

January 2019

The Department of Injustice Under Jeff Sessions



ACLU

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INTRODUCTION

Jeff Sessions' tenure at the Department of Justice was a national disgrace. As attorney general, he was entrusted to enforce federal laws — including civil rights laws — and secure equal justice for all. Instead, Sessions systematically undermined our civil rights and liberties, dismantled legal protections for the vulnerable and persecuted, and politicized the Justice Department's powers in ways that threaten American democracy. When President Donald Trump and his political appointees elsewhere in his administration tried to do the same, often in violation of the Constitution, Sessions' Justice Department went into overdrive manufacturing legal and factual justifications on their behalf and defending the unjust actions in court.

Sessions was aided by Trump-approved appointees who often overruled career attorneys and staffers committed to a high level of neutral professionalism. Under Sessions' political leadership, these Trump appointees have inflicted significant damage in the past two years. Together they have threatened the First Amendment rights of the press and protesters, targeted the communities Trump disfavors through discriminatory policies and tactics, attacked the ability of ordinary citizens to vote and change their elected government, vindictively retaliated against perceived political opponents, and thwarted congressional oversight of the Justice Department's activities. Those actions do not merely subvert the mission and powers of the Justice Department. They strike at the heart of American democracy by weakening individual liberty and undermining constitutional checks and balances.

Sessions' record in the Trump administration, from Feb. 9, 2017, to Nov. 7, 2018, should come as no surprise. During his confirmation hearings, the ACLU¹ among others voiced strong warnings that his long career as a prosecutor and senator was already tainted by a record of race discrimination, virulent hostility towards a diverse array of marginalized and vulnerable communities, and an overreaching, corrupt view of government powers. Sessions brought that very mindset to the office of attorney general, before being forced out by the president for the one decision he most famously got right: allowing Special Counsel Robert Mueller's investigation implicating Trump's presidential campaign to move forward despite Trump's complaints.

The president announced on Dec. 7, 2018, that he intends to nominate William P. Barr to be the next attorney general. In the coming weeks and months, the Barr nomination and changes at the Justice Department will loom large on the national stage. The following list of actions by Sessions' "Department of Injustice" should serve as a blueprint for corrective actions that need to be taken.

VOTING RIGHTS

- Sessions' Justice Department repeatedly sided with restrictions that make it harder especially for people of color to vote, on top of refusing to enforce and expand voter protections.² DOJ litigators have gone so far as to switch sides at the last minute in active litigation before the Supreme Court.
 - In *Abbott v. Perez*, a Texas redistricting case, the Justice Department previously agreed that the state's gerrymandered legislative maps are racially discriminatory and designed to dilute minority voting power.³ Under Sessions, the department flipped positions⁴ as the issue was litigated up to the Supreme Court, which largely upheld Texas's discriminatory voting districts.⁵
 - In an Ohio voter purge case, *Husted v. A. Philip Randolph Institute*,⁶ which also reached the Supreme Court, the Justice Department switched sides after Trump came to power to defend purges from the state's voter rolls records that risk wrongful removals, reversing more than 20 years of its own precedent. Under both Republican and Democratic administrations, the Justice Department had long maintained that such practices violate the National Voter Registration Act; the Trump administration, however, pushed the Supreme Court to purge voters anyway, and the Supreme Court agreed.
 - In *Texas NAACP v. Steen*, the Justice Department reversed its previous legal position to defend a photo identification law that a lower court found intentionally discriminatory towards Black and Hispanic voters.⁷

Right after the Supreme Court upheld Ohio's voter purges, Sessions' Justice Department even sued Kentucky officials to remove voters from the state's voter registration rolls.⁸ It's worth noting that Trump's political appointees led the Justice Department's work on the Texas voter ID and Ohio voter purge cases, not the department's career attorneys.⁹

Going forward, the Justice Department should drop these destructive legal stances in federal lawsuits involving voting rights and steer its orientation back to enforcing legal protections for voters facing discriminatory barriers.

- Sessions' Justice Department sent out a broad inquiry to all 44 states covered by the National Voter Registration Act about their compliance with the statute, sparking concerns that Sessions was hunting for excuses to litigate and force voters off the voter rolls.¹⁰ Those alarms were compounded by the fact that on the same day, President Trump's now-defunct "Presidential

Advisory Commission on Election Integrity" wrote to all 50 states seeking the personal information of all registered voters.¹¹

In addition, federal prosecutors issued an unprecedented subpoena demanding an estimated 15 million voter record documents pertaining to North Carolinians on behalf of U.S. Immigration and Customs Enforcement, including completed ballots traceable to the voter. The large-scale fishing expedition raised alarms that it would violate voter privacy and dissuade citizens from casting their ballot.¹²

Then, shortly before Election Day in November 2018, Sessions deployed Justice Department staff to 35 jurisdictions in 19 states to monitor compliance with voting laws¹³ and issued public notices threatening maximum criminal prosecution. He did so while pushing a false message about supposedly rampant voter fraud, which is vanishingly rare in the U.S. That action was very likely an attempt to keep voters away from the polls, particularly voters of color.¹⁴

The new attorney general should bar such violations of voter privacy and attempts to dampen voter participation, and instead, strengthen departmental policy and procedures guarding against such actions.

