

TESTIMONY OF DAVID COLE,

NATIONAL LEGAL DIRECTOR, AMERICAN CIVIL LIBERTIES UNION

ON THE NOMINATION OF SENATOR JEFFERSON SESSIONS TO BE ATTORNEY
GENERAL

HEARING BEFORE THE SENATE JUDICIARY COMMITTEE

JANUARY 11, 2017

I. INTRODUCTION

Mr. Chairman and members of the Senate Judiciary Committee, thank you for inviting me to testify on behalf of the American Civil Liberties Union on the nomination of Senator Jefferson Sessions to be Attorney General of the United States. The ACLU is strictly non-partisan and, as a matter of long-standing policy, does not oppose or endorse the nomination of judges or executive branch officials. In this instance, we have such serious questions about the civil liberties and civil rights record of Sen. Sessions that we are taking the extraordinary step of testifying. We owe it to the American people and to the Senate because there are serious questions about Sen. Sessions's commitment to the civil rights and civil liberties that define us as a nation and that our organization was founded, nearly one hundred years ago, to defend. Sen. Sessions's record raises grave questions about his qualifications to serve as the nation's chief law enforcement officer. Some of those questions led this committee on a bipartisan vote to reject his nomination to become a federal district court judge in 1986.¹ The questions remain, and now he is being considered for a far more powerful post. At a minimum, those questions deserve thorough investigation before the Senate votes on his confirmation.

At bottom, our concern is whether Sen. Sessions will be able in good faith to fulfill the obligations of the nation's top law enforcement official — namely to defend the rights of *all*

¹ Philip Hager, *Panel's Action Only 2nd Such Turndown in 49 Years Reagan Judicial Nominee Rejected*, L.A. TIMES (June 6, 1986), http://articles.latimes.com/1986-06-06/news/mn-8903_1_judicial-nominee.

Americans and, in particular, those of the most vulnerable among us. Sen. Sessions's past statements and actions have demonstrated not just insensitivity but active hostility to the rights of many of our fellow citizens. He has reportedly made racially offensive remarks to African-American colleagues, including about the Ku Klux Klan.² He vigorously defended President-elect Trump's patently unconstitutional call for a Muslim ban on immigration.³ He claimed that President-elect Trump's outrageous and deeply offensive remarks about using his celebrity to grab women by their genitals did not describe sexual assault.⁴ He has criticized the Voting Rights Act,⁵ and as a US Attorney in Alabama, he prosecuted civil rights activists for merely assisting African-Americans to vote.⁶ Despite this, he now seeks to pad his application by taking credit for litigating voting rights cases on which he actually did no work.⁷ He has consistently voted against legal protections for women and LGBT persons, and has denied that they face discrimination.⁸ He twice opposed a legislative ban on torture⁹ and praised Michael Mukasey for declining to rule out waterboarding, a form of torture.¹⁰ And he has called Islam, a religion practiced by millions of Americans, a "toxic ideology."¹¹

If you learned that a candidate for an entry-level position on your staff had said some of the offensive things Sen. Sessions has said and had misled you about his prior accomplishments, you would probably look elsewhere. You would almost certainly not hire him unless you did an extraordinarily thorough review of the young man's background. Here, such a review of Sen.

² Scott Zamost, Curt Devine & Katherine Noel, *Sessions Dogged by Old Allegations of Racism*, CNN (Nov. 18, 2016), <http://www.cnn.com/2016/11/17/politics/jeff-sessions-racism-allegations/>.

³ Tom LoBianco, *Sessions: Trump Travel Ban Could Include Egypt*, CNN, (June 20, 2016), <http://www.cnn.com/2016/06/19/politics/jeff-sessions-donald-trump-muslim-ban/>.

⁴ John McCormack, *Jeff Sessions: Behavior Described by Trump in 'Grab Them by the P---y Tape Isn't Sexual Assault*, THE WEEKLY STANDARD (Oct. 10, 2016), http://www.weeklystandard.com/jeff-sessions-behavior-described-by-trump-in-grab-them-by-the-p-y-tape-isnt-sexual-assault/article/2004799?custom_click=rss.

⁵ Ari Berman, *Voting Rights in the Age of Trump*, N.Y. TIMES (Nov. 19, 2016), <http://www.nytimes.com/2016/11/22/opinion/voting-rights-in-the-age-of-trump.html>.

⁶ Robert Pear, *Judge Nomination Stirs Opposition*, N.Y. TIMES (Dec. 1, 1985), <http://www.nytimes.com/1985/12/01/us/judge-nomination-stirs-opposition.html>.

⁷ J. Gerald Herbert, Joseph D. Rich & William Yeomans, *Jeff Sessions Says He Handled These Civil Rights Cases. He Barely Touched Them*, WASH. POST (Jan. 3, 2017), https://www.washingtonpost.com/opinions/jeff-sessions-says-he-handled-these-civil-rights-cases-he-barely-touched-them/2017/01/03/4ddffa6-d0fa-11e6-a783-cd3fa950f2fd_story.html?utm_term=.257eacfe618f.

⁸ 159, Cong. Rec. S7,793 (daily ed. Nov. 4, 2013) (roll call vote no. 229), available at <https://www.congress.gov/crec/2013/11/04/CREC-2013-11-04-pt1-PgS7793-2.pdf>.

⁹ Conor Friedersdorf, *These 21 Republicans Voted Against a Torture Ban*, THE ATLANTIC (June 17, 2015), <http://www.theatlantic.com/politics/archive/2015/06/these-21-republicans-voted-against-a-torture-ban/396095/>.

