



**United States' Compliance with the
International Covenant on Civil and Political Rights**

**American Civil Liberties Union
Suggested List of Issues Prior to Reporting to Country Report Task Force on the
United States**

**125th Session of the Human Rights Committee, Geneva
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Table of Contents

Introduction.....	3
Use of Force and Militarization of the U.S. Mexico Border	5
Extraterritorial Use of Lethal Force	10
U.S. Foreign Intelligence Surveillance	14
Solitary Confinement	20
Death Penalty	24
Annex – ACLU Report: The Department <i>of</i> Injustice Under Jeff Sessions	29

Introduction

The American Civil Liberties Union (ACLU) is honored to submit a list of suggested issues and questions to be considered by the U.N. Human Rights Committee prior to the 4th U.S. periodic report. The Committee's consideration of United States compliance with the International Covenant on Civil and Political Rights (ICCPR) comes at a critical time of grave civil liberties and human rights violations committed by the Trump administration.

The Trump administration's actions and policies have made it clear that the U.S. is no longer interested in being a global champion of human rights. The Trump administration has not only violated the U.S. Constitution and civil rights laws, but it has also taken unprecedented steps to disengage the United States from international bodies and undermine the very global system of human rights which was built in the wake of the horrors of the Holocaust and crimes against humanity committed during World War II.

The world has now witnessed the human costs of President Trump's self-defeating "America First" and isolationist policies: discriminatory Muslim ban, the inhumanity of family separation, the ruined lives from the repeal of the Deferred Action for Childhood Arrivals (DACA) program, reviving the racist 'war on drugs', the illegal restrictions on asylum rights as well as the suffering caused by abusive immigration policies and militarization of the U.S.-Mexico border. By pushing xenophobic policies that defy international law, the Trump administration is pitting the United States against the very system of multilateralism that our country worked so hard to create in the years after World War II. This system was designed to benefit the entire world — including the U.S. — by promoting peace, security, and human rights while deterring authoritarianism and combating impunity.

In the past six months alone, the Trump administration has threatened to prosecute judges and prosecutors of the International Criminal Court, withdrawn from the U.N. Human Rights Council, threatened to cut funding to the Office of the United Nations High Commissioner for Human Rights, severed cooperation with U.N. experts including bashing the U.N. Expert on Human Rights and Extreme Poverty for publishing a report on the state of poverty in the United States.

The ICCPR and other human rights treaties (most of which the United States has yet to ratify) offer a blueprint to creating a more peaceful and equitable world and global society. From protecting the rights to life, liberty, and security of individuals; the right of persecuted individuals to seek asylum on our safe shores; the right to freedom of expression even when one's views are in disagreement with that of the president; the right of all children to an equal quality education; the right to be treated equally regardless of race, religion, gender, national origin, disability or sexual orientation; and the right to be free from torture, abuse and inhumane treatment, among others.

This brief submission is focused only on five issues: 1) The Militarization of the U.S.-Mexico Border; 2) Extraterrestrial Use of Force; 3) National Security Agency Surveillance; 4) Solitary Confinement; and the 5) Death Penalty.

We are also attaching as an annex, a new [report](#) by the ACLU on the U.S. Justice Department under the tenure of Attorney General Jeff Session who resigned on November 7, 2018. The report will provide additional information to the Committee on the way the Trump administration has systematically undermined 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 and violate international human rights obligations.

Under Jeff Sessions' leadership, the Justice Department defended and manufactured legal and factual justifications on behalf the Trump administration that have inflicted significant damage in the past two years and violated bedrock principles of the ICCPR. They have violated and threatened the First Amendment rights of the press and protesters, targeted the communities Trump disfavors through discriminatory policies and tactics including migrants, racial and religious minorities, women, and LGBTQ people, 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 human rights and undermining constitutional checks and balances. As we make this submission, President Trump is manufacturing another crisis at the U.S.-Mexico border, threatening to declare a national emergency to build his inhumane and ineffective wall and escalate human rights violations in the name of protecting U.S. sovereignty and national security.

We urge the U.N. Human Rights Committee to expedite the review of the United States and allocate adequate time and resources to hold the United States accountable to its treaty and other human rights obligations.

