Written Testimony of J. Gerald Hebert
On the Nomination of Jefferson Beauregard Sessions III
For Attorney General of the United States

January 9, 2016

Thank you Mr. Chairman, Ranking Member Feinstein, and members of the Committee. My name is J. Gerald Hebert. For the first twenty-one years of my legal career I practiced law as an attorney in the Civil Rights Division of the United States Department of Justice (DOJ), where I served as Acting Chief, Deputy Chief, and Senior Litigation Counsel in the Voting Section. I am currently the Director of the Voting Rights and Redistricting program at the Campaign Legal Center, a nonpartisan, nonprofit election law organization in Washington, D.C. I am also an Adjunct Professor of Law at the Georgetown University Law Center.

This testimony presents my views as to the nomination of Senator Jefferson Beauregard Sessions III to be the Attorney General of the United States, based on my personal experience with Mr. Sessions and my professional experience as a civil rights attorney for over forty years. In 1986, I testified before this Committee when it considered, and subsequently rejected, Mr. Sessions' nomination to the United States District Court for the Southern District of Alabama. I testified then that Mr. Sessions' personal interactions with me demonstrated a troubling tendency towards racial insensitivity. I stand by my 1986 testimony in its entirety, which was given to the best of my knowledge and belief. His actions in the interim have convinced me that Mr. Sessions has little respect for the civil rights laws he would be charged to enforce as Attorney General. **Since 1986, instead of demonstrating that he has taken seriously the criticisms that derailed his judicial nomination, Mr. Sessions has opposed the rights of minorities at every turn. It is not merely that Mr. Sessions is politically conservative—there are many conservatives I respect and whom I believe would make exemplary Attorneys General. It is that Mr. Sessions has shown himself to be dangerously outside the mainstream on the most basic issues of fairness and equal rights under law.**

My testimony proceeds in three parts. The first part relates the circumstances and substance of my 1986 testimony. The second explains that Mr. Sessions' record since his 1986 nomination has been remarkably hostile toward civil rights, and particularly toward the rights of minorities to vote on equal terms with whites. The third discusses Mr. Sessions' propensity to lie about or exaggerate his civil rights experience, in an effort to hide his damning record and mislead this Committee as it inquires into his fitness to enforce our nation's most precious civil rights protections.

I. The 1986 Hearings

I first encountered Mr. Sessions in 1981 when I was a young lawyer in DOJ's Civil Rights Division. At the time, Mr. Sessions was the new U.S. Attorney for Alabama. I met him while I was handling two major voting rights cases in Mobile (*Bolden v. City of*

Mobile and *Brown v. Board of School Commissioners of Mobile County*), and I relayed to him a rumor I had heard: a federal judge there had allegedly referred to a white civil rights lawyer as a "disgrace to his race" for representing black clients. Mr. Sessions responded: "Well, maybe he is." Five years later, that startling incident emerged again, after Mr. Sessions was nominated for a federal judgeship.

I became involved in Mr. Sessions' confirmation process when the American Bar Association contacted me to ask for background on Mr. Sessions, as was standard in those days for judicial confirmations. I told the ABA about conversations I had had with Mr. Sessions in which he referred to the NAACP and the American Civil Liberties Union as "un-American" and "Communist inspired." As he saw it, by fighting for racial equality, these groups were "trying to force civil rights down the throats of people who were trying to put problems behind them."

Shortly before the Sessions confirmation hearings began in March 1986, the leadership of the Civil Rights Division informed my DOJ supervisor, Paul Hancock, and me that the Senate Judiciary Committee had requested that we provide sworn testimony to one of its counsel, Mr. Reggie Govan. DOJ leadership directed us to do so and we did. At that meeting, which was held March 12, 1986, I reiterated to Mr. Govan the racially insensitive remarks that Mr. Sessions made to me. Those remarks, which I had reported earlier to the ABA, included Mr. Sessions' seeming agreement that a white civil rights lawyer was a "disgrace to his race."[1]

Mr. Sessions' confirmation hearings began the next day, March 13, 1986. The sworn statements I made to Mr. Govan were the focus of several of the Senators' questions that day. When I arrived to attend the hearing, Senator Jeremiah Denton of Alabama and a Senate staffer to Chairman Strom Thurmond took me into a back room. The testimony on Mr. Sessions was going awry, and they told me to get out there and repair the damage I had done to Mr. Sessions' nomination prospects—or my job would be in jeopardy.

Before the threats, I was conflicted about testifying. I knew Mr. Sessions pretty well from my time in Alabama. He and I had engaged in numerous conversations during my time in Mobile, especially in 1981-82 when I was handling two major voting rights trials in that city. He had allowed me to use space in the U.S. Attorneys' office in Mobile and was welcoming—he would meet with me to talk casually over a cup of coffee. On the one hand, I knew that my comments relaying his racially insensitive remarks could very well harm his chances of getting confirmed. But I also felt, as I do today, that it was my duty as a citizen to be forthright and honest about what I knew and about the remarks he made to me. Having my job threatened only strengthened my resolve.

Mr. Sessions disputed some of the testimony against him, including that he had called an African-American prosecutor who worked for him "boy" and told him to "be

[1] *Nomination of Jefferson B. Sessions III, to be U.S. District Judge for the Southern District of Alabama: Hearings Before the S. Comm. on the Judiciary*, 99th Cong. 103-107 (1986) [hereinafter *Sessions Nomination Hearings*] (statement of J. Gerald Hebert).

careful what you say to white folks." But he did not deny what I reported he said. Nor did he apologize for those comments, saying only: "I am loose with my tongue on occasion."[2] As I testified in 1986, just a few days before that hearing Mr. Sessions himself acknowledged to me in a phone conversation that he and I had had a number of conversations in his office.[3] During that call, he only explained his racially insensitive comments by remarking: "I have a tendency to pop off."[4] As noted above, I testified about that phone call and that remark in my 1986 deposition.[5] The Republican-controlled Judiciary Committee did not approve Mr. Sessions' nomination, making him only the second nominee in fifty years to be rejected by the Senate for a federal judgeship.

Now, thirty years after I originally testified about Mr. Sessions, I again feel compelled to provide testimony to this Committee about the man who has been nominated to be the federal government's top attorney, charged with enforcing our laws fairly and evenly and with protecting the civil rights of all Americans. I have little faith that he will do so.

