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American Civil Liberties Union
125 Broad St, 18th Floor
New York, NY 10004

P: 212 519 7884
humanrights@aclu.org

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The Excessive Militarization of American Policing

As the nation watched Ferguson, Missouri, in the aftermath of the killing of Michael Brown, it saw a highly and dangerously militarized response by law enforcement. Media reports indicate that the Ferguson Police Department responded to protests and demonstrations with “armored vehicles, noise-based crowd-control devices, shotguns, M4 rifles like those used by forces in Iraq and Afghanistan, rubber-coated pellets and tear gas.” Law enforcement’s response in Ferguson gave pause to many and brought national attention to the issue of police militarization, especially in Washington, where President Obama said “[t]here is a big difference between our military and our local law enforcement, and we don’t want those lines blurred.” Militarized policing is not limited to situations like those in Ferguson or emergency situations—like riots, barricade and hostage scenarios, and active shooter or sniper situations—for which Special Weapons And Tactics (SWAT) were originally created in the late 1960s. Rather, SWAT teams are now overwhelmingly used to serve search warrants in drug investigations, with the number of these teams having grown substantially over the past few decades. Today, there are an estimated 50,000 to 80,000 SWAT deployments per year, which amounts to at least 136 SWAT raids per day.

A 2014 ACLU report titled [War Comes Home: The Excessive Militarization of American Policing](#) found that 79% of the incidents reviewed involved the use of a SWAT team to search a person’s home, and more than 60% of the cases involved searches for drugs. We also found that more often in drug investigations, violent tactics and equipment, including armored personnel carriers (APCs), were used. The use of a SWAT team to execute a search warrant essentially amounts to the use of paramilitary tactics to conduct domestic criminal investigations in searches of people’s homes. This sentiment is shared by Dr. Peter Kraska, who has concluded that “[SWAT teams have] changed from being a periphery and strictly reactive component of police departments to a proactive force actively engaged in fighting the drug war.” Just as the War on Drugs has disproportionately impacted people and communities of color, we have found that the use of paramilitary weapons and tactics also primarily impacts people of color. Of the people impacted by SWAT deployments for warrants, at least 54% were minorities. We also found that, of the deployments that impacted minorities, 68% were for drug searches.

The militarization of American policing has occurred in part as a result of federal programs that use equipment transfers and funding to encourage aggressive enforcement of the War on Drugs by state and local police agencies, specifically:

- The Department of Defense 1033 program, which has resulted in the free transfer of over \$5 billion worth of military equipment to state and local law enforcement agencies;

- The Homeland Security Grant Program, which has provided billions of dollars to state and local law enforcement agencies for “terrorism prevention-related law enforcement activities,” though that phrase does not appear to be clearly defined;
- The Department of Justice’s Edward Byrne Memorial Justice Assistance Grant program, which state and local law enforcement agencies often use to fund lethal and less-lethal weapons, tactical vests, and body armor.

President Obama established a Law Enforcement Equipment Working Group to review and evaluate the 1033 program and other federal programs and grants to determine whether they are being administered as intended and whether they are effective. The report from this interagency working group, which includes the Department of Defense, Department of Homeland Security, and Department of Justice, was published in May 2015. This report forwards a few key recommendations that will provide accountability and transparency for these federal programs and should be codified by Congress. The first of these recommendations is the establishment of a federal government-wide prohibited and controlled equipment list: the Prohibited Equipment List “identifies categories of equipment that [law enforcement agencies] will not be able to acquire via transfer from Federal agencies or purchase using Federally-provided funds (e.g., Tracked Armored Vehicles, Bayonets, Grenade Launchers, Large Caliber Weapons and Ammunition,” while the Controlled Equipment List “identifies categories of equipment that [law enforcement agencies]...may acquire if they provide additional information, certifications, and assurances.”

Other important recommendations include the “harmonization of Federal acquisition processes,” “required protocols and training for [law enforcement agencies] that acquire controlled equipment,” “required information collection and retention for controlled equipment used in significant incidents,” and “increase[d] Federal Government oversight and compliance.” Significantly, the report also requires a civilian governing body’s review and approval of the law enforcement agencies acquisition request. This means that a city council, county council, or other local governing body has to approve a police department’s request for military weapons or equipment. The report indicates that a permanent interagency working group will oversee the implementation of these recommendations and continue to assess the utility of military weapons and equipment for state and local law enforcement. The President also created a Task Force on 21st Century Policing in December 2014, which gave some consideration to militarized policing, primarily in the context of Ferguson-related events. A [report](#) from the Task Force issued in May 2015 made the following recommendation: “Law enforcement agencies should create policies and procedures for policing mass demonstrations that employ a continuum of managed tactical resources that are designed to minimize the appearance of a military operation and avoid using provocative tactics and equipment that undermine civilian trust.” The Task Force also adopted other recommendations to “collect, maintain, and report data to the Federal Government on all

officer-involved shootings,” to “adopt and enforce policies prohibiting profiling,” that “training on the use of force should emphasize de-escalation,” and that there be “some form of civilian oversight of law enforcement.”