IMMIGRANTS' RIGHTS

- Under the guise of national security,¹⁵ President Trump imposed a ban on people from several Muslim-majority countries coming to the United States through a series of Executive Orders. Acting Attorney General Sally Yates, who had spent three decades at the Justice Department, determined she could not defend Trump's Muslim ban because it was unlawful; she also concluded that defending it would have required the Justice Department to lie.¹⁶ Under Sessions, however, the Justice Department embraced Trump's attempts to implement his unconstitutional campaign promise of "a total and complete shutdown of all Muslims entering the United States" and vigorously defended it in court.¹⁷ As a result, millions of Muslims in the United States and worldwide have been and continue to be impacted by this discriminatory ban and denied the ability to be with their families — whether to celebrate milestones or mourn the loss of loved ones, seek life-saving health care, or pursue educational opportunities, among other things.

The Justice Department should rescind its embrace of the Muslim ban and acknowledge its unconstitutional and unjust nature and impact.

- As attorney general, Sessions conspired with Commerce Secretary Wilbur Ross to require everyone to reveal in the decennial U.S. Census survey whether or not they are U.S. citizens.¹⁸ This Jim Crow era question will not only sabotage the accuracy of the survey by scaring away immigrants and noncitizens from participation. It discriminates against states with large immigrant populations that may lose representation in Congress and crucial federal funding that is tied to census results.¹⁹ The commerce secretary added the citizenship question over the objections of nonpartisan career officials at the Census Bureau²⁰ and previous bureau directors under both Republican and Democratic administrations.²¹ Since then, the Justice Department has been defending the citizenship question in federal court.

The Justice Department should refuse to defend this change to the U.S. Census in federal court.

- Under Sessions, Justice Department officials also discussed ways of bypassing the legal guarantee that prevents the U.S. Census from sharing people's personal information with law enforcement agencies.²² Breaching the confidentiality of U.S. Census questionnaires in this

manner would be disastrous for the constitutionally-required census, as it risks stoking mass fears among the public about how the Trump administration might use their U.S. Census responses against them.

The attorney general should issue a clear and unequivocal disavowal of such a breach of the confidentiality of the U.S. Census as prohibited.

- Sessions implemented the Trump administration's notorious "zero tolerance" policy to pursue criminal charges against every person crossing the southern border without authorization,²³ including those who have a legal right to asylum because they are fleeing danger or persecution — and including those adults who came with their minor children. This policy — which was intended to send a message that would deter families from seeking asylum in the United States — resulted in the tragic and extended separation of thousands of children from their parents. While parents were placed in criminal detention to face trial, their children were sent to often faraway detention facilities, operated by the Department of Health and Human Services (HHS), to face deportation proceedings alone.²⁴ And even though those parents were usually quickly returned to ICE detention, the government failed to reunite them with their children.

As a result of public outcry and litigation, Trump retreated from the "zero tolerance" policy for families. But the administration continues to separate families,²⁵ as well as criminally prosecute migrants, including bona fide asylum seekers, who enter the country without inspection. Under current policy, U.S. attorneys are effectively prohibited from exercising their discretion *not* to pursue criminal charges against such individuals, even though they would be placed in civil deportation proceedings upon apprehension anyway. The policy diverts prosecutorial resources away from actual threats to public safety and wastes taxpayer dollars.²⁶ Federal incarceration costs alone for illegal entry and reentry have been estimated at \$1 billion annually, often lining the pockets of private prison corporations.

The Justice Department should end departmental support of this policy of criminally prosecuting asylum seekers and redirect federal prosecutors to focus on actual threats to public safety.

- After intense public backlash to the Trump administration's family separation policy, President Trump announced his intent to replace the practice of separating immigrant families with the practice of imprisoning them together, potentially indefinitely. In supporting this policy, Sessions' Justice Department came to his aid, working to end the *Flores* Settlement Agreement — a longstanding federal consent decree that prohibits the detention of immigrant children for more than 20 days.²⁷ Although a federal court rejected this attempted bid, the Department of Health and Human Services and the Department of Homeland Security later proposed new regulations to gut the *Flores* protections.²⁸

The Justice Department should cease its legal attacks on the Flores settlement.

- In 2018, the Justice Department, along with the Department of Homeland Security, developed and adopted a new regulation²⁹ aiming to ban asylum for those entering the United States at any place other than an official port of entry. Even prior to this new regulation, the Justice Department's criminalization of asylum seekers already violated due process and U.S. treaty obligations.³⁰ The new regulation violates the asylum law passed by Congress, which entitles people who fear persecution in their home countries to seek asylum regardless of how they entered the United States. Trump's attempted asylum ban has been temporarily enjoined by a federal court and the Supreme Court rejected the government's effort to stay the injunction.³¹ Thus, implementation of the asylum ban remains blocked pending litigation of its legality in the

courts.

The Justice Department should rescind the proposed regulations that would ban asylum for individuals who do not arrive at a port of entry.