II. Mr. Sessions' Post-1986 Record Proves That He Has Not Changed

The main charge that emerged from his 1986 confirmation hearings was that Mr. Sessions was a racist, a charge he vigorously denied in his testimony. One would expect that, in the thirty-plus years since, he would be able to point to examples where he had demonstrated a strong commitment to civil rights, if only to clear his name. In fact, he can point to few if any such examples.

My testimony today would be quite different if Mr. Sessions had shown over the last thirty years, through his deeds, that the statements he made to me in the 1980s were just stray remarks. I would love nothing more than to be able to tell you that the man I considered a friendly acquaintance thirty years ago has since proven himself to be a champion, or even a friend, for minorities in this country. But I simply cannot do that. Everything in Mr. Sessions' record since those 1986 hearings reinforces what was already clear three decades ago: **Jeff Sessions is a danger to civil rights**.

In my long career as a voting rights attorney, I have seen Mr. Sessions display consistent hostility toward minorities' right to vote. One glaring example of this hostility is Mr. Sessions' attitude toward the Voting Rights Act (VRA). In 1986, he expressed disagreement with DOJ's enforcement of the Voting Rights Act in four cases that we brought in the City of Mobile, Mobile County, Dallas County, and Marengo County. All four were challenges to at-large elections in jurisdictions where the governing bodies were all-white as a result of the dilution of black voting strength under the at-large method of election. Mr. Sessions expressed disagreement with DOJ's position in those cases. He believed they lacked merit. I testified to this in 1986.[6] He did not interfere with

[2] *Id.* at 30 (statement of Jefferson B. Sessions III).
[3] *Id.* at 116 (statement of J. Gerald Hebert).
[4] *Id.*
[5] *Id.*
[6] *Id.* at 97-98.

my handling of those cases. But as I explain below, while his office did provide administrative support to me and other DOJ lawyers in those cases (*e.g.*, giving us a key to the U.S. Attorneys' office so we could work weekends, permitting me to dictate a letter to his secretary on one occasion), he was not personally involved in any of the litigation in those four cases and played no role in them.

Mr. Sessions did vote to extend the Voting Rights Act (VRA) in 2006[7]—but it took no special courage to do so, as the extension passed the Senate 98 to 0.[8] Indeed, voting against the unanimously supported law had no political upside for Mr. Sessions. Therefore, his vote provides no insight into his true views of the VRA. The events of 2013, however, do. Mr. Sessions celebrated the Supreme Court's 2013 decision in *Shelby County v. Holder*[9] to cut the heart out of the Act by striking down the coverage formula that supported Section 5's preclearance regime.[10] He has since refused to consider updating the law.[11]

Mr. Sessions' opposition to the VRA was not solely based on his conception of federalism. He made a number of racially tone-deaf statements in reaction to the *Shelby County* ruling, which suggest a troublesome disregard for the ongoing struggles minorities face when trying to vote. He said, for instance, that the VRA "was passed in direct response to blatant voting rights denial based on the color of one's skin," but that "now if you go to Alabama, Georgia, North Carolina, people aren't being denied the vote because of the color of their skin."[12] This statement willfully ignores the extensive and recent history of racial discrimination in the voting laws passed by jurisdictions covered by Section 5—a history that continues to the present day.[13]

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[7] David Weigel, *Southern Republican Senators Happy That Supreme Court Designated Their States Not-Racist*, SLATE (June 23, 2013, 2:08 PM), http://www.slate.com/blogs/weigel/2013/06/25/southern_republican_senators_happy_that_supreme_court_designated_their_states.html.

[8] *See U.S. Senate Roll Call Votes 109th Congress - 2nd Session*, U.S. Senate (July 20, 2006), http://www.senate.gov/legislative/LIS/roll_call_lists/roll_call_vote_cfm.cfm?congress=109&session=2&vote=00212.

[9] 133 S. Ct. 2612 (2013).

[10] Weigel, *supra* note 7.

[11] Mary Troyan, *Sessions opposes update to Voting Rights Act*, Montgomery Advertiser (June 25, 2014, 2:10 PM), http://www.montgomeryadvertiser.com/story/news/2014/06/25/sessions-opposes-update-voting-rights-act/11364929.

[12] Weigel, *supra* note 7.

[13] *See, e.g.*, *Shelby Cty.*, 133 S. Ct. at 2640-41 (Ginsburg, J., dissenting) (listing a number of examples of racially charged voting changes stopped through Section 5 objections, and noting the "'avalanche of case studies of voting rights violations in the covered jurisdictions,' ranging from 'outright intimidation and violence against minority voters' to 'more subtle forms of voting rights deprivations'"); *N.C. St. Conf. of NAACP v. McCrory*, 831 F.3d 204, 214 (4th Cir. 2016) ("[T]he General Assembly enacted legislation that restricted voting and registration in five different ways, all of which disproportionately affected African Americans. . . . Although the new provisions target African Americans with almost surgical precision, they constitute inapt remedies for the problems assertedly justifying them and, in fact, impose cures for problems that did not exist."); *Veasey v. Abbott*, 830 F.3d 216, 234-41, 265 (5th Cir. 2016) (en banc) (holding that Texas's voter ID law has a discriminatory effect on African-American and Latino voters in violation of Section 2 of the VRA, and laying out the evidence upon which the district court could also make a finding of discriminatory intent); *id.* at 240 ("[I]n every redistricting cycle since 1970, Texas has been found to have violated the [Voting Rights Act] with racially gerrymandered districts."); *Texas v.*

In reaction to the Supreme Court's decision gutting a key provision of the Voting Rights Act, Mr. Sessions said that "Shelby County never had a history of denying the vote, certainly not now."[14] This was a rather bizarre claim to make, given Alabama's well-known, decades-long efforts to prevent African-Americans from voting. Indeed, the only reason Shelby County brought its challenge to the VRA in the first place was that "the Attorney General ha[d] recently objected to voting changes proposed from within the county," making it ineligible to bail out from Section 5 preclearance.[15] Since the VRA was enacted, "the Department [of Justice] ha[d] lodged objections to five proposed voting changes submitted by jurisdictions located wholly or partially within Shelby County."[16] In 2008, for instance, the City of Calera drew a redistricting plan and annexed a number of white areas, all designed to eliminate the one district that had elected an African-American to the city council.[17] DOJ objected to these voting changes as discriminatory, noting the City had failed to show that its redistricting plan was not free of a racially discriminatory effect *and intent*.[18] In light of that 2008 ruling and others, Mr. Sessions' claim that Shelby County never had a history of vote denial shows either great ignorance or willful disregard for the truth.