A recent report titled “[Lethal in Disguise: The Health Consequences of Crowd-Control Weapons](#)” highlighted militarized police tactics around the world, and included a case study on the militarized police response to protests in Ferguson, Missouri. There, “... the police intervention included the indiscriminate use of tear gas, disorientation devices, acoustic devices, beanbag rounds, and rubber bullets, causing injuries to protesters and journalists covering these events”. The report pointed to a growing worldwide trend of law enforcement using Crowd-Control Weapons (CCWs) against crowds in inappropriate, unnecessary, and disproportionate ways, causing serious and even fatal injuries. However, there is very little information on how these weapons should be used and on their potential health impacts. Despite their long-standing presence, the use and misuse of these weapons, which include kinetic impact projectiles, chemical irritants, water cannons, disorientation devices, acoustic weapons, and directed energy weapons, as well as the health consequences thereof, have not been systematically studied or documented. Manufacturers provide limited information on the intended use and possible adverse health effects of CCWs- many of them are produced in the United States - and most law enforcement agencies collect only limited information on use-of-force incidents involving CCWs. Where they do collect data, it is rarely publicly available.

Police militarization increases the risk of the employment of methods that may constitute or result in civil and human rights violations, including the suppression of protests, storming of civilian households and the infliction of unjustified injury or death. Furthermore, police militarization exacerbates already existing abuses within the law enforcement system, such as selective policing, racial profiling, excessive and disproportionate use of force.

Recommended Questions

1. What reforms have been implemented by the Law Enforcement Equipment Working Group? What is the status of equipment recall efforts by the working group? Are the working groups’ efforts guided by U.S. CAT obligations and other human rights commitments?
2. Is there a legitimate role for the United States government to play in providing free military equipment to state and local law enforcement agencies, in light of the traditional distinction that has been drawn between the military and the police? If so, what is the scope of that role?
3. What additional steps will the United States government take to ensure that state and local law enforcement agencies are not making inappropriate use of weapons designed for combat and in violation of U.S. human rights obligations?

4. Please detail any steps taken to reduce injuries, disabilities, and death caused by Crowd Control Weapons (CCWs).
5. Please provide information detailing efforts to regulate production, sale, and use of less-lethal weapons?
6. Please provide information on federal and state efforts to ensure safe use of less-lethal weapons, including training, accountability for abuses, oversight, and data collection pertaining to their use.

Racial and Other Profiling

Racial and other biased profiling in law enforcement is a persistent problem in the United States. Although top U.S. officials have condemned racial profiling, noting that it “can leave a lasting scar on communities and individuals” and is “bad policing,” federal policy fails adequately to protect against biased law enforcement. In particular, despite repeated calls by civil society, the U.S. Departments of Justice and Homeland Security have failed to issue a complete ban on discriminatory profiling. Although the U.S. government states that the purpose of the Department of Justice’s December 2014 Guidance for Federal Law Enforcement Agencies is to ban profiling based on race, ethnicity, gender, national origin, religion, sexual orientation, or gender identity, the current Guidance has the perverse effect of tacitly authorizing that very profiling.

The Guidance, which is a significant improvement from its 2003 predecessor in expanding the scope of protected categories, nevertheless exempts from its coverage national security investigations, “interdiction activities in the vicinity of the border, [and] protective, inspection, or screening activities.” Large parts of Customs and Border Protection (CBP) and Transportation Security Administration (TSA) operations are not covered. Moreover, the Guidance’s national security provisions are so loosely drafted that they permit some of the worst law enforcement policies and practices that have victimized and alienated American Muslim and other minority communities. Profiling in national security investigations which has led to the inappropriate targeting of Muslims, Sikhs, and people of Arab, Middle Eastern, and South Asian descent is not barred. Moreover, the new Guidance allows law enforcement to continue directing sources and informants to spy on particular communities based solely upon their protected characteristics regardless of any connection to criminal activity.