¹⁰ Tamara Keith, *On Waterboarding, A President Trump Could Face Resistance From Some Republicans*, N.P.R. (Nov. 21, 2016), <http://www.npr.org/2016/11/21/502871948/on-waterboarding-a-president-trump-could-face-resistance-from-some-republicans>.

¹¹ Joby Warrick & Abigail Hauslohner, *Trump's Security Picks Deepen Muslim Worries About an Anti-Islamic White House*, WASH. POST (Nov. 18, 2016), https://www.washingtonpost.com/world/national-security/trumps-security-picks-deepen-muslim-worries-about-an-anti-islamic-white-house/2016/11/18/d7796cc6-add6-11e6-8b45-f8e493f06fcd_story.html?utm_term=.1925d8817479.

Sessions was done, in 1986, by this very Committee, and it led to a bipartisan vote against Sen. Sessions's nomination to become a federal judge.

The ACLU cannot and does not take a position on whether you should confirm Sen. Sessions's nomination. But we do maintain unequivocally that Sen. Sessions's record of hostility to civil rights warrants the most serious examination, particularly given the role he would play as chief enforcer of our nation's civil rights guarantees. We recognize, of course, that senatorial courtesy may make some members reluctant to probe their own colleague's record in detail. But given the importance of this position and the gravity of the allegations, we believe it is your responsibility to do so.

We believe that it is especially important, at this time, to ensure that the nation's chief law enforcement officer is a uniter, not a divider. Controversy about the fairness of our justice system, especially along racial lines, has roiled our nation in recent years. Many of our citizens are deeply skeptical of a criminal justice system that disproportionately stops, frisks, arrests, and imprisons young men of color. Videos of police shootings of unarmed Black men have added to the frustration, alienation, and fear that too many feel about our justice system. When trust in the system erodes, problems soon follow. Those who don't trust the system are less likely to play by the rules, less likely to cooperate with police, and less likely to serve as witnesses in criminal trials. Our broken criminal justice system requires a leader who can comport his office with the fairness and resolve to unite us and who has shown compassion and sympathy for the most vulnerable. We think the statements and conduct of Sen. Sessions raise serious questions as to whether he is such a leader.

II. AREAS OF CONCERN

In our view, Sen. Sessions's record raises grave concern in at least seven specific areas.¹² Taken together, they raise questions about whether he is qualified to become an Attorney General for all the people, and in particular whether he will faithfully carry out his obligation to protect the most vulnerable among us.

1) Racial equality and voting rights

At an absolute minimum, the Attorney General of the United States must not be someone who harbors racial prejudice or fails to take seriously racism and racially motivated violence. It is this concern that probably most contributed to the Committee's rejection of Sen. Sessions when he was nominated to be a district court judge. It remains every bit a concern today.

¹² We detail even more extensive concerns in our report on Sen. Sessions. *See* ACLU, REPORT: THE CONFIRMATION SESSIONS (Jan. 2017), available at <https://www.aclu.org/report/report-confirmation-sessions>.

In the 1986 hearings, one of Sen. Sessions's former colleagues, Thomas Figures, an African-American attorney, testified that Sen. Sessions had called him "boy" and had told him he thought the Ku Klux Klan was okay until he learned that some of them smoked marijuana.¹³ Some have suggested that the comment about the Klan might have been a joke, although Mr. Figures testified that he took it seriously.¹⁴ Even if said in jest, however, the remark demonstrates a disturbing level of insensitivity. It is not unlike joking about the Nazis to a Jew. The Klan was responsible for the lynching of thousands of African-Americans, and it is defined by an ideology of racial supremacy and hatred. There are some subjects you don't joke about.

Along similar lines, in a speech in 2006 on immigration, Sen. Sessions broadly condemned all Dominican immigrants, saying, "Fundamentally, almost no one coming from the Dominican Republic to the United States is coming here because they have a provable skill that would benefit us and that would indicate their likely success in our society."¹⁵ Is a man who proclaims such baseless and offensive stereotypes about an entire ethnic community qualified to be the Attorney General of the United States?

One of the Attorney General's most important responsibilities is to ensure that the machinery of democracy works fairly for all. The Justice Department enforces all federal voting rights laws. It prosecutes election misconduct, provides guidance on compliance with federal voting laws, and monitors elections. It is currently engaged in ongoing litigation to protect voting rights in at least six states. Yet Sen. Sessions's record on voting rights is deeply troubling.

In the 1980s, when he was U.S. Attorney for the Southern District of Alabama, Sen. Sessions investigated and prosecuted three long-time civil rights activists for alleged voter fraud. According to former Governor Deval Patrick, who as a young lawyer with the NAACP Legal Defense and Educational Fund represented one of the defendants, Sessions's theory for many of the charges in the indictment was that it was a federal crime to help someone to vote or to advise them on how they should vote, even when they sought the help.¹⁶ It is, of course, not a crime to advise people how to vote; that's the whole point of an electoral campaign. Candidates themselves, their supporters, newspapers, our friends, and our spouses all advise us on how to vote. The judge hearing the case rejected Sessions's overbroad and anti-democratic theory before trial and dismissed 50 counts in the indictment. Sessions proceeded to trial anyway on the

¹³ Michelle Ye Hee Lee, *Jeff Sessions's Comments on Race: For the Record*, WASH. POST (Dec. 2, 2016), https://www.washingtonpost.com/news/fact-checker/wp/2016/12/02/jeff-sessions-comments-on-race-for-the-record/?utm_term=.a18d4cd03609.