While falsely asserting that there is no history of voting discrimination in Shelby County, Mr. Sessions also claimed that "[i]t would be much more likely to have those things occur in Philadelphia, Chicago, or Boston."[19] He said that the only reason that more successful VRA lawsuits have occurred in areas covered by Section 5 is that

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United States, 887 F. Supp. 2d 133, 159 (D.D.C. 2012) (holding that Texas's 2011 district maps were enacted with discriminatory purpose), *vacated and remanded on other grounds*, 133 S. Ct. 2885 (2013); First Amended Complaint at 4-5, *Greater Birmingham Ministries v. Alabama*, Civil Action No. 2:15-cv02193-LSC (N.C. Ala. filed May 3, 2016) (alleging that Alabama's voter ID law was passed with a discriminatory purpose), http://www.naacpldf.org/files/case_issue/Greater%20Birmingham%20Ministries%20v.%20Alabama%20Amended%20Complaint.pdf; Kent Faulk, *Lawsuit: Current election system of Alabama appellate judges discriminates against blacks* ("As a result of the at-large voting for the judges and justices, no African American has ever served on the state's criminal and civil appellate courts and only three on the nine-member Alabama Supreme Court in the past 36 years . . . .").

[14] Weigel, *supra* note 7.

[15] *Shelby Cty.*, 133 S. Ct. at 2621.

[16] Shelby Cty. v. Holder, 811 F. Supp. 2d 424, 442 (D.D.C. 2011), *aff'd*, 679 F.3d 848 (D.C. Cir. 2012), *rev'd on other grounds*, 133 S. Ct. 2612 (2013).

[17] *Id.* at 443.

[18] Letter from Grace Chung Becker, Acting Ass't Att'y Gen., Civil Rights Div., U.S. Dep't of Justice, to Dan Head, at 1 (Aug. 25, 2008) ("I cannot conclude that the city has sustained its burden of showing that the proposed change does not have a discriminatory purpose or effect."), https://www.justice.gov/sites/default/files/crt/legacy/2014/05/30/l_080825.pdf. For an example of an objection letter that raises only the issue of discriminatory effect, see Letter from Wan J. Kim, Ass't Att'y Gen., Civil Rights Div., U.S. Dep't of Justice, to Troy King, Att'y Gen., State of Alabama, and John J. Park, Jr., Ass't Att'y Gen., State of Alabama, at 3 (Jan. 8, 2007) ("Under these circumstances, the State has failed to carry its burden of proof that the change is not retrogressive."), https://www.justice.gov/sites/default/files/crt/legacy/2014/05/30/AL-2020.pdf. Additionally, Shelby County was a defendant in a case that struck down Alabama's at-large elections for county commissioners as intentionally discriminatory. Shelby County continued to resist the suit after other counties were found liable, and eventually had to settle the case. *Shelby Cty.*, 811 F. Supp. 2d at 442-43.

[19] Weigel, *supra* note 7.

Section 5 "doesn't apply to inner-city Philadelphia."[20] Mr. Sessions cited no evidence that these cities are denying the right to vote based on skin color. But these statements suggest that Mr. Sessions is choosing to downplay the real history of voting discrimination in the covered jurisdictions.

Mr. Sessions' views on the VRA dovetail with his quixotic crusade against the unsubstantiated specter of in-person voter fraud. Overwhelming evidence confirms what logic already tells us: individuals do not risk criminal prosecution just to impersonate another individual in the hopes of casting one extra vote.[21] One prominent study found only 31 possible examples of in-person voter fraud in fourteen years, out of over one billion ballots cast.[22] Yet Mr. Sessions refuses to believe the facts. He has suggested that the Florida results in the 2000 presidential election may have been rigged, that "there is fraud still in America today," and that without strict voter photo ID requirements "you can go vote for someone, some other name that you know is not available to vote that day."[23] Asked about President-Elect Trump's assertion that Hillary Clinton would only be able to win Pennsylvania if there was "cheating," Mr. Sessions claimed that "there's cheating in every election."[24] He has been peculiarly fixated on the idea that non-citizens are illegally voting—even though many non-citizens could be deported for doing so and there is miniscule evidence of non-citizens actually voting[25]—and that strict voter photo ID laws are necessary to prevent this from occurring.[26]

Meanwhile, Mr. Sessions has said—again, in contradiction of all the evidence—that he simply "do[esn't] believe" that voter ID laws prevent anyone from voting.[27] Strict voter ID laws place a disproportionate burden on minorities, who are less likely to

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[20] *Id.*

[21] Sarah Childress, *Why Voter ID Laws Aren't Really about Fraud*, PBS: Frontline (Oct. 20, 2014), http://www.pbs.org/wgbh/frontline/article/why-voter-id-laws-arent-really-about-fraud; Associated Press, *Voter ID Laws Target Rarely Occurring Voter Fraud*, Fox News (Sept. 24, 2011), http://www.foxnews.com/politics/2011/09/24/voter-id-laws-target-rarely-occurring-voter-fraud.html.

[22] Justin Levitt, *A comprehensive investigation of voter impersonation finds 31 credible incidents out of one billion ballots cast*, Wash. Post (Aug. 6, 2014), https://www.washingtonpost.com/news/wonk/wp/2014/08/06/a-comprehensive-investigation-of-voter-impersonation-finds-31-credible-incidents-out-of-one-billion-ballots-cast/?tid=a_inl&utm_term=.0ebf64412371.

[23] Sam Reisman, *Republican Senator Says 2000 Election Could Have Been Rigged*, Mediaite (Aug. 9, 2016, 7:20 PM), http://www.mediaite.com/online/republican-senator-says-2000-election-could-have-been-rigged.

[24] Josh Feldman, *GOP Sen. Jeff Sessions Defends Trump: 'There's Cheating in Every Election,'* Mediaite (Aug. 13, 2016, 10:39 AM), http://www.mediaite.com/tv/gop-sen-jeff-sessions-defends-trump-theres-cheating-in-every-election.