A stronger Guidance is necessary because discriminatory profiling persists at the federal, state, and local levels. Examples of profiling include: Federal Bureau of Investigation (FBI) racial and other mapping; Transportation Security Administration (TSA) profiling; and CBP use of race and ethnicity at checkpoints and on roving patrols. Allowing profiling “in the vicinity of the border” disproportionately impacts Latino communities and communities living and working within the border zone; profiling in national security investigations has led to the inappropriate targeting of Muslims, Sikhs, and people of Arab, Middle Eastern, and South Asian descent. The result of these broad exemptions and omissions is that the Guidance facilitates profiling against almost every minority community in the United States in violation of Article 16 of the Convention against Torture which requires prevention of acts of cruel, inhuman or degrading treatment or punishment.

Recommended Questions

1. Why have the Departments of Justice and Homeland Security left room for discriminatory profiling after the December 2014 Guidance? How will these loopholes be closed?
2. Will the U.S. commit to: making the Department of Justice’s Guidance Regarding the Use of Race enforceable and revising it to: (a) explicitly extend its application to encompass

all of border enforcement and national security operations; and (b) apply the Guidance to state and local law enforcement agencies that work in partnership with the federal government, including fusion centers, or receive federal funds?

3. What specific data collection and training reforms have taken place across federal law enforcement agencies to implement the December 2014 Guidance?
4. Will the U.S. commit to having all federal law enforcement agencies record and make public the data recommended by the President's Task Force on 21st Century Policing, namely "to collect, maintain, and analyze demographic data on all detentions (stops, frisks, searches, summons, and arrests)"?

Non-refoulement and Asylum Seekers at the US Border

Each year, many foreign nationals arrive in the United States escaping persecution or torture and seeking protection in the United States. While some are able to enter the United States, be interviewed by an asylum officer, and present their asylum case in court, others are instead deported rapidly at the border and returned to the persecution they fled, sometimes with devastating consequences. In the broadly defined border zone and at ports of entry, U.S. law allows immigration officers to order immediate deportation of individuals who arrive in the country without valid travel documents through a procedure called “expedited removal.” When this law was introduced in 1996, the U.S. government recognized the danger that *bona fide* asylum seekers could be erroneously *refouled* to danger through this process. Thus, when an immigration officer processes an individual for deportation under expedited removal, they are also supposed to inquire whether the individual is afraid to return to her country of origin, and, if so, refer her to an asylum officer with specialized training in immigration law who will determine whether the individual can pursue her claim in immigration court.

However, since expedited removal (and other summary removal procedures) was introduced and subsequently expanded, the U.S. government has deported asylum-seekers back to danger without providing them the opportunity to present their claims to an independent and qualified decision-maker, in violation of U.S. *non-refoulement* obligations. In 2004, a U.S. government-commissioned study on expedited removal found “serious implementing flaws which place asylum-seekers at risk of being returned from the U.S. to countries where they may face persecution.” In particular, the study noted that in 50% of the interviews observed, arriving noncitizens were not informed they could ask for protection if they feared torture or persecution in their home country; in 15% of observed interviews, a person who expressed a fear of returning was nonetheless deported without a referral to an asylum officer. Instead of reforming expedited removal, the U.S. government expanded its use in 2005, and it now accounts for 44% of all deportation orders from the United States.

The expansion of expedited removal without necessary reforms and safeguards has had devastating consequences. A yearlong ACLU investigation published in December 2014 (based on interviews with individuals deported by immigration enforcement officers at the U.S. border) found that 55% of individuals said they were not asked about fear of returning to their country—or were not asked anything in a language they understood. Of the 28% who said they *were* asked about their fear of persecution, 40% said they told the border agent of their fear of returning to their country but were nevertheless *not* referred to an asylum officer before being summarily deported. More recently, in early 2016, the ACLU documented several incidents at the U.S.-Mexico border of asylum seekers being denied food and water; being verbally abused; and being given incorrect or misleading information by border officials. In many cases documented by the ACLU, individuals reported being coerced to sign forms they didn’t understand, threatened by law enforcement officers, and told they would have to be deported back to their home country even if they faced persecution or torture there. Some of the individuals interviewed by the ACLU were physically attacked, kidnapped, and/or sexually assaulted when they were returned, without a hearing, to the very dangers they had fled. Others faced extortion and threats to their own and their families’ safety. One individual was murdered after he was deported. These individuals, however, had all been turned away by U.S. border officials without even the opportunity to explain their fears, sometimes with a deportation order they did not understand or had been

coerced into signing. In some cases, individuals seeking asylum were instead prosecuted for illegal entry or reentry. A 2015 U.S. government report observed that the border officers did not have guidance on referring individuals seeking protection for criminal prosecution and noted that existing practices “and may violate U.S. treaty obligations.” Since the ACLU’s report was published, and as the U.S. government’s expulsion of children and families along the southern U.S. border has increased, these incidents have continue to occur.