¹⁴ *Id.*

¹⁵ Same Stein & Amanda Terkel, *Donald Trump's Attorney General Nominee Wrote Off Nearly All Immigrants From An Entire Country*, HUFFINGTON POST (Nov. 20, 2016), http://www.huffingtonpost.com/entry/jeff-sessions-dominican-immigrants_us_582f9d14e4b030997bbf8ded.

¹⁶ Letter from Deval L. Patrick to Senator Charles Grassley and Senator Dianne Feinstein (Jan 3, 2017), *available at* <http://www.naacpldf.org/files/about-us/Deval-L-Patrick-Letter-re-Sessions-AG-Nom-1-3-17.pdf>.

remaining counts, and after a three-week trial, he was unanimously rebuffed by the jury, which found all three defendants not guilty on all charges.

The prosecution took place in the wake of a significant increase in voting by African-Americans in Alabama and throughout the South. In 1965, almost no African-Americans voted in Alabama. By 1982, about 70,000 African-Americans were voting and had helped elect 138 Black officials across the region.¹⁷ The case concerned the use of absentee ballots, which are, of course, used by white and Black voters alike. Sessions, however, investigated only the use of absentee ballots by Black voters and only in counties where white incumbents were losing ground because of advances in voting rights. According to the Brennan Center for Justice, Sessions's investigation focused on "five Black Belt counties where black leaders had begun to assume local office — Perry, Sumter, Greene, Wilcox, and Lowndes."¹⁷ The investigation was entirely one-sided. Again, according to the Brennan Center:

Sen. Sessions and his counterpart in the Northern District of Alabama began investigating alleged absentee ballot fraud by black civil-rights activists.... 'Hundreds of witnesses, most of them black, [were] interviewed about vote fraud.' Meanwhile, at the same time, the Department of Justice refused to investigate complaints that white politicians solicited longtime nonresidents to submit absentee ballots in local elections. In Perry County, where the Marion Three had collected absentee ballots, the FBI went to the doors of hundreds of black citizens, flashing their badges, asking how they had voted, whether they had received help from black civil-rights activists, whether they could read and write, and why they had voted absentee. The chairman of the National Council of Black State Legislators called the tactics an effort 'to disenfranchise blacks who are finally gaining political power in the South.'¹⁸

As a federal legislator, Sen. Sessions has opposed restoring felons' voting rights even after they have done their time¹⁹ and even though felon disenfranchisement disproportionately affects African-Americans. He has defended restrictive voter ID laws,²⁰ which also disproportionately exclude minority and poor voters, notwithstanding the widely noted lack of virtually any evidence of voter impersonation fraud. Sen. Sessions joined his colleagues in a 98-0 vote to extend the Voting Rights Act in 2006. But more recently, he called the Supreme Court's decision

¹⁷ ADAM GITLIN & WENDY R. WEISER, BRENNAN CENTER FOR JUSTICE, THE JUSTICE DEPARTMENT'S VOTER FRAUD SCANDAL: LESSONS (2017), available at <https://www.brennancenter.org/publication/justice-departments-voter-fraud-scandal-lessons>.

¹⁸ *Id.*

¹⁹ Ari Berman, *Jeff Sessions Has Spent His Whole Career Opposing Voting Rights*, THE NATION (Jan 10, 2017), <https://www.thenation.com/article/jeff-sessions-has-spent-his-whole-career-opposing-voting-rights/>.

²⁰ Tierney Sneed, *Why Jeff Sessions As Attorney General Horrifies Voting Rights Advocates*, TALKING POINTS MEMO (Nov. 18, 2016), <http://talkingpointsmemo.com/dc/why-trump-s-choice-of-jeff-sessions-as-ag-is-alarmed-voting-rights-advocates>.

in *Shelby County v. Holder*,²¹ which gutted the Act's most important enforcement provision, "good news . . . for the South."²² The decision, which lifted an obligation on many states with a history of voting discrimination to clear voting changes with the Justice Department, spurred renewed efforts in several of those states to suppress voting by minorities. In North Carolina, for example, a federal appeals court found that the state legislature intentionally discriminated against Black voters through a series of voting changes undertaken the day after *Shelby County* was decided.²³ Sen. Sessions has expressed no concern whatsoever about those efforts.

2) Religious freedom

Sen. Sessions has also shown insensitivity at best and hostility at worst toward Muslims and the Muslim faith. When Donald Trump advocated a ban on all Muslims entering the United States, a blatantly unconstitutional proposal, Sen. Leahy introduced an amendment providing that "it is the sense of the Senate that the United States must not bar individuals from entering into the United States based on their religion."²⁴ The amendment did no more than restate what the Constitution already requires. The Establishment Clause forbids the government from taking action that either favors or disfavors any specific religion, and therefore the government can no more favor specific religions in immigration decisions than it can in public displays or funding decisions. Yet Sen. Sessions was one of only four senators to oppose the amendment.²⁵

As noted above, Sen. Sessions has also called Islam, one of the largest religions in the world and a faith held by millions of Americans, a "toxic ideology." If he had called Christianity a "toxic ideology," is there any doubt that he'd be disqualified for this post?