- Exploiting the attorney general's direct authority over the immigration courts and their appellate entity, the Board of Immigration Appeals (BIA), Sessions "certified" decisions of the BIA to himself to push through systemic changes that limit legal relief for immigrants and ramp up the Trump administration's brutal deportation machine.³² His unusually frequent and aggressive use of the attorney general's self-certification powers was troubling in itself, but he invoked them to make sweeping changes, including his attempt to eliminate asylum for victims of domestic abuse and gang violence; elimination of a practice called "administrative closure" that enabled immigration judges to pause deportation proceedings on crowded dockets; and further restrictions on immigration judges' ability to dismiss removal proceedings or grant continuances, which allow immigrants and their counsel adequate time to prepare for court. Sessions also overturned a BIA precedent that gave immigrants a right to a full hearing on their asylum application.³³

*The new attorney general should reverse Sessions' anti-immigrant and anti-refugee rulings, as well as his overbroad invocation of the attorney general's certification authority. The Justice Department should also stop defending those decisions in court, including Sessions' ruling seeking to shut out asylum seekers fleeing domestic violence and gang persecution that was recently struck down by a federal district court in Washington.*³⁴

- The Justice Department imposed arbitrary and unreasonable caseload quotas on immigration judges for the first time despite the complexity and huge stakes of the work.³⁵ Such quotas are a direct assault on the due process rights of immigrants,³⁶ which will drastically shrink the available time for immigrants to find counsel, for their attorneys to present their claims, and for immigration judges to correctly adjudicate their cases.

The Justice Department should withdraw the caseload quotas on immigration judges.

- As part of the Trump administration's broader effort to close the door on immigrant children,³⁷ the Justice Department weakened its guidelines for immigration judges on how children should be treated in the courtroom. Among the changes are deletions of suggestions for conducting "child-sensitive questioning" towards children facing deportation proceedings.³⁸

The Justice Department should restore the protections for children facing immigration proceedings in the courtroom.

- Under Sessions, Justice Department lawyers litigated to block unaccompanied immigrant teens' access to abortion and to force them to carry their pregnancy to term against their will.³⁹ After the Justice Department lost its bid in court in this Jane Doe case, the department even petitioned the Supreme Court to punish the ACLU lawyers who represented Doe for not voluntarily making it easier for the Justice Department to block her abortion.⁴⁰

The Justice Department should refuse to defend blatantly unconstitutional attempts to ban abortion for people held by the federal government.

- Mirroring Sessions' own animosity towards the Deferred Action for Childhood Arrivals (DACA) program for immigrants brought to America as children, the Justice Department reversed itself to

attack DACA in a legal challenge.⁴¹ The department is also fighting in federal court to enable President Trump to end the program,⁴² going so far to circumvent the regular appellate process by petitioning the Supreme Court directly.⁴³

The Justice Department should restore its legal position affirming the constitutionality of the DACA program.

- The Justice Department is targeting U.S. citizens for denaturalization, according to a draft five-year strategy document created under Sessions' watch.⁴⁴ In *Maslenjak v. United States*, Justice Department attorneys even argued that the federal government has extraordinary prosecutorial powers to revoke Americans' citizenship over even trivial misstatements during their naturalization proceedings.⁴⁵

The process of becoming a U.S. citizen through naturalization is long and rigorous, including a long list of eligibility requirements. Along with citizenship comes the right to vote in federal elections and serve in certain offices as well as the knowledge that a citizen cannot be lawfully deported from or denied entry to the United States. Given the importance of citizenship and the arduous process it entails, the process of stripping individuals of citizenship, i.e., denaturalization, has always been a drastic measure that is only taken in the rarest of circumstances. But now the Trump administration is discarding long-standing legal norms and protections by launching a denaturalization operation to strip a large number of Americans of their citizenship, sending the message that no naturalized citizen is safe in America.

The Justice Department should cease filing denaturalizations except in the most egregious of circumstances and should instead treat all U.S. citizens the same — regardless of whether they were born here.

- Sessions crusaded against so-called "sanctuary cities" for their policies of welcoming immigrants into their communities and declining to divert local resources to aid the federal government's mass deportations. In carrying out his attacks on states and municipalities, the Justice Department threatened state and local governments with the coercive loss of federal funding⁴⁶ and subpoenas⁴⁷ and stalled the release of federal criminal justice funding to local governments.⁴⁸ Sessions also aided Texas in defending its anti-immigrant law, SB4,⁴⁹ and sued California over its sanctuary laws⁵⁰ — despite a nonpartisan career attorney telling him that no legal grounds exist for such a lawsuit against California.⁵¹

The Justice Department should cease its attacks on sanctuary jurisdictions in the courtroom and drop its misguided attempts to use federal funding to coerce localities into facilitating Trump's mass deportation agenda.