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Use of Force and Militarization of the U.S. Mexico Border

I. Issue Summary

Since the early 1990s, the United States has institutionalized a “prevention through deterrence” strategy to curb unauthorized migration across the border with Mexico. The creation of the Department of Homeland Security (DHS) after 9/11 accelerated the government’s operations on the U.S.-Mexico border. U.S. Customs and Border Protection (CBP), a division of DHS, grew in size and scope under the Bush and Obama administrations, gaining additional powers and hiring thousands of new personnel despite a “shocking” pattern of serious misconduct among its officers, including child abuse, sexual assault, poor medical treatment, excessive punishment, and murder.¹ The number of Border Patrol agents more than doubled between fiscal year 2000 and 2011, and by the year President Trump took office, CBP reported 19,437 Border Patrol agents on staff nationwide.²

The deployment of military troops to the U.S.-Mexico border dates back to the Mexican-American war of 1846 and extended to tactics of the Obama Administration, deployments of National Guard troops that lacked transparency and justification. In 2014, Texas Governor, Rick Perry, deployed 1,000 Texas National Guard troops to the Rio Grande Valley in South Texas in a political stunt surrounding the humanitarian crisis of unaccompanied minors crossing the border, taking valuable resources away from an appropriate humanitarian response. On April 4, 2018, President Trump announced the deployment of U.S. military troops to the border until his border wall was constructed. The next day Trump signed a memo to deploy between 2,000 and 4,000 National Guard troops to the southwest border. Most recently, President Trump sent an additional 5,900 military troops to the Southwest border just prior to the November 2018 midterm election.³

The lack of transparency, accountability, and a culture of cruelty within Customs and Border Protection has long been punctuated by impunity for the agency’s use of excessive force and commitment to policies that cause migrant deaths. In 2014, CBP rejected changes to its use-of-force policies recommended by law-enforcement experts and refused to release those recommendations publicly.⁴ A government review also concluded that many CBP agents do not understand the use-of-force policies. Most recently, the Trump Administration has coupled ongoing unaddressed concerns around CBP’s use of force policies with attempts to grant military personnel authority to use force, including deadly force, in “defense” of federal agents at ports of entry.

II. Border Walls

Border walls have long been a pawn in enforcement-focused immigration policy, under the guise of necessary security measures. Part of the early strategy around border walls was to push migrants into more dangerous crossings as a means of deterrence. Then-INS Commissioner Doris Meissner called the deadly terrain an “ally.” Total border apprehensions decreased from a high of over 1.6 million in 2000 to over 500,000 in 2009 and have held largely steady since. According to the Migration Policy Institute, the number of individuals apprehended at the U.S.-Mexico border in 2018 further declined to about 400,000.⁵

Although the number of border crossers has dramatically fallen, migrant deaths have continued to increase.⁶ A study by the U.S. Government Accountability Office (GAO) found that between 2006 and 2017, when most border walls and barriers were deployed, migrant death rates in the Tucson sector rose over 400%, while death rates in the Laredo skyrocketed by nearly 700 percent.⁷ For border communities, the ongoing construction and expansion of border barriers signifies a distinct form of border militarization. Barriers divide historic communities, cut off access to private lands, devastate the environment and wildlife, and cause the deaths of thousands of migrants.

III. Current U.S. Government Policy or Practice

As government forces, most notably CBP, have gained more authority, personnel, and resources at the U.S.-Mexico border, the result has been an increase in civil rights and liberties violations. In a recent show of force, CBP officers used tear gas on a crowd of largely peaceful migrants seeking asylum, a cruel and unnecessary escalation that violated U.S. obligations under international human rights law to process asylum seekers.⁸ Most recently on January 1, 2019, CBP officers fired smoke, pepper spray, and tear gas at 150 migrants attempting to cross the border near Tijuana.⁹ CBP's dismal practice of racial profiling means that people of color face a disproportionate level of constitutional violations along the Southwest border.¹⁰

According to the Southern Border Communities Coalition, at least 83 people have died following encounters with CBP personnel since 2010. Such encounters include shootings, car chases ending in deadly crashes, and CBP agents forcing a young man to drink liquid methamphetamine.¹¹ On May 23, 2018, 20-year old Claudia Patricia Gómez González was shot in the head by a Border Patrol agent shortly after crossing into the U.S.¹² In further setback for justice and accountable, an Arizona jury found Border Patrol agent Lonnie Swartz not-guilty of manslaughter in the cross border killing of 16-year-old Jose Antonio Elena Rodriguez in November 2018.¹³ In December 2018, two children, Felipe Gómez Alonzo and Jakelin Amei Rosmery Caal Maquin, both died after being held in U.S. Border Patrol custody.¹⁴ On January 7, 2019, the Inter-American Commission on Human Rights (IACHR) released a statement conveying concern over the deaths of Alonzo and Maquin in Border Patrol custody. The IACHR statement urges the United States to begin investigations of these two deaths, as well as develop new protocols and practices to prevent any further fatal incidents.¹⁵