Even when asylum seekers have been referred for an interview to assess whether they have a “credible fear” of persecution or torture, numerous procedural problems often make it difficult for bona fide asylum seekers, especially those who are unrepresented (which is the overwhelming majority), to pass a credible fear screening. For example, individuals who have gone through the credible fear process report problems such as inaccurate translation, adversarial and even hostile interviewers, lack of privacy and confidentiality in the questioning (which takes place in close proximity to other migrants), and lack of explanation of the process—all of which can lead to erroneous findings that the individual does not have a credible fear of persecution. In some instances, asylum officers and immigration judges have also erred by demanding a higher showing than the low “significant possibility of persecution” threshold, which Congress intended and international law requires. The ACLU is currently litigating a group of consolidated habeas cases on behalf of detained Central American mothers and children who did not receive a substantively or procedurally fair opportunity to demonstrate that they are bona fide asylum seekers.

Finally, unaccompanied Mexican children have also been returned from the United States without the opportunity to claim international protection at the U.S. border. U.S. law (specifically the William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008) requires that any border officer who apprehends an unaccompanied Mexican or Canadian child must interview the child and confirm that he or she (i) is not a potential victim or at risk of trafficking, (ii) has no possible claim to asylum, and (iii) has the capacity to voluntarily agree to go back home. However, an investigation by the UNHCR found that border officers are not asking the required questions, which may anyway be difficult for young children – alone, afraid, and languishing in detention – to immediately comprehend or answer. The UNHCR also found that border officers do not understand what human trafficking means and are unable to identify child victims of human trafficking—which includes recruitment and coerced participation in the human trafficking industry. Consequently, around 95 percent of Mexican children arriving alone are returned to Mexico, many of whom may have strong claims to remain and receive protection in the U.S.

Recommended Questions

1. In light of mounting evidence that border officers do not consistently ask non-citizens about fear of persecution or torture if returned to their country, what steps is the U.S. government taking to ensure that asylum seekers are asked about their fears and referred to an asylum officer?
2. What processes are in place to monitor border officers’ compliance with U.S. obligations under Article 3 and to censure officers who routinely disregard those obligations?
3. What steps is the U.S. taking to ensure that asylum seekers are represented by counsel and receive an adequate opportunity to present their claims for asylum?

Conditions of Confinement in US Immigration Detention Facilities

Every day, hundreds of thousands of noncitizens are administratively detained in jails and prisons throughout the United States. Despite years of advocacy and some additional oversight, these detention facilities continue to be plagued by inhumane conditions, including over-use of solitary confinement and sexual assault.

Sexual assault

Sexual assault and abuse against detained immigrants is not new; but it persists despite some recent reforms. For example, for many years, the federal government resisted calls from advocates to extend the 2003 Prison Rape Elimination Act (PREA) to immigration detainees. PREA created a zero-tolerance standard for sexual abuse of prisoners, developed standards for preventing prison rape, and required facilities to keep and disseminate statistical information about prison rape. In 2013, the US government acknowledged that the protections of the PREA apply to immigration detainees (although final regulations were not issued until 2014). These protections have not been fully implemented; notably, privately-owned contract detention facilities, some short-term detention facilities, and local jails have not been required to fully and immediately comply with regulations implementing the law. In April 2016, a guard at the Berks family detention facility in Pennsylvania was convicted of sexually assaulting a 19-year-old asylum seeker detained there. Although Berks authorities did promptly report the assault, staff also responded by ordering detained women and children as young as six not to wear shorts or tight clothes, raising significant concerns about ICE commitment to ensure PREA compliance beyond formal regulatory and policy change. At least 101 unaccompanied immigrant children have been abused by staff at the shelters with which the Department of Health and Human Services (HHS) contracts to provide care. Under federal law, HHS is required to implement regulations protecting children from sexual assault. To date, however, it has failed to do so, and HHS lacks transparent and effective monitoring and investigatory systems for the incredibly vulnerable children in its care.

Short-term custody at the US border

While in short-term custody, adults and unaccompanied children have been subjected to inhumane treatment by Customs and Border Protection (CBP) upon arrival in the United States, including unsanitary, overcrowded and freezing detention conditions. In 2015, the ACLU and other civil society organizations sued CBP over these conditions, in which men, women, and children have been held for extended periods of time. A 2016 report from the U.S. government found that CBP utilizes an abysmal record-keeping system to identify and track the individuals in its custody and criticized its poor handling of complaints from detainees. In June 2014, the ACLU and several advocacy organizations filed a complaint with DHS regarding the abhorrent treatment of unaccompanied minors in CBP detention. The complaint, based on 116 cases, found that approximately one in four children reported some form of physical abuse, including sexual assault, beatings, and the use of stress positions by CBP officials. More than half of these children reported various forms of verbal abuse, including racially- and sexually-charged comments and death threats. These complaints are not new, nor are they unique to children; in 2011, the organization No More Deaths documented over 30,000 incidents of abuse against persons in CBP custody and several other organizations have documented similar allegations of abuse and inhumane treatment. However, DHS oversight agencies have generally failed to

respond to or meaningfully investigate complaints of abuse, resulting in a culture of impunity. CBP has failed even to promulgate robust, enforceable detention standards for its facilities; indeed, not even the number, capacity and location of all these facilities have been made public.