CRIMINAL JUSTICE

- Despite being the nation's chief law enforcement officer, Sessions opened just one investigation of systemic policing abuse during his tenure⁵² and dismissed efforts to seek justice for Black people killed during police encounters.⁵³ He also weakened federal oversight of police departments plagued by constitutional violations, corruption, gender-biased policing of domestic violence and sexual assault, and other misconduct — signaling early that the Justice Department would retreat from using court-enforceable consent decrees to hold law enforcement agencies accountable for violations of civil rights.⁵⁴ Sessions' actions in this regard included opposition to a consent decree to revamp the Chicago Police Department⁵⁵ and an unsuccessful bid to withdraw from the consent decree imposed on the Baltimore Police Department.⁵⁶ Then, as his

final move in office, Sessions restricted the Justice Department's ability to negotiate the reform agreements at all.⁵⁷

Additionally, the Justice Department's decision to refuse to participate in consent decrees reforming police departments is harming people with disabilities, including people of color with disabilities. For example, in January 2017, the Justice Department issued a report on its investigation into the Chicago Police Department which found a pattern of constitutional and statutory violations, including "unreasonable and repeated uses of force against individuals in mental health crisis."⁵⁸ But after the change of administration, the Justice Department refused to negotiate a consent decree with the city of Chicago. Community groups represented by the ACLU of Illinois, Equip for Equality, and additional legal organizations had to pursue independent litigation to force accountability. These pleadings identify additional individuals with disabilities who have been killed or seriously injured by the Chicago Police Department.⁵⁹ This enforcement work should be spearheaded by the federal government.

The Justice Department should once again support consent decrees to reform failing police departments.

- Sessions drastically changed the Collaborative Reform Initiative for Technical Assistance program within the Justice Department's Office of Community Oriented Policing Services (COPS), now using it to promote a failed drug war agenda instead of community policing.⁶⁰ The collaborative reform program had once helped struggling police departments, at their own request, clean up illegal or abusive practices like excessive use of force.⁶¹

The new attorney general should reverse Sessions' damaging changes to the Community Oriented Policing Services program.

- As attorney general, Sessions defended unconstitutional and racially biased "stop and frisk" practices⁶² and even insisted that law enforcement agencies should be allowed to revert back to those tactics.⁶³

The Justice Department should disavow unconstitutional and racially biased "stop and frisk" practices and discourage their use by law enforcement.

- Sessions encouraged and applauded the transfer of U.S. military weapons to local law enforcement,⁶⁴ even though police militarization can turn a nonviolent situation into a deadly one and erode public confidence in law enforcement.⁶⁵

The Justice Department should discourage the militarization of local police.

- Sessions restored the federal government's full use of civil asset forfeiture, which allows law enforcement to seize people's homes, cars, money, and other assets on the mere suspicion they are connected to a crime, even when they have not been convicted of any crime.⁶⁶ Sessions revived a federal practice known as "adoption," a loophole that was closed by former Attorney General Eric Holder, which allows local law enforcement to circumvent more restrictive state forfeiture laws by partnering with the federal government.⁶⁷

The Justice Department should close the "adoption" loophole and consider ending the practice of civil asset forfeiture.

- Sessions' Justice Department postponed implementation of the Death in Custody Reporting Act until 2020, despite its enactment in 2014.⁶⁸ Congress passed the Death in Custody Reporting Act, which requires all states and law enforcement agencies to report arrest-related deaths and other deaths in custody, in response to the national crisis of fatal police shootings.⁶⁹

The Justice Department should immediately implement the Death in Custody Reporting Act.

- As part of his efforts to resurrect the country's disastrous and failed "war on drugs"⁷⁰ that targeted people charged with low-level offenses, Sessions sought to reinstate federal prosecutions of marijuana users in states that have legalized it.⁷¹ He even instructed U.S. attorneys to proactively pursue the death penalty in drug-related prosecutions⁷² and directed federal prosecutors to pursue the most serious charges against defendants.⁷³

The new attorney general should rescind these instructions to U.S. attorneys and disavow any efforts to revive the destructive "war on drugs."

- By picking a fight with an ethics agency in Tennessee, the Justice Department sought to oppose the efforts of the state agency to hold federal prosecutors to high ethical standards to ensure fair trials. Earlier this year, the Tennessee Board of Professional Responsibility announced an ethics opinion that required federal prosecutors working in the state to disclose additional exculpatory information beyond the bare minimum required by the Constitution.⁷⁴ Instead of applauding this salutary rule, the Justice Department came out in strong opposition.

The Justice Department should support the Tennessee board's ethics opinion, not attack it.

- Sessions' Justice Department changed policies governing how federal prisoners are treated during and after incarceration in ways that undermine their chances of successful rehabilitation and reintegration. Specifically, the Federal Bureau of Prisons cut back its use of home confinement and transitional programs for formerly incarcerated people returning to the community⁷⁵ and ended some contracts with halfway houses.⁷⁶ The halfway houses still in use in the federal system are also no longer required to provide treatment for mental health and drug addiction. The Bureau of Prisons even unsuccessfully sought to limit incarcerated people's access to books to only specific prison-approved vendors — in some cases at a steep markup — which meant they could not receive books sent directly by friends and families, online retailers, or book clubs.⁷⁷

The Justice Department should reverse these counterproductive policy changes for the federal prison system.