[25] 8 U.S.C. § 1227(3)(D)(i); *see* sources cited *supra* notes 21-22.

[26] *See, e.g.*, *Senator Jeff Sessions, Questions for the Record: Thomas Perez* at 1-2, http://legaltimes.typepad.com/files/perez-qfrssessions.pdf; *Sessions Response to President Obama's Comments on Illegal Immigrants Voting in U.S.* (Nov. 6, 2016), http://www.sessions.senate.gov/public/index.cfm/news-releases?ID=A51DA0E8-D2B2-4776-90C6-2C80BCC16653.

[27] Fred Lucas, *Republican Senators Question Obama's Call for a National Voting Commission*, CNSNews (Feb. 13, 2013, 7:01 AM), http://www.cnsnews.com/news/article/republican-senators-question-obama-s-call-national-voting-commission-0.

possess or to be able to pay for and obtain the limited forms of ID such laws allow.[28] Voter ID laws have the potential to, and do in fact, prevent eligible voters from casting ballots.[29] This has been proven in a case I personally handled in Texas.[30] Yet Mr. Sessions ignores these facts because they do not fit his predetermined views, which itself calls into question his qualifications to be the nation's top law enforcement officer.

Mr. Sessions' statements and his past actions give every indication that he will move DOJ's focus away from cases of voting discrimination and other civil rights violations. Indeed, as Assistant U.S. Attorney Tom Figures testified, Mr. Sessions, while U.S. Attorney, said that he wished he did not have to take on *any* criminal civil rights cases.[31] Instead, his record suggests that he will spend taxpayer money on baseless witch-hunts against groups of which he disapproves. As U.S. Attorney, Mr. Sessions chose to expend his office's limited resources to prosecute three innocent African-American civil rights activists for voter fraud. There was no evidence of any wrongdoing and the so-called "Marion Three" were acquitted by a jury. But the case gave the African-American community the distinct impression that the U.S. Attorney was seeking to intimidate and suppress its voter registration efforts.[32] Mr. Sessions later demanded that DOJ prosecute Americans United for Separation of Church and State for supposed "intimidation" of religious voters, simply because the group reminded tax-exempt religious organizations that they are prohibited under federal law from engaging in partisan politics.[33] He has also held a decades-long animosity toward the American Civil Liberties Union. As I testified in 1986, then-U.S. Attorney Sessions called the ACLU and the NAACP "un-American" and "Communist inspired."[34] More recently, he has attacked President Obama's judicial nominees for having what he calls "ACLU DNA" or the "ACLU chromosome."[35] He doesn't appear to have come very far from the days when he thought

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[28] *See, e.g.*, *N.C. St. Conf. of NAACP v. McCrory*, 831 F.3d 204, 230 (4th Cir. 2016) (noting, in the context of North Carolina bill imposing strict photo ID requirements and restricting other voting mechanisms, "that 'African Americans disproportionately used' the removed voting mechanisms and disproportionately lacked DMV-issued photo ID"); Zoltan Hajnal et al., *Voter Identification Laws and the Suppression of Minority Votes* 15-19 (working paper) (finding significant negative effects on minority and immigrant turnout from strict ID laws), http://pages.ucsd.edu/~zhajnal/page5/documents/voterIDhajnaletal.pdf.

[29] *See, e.g.*, Veasey v. Abbott, 830 F.3d 216, 254-56 (5th Cir. 2016) (en banc) (discussing plaintiffs who could not vote or faced significant barriers to voting due to Texas's voter ID law and its implementation); Keesha Gaskins & Sundeep Iyer, The Challenge of Obtaining Voter Identification 1, Brennan Ctr. for Just. (2012), http://www.brennancenter.org/sites/default/files/legacy/Democracy/VRE/Challenge_of_Obtaining_Voter_ID.pdf.

[30] *See Veasey*, 830 F.3d at 254-56.

[31] *Sessions Nomination Hearings*, *supra* note 1, at 330 (statement of Thomas Figures)

[32] Mary Troyan & Brian Lyman, *Black Belt voter fraud case in Alabama shaped Sen. Jeff Sessions' career*, USA Today (Nov. 18, 2016, 5:50 PM), http://www.usatoday.com/story/news/politics/2016/11/18/black-belt-voter-fraud-case-alabama-shaped-sen-jeff-sessions-career/94088186.

[33] Jeremy Reading, *Senators ask Justice Department to investigate church-state group*, First Amendment Center (Aug. 2, 1999), http://www.firstamendmentcenter.org/senators-ask-justice-department-to-investigate-church-state-group.

[34] *Sessions Nomination Hearings*, *supra* note 1, at 106 (statement of J. Gerald Hebert).

[35] Ryan J. Reilly, *Jeff Sessions Rants Against Judicial Nominees With 'ACLU DNA,'* Talking Points Memo (Dec. 21, 2010, 7:25 PM), http://talkingpointsmemo.com/muckraker/jeff-sessions-rants-against-judicial-nominees-with-aclu-dna-video.

the ACLU was "un-American," choosing to use ACLU as a pejorative adjective in describing some judicial nominees. It is unacceptable that Mr. Sessions would bring to DOJ this tendency to lash out at—and even try to prosecute—groups that seek to defend civil liberties.

These voting rights issues are not isolated from other concerns about Jeff Sessions' record. I have already noted Mr. Sessions' concerns about non-citizen voting. Those beliefs are of a piece with his hardline stance on immigration[36] and his more general negative opinion of many immigrants, regardless of their legal status.[37] The Senator has also fought against the bipartisan trend, in this body and elsewhere, toward eliminating our draconian sentencing laws and byzantine felon disenfranchisement statutes, both of which have a far-outsized impact on minority communities. Mr. Sessions supports laws that prevent felons from voting—sometimes for the rest of their lives—and criticized Justice Sotomayor for having written as an appeals court judge that those laws are subject to the Voting Rights Act.[38] (The Senator's criticisms of then-Judge Sotomayor were based on a misreading of her dissenting opinion in *Hayden v. Pataki*.[39])At the same time, Mr. Sessions has opposed efforts to reduce mandatory minimums for or decriminalize nonviolent drug offenses, thereby ensuring that millions more individuals will be stripped of their voting rights.[40]

Mr. Sessions has opposed efforts to ensure equal protection of the law for women, voting against giving women equal pay and against reauthorizing the Violence Against

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[36] Matthew Boyle, *Sen. Jeff Sessions: McCaul Bill Breaks Republican Promise to Voters on Immigration*, Breitbart (Jan. 20, 2015) (calling Sessions "arguably the intellectual leader of the national movement against immigration amnesty"), http://www.breitbart.com/big-government/2015/01/20/sen-jeff-sessions-explains-mccauls-new-border-bill-fails-to-adequately-fix-immigration-issues; Jordan Fabian, *Jeff Sessions Wants to Single-Handedly Crush Immigration Reform*, ABC News (June 3, 2013), http://abcnews.go.com/ABC_Univision/Politics/jeff-sessions-kill-immigration-reform-bill-thing/story?id=19311727.