Solitary confinement

The ACLU has long been concerned about the widespread use of solitary confinement in immigration detention. Immigration detention facilities have often used solitary as a punishment for minor offenses, as well as to "protect" especially vulnerable populations like youth, LGBT people, and persons with mental disabilities. In September 2013, U.S. Immigration and Customs Enforcement (ICE) released a nationwide policy directive regulating the use of solitary confinement. However, ICE has not provided public information on directive implementation or on compliance at the more than 250 private, local and government detention facilities used by ICE. Indeed, in April 2014, the ACLU filed suit in Washington State over ICE's use of solitary confinement to retaliate against detainees who went on hunger strike to express concerns about national immigration policy and the conditions of their confinement. The ACLU has been seeking information from ICE through FOIA on its use of solitary confinement but has yet to receive any responsive documents from ICE in close to 500 days since the request was filed.

Recommended Questions

1. What steps is the U.S. government taking to ensure Prison Rape Elimination Act regulations are fully and immediately implemented in *all* facilities or shelters housing immigration detainees?
2. What steps is the U.S. taking to fully and independently monitor and investigate complaints of sexual assault, particularly against children and transgender detainees?
3. What steps has the U.S. taken to ensure that ICE's directive on solitary confinement is uniformly and properly enforced in all facilities housing immigration detainees?
4. What steps has ICE/DHS taken in response to the September 2014 complaint about sexual abuse at the Karnes detention facility? Have any of the families detained in Karnes been deported, and what assurances/safeguards has the US government taken to ensure that none of the victims or witnesses to the alleged Karnes sexual abuse are deported? Has ICE screened (or permitted non-profits to screen) for U visa relief?

Immigrant Family Detention in the United States

Every year, the U.S. Department of Homeland Security (DHS) imprisons hundreds of thousands of non-citizens, including children and families, in immigration detention. In 1997, after over a decade of litigation, the *Flores v. Reno* settlement agreement created nationwide standards requiring that immigrant children be held in the least restrictive setting appropriate to their age and be released from custody without unnecessary delay. The Flores settlement, which protected children arriving alone as well as children arriving with family, marked the beginning of the U.S. government's recognition that immigrant children are entitled to due process rights, particularly with respect to the U.S. government's ability to hold them in detention. In recent years, however, that recognition has suffered significant setbacks, particularly for children arriving with a parent or parents. Starting in 2014, in response to the arrival of several thousands of Central American families and unaccompanied children arriving at the U.S.-Mexico border, the U.S. government dramatically expanded the detention of immigrant families, including those with young children. Prior to this summer, the United States had begun to move away from family detention.

In 2009, ICE stopped detaining families at the T. Don Hutto facility in Texas following ACLU litigation and other advocacy challenging the deplorable conditions of confinement and treatment of children there; and until 2014, the administration had reduced its detention of immigrant families to 96 beds at one facility. But in June 2014, the government abruptly reversed course, announcing plans to expand family detention. Currently, the government is operating family detention facilities in Karnes County, Texas, with almost 600 beds, run by the GEO private prison company, and in Dilley, Texas, with 2,400 beds, which is operated by the largest private prison company in the United States—Corrections Corporation of America. In 2016, the federal government announced plans with British corporation Serco to build yet another family detention center in Texas (one county voted against the new facility but another site is still being considered.) The majority of the families detained in these facilities are Central American women and children who have fled extreme violence in their countries and are seeking political asylum. When the U.S. government began detaining families *en masse* in mid-2014, it did so pursuant to a blanket “no-release” policy, the express purpose of which was to send a deterrent message to other Central Americans who might be considering migrating to the United States. After litigation brought by the ACLU, the government announced that it would cease using deterrence as a basis for detention, but it continues to detain families, including those who are unable to pay high bonds, and it often requires families who are released to agree to wear painful and humiliating ankle monitors. Meanwhile, some families who were not detained were subjected to traumatic immigration raids at home in early 2016, resulting in the detention of women and children.