- Sessions revoked an Obama administration policy to ultimately reduce reliance on the use of private prisons by the Justice Department.⁷⁸ If the Justice Department continues to rely on private prisons, it could result in the further privatization of what should be public functions and would allow private entities to unduly profit from incarceration.⁷⁹

The Justice Department should reinstate the prohibition on private prisons.

- In response to a national crisis of shootings, Sessions announced a plan for the Justice Department to divert more grant money to funding more police in schools, also known as "school resource officers."⁸⁰ The final report of President Trump's Federal Commission on School Safety, to which Sessions' Justice Department contributed, also extols the presence of police on campus.⁸¹ However, a heavier police presence on campus and in the classrooms could

actually make schools less safe and less welcoming for students of color and students with disabilities who are already disproportionately targeted for harsh punishment, even for minor infractions and disruptions. Unfortunately, the commission also recommended reversing guidance by the Justice and Education Departments to address racial disparities in school discipline, which will further exacerbate the problem and endanger millions of public school students.⁸²

The Justice Department should abandon its efforts to promote greater police presence in schools and reorient itself toward protecting students of color and students with disabilities.

- To the dismay of local leaders, the Justice Department ended federal oversight of the Juvenile Court of Memphis and Shelby County and the Shelby County Detention Center in Tennessee.⁸³ The now-abandoned agreement was originally set in place following a Justice Department investigation⁸⁴ that found that the juvenile court and its detention center were violating the children's constitutional rights and discriminating against Black children in particular.

The Justice Department should resume federal oversight of this juvenile court and detention center.

- In changes that more broadly undercut the juvenile justice system, under Sessions' authority the Justice Department's Office of Juvenile Justice and Delinquency Prevention (OJJDP) has shifted to a harshly punitive approach and reversed course on policies and programs intended to ensure equity and protect juveniles. The department has rolled back research efforts; withdrawn training manuals focused on reducing racial disparities; rescinded guidance materials on status offenses, juveniles in adult custody, and juvenile fines and fees; removed public information about racial disparities, girls in the juvenile justice system, and eliminating solitary confinement of youth; and through changes in its data collection mandates for local agencies, weakened federal oversight of states on their racial gaps in juvenile justice.⁸⁵ OJJDP has even removed references to "justice-involved youth"⁸⁶ from its public materials and instructed employees to use the stigmatizing term "offenders."⁸⁷

The Justice Department should reverse these harmful changes to the Office of Juvenile Justice and Delinquency Prevention.

DISABILITIES

- The Americans with Disabilities Act (ADA) ensures that people with disabilities are integrated into society rather than relegated to segregated places and restrictive institutions. The Justice Department had previously issued guidance applying this integration mandate under the ADA and the *Olmstead v. L.C.* ruling to workplaces, helping employers move workers out of isolated "sheltered workshops" rife with exploitation and abuse.⁸⁸ In December 2017, Sessions rescinded that *Olmstead* guidance⁸⁹ along with nine other technical assistance documents on the ADA.⁹⁰

*The Justice Department should reinstate the guidance documents and renew its previous vigorous enforcement of *Olmstead v. L.C.**

- People with disabilities continue to face systemic barriers throughout society. The Americans with Disabilities Act is an important tool to protect their rights to full access to the same things as their non-disabled counterparts. Unfortunately, in July 2017, the Justice Department filed a friend-of-the-court brief⁹¹ to the Supreme Court arguing that self-service machines did not constitute a public accommodation under Title III of the ADA, and thus did not need to use

technology accessible to people with disabilities. On Dec. 26, 2017, the Justice Department also withdrew four Advance Notices of Proposed Rulemaking issued by the Obama administration asking for feedback on making 911 emergency calls, websites, and health care equipment accessible to people with disabilities.⁹² This rollback of the Justice Department's previous work fighting for people with disabilities to have full access to society represents a national disgrace.

The Justice Department should stop undermining the Americans with Disabilities Act (ADA) and commit to enforcing the accessibility provisions of the ADA.

HEALTH CARE

- For women, LGBT people, people with disabilities, and racial and ethnic minority communities,⁹³ the Affordable Care Act (ACA) contains crucial protections, including insurance reforms to guarantee coverage despite pre-existing conditions and Section 1557⁹⁴ affirming the ban on health care discrimination on the basis of race, skin color, national origin, age, disability, or sex. Under Sessions, the Justice Department reversed itself on the constitutionality of key parts of the ACA,⁹⁵ abandoned its defense of Section 1557 against a court challenge,⁹⁶ and accepted a nationwide court order that rendered the department powerless to enforce the anti-discrimination protections.⁹⁷ Sessions' decision was dubious enough that career Justice Department attorneys withdrew from the litigation in protest,⁹⁸ only to be replaced by political appointees.⁹⁹

The Justice Department should reverse this approach and continue to defend and enforce the health care law in pending and future lawsuits.

RELIGIOUS LIBERTY

- Under Sessions, the Justice Department published new guidelines requiring all federal agencies to use a dangerously distorted interpretation of religious freedom laws¹⁰⁰ and created a new "task force"¹⁰¹ to implement them. The move opens the door to taxpayer-funded discrimination against LGBT people, women, and people of minority faiths. Moreover, Sessions issued changes¹⁰² to the U.S. Attorney Manual directing federal prosecutors to consult his new 20 "principles of religious liberty"¹⁰³ and to notify him about related lawsuits against the federal government.