In 2017, the GAO found that CBP could not demonstrate whether or not border walls had a measurable impact on border security. The agency had “not developed metrics for this assessment.”¹⁶ However, in 2018 CBP was given \$1.34 billion to erect new barriers where fencing currently exists in the Rio Grande Valley and San Diego sectors and requested another \$1.6 billion for construction of a “wall system” in the Rio Grande Valley. Border barriers cut through sensitive ecosystems, create damaging floods, and divide communities and tribal nations.¹⁷ Over 2,800 scientists from 47 countries published a paper objecting to Trump's border wall due to the catastrophic impact on biodiversity and the environment. Yet, the Trump administration is already pushing forward with construction plans in Texas that are likely to cause deadly flooding.¹⁸

IV. 2014 Concluding Observations

In 2014, the Human Rights Committee called on the U.S. to “[s]tep up its efforts to prevent the excessive use of force by law enforcement officers by ensuring compliance with the 1990 Basic Principles on the Use of Force and Firearms by Law Enforcement Officials; [e]nsure that the new CBP directive on the use of deadly force is applied and enforced in practice; and, [i]mprove reporting of violations involving the excessive use of force and ensure that reported cases of excessive use of force are effectively investigated.”¹⁹

V. Recommendations by other UN Human Rights Bodies

1. On November 28, 2018, several United Nations human rights experts expressed deep concern over the U.S. government decision to send military personnel to secure the southern border of the United States. The U.N. experts rightly noted that “[e]xperience shows that when armed forces are used to perform tasks that they are not trained to do, this usually leads to serious violations of human rights.”²⁰
2. On May 17, 2017, the U.N. Committee on the Elimination of Racial Discrimination asked the U.S. Government to provide information on the Trump administration’s expansion of the border wall and its effects on indigenous peoples living along the U.S.-Mexico border.²¹ Under its early warning and urgent action procedure, the U.N. Committee requested that the U.S. provide the information to address concerns that the expansion of the wall—as outlined in the Trump Administration’s executive order issued January 25th—will discriminate against indigenous groups living in the border region. This information has yet to be furnished to the UN Committee.

VI. Recommended Questions

1. What are the administrative, legislative and judicial measures taken to hold CBP officials accountable for human rights abuses against migrants including excessive use of force, lethal and less-lethal weapons (tear gas), deaths, and sexual abuses against migrant children and asylum seekers in custody?
2. How will the U.S. ensure full transparency and accountability for use of force and abusive immigration enforcement measures on the U.S.-Mexico border? What are the independent oversight mechanisms to hold CBP and other DHS agents accountable for abuses at the border?
3. What are the changes and improvements that have been made to the 2014 CBP directive on the use of force? Describe any improvements in policies or training that have been made as well as any mechanisms put in place to hold agents accountable for inappropriate use of force?
4. Will the United States extend an invitation to international human rights bodies including the U.N. special rapporteur on human rights of migrants and the Inter-American Commission on Human Rights to visit the U.S.-Mexico border to monitor and investigate human rights violations including migrant deaths?

VII. Suggested Recommendations

1. Immediately withdraw all military troops from the U.S. southwest border.
2. CBP agents, including Border Patrol, should be held accountable for human rights abuses at the border, which should include a policy to address abuses and publicly-

- release investigations and disciplinary actions for agents who commit lethal and non-lethal abuse.
3. The U.S. Congress should not allocate any additional funds for “border security” or border walls. It should conduct robust oversight of existing funding and demand DHS provide a full accounting of funds previously allocated for border security infrastructure, and require open and consistent community consultations that include in-person community meetings and open comment periods for all construction proposals, as well as Congressional reporting requirements on the outcomes of such consultation.