[37] Jonathan Weisman, *Senator Tries to Run Out the Clock on Immigration*, N.Y. Times (June 17, 2013) ("[I]n a May 2006 floor speech, . . . [Sessions] declared, 'Fundamentally, almost no one coming from the Dominican Republic to the United States is coming because they have a skill that would benefit us and that would indicate their likely success in our society.'"), http://www.nytimes.com/2013/06/18/us/politics/in-round-3-immigration-bill-faces-sessions-who-won-rounds-1-and-2.html.

[38] *Sessions Speaks to Senate About Sotomayor Concerns* (June 23, 2009), http://www.sessions.senate.gov/public/index.cfm/floor-statements?ID=125C2CC3-96F3-6E17-2008-6CC1ED5B9A71.

[39] *See* Judith E. Schaeffer, *So Senator Sessions Doesn't Want a Judge Who Follows the Law?*, Huffington Post (July 25, 2009, 5:12 AM), http://www.huffingtonpost.com/judith-e-schaeffer/so-senator-sessions-doesn_b_220101.html.

[40] Christopher Ingraham, *Trump's pick for attorney general: 'Good people don't smoke marijuana,'* Wash. Post (Nov. 18, 2016), https://www.washingtonpost.com/news/wonk/wp/2016/11/18/trumps-pick-for-attorney-general-good-people-dont-smoke-marijuana/?utm_term=.2b614b0021c4; Mary Clare Jalonick, Associated Press, *Nonviolent drug offenders could be eligible for shorter prison sentences under Senate bill*, U.S. News & World Rep. (Oct. 22, 2015, 6:15 PM), http://www.usnews.com/news/politics/articles/2015/10/22/senate-bill-could-cut-nonviolent-drug-offenders-sentences; Kerry Picket, *Sessions On Obama Commuting Felons' Sentences: 'President Playing A Dangerous Game,'* Daily Caller (Aug. 5, 2016, 3:53 PM), http://dailycaller.com/2016/08/05/sessions-on-obama-commuting-felons-sentences-president-playing-a-dangerous-game/#ixzz4UzvKw92f.

Women Act.[41] He has opposed efforts to ensure equal protection of the law for LGBT Americans, voting against the Matthew Shepard and James Byrd Jr. Hate Crimes Prevention Act and supporting a constitutional amendment to ban same-sex marriage.[42] He has opposed efforts to ensure equal protection of the law for impoverished and disabled Americans, fighting as Alabama Attorney General to stop poor school districts from getting the funding they needed to teach their children.[43] For his entire career, Mr. Sessions has shown a disturbing hostility toward the rights of those who are different from himself. I cannot support him to lead our nation's Department of Justice.

III. Mr. Sessions Has Exaggerated and Outright Lied About His Civil Rights Record

Mr. Sessions' most recent actions, specifically the misleading statements he made to this Committee about his record on civil rights, also demonstrate his unsuitability for the office of Attorney General. To be blunt: Mr. Sessions has lied about his civil rights record in an attempt to portray himself as a civil rights champion and to head off legitimate criticism about his record both before and after this Committee rejected his nomination to a federal judgeship. In so doing, he has repeatedly taken credit for work that he did not do and exaggerated the role he played in significant civil rights victories. Finally, he has failed to address legitimate concerns about his application of prosecutorial discretion, by omitting from the record a history of allegations of prosecutorial misconduct. I realize these are serious accusations, but they are supported by facts of which I have personal knowledge. This Committee should not countenance a nominee's false claims in order to gain Committee approval.

In the questionnaire Mr. Sessions filed to support his confirmation as Attorney General, he listed three voting rights cases and one school desegregation case among the ten most significant cases he claims to have litigated.[44] I can categorically state that Mr. Sessions had no substantive involvement in any of these cases. Attorneys in the Civil Rights Division at DOJ handled all four cases, and each one was litigated during my DOJ tenure (which spanned from 1973-1994). This practice of Division attorneys in D.C.

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[41] *S. 181 (111th): Lilly Ledbetter Fair Pay Act of 2009*, GovTrack (Jan. 22, 2009), https://www.govtrack.us/congress/votes/111-2009/s14; *U.S. Senate Roll Call Votes 113th Congress - 1st Session*, U.S. Senate (Feb. 12, 2013), http://www.senate.gov/legislative/LIS/roll_call_lists/roll_call_vote_cfm.cfm?congress=113&session=1&vote=00019.

[42] German Lopez, *Here are the members of Congress who voted against protecting gay people from hate crimes*, Vox (June 13, 2016, 3:50 PM), http://www.vox.com/2016/6/12/11912076/orlando-florida-mass-shooting-gay-hate-crime-law; *U.S. Senate Roll Call Votes 109th Congress - 2nd Session*, U.S. Senate (June 7, 2006), http://www.senate.gov/legislative/LIS/roll_call_lists/roll_call_vote_cfm.cfm?congress=109&session=2&vote=00163.

[43] Thomas J. Sugrue, Op-Ed, *Jeff Sessions' Other Civil Rights Problem*, N.Y. Times (Nov. 21, 2016), http://www.nytimes.com/2016/11/21/opinion/jeff-sessions-other-civil-rights-problem.html.