The new attorney general should withdraw Sessions' guidelines and instructions for U.S. Attorneys and disband the so-called "Religious Liberty Task Force."

LGBT RIGHTS

- In an effort to strengthen the basic rights of transgender people, who face intense discrimination across different aspects of American life, the previous attorney general directed¹⁰⁴ the Justice Department — consistent with decades of legal developments — to treat workplace discrimination against transgender people as a violation of the sex discrimination ban in Title VII of the Civil Rights Act. The Justice Department reversed course under Sessions, advancing discriminatory legal arguments in pending cases¹⁰⁵ and essentially arguing that companies have free rein to discriminate against transgender workers.¹⁰⁶ Similarly, the Justice Department under Sessions argued in federal court that lesbian, gay, and bisexual individuals have no protection against workplace discrimination under Title VII.¹⁰⁷

Also, in a Supreme Court case, *Masterpiece Cakeshop, Ltd. v. Charlie Craig & David Mullins*,¹⁰⁸ Sessions' Justice Department endorsed the argument that businesses open to the public have a constitutional right to discriminate against LGBT people.¹⁰⁹ However, the First Amendment

enshrines the right to exercise one's religion and speech free from government interference; it does not entitle people to harm or discriminate against others in violation of another person's civil rights.

The Justice Department should revert to upholding and advancing anti-discrimination protections for LGBT people.

- Sessions has targeted transgender students in the classroom as well. The Justice and Education Departments revoked guidance to schools explaining how Title IX of the Education Amendments of 1972 protects transgender students from discrimination, including the right to use restrooms that are inconsistent with their gender identity.¹¹⁰

The Justice and Education Departments should reinstate the Title IX guidance.

- Sessions' Justice Department eliminated protections for transgender people in the federal prison system when it instituted a new policy mandating prison placements based on assigned sex at birth, except in rare cases.¹¹¹ That new policy puts transgender people in federal prison in significant danger and violates the bureau's obligations under the Prison Rape Elimination Act.

The Bureau of Prisons should reverse this new policy and commit to housing transgender prisoners safely, based on their individual needs.

- When the Trump White House tried to ban transgender people from serving in the U.S. military,¹¹² Sessions' Justice Department sought to have the legal challenge to this ban be dismissed.¹¹³ In November, the Justice Department urged the Supreme Court to take up the issue and to lift the injunctions that are preventing the administration from being able to enforce the ban.¹¹⁴

The Justice Department should drop its defense of this discriminatory and unconstitutional ban and uphold transgender Americans' ability to serve in the military.

CRIMINALIZATION OF POVERTY

- As part of a broader rollback by the Trump administration,¹¹⁵ the Justice Department rescinded guidance documents that supported state and local efforts¹¹⁶ to avoid criminalizing poverty and to ensure that poorer Americans can get a fair shake in our legal system. One document¹¹⁷ urged state and local courts to review their fines and fees policies to ensure compliance with "due process, equal protection and sound public policy" while another legal advisory¹¹⁸ focused specifically on juvenile courts.

The Justice Department should reinstate the guidance documents and renew a commitment to fixing the ways in which our legal system criminalizes poverty.

- Established in 2010, the Justice Department's Office for Access to Justice (ATJ) worked to improve access to indigent defense and legal aid. Under Sessions, the Justice Department downgraded ATJ's resources and staffing, effectively closing it¹¹⁹ at a time when there's a great need to support access to legal aid. In fact, as the Justice Department itself noted, poverty rates in the country indicate that more than 60 million Americans would qualify for free civil legal assistance.¹²⁰ Furthermore, in more than three-fourths of all civil trial cases in the country, at least one party is proceeding without legal counsel.¹²¹

The Justice Department should restore and support the Office for Access to Justice.

AFFIRMATIVE ACTION

- Led by Sessions, who has disparaged affirmative action as "a cause of irritation,"¹²² the Department of Justice along with the Department of Education reversed an Obama-era policy providing guidance to colleges and universities and to elementary and secondary schools on the voluntary consideration of race to achieve diversity.¹²³ In addition to abandoning that affirmative action guidance, the Justice Department filed a brief in support of plaintiffs suing Harvard University for allegedly discriminating against Asian-American applicants — a lawsuit that seeks the extreme remedy of prohibiting the university from considering race as part of a holistic review designed to achieve diversity across many factors.¹²⁴ The Justice Department also launched investigations into several elite universities' admissions practices,¹²⁵ threatening the future of diversity initiatives in these and other programs.

Moreover, the Justice Department sought to hire attorneys expressly for the purpose of attacking affirmative action in college admissions and structured the effort to be run by political appointees. In doing so, Sessions sought to circumvent nonpartisan career attorneys in the department's Civil Rights Division.¹²⁶

The Justice Department should recognize the importance of diversity in achieving its commitment to equitable educational opportunities as the foundation of citizenship, and the department itself should lead by example in its own personnel practices.