It is just as forbidden to use one's office to favor a specific religion as to disfavor it. Yet Sen. Sessions has adopted a very different stance toward Christianity than towards Islam. In 1998, he defended the actions of Alabama Judge Roy Moore in displaying the Ten Commandments in his courtroom. Indeed, he introduced a formal resolution in the Senate to support the display.²⁶ Such a display, as the courts have ruled, plainly violates the Establishment Clause. It links the administration of public justice with the tenets of a specific faith and thereby sends a message to the millions of Americans who do not share that faith that they are outsiders.²⁷ (An Alabama

²¹ 133 S. Ct. 2612 (2013).

²² Sharon LaFraniere & Matt Apuzzo, *Jeff Sessions, a Lifelong Outsider, Finds the Inside Track*, N.Y. TIMES (Jan. 8, 2017), <http://www.nytimes.com/2017/01/08/us/politics/jeff-sessions-attorney-general.html>.

²³ *North Carolina State Conference of NAACP v. McCrory*, 831 F.3d 204 (4th Cir. 2016).

²⁴ S. 1318 (2015) (nonbinding amendment from Sen. Leahy), *available at* <http://www.judiciary.senate.gov/imo/media/doc/Leahy2%20-%20ALB15F55.pdf>.

²⁵ Press Release, Sen. Jeff Sessions, Sessions Delivers Remarks in Opposition to Global 'Right to Migrate' Amendment (Dec. 10, 2015), <http://www.sessions.senate.gov/public/index.cfm/news-releases?ID=186AEDE2-B813-4741-A1B1-C3759DFDD2C5>.

²⁶ Press Release, Sen. Jeff Sessions, Senator Sessions Offers Resolution Defending Display of Ten Commandments (Apr. 2, 1998), <http://www.sessions.senate.gov/public/index.cfm/1998/4/senator-sessions-offers-resolution-defending-display-of-the-ten-commandments->

²⁷ *McCreary County v. American Civil Liberties Union*, 125 S. Ct. 2722 (2005).

judicial ethics committee subsequently removed Judge Moore from office for defying a court order to remove a monument of the Ten Commandments from the state courthouse). Here, too, one might ask, would Sen. Sessions support the display of an analogous list of “commandments” from Islam or any other religion? The Constitution demands religious neutrality from government officials. Sen. Sessions has failed that test. He should be asked whether he respects the separation of church and state and how his statement that Islam is a “toxic ideology” squares with his constitutional obligation to remain neutral toward particular religions.

3) Prosecutorial ethics

The Attorney General sits atop the most powerful prosecutors’ office in the nation. It is essential that anyone assuming that position have impeccable ethics. Yet Sen. Sessions’s involvement in a case of egregious prosecutorial misconduct when he was Attorney General of Alabama raises urgent questions about his fitness for the job. Working hand-in-glove with US Steel and its outside counsel, both of whom had made contemporaneous contributions to Sessions’s senatorial campaign, then-Attorney General Sessions’s office brought more than 200 criminal charges against TIECO, Inc., an equipment vendor, arising out of a business dispute with US Steel. Sen. Sessions’s office described the case as “of the most magnitude that the Attorney General’s office has undertaken in the last twenty-five years.”²⁸ Yet all 222 charges were eventually dismissed before trial, many for being baseless, others for prosecutorial misconduct. In a remarkable opinion, the Alabama state trial judge hearing the case concluded that “the misconduct of the Attorney General in this case far surpasses in both extensiveness and measure the totality of any prosecutorial misconduct ever previously presented to or witnessed by the Court.”²⁹

The court found that the “the prosecutorial misconduct is so pronounced and persistent that it permeates the entire atmosphere of this prosecution and warrants a dismissal of these cases.”³⁰ It also found the misconduct so pervasive that “this court can only conclude it is dealing with either intentional and deliberate misconduct or conduct so reckless and improper as to constitute conscious disregard for the lawful duties of the Attorney General and the integrity and dignity of this court and this Judge.”³¹

The misconduct perpetrated by the Attorney General’s office is breathtaking. According to the court, it included:

- 1) the Attorney General’s repeated refusals and failures to produce exculpatory evidence;

²⁸ Order and Opinion, *Alabama v. TIECO, Inc.*, Case Nos. CC-96-2961 (Circuit Ct. of Jefferson County, AL July 16, 1997), at 3-4.

²⁹ *Id.* at 2.

³⁰ *Id.*

³¹ *Id.*

- 2) the Attorney General's repeated denials of the very existence of exculpatory evidence subsequently discovered by the Defendants;
- 3) the flagrant disregard of the constitutional rights of those accused; and
- 4) the completely incredible and deceptive testimony of so many witnesses this Court treated as officers of the court (some of whom were either assistants or agents for the Attorney General).³²

Then-Attorney General Sessions's office conducted the investigation and brought the case in unusually close collaboration with US Steel. . The Attorney General's office inappropriately shared with US Steel and its outside counsel multiple documents that it obtained through the criminal process. The judge suggested that the Attorney General's office brought the case to aid US Steel in its private civil lawsuit against TIECO and rushed the case to indictment only after an ethics complaint was filed against Sessions. The state ethics commission found no ethics violation in July 1996, but one year later, all 222 charges in the case had been dismissed, many of them for egregious prosecutorial misconduct. The trial court's finding of prosecutorial misconduct thus post-dates the ethics commission's ruling. Notably, the Attorney General's office neither sought reconsideration of the prosecutorial misconduct decision nor filed an appeal, despite its damning indictment of the office.