¹ Garrett M. Graff, *The Green Monster: How the Border Patrol became America’s most out-of-control law enforcement agency*, Politico Magazine (2014), <https://www.politico.com/magazine/story/2014/10/border-patrol-the-green-monster-112220?o=1>; *Neglect and Abuse of Unaccompanied Immigrant Children by U.S. Customs and Border Protection*, Int’l Hum. Rts. Clinic, Univ. of Chicago Law School, Border Litigation Project, ACLU of San Diego, ACLU (May 2018); Dara Lind, *The Border Patrol has a big problem with excessive force*, Vox (May 30, 2014), <https://www.vox.com/2014/3/27/5551668/why-border-patrol-agents-use-of-force-abuse-assault; US: Poor Medical Care, Deaths, in Immigrant Detention>, Human Rights Watch (June 20, 2018), <https://www.hrw.org/news/2018/06/20/us-poor-medical-care-deaths-immigrant-detention>; Nicholas Kristof, *3 Enemas Later, Still No Drugs*, N.Y. Times: Opinion (Jan. 25, 2014), <https://www.nytimes.com/2014/01/26/opinion/sunday/kristof-3-enemas-later-still-no-drugs.html>; Mark Binelli, *10 Shots Across the Border*, N.Y. Times (Mar. 3, 2016), <https://www.nytimes.com/2016/03/06/magazine/10-shots-across-the-border.html>.

² *Border Patrol Agent Nationwide Staffing by Fiscal Year*, U.S. Border Patrol (2017), available at <https://www.cbp.gov/sites/default/files/assets/documents/2017-Dec/BP%20Staffing%20FY1992-FY2017.pdf>. The rise in Border Patrol agents does not include the over 20,000 CBP officers, tasked with staffing ports of entry along the Southwest border, nor does it include representatives of other federal agencies deployed to the U.S.-Mexico border, including one-fourth of all Immigration and Customs Enforcement (ICE) personnel and thousands of agents of the Drug Enforcement Agency (DEA), the Federal Bureau of Investigation (FBI), and the Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF).

³ Bill Chappell and Tom Bowman, *Trump Expected To Extend U.S. Troops’ Deployment To Mexico Border Into January*, NPR: All Things Considered (Nov. 28, 2018), <https://www.npr.org/2018/11/28/671472765/trump-is-expected-to-extend-u-s-troops-deployment-to-mexico-border-into-january>; *Written Statement Submitted to the Inter-American Commission on Human Rights*, ACLU of Texas Border Rights Center (Dec. 6, 2018), available at <https://www.aclu.org/other/aclu-texas-militarization-us-mexico-border>.

⁴ Brian Bennett, *Border Patrol’s use of deadly force criticized in report*, L.A. Times (Feb. 27, 2014), <https://www.latimes.com/nation/la-na-border-killings-20140227-story.html>.

⁵ Maria Sacchetti, *Congressional Democrats blast Trump’s aggressive pitch for a border wall*, Wash. Post (Jan. 7, 2019), https://www.washingtonpost.com/local/immigration/congressional-democrats-blast-trumps-aggressive-pitch-for-border-wall/2019/01/07/954fd914-12c1-11e9-90a8-136fa44b80ba_story.html; U.S. Customs and Border Protection, Southwest Border Migration FY2018, available at <https://www.cbp.gov/newsroom/stats/sw-border-migration/fy-2018>.

⁶ Agence France-Presse, *US-Mexico Border Migrant Deaths Rose in 2017 Even as Crossings Fell*, UN Says, The Guardian (Feb. 2, 2018), <https://www.theguardian.com/us-news/2018/feb/06/us-mexico-border-migrant-deaths-rose-2017>.

⁷ ACLU Border Rights Center, et al., *Death, Damage, and Failure: Past, Present, and Future Impacts of Walls on the U.S.-Mexico Border* 49 (Sep. 2018), available at <https://www.aclu.org/report/death-damage-and-failure>.

⁸ Jamil Dakwar, *Tear Gas Should Have Never Been Used at the Border. It Doesn’t Belong at Protests Either*, Wash. Post (Nov. 28, 2018), https://www.washingtonpost.com/outlook/2018/11/28/tear-gas-should-never-have-been-used-border-it-doesnt-belong-protests-either/?noredirect=on&utm_term=.5df325e49c70.

⁹ Alan Yuhas, *U.S. Agents Fire Tear Gas Across Mexican Border*, N.Y. Times (Jan. 1, 2019), <https://www.nytimes.com/2019/01/01/world/americas/migrants-border-tear-gas.html>.