WORKERS' RIGHTS

- Recognizing the injustice of forcing workers to sign away their right to bring a class-action lawsuit against their employer, the Justice Department once held the view that such arbitration clauses in employment contracts are prohibited and unenforceable under federal law. In *NLRB v. Murphy Oil*, Sessions' Justice Department reversed that legal position and switched sides from protecting worker rights to defending powerful corporate interests.¹²⁷

The Justice Department should revert to its previous legal position of defending worker rights.

FREE PRESS AND PROTEST RIGHTS

- Although past administrations aggressively battled government leaks (such as the release of the Pentagon Papers and the Watergate scoops), Attorney General Sessions escalated the intimidation of reporters and their sources in key ways and launched a broad crackdown that threatens the free press, government accountability, and democracy as a whole. Sessions' Justice Department abandoned the Obama administration's pledge not to prosecute journalists for doing their jobs,¹²⁸ established a new unit inside the FBI for the sole purpose of targeting leaks,¹²⁹ and ordered a review of Justice Department policies for subpoenas of media organizations in criminal investigations.¹³⁰ In his first year alone, Sessions increased the number of federal investigations into government leaks by 800 percent, opening at least 27 investigations compared with about a dozen prosecutions for leaks in the entire history of the United States.¹³¹ In seizing the communications records of a reporter for The New York Times in one case, the Justice Department may have also violated its own standards.¹³²

The Justice Department should restore the pledge not to prosecute journalists for doing their jobs and strengthen internal protections for government whistleblowers, as well as set a stronger transparency policy in releasing department information to the public.

- In case the public wasn't convinced of Sessions' hostility toward a free and independent press, the Justice Department removed the section on press freedoms from its U.S. Attorneys' Manual.¹³³

The Justice Department should restore its focus and official statements on press freedoms in its manual for federal prosecutors.

- Until it finally dropped the case in late 2017, the Justice Department aggressively prosecuted Code Pink activist Desiree Ali-Fairooz for laughing out loud during Sessions' confirmation hearing.¹³⁴ The part that sparked the activist's laughter? Sen. Richard Shelby was testifying that Sessions' record of "treating all Americans equally under the law is clear and well-documented."¹³⁵

Under Sessions' watch, federal prosecutors also filed disproportionately harsh felony charges against Inauguration Day protesters, including charges that carry penalties of decades in prison.¹³⁶ On the day that Donald Trump was inaugurated, local police had deployed abusive tactics against people exercising their First Amendment right to protest and arrested hundreds, even though the vast majority were protesting peacefully. A jury found all defendants in the first criminal trial not guilty on all counts¹³⁷ and the Justice Department later dropped charges for most of the remaining defendants.¹³⁸

The Justice Department should avoid such prosecutions of Americans exercising their First Amendment rights.

- Even as racist crime and violent attacks against people of color intensify, the Justice Department is improperly scrutinizing and possibly surveilling Black activists. The FBI wrote an official internal report on the supposed existence of a "Black Identity Extremists" movement and branded it a dangerous threat against law enforcement, despite ample evidence discrediting the claims¹³⁹ and Sessions' inability to name a single African-American organization today that has violently targeted police officers.¹⁴⁰ The revelation reinforced concerns that the Trump administration continues to use unfounded claims of "threats" in order to target individuals, organizations, and their dissent, including civil disobedience.¹⁴¹

The Justice Department should retract this report, disclose all reports using the same or similar terminology, and conduct an internal assessment to ensure the FBI is not improperly profiling Black activists or any other community members based upon their political beliefs.

PRIVACY RIGHTS

- Sessions lobbied¹⁴² Congress to make permanent Title VII of the Foreign Intelligence Surveillance Act (FISA), which the ACLU strongly opposed because the federal government invokes Section 702¹⁴³ to engage in warrantless surveillance of people's electronic communications, including vast quantities of Americans' personal data. Ultimately, with the support of the Justice Department, Congress passed a bill to reauthorize Title VII. Although it did not make Title VII permanent, the bill contains language that could be exploited to engage in additional surveillance abuses.¹⁴⁴

The legal arguments from Sessions' Justice Department in litigation have been troubling as well. In the *Wikimedia v. NSA* case,¹⁴⁵ as a prime example, the Justice Department continued to defend the National Security Agency's "Upstream" mass surveillance program despite it violating the Fourth Amendment, First Amendment, and the statutory limits of Section 702 itself.¹⁴⁶ Sessions'

Justice Department also insisted on hiding the contents of a new policy, which was distributed to federal prosecutors in late 2016, for notifying Americans as statutorily required about government surveillance of their emails and phone calls under Section 702.¹⁴⁷ Although the Justice Department under previous attorneys general also fought to assert sweeping executive authorities and thwart government transparency, its push for greater and more easily-abused surveillance powers for the Trump presidency raises heightened human rights and democratic governance concerns.

The Justice Department should work with Congress to reform surveillance powers as part of upcoming debates on reauthorization of FISA provisions set to expire in 2019, including by supporting reforms to stop bulk surveillance, limit use of sensitive information collected without a warrant against Americans, and halt other surveillance abuses that threaten constitutional rights. The Justice Department should also reverse its troubling legal positions and come clean with the public on how the federal government is using FISA.