[44] Jefferson Beauregard Sessions III, *U.S. Senate Committee on the Judiciary: Questionnaire for Non-Judicial Nominees* 14-29 (2016), https://www.judiciary.senate.gov/imo/media/doc/Sessions%20SJC%20Questionnaire%20F.pdf [hereinafter *2016 Questionnaire*].

handling all of the legal proceedings existed throughout the time I was at DOJ. It is my understanding that the practice continues to this day, and is followed in all voting rights and school desegregation cases brought by the Department. Indeed, the Civil Rights Division was formed in 1957 because U.S. Attorneys in the Deep South could not and would not vigorously enforce laws prohibiting racial segregation and discrimination. While it is customary for the local U.S. Attorney to sign the initial complaint, that usually ends the U.S. Attorney's role in the lawsuit. U.S. Attorneys, like Mr. Sessions at the time, play virtually no role in the litigation after the filing of the complaint. Civil Rights Division attorneys and their supervisors take the lead on investigating claims, decide which cases to bring and where to bring them, and then litigate the cases from beginning to end. Let me re-emphasize that once the complaint is filed, Civil Rights Division attorneys typically handle all of the proceedings in the case, drafting all legal documents and sending them to the clerk of the U.S. District Court for filing. The U.S. Attorney (or his or her office) doesn't review the legal filings before they are made. In nearly all court filings, the name of the U.S. Attorney is placed on the document by Civil Rights Division attorneys. Again, that was the standard practice throughout my legal career (1973-1994). Placing the name of the U.S. Attorney on all briefs, motions, and other legal documents is a mere formality that indicates neither any substantive involvement in the litigation nor even any review of the document itself.

Two of the four cases Mr. Sessions claims credit for, *United States v. Dallas County Commission* and *United States v. Marengo County Commission*, were cases I litigated personally, either from their beginning or on remand at the trial level. Both cases were initially filed before Mr. Sessions was even appointed U.S. Attorney, meaning that he would not have signed the complaint to launch either lawsuit. I describe each case below, my personal involvement, and Mr. Sessions' non-involvement.

United States v. Dallas County Commission.

This was a lawsuit brought by DOJ in 1979 challenging the at-large method of electing the Dallas County Commission and the Dallas County School Board. Selma is the county seat of Dallas County. Although blacks constituted nearly half of the population in the County, the governing bodies of each were all-white. This was because the at-large system, when combined with severe patterns of racially polarized voting in the County and other factors, led to the systematic dilution of black voting strength. Black-supported candidates would run in the at-large elections, but were always defeated by white bloc voting.

I served as the lead attorney in the *Dallas County* case, working with several other less experienced lawyers in the Civil Rights Division. The case was actively litigated from 1979 to the late 1980s. Depositions and active discovery ensued, followed by a trial (DOJ lost) and then an appeal (DOJ prevailed). The case dragged on until the late 1980s, largely due to the recalcitrance of the federal district court judge. There were numerous hearings held in the case, which was litigated in the federal courthouse in Selma, Alabama. In those days, the U.S. Attorney for the Southern District of Alabama had a room in the federal courthouse down the hall from the courtroom on the second floor, but

it was not staffed and we used it primarily to interview witnesses and to make phone calls. We filed motions and briefs in the case and again, as was standard practice in the Civil Rights Division, we placed the name of the U.S. Attorney (Mr. Sessions) on all our filings in the case. Mr. Sessions did not review any of those filings before we filed them, nor did he make any edits or suggestions about any of them. He was largely unaware of the filings, as was typical of U.S. Attorneys in those days: they simply did not participate in voting rights cases. He played absolutely no role in any of the Dallas County proceedings. Indeed, despite my numerous appearances in the federal courthouse in Selma from 1979-1994, I never saw Mr. Sessions there.

Mr. Sessions' questionnaire to this Committee also states with regard to this case the following: "Along with the ACLU, my office continued to support the extensive litigation and appeals . . . ."[45] Mr. Sessions' office did not work with the ACLU in the *Dallas County* case. The ACLU's sole role in the case was as appellate counsel for a group of voters who sought to intervene in the case during the remedial phase. That intervention was denied, and the ACLU attorney handled the appeal of the order denying intervention. *All* contacts with the ACLU counsel in that case were made by me personally.

I can only recall one matter in which I contacted Mr. Sessions regarding the *Dallas County* case. A witness in the case provided false testimony at the trial, and the facts showed he knowingly did so. I discussed with Mr. Sessions a possible investigation and prosecution for perjury, and I provided him with the trial testimony and other documents that I believed he would need to review the matter. To my knowledge, there was no follow-up by Mr. Sessions or his office about this matter. That is the extent of what I can recall about the matter without looking at DOJ records.

United States v. Marengo County Commission.

Like the *Dallas County* case, this was a challenge to the at-large method of electing the Marengo County Commission and Marengo County School Board. Like Dallas County, both governing bodies were all-white despite the presence of a substantial black population in the County. The case was first brought by DOJ in 1978.

I was not involved in this case when it was first filed in 1978, but I later served as lead attorney. Again, although Mr. Sessions lists this case in his questionnaire as among his most significant ten cases (along with *Dallas County*), he played no role in that litigation. Here is what happened.

Private plaintiffs sued Marengo County in 1977 alleging the at-large election system diluted black voting strength. DOJ filed its lawsuit making the same substantive allegations in August 1978. The cases were immediately consolidated. A trial was held in the Selma federal courthouse in October 23-25, 1978, and again on January 4, 1979. The trial court, the same recalcitrant judge that was involved in the *Dallas County* case, entered judgment for the defendants in April 1979.

[45] *Id.* at 24.

The United States appealed the 1979 decision. Meanwhile, the U.S. Supreme Court decided C*ity of Mobile v. Bolden*, 446 U.S. 55 (1980). Thereafter, the Court of Appeals, upon motion of the United States, vacated the district court judgment and remanded for further proceedings, including additional evidence as appropriate in light of *Bolden*.

While the case was pending on remand, the Fifth Circuit decided *Lodge v. Buxton*, 639 F.2d 1358 (5th Cir.1981), a challenge to at-large elections in Burke County, Georgia. Following that decision, on July 30, 1981, the district court again ordered judgment for the defendants. (I believe my involvement in the Marengo County case may have started in 1981 due to a dispute between the federal judge and the trial team that handled the case in 1978-79.) The U.S. once again appealed and the Eleventh Circuit granted the government's motion to hold the appeal in abeyance pending the U.S. Supreme Court's review of *Lodge v. Buxton*, which became *Rogers v. Lodge* in the U.S. Supreme Court.