Stephen Gillers, a professor of legal ethics at NYU Law School, has informed the committee in a letter dated January 6, 2017, that the decision dismissing the case "is the most scathing criticism of a prosecutorial office I have read in the nearly 40 years I have been teaching legal ethics."³³ More than 30 ethics professors share Professor Gillers's assessment, and have also filed letters with the committee.³⁴

The TIECO case, like the prosecution of voting rights activist Albert Turner, raises serious questions about Sessions's abuse of prosecutorial power. Both cases involved the

³² *Id.*

³³ Letter from Stephen Gillers, Prof. of Law, NYU School of Law, to Sen. Chuck Grassley and Sen. Dianne Feinstein (Jan 6, 2017).

³⁴ See Letter from Stephen Saltzburg et al. to Sen. Chuck Grassley and Sen. Dianne Feinstein (Jan 7, 2017); Letter from Cheryl Bader et al., to Sen. Chuck Grassley and Sen. Dianne Feinstein (Jan 9, 2017). Some have suggested that a subsequent decision of the U.S. Court of Appeals for the Eleventh Circuit in the related civil case between US Steel and TIECO undermines the findings of misconduct. See *United States Steel, LLC, v. TIECO, Inc.*, 261 F.3d 1275 (11th Cir. 2001). But as Prof. Gillers correctly explains in his letter, the Eleventh Circuit decision has no such effect. The court held merely that it was a legal error to admit the trial court's opinion and addendum as evidence in the civil case, because as hearsay it was legally presumed unreliable, and therefore its introduction was prejudicial, denying US Steel the opportunity to cross-examine the declarants. The Eleventh Circuit did not question Judge Garrett's findings or their factual basis, as that issue was not before them. It merely determined that its introduction was erroneous because it was very prejudicial to US Steel and denied it an opportunity to cross-examine its accusers. The only court that could have reviewed the Alabama state trial judge's findings would have been an Alabama state appellate court, but the Alabama District Attorney elected not to appeal.

filing of multiple charges that were so baseless that they were dismissed before trial. In both cases, prosecutorial authority may have been used for illegitimate purposes — for partisan gain in the Turner case and to aid campaign contributors in the TIECO case. And both cases ended in an utter and complete rebuff to the Attorney General’s office. The facts of these cases are complicated, and it is possible that Sen. Sessions can explain his actions. But at a minimum, in light of the power the Attorney General of the United States wields, the committee and the Senate should demand full disclosure from Sen. Sessions of all documents relating to both cases (including the related ethics investigation). Only an examination of the full record by the Committee and the full Senate can dispel the concerns that these cases raise on the record as it stands today.

4) Criminal justice, due process, and privacy rights

As Attorney General, Sen. Sessions would directly oversee the federal criminal justice system, and he would also play a leading role in ensuring that the states’ administration of criminal law respects the civil rights of all. In particular, the Justice Department’s Civil Rights Division investigates alleged patterns and practices of civil rights violations by state and local police. Where appropriate, it enters enforceable consent decrees to bring about reform. Such measures have been pivotal in protecting constitutional and civil rights in cities like Los Angeles, Cincinnati, New Orleans, and Ferguson, Missouri.

Yet Sen. Sessions has criticized such consent decrees as “dangerous” and an “end run around the democratic process.”³⁵ These decrees are neither dangerous nor anti-democratic. By definition, they are entered into only with the *consent* of elected officials, so they are as democratic as anything else that an elected official does. The real danger lies not in being obligated to obey our nation’s civil rights laws, but in allowing patterns and practices of civil rights violations to go unremedied.

Although Sen. Sessions supported legislation to eliminate prison rape and the disparity between crack and powder cocaine, more recently he was the leading opponent of the Sentencing Reform and Corrections Act, a bipartisan consensus bill to reduce overly harsh mandatory minimum sentences for nonviolent drug offenses. In Congress, the bill was supported by, among others, Republican Senators Charles Grassley, Mike Lee, and John Cornyn as well as House Speaker Paul Ryan. A coalition of conservative and liberal criminal justice organizations also supported the bill, as did the Major Cities Chief and National District Attorneys Associations. The bill was based on a consensus that our nation has relied too excessively on the criminal justice system to respond to a variety of social ills, overpopulating the nation’s prisons through the imposition of costly and overly harsh prison sentences that do not fit the crime. In opposing

³⁵ MICHAEL E. DEBOW, GARY J. PALMER & JOHN J. PARK, JR., ALABAMA POLICY INSTITUTE, CONSENT DECREES IN INSTITUTIONAL REFORM LITIGATION: STRATEGIES FOR STATE LEGISLATURES (2008), *available at* <http://www.alabamapolicy.org/wp-content/uploads/API-Research-Consent-Decrees.pdf>.

the bill, Sen. Sessions claimed, contrary to all the evidence, that crime was “rising at an alarming rate.”³⁶ In fact, crime in 2015 was at the lowest it had been in several decades and was not rising.³⁷

Sen. Sessions has been an ardent proponent of civil asset forfeiture laws, which empower the government to take people’s property without affording them basic due process and without establishing that they have committed any crime. Many innocent people have lost their homes and property because of this expansive and overbroad authority. As the Heritage Foundation has explained, “This means that police can seize your car, home, money, or valuables without ever having to charge you with a crime. There are many, many stories of innocent people being stripped of their money and property by law enforcement.”³⁸ *Washington Post* columnist George Will harshly criticized Sen. Sessions in a recent column for his support of unfair civil asset forfeiture laws and suggested that the Judiciary Committee should question Sen. Sessions about his zealous support of this unfair and often abused practice.³⁹