- Sessions' Justice Department supported the CLOUD act,¹⁴⁸ a version of which was recently enacted, that amended current law to allow the administration to enter into foreign agreements without Congress' approval. These agreements can permit foreign governments to obtain electronic content and wiretaps directly from U.S. technology companies without meeting U.S. standards or adhering to safeguards to protect human rights. These agreements may also permit foreign governments to share Americans' communications back to the Trump administration with few restrictions on usage. In short, the CLOUD Act represents a dramatic and dangerous change in our law, with effects to be felt across the globe.¹⁴⁹

The Justice Department should not enter into agreements that permit foreign governments to obtain content and wiretaps without meeting U.S. and human rights standards. (The Trump administration is actively negotiating CLOUD Act agreements with the British government.)¹⁵⁰

- In *Carpenter v. United States*,¹⁵¹ the Justice Department argued before the Supreme Court that when law enforcement officials want to obtain a person's cellphone location information, they are not required to obtain a warrant supported by probable cause as required by the Constitution. The Supreme Court rejected that position, recognizing that cell location data would enable "near perfect surveillance" by the government.¹⁵² The Justice Department's legal argument was all the more troubling because it could extend to any data generated by modern technologies and held by private companies.¹⁵³ Although the Justice Department took this legal position even prior to Sessions' tenure as attorney general, it is not yet clear how the current administration plans to apply the *Carpenter* decision.

*The Justice Department should publicly disclose how it is applying the *Carpenter* decision, especially given that we cannot rely on President Trump's administration to police itself. This guidance should make clear that federal officials must obtain a warrant when seeking cell-site or other sensitive information from third party providers.*

- With Sessions as attorney general, the FBI finalized a misguided rule it had proposed under the Obama administration that exempted its massive trove of people's biometric data — such as fingerprints, photos for face recognition, and iris patterns — from what limited privacy protections exist in federal law.¹⁵⁴ Touted by the FBI as the world's largest electronic repository of biometric and criminal history information, the Next Generation Information (NGI) system¹⁵⁵ is a powerful, intrusive surveillance tool ripe for abuse by the Trump administration as well as state and local police partners. Not only would such data combined with new technology likely worsen discriminatory policing disparities, there is also evidence that law enforcement has used

face recognition technology to target activists and protesters exercising their First Amendment freedoms.¹⁵⁶ And yet members of the American public can no longer invoke the Privacy Act to verify whether the NGI database contains their personal biometric records, let alone correct errors or raise certain legal challenges under the Act to vindicate their rights.

The Justice Department should reverse its decision to exempt the Next Generation Information (NGI) database from Privacy Act protections. In addition, it should publicly disclose basic usage information about the NGI system, including error rates, institute strong privacy protections, and establish transparent rules and audit procedures to prevent misuse and abuse of the biometric data.

SEPARATION OF POWERS

- The Justice Department's Office of Legal Counsel wrote an internal legal opinion¹⁵⁷ that would significantly curtail lawmakers' access to government information — and thus their ability to conduct oversight of the Trump administration — if those lawmakers are not members of the political party that controls Congress. Specifically, the Justice Department lawyers asserted that federal agencies can ignore individual lawmakers' requests for information, unless the requests are blessed by the full chamber of Congress, a committee, or a subcommittee.¹⁵⁸

The Justice Department should retract this legal opinion or issue a revised legal opinion affirming the legislative branch's access to information and ability to fulfill its constitutional duty to conduct oversight.

- Under the Constitution, Congress holds the authority to decide whether to take our country to war. Yet in April 2017 and again in April 2018, President Trump unilaterally launched military strikes against the Syrian government. The bombings violate fundamental legal constraints under domestic and international law on the executive use of force.¹⁵⁹ The Justice Department's Office of Legal Counsel crafted a legal memo to justify these illegal strikes, which the Trump Administration initially refused to disclose to the public or even in full to Congress.¹⁶⁰

The Justice Department should retract this legal opinion or issue a revised legal opinion on Congress's war-making authority.

POLITICIZED ANALYSIS AND PERSONNEL

- During Sessions' tenure, whistleblowers alleged that the Department of Justice and its Executive Office for Immigration Review (which encompasses the immigration court system) were engaging in illegal political discrimination when hiring immigration judges and members of the Board of Immigration Appeals (BIA).¹⁶¹

The Justice Department should conduct an internal investigation, publicly release its findings, and institute strong new measures to prevent such violations.

- The Justice Department co-authored with the Department of Homeland Security a fundamentally dishonest and shoddy report¹⁶² on the origins of terrorism in an attempt to fuel anti-immigrant sentiment and bolster President Trump's xenophobic agenda. Among other flaws, the report focuses on terrorism while ignoring domestic terrorism by native-born Americans¹⁶³ and cherry-picked only Muslim examples to showcase.¹⁶⁴ The Justice Department has refused to withdraw the document, despite admitting errors.¹⁶⁵

The Justice Department should correct the record by retracting the misleading joint report and

issuing an accurate one in its place, as well as disavow factual falsehoods repeated by the former attorney general.

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