¹⁰ Chris Rickerd, *A Dangerous Precedent: Why Allow Racial Profiling at or Near the Border?*, ACLU: Speak Freely (Dec. 8, 2014), <https://www.aclu.org/blog/speakeasy/dangerous-precedent-why-allow-racial-profiling-or-near-border>.

¹¹ Southern Borders Communities Coalition, *Track Death and Abuse by Border Patrol* (Jan. 3, 2019), https://www.southernborder.org/deaths_by_border_patrol; Kristine Phillips, *Video Shows U.S. Border Officers Telling Mexican Teen to Drink the Liquid Meth that Killed Him*, Wash. Post (July 29, 2017), https://www.washingtonpost.com/news/post-nation/wp/2017/07/29/video-shows-u-s-border-officers-telling-mexican-teen-to-drink-the-liquid-meth-that-killed-him/?utm_term=.bd30a67de32b.

¹² Daniel Altschuler and Natalia Aristizabal, *Claudia Gómez González Wasn’t Killed by a Rogue Border Agent—She Was Killed by a Rogue Agency*, The Nation (May 29, 2018), <https://www.thenation.com/article/claudia-gomez-gonzalez-wasnt-killed-by-a-rogue-border-agent-she-was-killed-by-a-rogue-agency/>.

¹³ Molly Olmstead, *Border Patrol Agent Acquitted in Deadly Shooting of Mexican Teenager Who Allegedly Threw Rocks*, Slate (Nov. 26, 2018), <https://slate.com/news-and-politics/2018/11/border-agent-acquitted-killing-jose-antonio-elena-rodriguez.html>.

¹⁴ Khushbu Shah, *Second Guatemalan Child Dies After Being Detained by US Border Agent*, The Guardian (Dec. 26, 2018), <https://www.theguardian.com/us-news/2018/dec/25/second-guatemalan-child-dies-detained-us-border-agents>.

¹⁵ IACHR Expresses Deep Concern over the Deaths of Two Migrant Children in the Custody of Immigration Authorities in the United States, OAS: IACHR – Press Release (Jan. 7, 2019), http://www.oas.org/en/iachr/media_center/PReleases/2019/001.asp.

¹⁶ *Death, Damage, and Failure*, at 43.

¹⁷ *Id.*, at 23-42.

¹⁸ Kate Furby, *Thousands of Scientists Object to Trump’s Border Wall*, Wash. Post (July 24, 2018), https://www.washingtonpost.com/news/speaking-of-science/wp/2018/07/24/thousands-of-scientists-object-to-trumps-border-wall/?utm_term=.2e5944f906f7; Melissa del Bosque, *Trump’s Border Wall Could Cause Deadly Flooding in Texas. Federal Officials Are*

Planning to Build It Anyway, Texas Monthly (Dec. 2018), <https://www.texasmonthly.com/news/trumps-border-wall-cause-deadly-flooding-texas-federal-officials-planning-build-anyway/>.

¹⁹ Human Rights Comm., Concluding Observations on the Fourth Periodic Report of the United States of America, p. 4, U.N. Doc. CCPR/C/USA/CO/4 (Apr. 23, 2014), *available at* <https://www.state.gov/documents/organization/235641.pdf>.

²⁰ United Nations Human Rights Office of the High Commissioner, *Migrant Caravan: States Have Duty to Protect Rights*, OHCHR (Nov. 28, 2018), *available at*

<https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=23941&LangID=E>.

²¹Office of the High Commissioner, Letter to Theodore Allegra, Representative of the U.S. to the United Nations (May 17, 2017), *available at* <https://law.utexas.edu/wp-content/uploads/sites/11/2015/04/2017-HRC-USA-BorderWall-LetterFromCERDtoUS.pdf>.

Extraterritorial Use of Lethal Force

I. Issue Summary

Since our last submission to the Committee in February 2014, transparency and accountability for the United States' extraterritorial use of lethal force has significantly worsened. The Trump administration has reportedly weakened even the limited policy safeguards put in place by the Obama administration to guard against civilian harm caused by strikes outside recognized armed conflict, even as it has increased secrecy about the rules it is using, specific strikes, and their consequences. In short, the Trump administration has dramatically expanded the use of U.S. lethal force abroad, killed numerous civilians, and refused to provide transparency or accountability to the victims.