Sen. Sessions has also supported dragnet surveillance of Americans. When it was revealed that the National Security Agency was misusing a provision of the USA PATRIOT Act to collect in bulk the phone records of virtually every American, Congress overwhelmingly voted, on a bipartisan basis, to eliminate bulk collection with the full support of the intelligence community. Yet Sen. Sessions voted against that law, and claimed, without any evidentiary support, that the bulk collection program had identified terrorist plots and helped prevent attacks.⁴⁰ In fact, the Privacy and Civil Liberties Oversight Board had found, after examining the NSA program in detail, that the bulk collection program identified no actual terrorists and disrupted no terrorist plots.⁴¹

³⁶ Press Release, Sen. Jeff Sessions, Sessions: Don’t Weaken Criminal Law in Middle of Crime Wave (Oct. 13, 2015), <http://www.sessions.senate.gov/public/index.cfm/2015/10/sessions-don-t-weaken-criminal-law-in-middle-of-crime-wave>.

³⁷ See Ames C. Grawert, *Analysis: Sen. Jeff Sessions’s Record on Criminal Justice*, BRENNAN CEN. FOR JUSTICE, 2-3, (2017), <https://www.brennancenter.org/analysis/analysis-sen-jeff-sessions-record-criminal-justice>.

³⁸ *Civil Asset Forfeiture: 7 Things You Should Know*, HERITAGE FOUND. (Mar. 26, 2014), <http://www.heritage.org/research/reports/2014/03/civil-asset-forfeiture-7-things-you-should-know>.

³⁹ George Will, *The Very Bad Reason Sessions is “Very Unhappy,”* WASH. POST (Dec. 23, 2016), https://www.washingtonpost.com/opinions/the-very-bad-reason-jeff-sessions-is-veryunhappy/2016/12/23/213a3cb8-c86d-11e6-bf4b-2c064d32a4bf_story.html?utm_term=.dfb5b7637058;

see also Jennifer Rubin, *Fighting the Wrong Battle on Sessions*, WASH. POST, (Dec. 22, 2016), https://www.washingtonpost.com/blogs/rightturn/wp/2016/12/22/fighting-the-wrong-battle-on-sessions/?utm_term=.f8d499005278.

⁴⁰ Jeff Sessions, *Why Should Terrorists Be Harder to Investigate than Routine Criminals?*, NATIONAL REVIEW (May 20, 2015), <http://www.nationalreview.com/article/418675/dont-hamper-nsas-ability-stop-terrorist-attacks>.

⁴¹ PRIVACY AND CIVIL LIBERTIES OVERSIGHT BOARD, REPORT ON THE TELEPHONE RECORDS PROGRAM CONDUCTED UNDER SECTION 215 OF THE USA PATRIOT ACT AND ON THE OPERATIONS OF THE FOREIGN INTELLIGENCE SURVEILLANCE (2014), available at https://www.pclob.gov/library/215-Report_on_the_Telephone_Records_Program.pdf.

In short, Sen. Sessions has opposed bipartisan consensus reforms of the criminal justice system's most troubling features, including unduly harsh mandatory minimums for nonviolent offenses, the forfeiture of property without due process from entirely innocent individuals, and the dragnet suspicionless surveillance of law-abiding Americans. The Senate should ask whether someone so far outside the mainstream on criminal justice should be put in charge of the nation's most powerful law enforcement agency.

5) Equality for women and LGBT people

The Justice Department plays a central part in the safeguarding the rights of women and LGBT people. It is responsible for investigating and prosecuting hate crimes and civil rights violations and for enforcing the Violence Against Women Act (VAWA) and the Freedom of Access to Clinic Entrances Act (FACE). Yet Sen. Sessions's record reveals a fundamental failure to take seriously — or in some instances, even to recognize — discrimination against women and gays and lesbians. He denied that “grab[bing] women by the pussy,” as Donald Trump bragged he could do, constituted sexual assault, Sen. Sessions said “I don't characterize that as a sexual assault. I think that's a stretch.” If grabbing a woman by her genitals is not sexual assault in Sen. Sessions's mind, one wonders what would be.

Sen. Sessions also voted against reauthorization of the Violence Against Women Act⁴² and has condemned the Supreme Court's protection of women's constitutionally protected choice to terminate a pregnancy.⁴³ While the ACLU has long supported the right of anti-abortion activists to express their views, they cross the line when they use violence or brute force to block women from entering clinics that are established to provide them necessary and constitutionally protected medical care. Would Sen. Sessions, who has condemned *Roe v. Wade* and *Planned Parenthood of Southeastern Pennsylvania v. Casey*,⁴⁴ be a vigorous enforcer of laws that protect women's right to access abortion clinics?

Sen. Sessions has been equally hostile to the rights of LGBT people. He voted in favor of a constitutional ban on marriage equality. He voted against the repeal of “Don't Ask, Don't Tell,”⁴⁵ a change of course favored by the military because sexual orientation has no relevance to military service. He stated in 2009 that filling a Supreme Court vacancy with an openly gay nominee “would be a big concern that the American people might feel — might feel uneasy

⁴² 159 Cong. Rec. S616 (daily ed. Feb 12, 2013) (roll call vote no. 19), *available at* <https://www.congress.gov/crec/2013/02/12/CREC-2013-02-12-pt1-PgS613-2.pdf>.