Thereafter, in 1984, the Eleventh Circuit decided the appeal in *U.S. v. Marengo County Comm'n* and rendered a decision favorable to the United States and private plaintiffs. 731 F.2d 1546 (11th Cir. 1984). The Court of Appeals held that Marengo County's at-large election system diluted black voting strength.

In August of 1984, I appeared as lead counsel for the United States in the *Marengo County* case in a post-remand evidentiary hearing held in Selma. The United States sought a preliminary injunction enjoining the September 1984 elections in Marengo County, which the trial court granted. A second hearing was held in early 1985. Mr. Sessions did not participate in either of those hearings. In September 1985, the district court ruled in favor of the United States and private plaintiffs and ordered the county defendants to develop a remedy of single-member districts for electing members to the governing bodies in Marengo County. *Clark v. Marengo County*, 623 F. Supp. 33 (S.D. Ala. 1985).

The district court held another hearing in July 1986 on the proposed remedy of single-member district plans. Mr. Sessions took no part in and played no role in this hearing. The district court ordered a remedial plan into effect in September 1986, although it issued a "preclusion" that same day noting its "dissent" from having to order a single-member district plan into effect, stating: "The appellate courts have apparently concluded that the Constitution has been amended in proper form to authorize the federal government's intervention in the state election process. So be it." *U.S. v. Marengo County Comm'n*, 643 F. Supp. 232, 232-33 (S.D. Ala. 1986).

As noted above, Mr. Sessions has submitted responses to a questionnaire to this Committee asking him to "[d]escribe the ten (10) most significant litigated cases which you personally handled[.]" Notably, in 1986, Mr. Sessions filled out a similar questionnaire, and had to provide the same information about his most important cases.[46]

[46] Jefferson Beauregard Sessions III, *U.S. Senate Committee on the Judiciary: Questionnaire for Judicial Nominees* 9-18 (1986) [hereinafter *1986 Questionnaire*].

Yet he listed none of the civil rights cases he now touts, even though all of those cases either were in progress or had reached a decision by 1986.[47] Instead, in his 1986 responses to the questionnaire, he chose to highlight his criminal prosecutions.[48] Further, in both the 1986 questionnaire and in hearings before this Committee, Mr. Sessions indicated that he only discussed civil rights cases with DOJ attorneys when they came to Mobile to get him to sign complaints.[49] He also said that he did not try any civil cases himself while U.S. Attorney, focusing instead on criminal prosecutions.[50] Indeed, he admitted that it was Assistant U.S. Attorney Tom Figures who handled all of the office's civil rights cases.[51] It therefore makes sense that his 1986 questionnaire included so many criminal cases and no civil rights matters. And it renders even more suspect his recent efforts to claim his colleagues' civil rights experience as his own. **I can state with absolute certainty that Mr. Sessions did not participate personally in either the *Dallas County* case or the *Marengo County* case, both of which he has listed in his 2016 questionnaire.**[52]

It is not just this Committee that Mr. Sessions has willfully misled about his record on civil rights. Mr. Sessions has proudly and publically touted his prosecution of members of the Ku Klux Klan for the 1981 murder of Michael Donald. In 2009 he told Mark Hemingway of the *Weekly Standard*: "I prosecuted the head of the Klan for murdering somebody, and I insisted the Klansman be given the death penalty. When I became attorney general years later, I handled that appeal and ensured that he was, in fact, executed."[53] At best, this is an overstatement of Mr. Sessions' role in the litigation, and another troubling example of taking credit for others' work. While his statements to this Committee about the matter are more circumspect, his claim to have "personally handled" the litigation and his description of his role are similarly self-aggrandizing.

Again, in his response to the questionnaire, Mr. Sessions lists the prosecution of Klansman Henry Hays as among the top ten litigation matters which he *personally* handled.[54] Yet his response makes clear that he actually declined to prosecute Hays,

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[47] *Id.*
[48] *Id.*
[49] *See id.* at 7; *Sessions Nomination Hearings*, *supra* note 1, at 31-32.
[50] *See 1986 Questionnaire*, *supra* note 46, at 7-8; *Sessions Nomination Hearings*, *supra* note 1, at 10.
[51] *See Sessions Nomination Hearings*, *supra* note 1, at 32.
[52] Based on information I have reviewed, I also believe Mr. Sessions played no role in two other civil rights cases listed in his questionnaire: *United States v. Conecuh County*, and *Davis v. Board of School Commissioners of Mobile County*. *See 2016 Questionnaire*, *supra* note 44, at 16-19. Mr. Joseph Rich, a former DOJ attorney and colleague of mine at DOJ, has provided testimony to this Committee on Mr. Sessions' non-involvement in the *Davis* school desegregation case. And the *Conecuh County* case was handled by our DOJ offices in the same standard way all voting rights cases were handled: Mr. Sessions would have signed the complaint but would not have been involved in the case thereafter. All post-complaint proceedings would be handled by the Civil Rights Division in Washington, DC. That accounts for the fact Mr. Session's name appears on the complaint filed in 1983 but not on the consent decree that resolved the case in 1984.
[53] Mark Hemingway, *In Alabama, Jeff Sessions Desegregated Schools and Got the Death Penalty for KKK Murderer*, Weekly Standard (Nov. 18, 2016, 12:25 PM), http://www.weeklystandard.com/in-alabama-jeff-sessions-desegregated-schools-and-got-the-death-penalty-for-kkk-murderer-updated/article/2005461.
[54] *2016 Questionnaire*, *supra* note 44, at 28-29.

insisting that he be prosecuted in state court.[55] Instead, Mr. Sessions describes his involvement as "working to solve the murder."[56] It is clear, however, that Mr. Sessions' role in the Hays prosecution was limited to ensuring the state District Attorney had access to federal investigative support.[57] I do not dispute that Mr. Sessions likely played an important role in granting the State access to investigative resources it otherwise would not have had.

