal prison system because there is no information on how rapidly or widespread people are being tested for COVID. On April 28, Andrea Circle Bear became the first woman in federal custody to die of COVID-19; she was transferred to a federal facility while eight months pregnant, and passed away, tragically, just days after giving birth to her child. As of this writing, 67 people have since died of COVID-19 while in federal custody.

Nearly two weeks after a national emergency related to COVID-19 was declared, Attorney General William Barr and the Department of Justice issued guidance to BOP to begin identifying people who could safely be released to home confinement.³³ The guidance instructed prison officials to grant “priority treatment” to incarcerated people deemed to present minimal risk to the public. However, according to a ProPublica investigation, very few prisoners are actually being released under the new guidance.³⁴ A BOP policy document altered a standard adopted only a year ago under the First Step Act, making it harder for an person to qualify as “minimum risk” and thus be eligible for release. As a result, only a little over 3,000 people— a mere 2.5% of those in BOP custody – were transferred to home confinement, according to the BOP’s most recent, updated statistics.³⁵ This is hardly enough to create safe distancing for incarcerated individuals throughout the federal prison system.

From the limited testing conducted and data BOP provides, different institutions have vastly disparate rates of infection and deaths. For instance, FMC Fort Worth, an administrative security federal medical center in Texas, has already incurred 10 deaths despite just 63 positive tests among the 1435 people incarcerated there.³⁶ Meanwhile, at FCI Forrest City, a low security prison in Arkansas, nearly one quarter of the population at the facility has tested positive for COVID (441 out of 1786) without a single death yet.³⁷ While FCI Elkton, another low security prison in Lisbon, Ohio, has a lower rate of infection (286 out of 1905), already 9 people

³² Bureau of Prisons, Coronavirus, <https://www.bop.gov/coronavirus/> (last visited June 1, 2020).

³³ Memorandum from Attorney General Barr, “Prioritization of Home Confinement As Appropriate in Response to COVID-19 Pandemic,” March 26, 2020, https://www.bop.gov/resources/news/pdfs/20200405_covid-19_home_confinement.pdf; Memorandum from Attorney General Barr, “Increasing Use of Home Confinement at Institutions Most Affected by COVID-19,” April 3, 2020, https://www.bop.gov/coronavirus/docs/bop_memo_home_confinement_april3.pdf.

³⁴ Ian McDougall, “Bill Barr Promised to Release Prisoners Threatened by Coronavirus — Even as the Feds Secretly Made It Harder for Them to Get Out,” ProPublica, May 26, 2020, <https://www.propublica.org/article/bill-barr-promised-to-release-prisoners-threatened-by-coronavirus-even-as-the-feds-secretly-made-it-harder-for-them-to-get-out>.

³⁵ Bureau of Prisons, Coronavirus, <https://www.bop.gov/coronavirus/> (last visited May 29, 2020).

³⁶ *Id.*; <https://www.bop.gov/locations/institutions/ftw/>.

³⁷ *Id.*; <https://www.bop.gov/locations/institutions/for/>.

incarcerated there have died – and one in four who have been given a test has tested positive.³⁸ Concern for prisoners at Elkton FCI was so grave that on April 13, a class action habeas petition was filed on behalf of prisoners at high risk of contracting COVID-19 detained at the facility.³⁹ Though the court ordered prison officials to expeditiously release on home confinement and compassionate release the 837 prisoners it had identified who were particularly vulnerable because of age or underlying medical conditions,⁴⁰ instead of complying with the court's order, the BOP applied to the Supreme Court for a stay, wasting precious time for those at risk in the facility.⁴¹

Close living conditions and an inability to effectively quarantine or avoid potentially infected people, coupled with populations exhibiting pre-existing conditions rendering them increasingly susceptible to the virus, make incarcerated people particularly vulnerable to COVID-19. Exacerbating the problem, prisons and jails generally are notoriously deficient in providing access to health care for incarcerated populations.⁴²

States are obligated to guarantee the right to health of all people deprived of their liberty, and to ensure that they have access to the same standards of health care as those available in wider society. Failure to provide appropriate medical treatment that could reasonably be expected of the state, including holding prisoners who suffer from serious and highly infectious diseases in overcrowded cells, may amount to ill-treatment prohibited under domestic and international law. Failure to provide adequate access to healthcare additionally constitutes discriminatory impact upon the predominantly black and brown people who are vastly and unjustly overrepresented in prisons, jails, and detention facilities.