II. Concluding Observations and ICCPR Legal Framework

The U.S. government's extraterritorial use of force implicates Article 2(3) (right to an effective remedy), Article 6 (right to life), and Article 14 (right to a fair trial) of the ICCPR. The Human Rights Committee issued six recommendations relating to "targeted killings using unmanned aerial vehicles" in its 2014 concluding observations, stating that the United States should: ensure compliance with its obligations under Article 6; increase transparency surrounding the criteria and legal basis for strikes; provide for oversight of the drone program; ensure the protection of civilians in any attacks; investigate allegations of violations of the right to life; and provide victims and/or their families with effective remedies.¹

III. Current U.S. Government Policies or Practices

Over the past five years, the United States has continued to use lethal force outside recognized armed conflict in violation of international law. In 2013, in response to widespread criticism of its lethal force program, the Obama administration announced that it had put in place policies, embodied in a "Presidential Policy Guidance," intended to limit the government's use of lethal force outside "areas of active hostilities."² These limits—which the administration maintained were discretionary policy restrictions—fell far short of the requirements of international human rights law, which prohibits any use of lethal force outside of armed conflict unless it is a last resort and used against a specific, concrete, and imminent threat.

Under the Presidential Policy Guidance, lethal force could be used only if there was "[n]ear certainty that the terrorist target is present," "[n]ear certainty that non-combatants will not be injured or killed," and if the target "pose[d] a continuing, imminent threat to U.S. persons."³ But the policy failed to define key terms and explain how these standards worked in practice. Additionally, the U.S. government's loose interpretation of its "imminence" standard did not require evidence that the threat involved was in any way concrete. The policy also permitted the president to circumvent its requirements, calling into question the extent to which the administration actually adhered to it.⁴

Despite their shortcomings, these policies still provided some constraints on the government's use of force outside of armed conflict. Since taking office, however, President Trump has reportedly replaced the Presidential Policy Guidance with a less restrictive policy called the "Principles, Standards and Procedures," but has refused even to confirm publicly that the new policy exists.⁵ The American Civil Liberties Union has sued the administration for public release of the new policy.

Media reports indicate that the new policy loosens the Obama-era requirements in several dangerous respects. For example, the new policy reportedly expands the scope of who may be targeted outside areas of active hostilities by eliminating the requirement that targets be "high-level militants" who pose a "continuing and imminent threat" to U.S. persons.⁶ Instead, it permits lethal force to be used against low-level members of groups the executive branch determines are covered by the Authorization for Use of Military Force of 2001 (which applies to the armed conflict in Afghanistan, but which the U.S. government wrongly interprets to apply in multiple other countries around the world).⁷ The new policy also reportedly lowers the confidence threshold that the intended target is in the strike zone from "near certainty" to "reasonable certainty."⁸ Although the administration kept the requirement of "near certainty" that no civilians will be harmed,⁹ the value of this restriction in practice is impossible to assess because the administration has not publicly described who it regards as a "civilian," nor has it explained how it makes such ex ante assessments.

The loosening of the applicable policies raises significant concerns, especially in light of the overall expansion of the use of lethal force under President Trump.¹⁰ The Trump administration has also reportedly restored and expanded the Central Intelligence Agency's lethal strike authority, including permitting the agency to carry out lethal operations in Africa.¹¹ As CIA missions are typically carried out in complete official secrecy, this is yet another step backward for transparency and accountability.

The Trump administration's use of lethal force has had devastating consequences, both in and outside areas of recognized armed conflict. In a June 2018 report to Congress, the administration stated that military operations had killed approximately 499 civilians in 2017.¹² That estimate was far lower than credible independent reporting and investigations would suggest. The Department of Defense may be applying too high a standard for assessing the credibility of reported civilian deaths and is failing to adequately investigate those allegations. Media reports and investigations by human rights organizations reveal that at least some civilian deaths in warzones, during both the Obama and Trump administrations, violate international humanitarian law.¹³

The Trump administration's extreme secrecy increases concerns that the U.S. government is not complying with international law. The Obama administration also maintained an unacceptable level of secrecy, but made limited positive steps toward transparency by late 2016. This included releasing a report explaining its view of the legal and policy limits on lethal force,¹⁴ disclosing statistics on the number of people the government had killed since 2009 in airstrikes "outside areas of active hostilities,"¹⁵ and issuing an Executive Order and memorandum that committed future administrations to disclosing the same information.¹⁶

President Trump has released limited information on civilian casualties, and is increasing secrecy with respect to strikes both in and outside recognized armed conflict.