At the same time, the Flores settlement, which created nationwide standards requiring that immigrant children be held in the least restrictive setting appropriate to their age, even when they were not traveling alone, is also hanging in the balance. Recently, the U.S. government has taken the position that the settlement's provisions do *not* apply to children who are accompanied by their parents and therefore does not limit or otherwise restrict the detention of these children along with their parents.

International human rights law strongly disfavors the use of immigration detention, and rejects it completely for children. Detention harms children's health. Their physical and psychological development suffers during detention, and the harms can be long-lasting. Being held in a prison-like setting, even for a short period of time, can cause psychological trauma for children and increase their risk factor for future mental disorders. U.N. Special Rapporteur on torture, Juan E. Méndez, said in 2015, "The detention of children is inextricably linked – in fact if not in law – with the ill-treatment of children, owing to the particularly vulnerable situation in which they have been placed that exposes them to numerous types of risk." According to Physicians for Human Rights and the Bellevue/NYU Program for Survivors of Torture, detention can also exacerbate the trauma experienced by both children and adults who have fled violence in their home countries – precisely the population detained at these family facilities. Finally, detention damages the family structure in particular by stripping parents of their role as arbiter and decision-maker in the family unit, confusing children and undermining child-rearing. This adds to the already extreme stresses on detained children and erodes their trust in their parents at a time when they need it most.

The U.S. government's expansion of family detention is also troubling given its problematic history at the T. Don Hutto facility in Texas. More recent reports of conditions in family detention centers raise alarming concerns: there have been allegations of abusive conditions at the different family detention facilities, including sexual abuse, threats by guards to separate mothers from their children, retaliation against mothers for engaging in actions to protest their detention, and inadequate mental health and medical care. Medical experts and child welfare specialists reported that many children had lost considerable weight after entering Artesia and several displayed symptoms of depression. In 2015, a group of non-governmental organizations providing assistance to families in detention (known collectively as CARA) filed a complaint with the U.S. government detailing inadequate medical care provided to young children at these new facilities but received no meaningful response.

Finally, U.S. policies and practices in constructing remote detention facilities like Artesia, Dilley, and Karnes directly result in unfair hearings. There are few private or free legal service providers available in those rural areas to provide representation in incredibly complex legal proceedings, and it is difficult to prepare cases for relief from inside a detention facility where access to counsel, phone services, supporting witnesses, and evidence is severely limited.

The ACLU and other organizations are currently representing several mothers and children detained at Artesia who experienced severe violence or threats of violence in Central America. Since the summer of 2014 the U.S. government moved Central American families to the front of the deportation queue, placing their removal hearings on an expedited calendar and aggressively pursuing fast-track removals of mothers and children but *without* ensuring that these families have a lawyer to represent them in immigration proceedings. And yet, while detained in the remote detention facility, their ability to find an attorney—pro bono or otherwise—and to meet privately with attorneys, access any information about the asylum process, or prepare for their asylum interviews has been significantly curtailed. The information that these mothers received is often incomplete, incorrect and sometimes coercive and, as a consequence, many detained mothers do not share critical information about the persecution from which they fled.

Moreover, the detention centers and credible fear processes fail to sufficiently screen for or treat individuals suffering from trauma and psychological problems, which results in flawed credible fear determinations.

Recommended Questions

1. Why has the U.S. government expanded its use of family detention, rather than investing in currently available alternatives to administrative immigration detention?
2. What is the U.S. government doing to ensure adults and children in detention can secure legal representation?

Solitary Confinement

Recent decades have seen an explosion in the use of solitary confinement in the United States. It is employed for a variety of reasons, including for administrative and security purposes, discipline, protection from harm, and health-related reasons. Although many prisoners in solitary confinement are housed in specially constructed ‘supermaximum’ facilities, solitary confinement is practiced in jails, prisons and other federal, state and local detention facilities throughout the United States, and may last for months, years, or decades. Any prisoner or detainee, regardless of age, gender, or physical or mental health, may be subject to solitary confinement. Persons with mental disabilities are dramatically overrepresented in solitary confinement. Children are subjected to solitary confinement in juvenile facilities as well as in jails and prisons that otherwise house adults. Women, vulnerable LGBTI prisoners, and immigration detainees are all placed in solitary confinement, in both civil and criminal detention facilities. An estimated 20,000 to 25,000 prisoners are held in the harshest forms of solitary confinement; more than 80,000 prisoners are held in some form of restricted housing unit.