The federal investigation itself, however, was driven by Assistant U.S. Attorney Tom Figures, who convinced the FBI not to close the case and to prosecute Hays' co-defendant, James (Tiger) Knowles, on federal civil rights charges.[58] This is consistent with Mr. Sessions' testimony from 1986 that Mr. Figures handled all civil rights cases.[59] It is also consistent with the fact that Mr. Sessions did not list the Hays prosecution case in his response to the 1986 questionnaire, despite Hays having been convicted in 1984.[60] In fact, Mr. Figures testified at the 1986 hearing that while Mr. Sessions never explicitly obstructed his pursuit of the Michael Donald case, he did attempt to persuade Mr. Figures to drop the case.[61] Mr. Figures testified that Mr. Sessions repeatedly referred to the Michael Donald case as "a waste of time" and indicated that he would not assign Mr. Figures to try the case if he was successful in bringing it to trial.[62] Significantly, it was also while discussing the investigation with Mr. Figures and other lawyers in the U.S Attorney's office that Mr. Sessions stated he thought the Klan was "OK" until he discovered they smoked marijuana.[63] As a result of Mr. Figures' perseverance, and the cooperation of the FBI in a second investigation, Knowles confessed, pled guilty to violating Michael Donald's civil rights, and testified against Hays in state court—evidence which led to Hays' conviction in 1984.[64]

Mr. Sessions also stated to the *Weekly Standard* that he handled Hays' appeal as Attorney General of Alabama.[65] However, he had no involvement at all in Mr. Hays' direct appeal of his conviction, which was affirmed by the Alabama Supreme Court in 1986.[66] Rather, as his questionnaire response makes clear, Mr. Sessions only got involved "later" as Attorney General of Alabama, defending against a *habeas corpus* petition filed

[55] *Id.* at 28.
[56] *Id.*
[57] Christian Jennings, *Former Mobile District Attorney Defends Jeff Sessions*, Local 15 TV (Nov. 21, 2016), http://local15tv.com/news/local/former-mobile-district-attorney-defends-jeff-sessions (describing Sessions' role as facilitating the state's access to the "investigative power of the FBI and the power of the federal grand jury.").
[58] Jesse Kornbluth, *The Woman Who Beat the Klan*, N.Y. Times (Nov. 1, 1987), http://www.nytimes.com/1987/11/01/magazine/the-woman-who-beat-the-klan.html.
[59] *Sessions Nomination Hearings*, *supra* note 1, at 32.
[60] *1986 Questionnaire*, *supra* note 46, at 9-18.
[61] *Sessions Nomination Hearings*, *supra* note 1, at 311.
[62] *Id.*
[63] *Id.* at 303.
[64] Kornbluth, *supra* note 58.
[65] Hemingway, *supra* note 53.
[66] Kendal Weaver, *Court Restores Death Sentence Against Klansman in Slaying of Black*, Associated Press (Aug. 26, 1986, 4:24 PM), http://www.apnewsarchive.com/1986/Court-Restores-Death-Sentence-Against-Klansman-In-Slaying-Of-Black/id-1baa110362e50e4ccee3ab5b95c55824.

by Mr. Hays.[67] Mr. Sessions was not elected Alabama Attorney General until 1994, and did not take office until 1995. The litigation over Mr. Hays' *habeas* petition concluded in 1996, ten years after Mr. Hays' lost his direct appeal.[68]

In listing the ten most significant pieces of litigation that he personally handled, Mr. Sessions has included four cases in which he had no substantive role and one case in which his role was significantly overstated. Not only does this raise questions about the accuracy of the questionnaire Mr. Sessions has presented to this Committee, but it conveniently provides Mr. Sessions with a shield against legitimate questions generated by his actual record on civil rights, as described above. Finally, it allows Mr. Sessions to fill his ten-case quota without referencing other significant pieces of litigation he handled, including one in which an Alabama judge forcefully called into question Mr. Sessions' application of prosecutorial discretion.

As has been widely reported, in 1997 Mr. Sessions prosecuted an Alabama company, Tieco, Inc., after a competitor alleged that Tieco had cheated its customers.[69] An Alabama Circuit Court judge found that, "even having been given every benefit of the doubt, 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 this court."[70] The court further concluded that Mr. Sessions had engaged in 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."[71]

Mr. Sessions claimed to the press that the allegations were unfounded.[72] Yet his failure to raise it on his questionnaire, even to dispute it, raises questions about his forthrightness to this Committee, particularly in light of an ongoing pattern of omission in his responses to the questionnaire. For example, while Mr. Sessions does disclose his involvement in the *United States v. Albert Turner* case (the "Marion Three"),[73] he fails to discuss similar allegations of prosecutorial misconduct and abuse of prosecutorial discretion resulting from his decision to prosecute civil rights activists for voter fraud. The ability to appropriately apply prosecutorial discretion in a fair and nondiscriminatory fashion is a necessary minimum qualification for Attorney General. It is troubling that Mr. Sessions, who understands better than most the exacting inquiry demanded by this Committee into the qualifications of candidates that come before it, avoids rather than confronts instances where his own discretion has been called into question.

Mr. Sessions' response to this Committee regarding the significant litigation he has personally handled over the course of his career presents a troubling picture. He has

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[67] *2016 Questionnaire*, *supra* note 44, at 28.
[68] *See*, *Henry F. Hays v. Alabama*, 85 F.3d 1492 (11th Cir. 1996), *cert denied*, 117 S.Ct. 1262 (1997).
[69] See, e.g., Drew Griffin et al., *Jeff Sessions' office accused of prosecutorial misconduct in the '90s*, CNN (Dec. 21, 2016, 2:16 PM), http://www.cnn.com/2016/12/21/politics/jeff-sessions-prosecutorial-misconduct.
[70] *Id.*
[71] *Id.*
[72] *Id.*
[73] *See supra* Part II.

provided false information about personally handling four cases in which, at most, his name appeared on court filings as a result of formalities undertaken by the United States Department of Justice. He exaggerated his role in the prosecution of a Ku Klux Klan member for the murder of a black teenager. In so doing he has attempted to deflect legitimate questions about his civil rights record. Finally, Mr. Sessions has similarly attempted to deflect questions about a history of allegations of prosecutorial misconduct leveled against him by failing to disclose and confront those allegations before this Committee.

Conclusion

Three decades ago, I testified before this Committee about several troubling statements that Jeff Sessions made to me during his time as U.S. Attorney. Since then, I have watched as his actions confirmed my worst rather than my best suspicions about his character. Mr. Sessions' history of racial insensitivity, his disdain for civil rights and voting rights, and his belated attempt to paint himself as a civil rights hero by taking credit for others' work, all demonstrate that he is unqualified to be Attorney General of the United States.