The Trump administration has also maintained the U.S. government's opposition to judicial review. For example, in response to a lawsuit by journalists claiming that they are included on the U.S. government's "kill list," the government argued that the claims were not appropriate for the court to review. A U.S. district court in June 2018 allowed three of the claims of one individual to proceed, noting that "[h]is interest in avoiding the erroneous deprivation of his life is uniquely compelling."¹⁷

To comply with its international legal obligations, the U.S. government must end the use of lethal force outside armed conflict and ensure that the use of force in armed conflict complies with the requirements of international humanitarian law. It must provide meaningful transparency about its lethal force policies, and investigate and provide redress for violations of the right to life.

IV. Human Rights Committee General Comments

On October 30, 2018, the Human Rights Committee adopted General Comment No. 36 regarding Article 6 on the right to life.¹⁸ The General Comment affirms the application of Article 6 in situations of armed conflict, calls for the disclosure of the criteria and legal basis for attacks involving lethal force, and requires investigations into "violations of article 6 in situations of armed conflict in accordance with the relevant international standards."¹⁹

V. Other UN Body Recommendations

1. [Recommendations on National Security, Universal Periodic Review of the United States of America, May 2015](#)
2. [Report of the Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms while Countering Terrorism, Ben Emmerson, March 2014](#)

VI. Recommended Questions

1. Describe with specificity the legal and policy standards to which the Trump administration adheres in its extraterritorial use of lethal force outside recognized armed conflict.
2. Describe whether and how the U.S. government may depart from the Trump administration policies referenced in Question (2).
3. Provide the identities and numbers of individuals killed or injured by the U.S. government's use of lethal force outside recognized armed conflict, including the number of civilians.

VII. Suggested Recommendations

1. The U.S. government should disclose the legal and policy standards applicable to its use of extraterritorial lethal force outside of recognized armed conflict.
2. The Executive Branch should not invoke jurisdictional, secrecy, and immunity doctrines to prevent judicial review of the merits of wrongful extraterritorial lethal force claims in domestic courts.
3. The U.S. government should ensure that only the Department of Defense—and not the Central Intelligence Agency—has authority to use lethal force abroad.

¹ Human Rights Comm., Concluding Observations on the Fourth Periodic Report of the United States of America, ¶ 9, U.N. Doc. CCPR/C/USA/CO/4 (Apr. 23, 2014), available at <https://www.state.gov/documents/organization/235641.pdf>.

² White House, *Fact Sheet: U.S. Policy Standards and Procedures for the Use of Force in Counterterrorism Operations Outside the United States and Areas of Active Hostilities* (May 23, 2013), <https://obamawhitehouse.archives.gov/the-press-office/2013/05/23/fact-sheet-us-policy-standards-and-procedures-use-force-counterterrorism>.

³ *Id.*; see also Presidential Policy Guidance, *Procedures for Approving Direct Action Against Terrorist Targets Located Outside the United States and Areas of Active Hostilities* (May 22, 2013), available at https://www.justice.gov/oip/foia-library/procedures_for_approving_direct_action_against_terrorist_targets/download.

⁴ Presidential Policy Guidance, *supra* note 3, at § 5.B.

⁵ Charlie Savage & Eric Schmitt, *Trump Poised to Drop Some Limits on Drone Strikes and Commando Raids*, New York Times (Sept. 21, 2017), <https://www.nytimes.com/2017/09/21/us/politics/trump-drone-strikes-commando-raids-rules.html>; Charlie Savage, *Will Congress Ever Limit the Forever-Expanding 9/11 War?*, New York Times (Oct. 28, 2017), <https://www.nytimes.com/2017/10/28/us/politics/aumf-congress-niger.html>.

⁶ *Savage & Schmitt, supra* note 5.

⁷ *Savage, Will Congress Ever Limit the Forever-Expanding 9/11 War?*, *supra* note 5.

⁸ *Id.*

⁹ *Id.*

¹⁰ Spencer Ackerman, *Trump Ramped Up Drone Strikes in America's Shadow Wars*, Daily Beast (Nov. 25, 2018), <https://www.thedailybeast.com/trump-ramped-up-drone-strikes-in-americas-shadow-wars>.