President Obama has spoken out against the over-use of solitary confinement and announced changes in the policies and practices of the Federal Bureau of Prisons, including the elimination of solitary for youth under 18, and some U.S. jurisdictions have taken steps to limit the use of solitary confinement for certain categories of prisoners through legislation, policy or litigation reform. But the over-use and abuse of the practice is still rampant across the country.. The ACLU is leading numerous state-based legislative and administrative reform efforts and is currently involved in several lawsuits challenging the use of solitary confinement. In a lawsuit challenging conditions at the East Mississippi Correctional Facility, a psychiatric expert found that, in the prison’s solitary confinement units, “there is so much severe and inadequately treated mental illness, such gross inattention by staff, and such intolerably filthy and harsh conditions that the smearing of feces becomes a predictable response by mentally ill prisoners to their dreadful plight.” In a lawsuit challenging solitary confinement in the state of Arizona, a psychologist concluded that the consequences of the state’s solitary confinement of mentally ill prisoners “can be extreme and even irreversible, including the loss of psychological stability, significantly impaired mental functioning, the inability to function in social settings and personal relationships, self-mutilation and harm, and even death.” Similar findings could be made in federal, state, and local facilities across the country.

Recommended Questions

1. Please provide data regarding the use of solitary confinement (including restrictive housing units, segregated housing units, special management units and administrative maximum facilities) in the Federal Bureau of Prisons, including:
 - i. State the number of prisoners in the custody of the Federal Bureau of Prisons who are currently in solitary confinement and have been continuously held in solitary confinement for more than 15 days.

- ii. For those prisoners identified in question 1(i), identify the institutions where the prisoners are held and state the number of prisoners in solitary confinement in each facility.
 - iii. State the number of suicides or other incidents of self-harm in the last 24 months among prisoners held in solitary confinement.
2. Please provide data regarding the implementation of limitations on the use of solitary confinement embodied in the newly adopted UN Standard Minimum Rules for Prisoners, the “Mandela Rules,” including Rule 37, 43, 44, and 45 in the Federal Bureau of Prisons and in state and local facilities.

Denial of Access to Justice under the Prison Litigation Reform Act

Since its enactment by the U.S. Congress in 1996, the Prison Litigation Reform Act (PLRA) has had a disastrous effect on the ability of prisoners to seek protection of their rights, creating numerous burdens and restrictions on lawsuits brought by prisoners. As a result of these restrictions, prisoners seeking a remedy for injuries inflicted by prison staff and others, or seeking the protection of the courts against dangerous or unhealthy conditions of confinement, have had their cases dismissed. Three provisions in particular affect the ability of prisoners, most of whom have no access to legal counsel, to bring their claims before the federal courts.

The PLRA provisions often referred to as the “physical injury requirement” prevent prisoners, including juvenile and pre-trial detainees, from obtaining money damages in federal court for violations of their civil and human rights that can amount to torture or cruel, inhuman and degrading treatment. These provisions require that a prisoner must demonstrate a “prior showing of physical injury or the commission of a sexual act” before she can win damages for mental or emotional injuries. Most federal courts have applied this provision to bar damages for all constitutional violations that do not intrinsically involve a physical injury. The following are examples of cases in which prisoners were denied relief because they were found to have no “physical injury:” actions challenging the violation of prisoners’ religious rights; a prisoner’s false arrest and illegal detention; prison officials’ failure to protect a prisoner from repeated beatings; and a prison official’s denial of a prisoner’s psychiatric medications to deliberately cause him to experience pain and depression.

The PLRA’s “exhaustion requirement” provides that before a prisoner may file a lawsuit in federal court, he must first comply with all deadlines and other procedural rules of the prison or jail’s internal grievance system; if he fails to strictly comply with all technical requirements or misses a filing deadline, his right to sue is lost forever. This provision has sharply limited the ability of prisoners to seek judicial remedies for serious violations of their human rights for several reasons. First, prisoners have low rates of literacy and education, and the number of mentally ill and cognitively impaired persons in prison is significant. Second, deadlines are very short in many grievance systems, and these deadlines operate as statutes of limitations for federal civil rights claims. In addition, a typical system may have three or more deadlines that could each lead to forfeiture of a claim, as prisoners must timely appeal to all levels of a grievance system. For illiterate, mentally ill, or cognitively challenged prisoners, these complex administrative systems are virtually impossible to navigate. Finally, prisoners who file grievances may be subject to threats and retaliation.

The provisions of the PLRA also apply to children confined in prisons, jails, and juvenile detention facilities. Application of the PLRA to children is especially problematic because youth are exceptionally vulnerable to abuse in institutions, and court oversight is therefore particularly important. The PLRA’s exhaustion requirement has been an especially significant obstacle to justice for incarcerated children, particularly because some courts have ruled that efforts to pursue grievance procedures by a prisoner’s parent or lawyer do not satisfy the PLRA.