⁴³ Press Release, Sen. Jeff Sessions, Partial-Birth Abortion ban Act of 1997 (May 15, 1997), <http://www.sessions.senate.gov/public/index.cfm/1997/5/partial-birth-abortion-ban-act-of-1997->.

⁴⁴ For Sen. Sessions's condemnation of both decisions, see Sen. Jeff Sessions, Speech on Reflections on Judicial Independence (Oct. 17, 1997).

⁴⁵ 156 Cong. Rec. S10,684 (daily ed. Dec. 18, 2010) (roll call vote no. 281) *available at* <https://www.congress.gov/crec/2010/12/18/CREC-2010-12-18.pdf>.

about.”⁴⁶ He has opposed extending anti-discrimination employment law to gays and lesbians.⁴⁷ And in voting against legislation that extended the hate crimes law to crimes motivated by gender, sexual orientation, or disability, Sessions argued that the law was unnecessary because women and LGBT people do not face serious discrimination. Sen. Sessions said, “today I am not sure women or people with different sexual orientations face that kind of discrimination. I just don’t see it.”⁴⁸ If the Attorney General does not see discrimination against women and LGBT people, how can he carry out his statutory responsibilities to enforce bans on such discrimination?

The Senator’s opposition to LGBT rights has a long history. When he was Attorney General of Alabama, Sen. Sessions tried to bar a state university from funding the activities of the Gay Lesbian Bisexual Alliance, a student group at the University of South Alabama, including sponsoring a conference. Sessions contended that supporting the group would violate a state law prohibiting public universities from funding groups promoting a “lifestyle or actions prohibited by the sodomy and sexual misconduct laws.”⁴⁹ When the students sued, a federal judge declared the state law unconstitutional because it penalized students for constitutionally protected speech.⁵⁰ The court found that the law was plainly unconstitutional under the authority of a recent Supreme Court decision treating the refusal to fund a Christian student group’s activities as unconstitutional viewpoint discrimination. Sen. Sessions was undeterred. “I intend to do everything I can to stop that conference,” he said, vowing to appeal.⁵¹ The district court’s decision was unanimously affirmed on appeal. Sessions’s deputy at the time, now federal judge William Pryor, saw the appeal as so baseless that he declined to participate. But Sessions proceeded nonetheless.

6) Torture and human rights.

Few legal prohibitions are more fundamental than the ban on torture and cruel, inhuman, and degrading treatment. It is a violation of the Constitution, a crime under federal law, a war crime under humanitarian law, and a violation of the Convention Against Torture and Other Cruel,

⁴⁶ Satyam Khanna, *Sessions Flip-Flops: Gay Supreme Court Nominee Would be a ‘Big Concern,’* THINKPROGRESS (May 8, 2009), <https://thinkprogress.org/sessions-flip-flops-gay-supreme-court-nominee-would-be-a-big-concern-266a1a6b4b3d#.odrv9w99t>.

⁴⁷ United States Senate, Vote 229, 13.

⁴⁸ *Hearing on the Matthew Shepard Hate Crimes Prevention Act of 2009 Before the S. Comm. On the Judiciary*, 111th Cong. (2009), available at <https://www.gpo.gov/fdsys/pkg/CHRG-111shrg56684/pdf/CHRG-111shrg56684.pdf>.

⁴⁹ The law provided that “No public funds or public facilities shall be used by any college or university to, directly or indirectly, sanction, recognize, or support the activities or existence of any organization or group that fosters or promotes a lifestyle or actions prohibited by the sodomy and sexual misconduct laws.” *Gay Lesbian Bisexual Alliance v. Sessions*, 917 F. Supp. 1548, 1549 (M.D. Ala. 1996)(quoting statute), *aff’d*, 110 F.3d 1543 (11th Cir. 1997).

⁵⁰ *Gay Lesbian Bisexual Alliance v. Sessions*, 917 F. Supp. at 1553-54.

⁵¹ *Id.*

Inhuman and Degrading Treatment and Punishment, which the United States helped draft and has signed and ratified. As Sen. John McCain said, the prohibition on torture is so fundamental to our legal system that “it is about who we are.”⁵²

In the wake of the terrorist attacks of September 11, 2001, the Justice Department, in a series of legal opinions now withdrawn and widely rejected, allowed the CIA to use “waterboarding,” a torture tactic, as well as other forms of torture and abuse against certain suspected Al Qaeda detainees. That “experiment” in torture was an unmitigated disaster, as the Senate Select Committee on Intelligence showed in excruciating detail. It was also blatantly illegal.

Yet Sen. Sessions has opposed legal reforms designed to forestall a repetition of such abuse and has praised a former Attorney General for refusing to commit to abjuring waterboarding. In 2005, Sen. Sessions supported Vice President Dick Cheney’s efforts to have the CIA exempted from an anti-torture amendment sponsored by Sen. John McCain to the Detainee Treatment Act.⁵³ That amendment was designed to underscore America’s commitment not to torture, by forbidding all federal officials from using cruel, inhuman, and degrading tactics in interrogations, no matter where they were acting and regardless of the nationality of the detainee. In the end, Sen. Sessions was one of only nine senators to vote against Sen. McCain’s anti-torture amendment.