The Senate must act now to address this crisis, prevent transmission, and help save the lives of people incarcerated in the federal prison system. A panel of UN experts recently observed that the U.S. government's response to the crisis in jails and prisons has been "insufficient," and that people at greatest risk should immediately be identified and release measures implemented.⁴³ Amnesty International thus calls on Senators to pass the Emergency Community Supervision Act, which establishes measures to reduce the number of individuals in federal custody during a national public health emergency such as this.

Amnesty International additionally urges BOP and federal prison officials to put in place in all federal prisons and adjacent facilities a comprehensive and effective plan to prevent and respond to the health crisis, as appropriate to the specific situation and facilities. This should include:

³⁸ *Id.*; <https://www.bop.gov/locations/institutions/elk/>.

³⁹ Petition for Writ of Habeas Corpus, Apr. 13, 2020, available at <https://www.acluohio.org/wp-content/uploads/2020/04/2020-04-13-001-Petition-for-Writ-of-Habeas-Corpus-1.pdf>

⁴⁰ Order on Motion to enforce, May 5, 2020, available at <https://www.acluohio.org/wp-content/uploads/2020/05/Order-on-motion-to-enforce.pdf>.

⁴¹ ACLU of Ohio, "Supreme Court Denies Bureau of Prisons Request to Block Order That Will Save Lives," <https://www.acluohio.org/archives/press-releases/supreme-court-denies-bureau-of-prisons-request-to-block-order-that-will-save-lives>.

⁴² Steve Coll, "The Jail Health Care Crisis," *New Yorker*, Feb. 25, 2019, <https://www.newyorker.com/magazine/2019/03/04/the-jail-health-care-crisis>.

⁴³ Office of the High Commissioner for Human Rights, "US Government urged to do more to prevent major outbreaks of COVID-19 in detention centres – UN experts," May 29, 2020, <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=25912&LangID=E>.

- Measures to prevent the spread of COVID-19 within BOP facilities and allocation of specific funds and resources exclusively to guarantee the implementation of health and hygiene measures within facilities (such as adequate access to soap, sanitizer and disinfecting materials and mass testing of all staff and incarcerated people);
- Measures to ensure that people deprived of their liberty can access specialized medical care, including COVID-19 testing, without complications as well as access to regular communications channels with family members, loved ones, and legal counsel;
- Measures to ease prison population density that respect the principle of non-discrimination. BOP must consider releasing people in pre-trial detention (absent strong countervailing factors) and should evaluate whether incarcerated people already serving their sentences qualify for parole, early release, or other alternative non-custodial measures; When doing such assessments, BOP should consider particularly if these individuals are older or at greater health risk due to underlying medical conditions or with weak immune systems;
- Measures to collect data to be made public regarding the number of people tested (including those who have been tested and have recovered), number of COVID-19 deaths, and numbers of those who have been released or transferred to non-custodial confinement. This data should be disaggregated to include information on age, race, ethnicity, religion, gender, gender identity, sexual orientation, and disability of incarcerated people and corrections staff.

For further information on the subject of immigration detention, please contact Charanya Krishnaswami, Americas Advocacy Director, at ckrishna@aiusa.org. For further information on our recommendations regarding detention in BOP jails and prisons, please contact Kristina Roth, Senior Program Officer, at kroth@aiusa.org.

Sincerely,



Joanne Lin
National Director
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Charanya Krishnaswami
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