Recommended Questions

1. Has the United States determined how many lawsuits alleging torture or cruel, inhuman or degrading treatment or punishment are dismissed pursuant to the provisions of the PLRA?

Death Penalty

Since 1976, when the modern death penalty era began in this country, 1,436 people have been executed. As of January 2016, there were 2,943 people awaiting execution across the country. The U.S. death penalty system in 31 states, the federal system, and the military violates international law and raises serious concerns regarding the United States' international legal obligations under the Convention against Torture.

There continue to be positive developments regarding the death penalty in the United States. The number of new death sentences and executions continue to drop. Last year saw a historic decline in death sentences: only 49 sentences were handed down. Twenty-eight people were executed in 2015, the lowest number since 1991. The fewest number of states since 1998 – only six – carried out executions, with three states – Missouri, Texas, and Georgia accounting for the large majority (86%) of them. On May 27, 2015, Nebraska became the most recent state to reject the death penalty, when its Republican-controlled legislature voted for abolition. Though the death penalty remains on the books, the governors of Colorado, Oregon, Pennsylvania, and Washington have imposed moratoria on executions in their states. Two justices on the U.S. Supreme Court have suggested that the country's death penalty system is unconstitutional and have called for briefing on that question. Despite these positive signs, the U.S. death penalty system remains fraught with problems.

The Supreme Court has now upheld in two separate cases the constitutionality of certain lethal injection protocols, most recently in the *Glossip v. Gross* decision in 2015. In recent years, drug companies have stopped manufacturing certain drugs long used in lethal injection and some companies have refused to make the drugs available to states for execution. In light of these shortages, many states hurriedly switched to new, untested methods of lethal injection, with little information released or oversight allowed. Many states—including South Dakota, Pennsylvania, Colorado, Georgia, Texas, Ohio, and Missouri—also began purchasing lethal drugs from compounding pharmacies, which are not regulated by the Food and Drug Administration. As a result of the novel and untested methods and the use of drugs from questionable sources, several condemned prisoners have suffered excruciating pain during executions, including the State of Oklahoma's botched execution of Clayton Lockett on April 29, 2014. Faced with the continued uncertainty over lethal injection and the availability of drugs, many states have explored alternate – and formerly rejected – execution methods, including the electric chair, hanging, and firing squad. Some states continue to authorize the electric chair under certain circumstances. States are also increasingly adopting secrecy laws so that condemned people and the public are unable to gain information about the drugs that will be used in executions or the sources of those drugs, creating barriers to bringing legal challenges alleging that their executions will amount to torture or cruel, inhuman or degrading treatment.

Since 1973, 156 innocent people have been released from death row, many after spending decades on death row. Still many others have been released from death row after their guilt for the capital offense was put in doubt, though they have not been exonerated completely. Tragically, not all innocent people have escaped execution.

Racial bias continues to taint the capital punishment system in the United States, from jury selection through decisions about who faces execution. The United States Supreme Court recently condemned the prosecution's discriminatory exclusion of Black jurors in a Georgia

death penalty case and subsequently sent three additional cases back to other state courts for further review in light of the decision. The death penalty continues to be imposed disproportionately on people of color, particularly when the victims of the crimes are white.

The death penalty also continues to be imposed against people with intellectual disability and serious mental illness. Though the execution of people with intellectual disability has been prohibited under the federal Constitution since 2002, states have continued to execute people with intellectual disability using non-clinical standards to determine who meets the exemption. Last year, the United States Supreme Court took an important step in correcting these unscientific practices, with its decision in *Hall v. Florida*, making clear that states' criteria on intellectual disability must conform to clinical practice. Still, the State of Texas executed prisoner Robert Ladd in January 2015, though his intellectual disability had been clearly documented since childhood.

Condemned prisoners often wait decades in solitary confinement before execution, in violation of internationally-recognized prohibitions against cruel, inhuman or degrading treatment. This "death row phenomenon" may cause some prisoners, like Robert Gleason executed in Virginia in January 2013, to "volunteer" for execution rather than remain on death row.

The White House itself characterized Lockett's gruesome execution as falling short of the requirement that the death penalty be carried out humanely. On May 2, 2014, President Obama tasked then-Attorney General Eric Holder with conducting a full policy review of capital punishment in the U.S., acknowledging both the cruelty of lethal injections and racial disparities in sentencing. It is unclear whether this review was ever conducted under Holder's leadership or whether current Attorney General Loretta Lynch intends to conduct the review. Meanwhile, the federal government continues to seek the death penalty against defendants across the country.

Recommended Questions

1. What measures will the United States take to ensure that it will not subject persons under sentence of death to cruel, inhuman, and degrading treatment?
2. What is the scope of the Department of Justice review, which was announced in May 2014?