In 2008, Sen. Sessions praised Attorney General Michael Mukasey for refusing to rule out waterboarding.¹⁰ And in 2015, he was one of only 21 senators who opposed a bipartisan amendment, sponsored by Sens. McCain and Feinstein, that required all federal agencies to interrogate detainees solely through tactics authorized in the Army Field Manual.⁵⁴

Given the centrality of the prohibition on torture and abuse to the rule of law, the Committee should ensure that Sen. Sessions is committed to abiding by and enforcing the bans on both torture and all forms of cruel, inhuman, and degrading treatment, and will abjure not only waterboarding, but all cruel, inhuman and degrading interrogation.

7) Respect for speech, association, and the defense of constitutional rights.

Finally, Sen. Sessions has shown a disturbing tendency to castigate those who defend constitutional rights with which he disagrees. The ACLU and NAACP, two of his targets, are two of the nation’s oldest and most established civil liberties and civil rights organizations. Sen.

⁵² Press Release, Sen. John McCain, Floor Statement by Senator John McCain on Senate Intelligence Committee Report on CIA Interrogation Methods (Dec. 19, 2014), <http://www.mccain.senate.gov/public/index.cfm/press-releases?ID=1a15e343-66b0-473f-b0c1-a58f984db996>.

⁵³ David Espo & Liz Sidoti, *Cheney Seeks CIA Exemption to Torture Ban*, WASH. POST (Nov. 5, 2005), <http://www.washingtonpost.com/wp-dyn/content/article/2005/11/05/AR2005110500410.html>.

⁵⁴ 161 Cong. Rec. S4182 (daily ed. June 16, 2015) (roll call vote no. 209), *available at* <https://www.congress.gov/crec/2015/06/16/CREC-2015-06-16-pt1-PgS4173.pdf>.

Sessions called both groups “un-American” and “communist-inspired.”⁵⁵ He also accused the groups of trying to “force civil rights down the throats of people who were trying to put problems behind them.”⁵⁶ He has criticized nominees to the bench for having the “ACLU gene,”⁵⁷ “ACLU DNA,”⁵⁸ and “ACLU Chromosome.”⁵⁹

To similar effect, at the outset of President Barack Obama’s term, Sen. Sessions criticized several appointees to the Justice Department, including the Solicitor General, for having engaged in constitutional litigation to vindicate the rights of alleged “enemy combatants” at Guantanamo. The Supreme Court held that the Guantanamo detainees were entitled to the constitutional protection of habeas corpus. Yet even though the lawyers singled out by Sen. Sessions were merely pursuing legal claims that the Constitution itself guaranteed, Sen. Sessions argued that this representation should be held against them. More recently, he condemned a judicial nominee because she had represented the family of Freddie Gray, a Black man who died while being transported in a police van without proper care.⁶⁰

The ACLU finds these statements concerning not because he has attacked us in particular, but because we need an Attorney General who respects the rights of citizens to band together to defend their constitutional rights and of lawyers to represent unpopular clients. Our system of justice depends on respecting the rights of all to have legal representation. We need an Attorney General for all Americans.

III. CONCLUSION

In our view, the nomination of Sen. Sessions to be Attorney General raises multiple serious questions about whether he is fit for the job. The Attorney General must uphold the laws equally for all, must exercise prosecutorial discretion responsibly and ethically, and has a special responsibility to enforce the civil rights laws, designed to protect those who have historically been victims of discrimination and continue to face discrimination today. Yet Sen. Sessions, in his statements and deeds, has shown insensitivity if not hostility to the rights of the most vulnerable. He has said that he does not believe that women and gays and lesbians suffer discrimination, that Islam is a “toxic ideology,” that we should use religion as a barrier to

⁵⁵ Michelle Ye Hee Lee, *Jeff Sessions’s Comments on Race: For the Record*, WASH. POST (Dec. 2, 2016), https://www.washingtonpost.com/news/fact-checker/wp/2016/12/02/jeff-sessionsss-comments-on-race-for-the-record/?utm_term=.a18d4cd03609.

⁵⁶ *Id.*

⁵⁷ Press Release, Sen. Leahy, *Leahy: Debate on Chen Nomination Long Overdue* (May 10, 2011), <https://www.leahy.senate.gov/press/leahy-debate-on-chen-nomination-long-overdue>.

⁵⁸ 156 Cong. Rec. S10,870 (daily ed. Dec. 21, 2010) (statement of Sen. Sessions), *available at* <https://www.congress.gov/crec/2010/12/21/CREC-2010-12-21-pt1-PgS10852-2.pdf>.

⁵⁹ Bob Egelko, *Senate Panel Oks Liu, Chen Nominations- Again*, S.F. GATE (Sept. 24, 2010), <http://www.sfgate.com/nation/article/Senate-panel-OKs-Liu-Chen-nominations-again-3251995.php>.

⁶⁰ Mary Clare Jalonick, *Senate Confirms Obama Judicial Nominee for Maryland*, A.P. (May 16, 2016), <http://bigstory.ap.org/article/6d2bb02ae384491f9c1ad4317aa2d35b/senate-confirms-obama-judicial-nominee-maryland>.

immigration, and that grabbing a woman by her genitals does not amount to sexual assault. He has abused his powers as a prosecutor to bring baseless charges against voting rights activists for getting out the vote, and he has collaborated with contributors to his senatorial campaign to use the criminal process, again baselessly, to aid those contributors in a private dispute with a competitor. His office was charged with engaging in the worst prosecutorial misconduct that an Alabama trial judge had ever witnessed, and Sen. Sessions's successor did not even deem that decision susceptible to appeal. In our view, these statements and actions compel the Senate to undertake the most thorough and deliberate investigation of Sen. Sessions's record before voting on his confirmation.