¹¹ Joe Penney, Eric Schmitt, Rukmini Callimachi & Christoph Koettl, *C.I.A. Drone Mission, Curtailed by Obama, Is Expanded in Africa Under Trump*, N.Y. Times (Sept. 9, 2018), <https://www.nytimes.com/2018/09/09/world/africa/cia-drones-africa-military.html>.

¹² Department of Defense, *Annual Report on Civilian Casualties in Connection with United States Military Operations* (June 1, 2018), available at https://www.aclu.org/sites/default/files/field_document/civcas_1057_report_-_final.pdf.

¹³ See, e.g., Amnesty International, “*War of Annihilation*”: *Devastating Toll on Civilians, Raqqa-Syria* (2018),

<https://www.amnesty.org/download/Documents/MDE2483672018ENGLISH.PDF>; Azmat Khan & Anand Gopal, *The Uncounted*, N.Y. Times Magazine, Nov. 16, 2017, <https://www.nytimes.com/interactive/2017/11/16/magazine/uncounted-civilian-casualties-iraq-airstrikes.html>.

¹⁴ White House, *Report on the Legal and Policy Frameworks Guiding the United States' Use of Military Force and Related National Security Operations* (Dec. 2016), https://obamawhitehouse.archives.gov/sites/whitehouse.gov/files/documents/Legal_Policy_Report.pdf.

¹⁵ Director of National Intelligence, *Summary of Information Regarding U.S. Counterterrorism Strikes Outside Areas of Active Hostilities* (July 1, 2016), <https://www.dni.gov/files/documents/Newsroom/Press%20Releases/DNI+Release+on+CT+Strikes+Outside+Areas+of+Active+Hostilities.PDF>.

¹⁶ Executive Order, *United States Policy on Pre- and Post-Strike Measures to Address Civilian Casualties in U.S. Operations Involving the Use of Force* (July 1, 2016), <https://obamawhitehouse.archives.gov/the-press-office/2016/07/01/executive-order-united-states-policy-pre-and-post-strike-measures>; White House, *Presidential Memorandum, Steps for Increased Legal and Policy Transparency Concerning the United States Use of Military Force and Related National Security Operations* (Dec. 5, 2016), <https://obamawhitehouse.archives.gov/the-press-office/2016/12/05/presidential-memorandum-steps-increased-legal-and-policy-transparency>.

¹⁷ *Zaidan v. Trump*, 317 F. Supp. 3d 8, 28 (D.D.C. 2018).

¹⁸ Human Rights Comm., General comment No. 36 on article 6 of the International Covenant on Civil and Political Rights, on the right to life, U.N. Doc. CCPR/C/GC/36 (Oct. 30, 2018), available at

https://tbinternet.ohchr.org/Treaties/CCPR/Shared%20Documents/1_Global/CCPR_C_GC_36_8785_E.pdf.

¹⁹ *Id.* ¶ 64.

U.S. Foreign Intelligence Surveillance

In the ACLU's submissions to the Committee in [2013](#) and [2014](#), we described the United States' far-reaching and unlawful global surveillance apparatus. Subsequent government disclosures and media accounts confirm that the U.S. government continues to engage in mass surveillance of global communications, violating its ICCPR obligations including Article 17. Below, we discuss National Security Agency (NSA) activities under one of the most significant foreign intelligence surveillance authorities, Executive Order (EO) 12333. We also review recent legal and factual developments concerning Presidential Policy Directive-28 (PPD-28) and Section 702 of the Foreign Intelligence Surveillance Act (FISA). Finally, we address the substantial obstacles to obtaining redress for rights violations resulting from foreign intelligence surveillance.

I. EO 12333

Since the ACLU's last submission, the public has learned more about EO 12333—the primary authority under which the NSA gathers foreign intelligence.¹ The executive order provides broad latitude for the government to conduct surveillance without any form of judicial review. Electronic surveillance under EO 12333 is largely conducted outside the United States, though certain EO 12333 collection is conducted on U.S. soil.²

EO 12333 and its accompanying regulations authorize the government to conduct electronic surveillance for the purpose of collecting “foreign intelligence”—a term defined so broadly that it encompasses information about the “intentions” and “activities” of foreign persons and governments.³

In addition, EO 12333 and its implementing regulations permit at least two forms of bulk surveillance.⁴ First, they permit the government to engage in “bulk collection”—that is, the indiscriminate collection of electronic communications or data. Second, the order and its regulations allow “bulk searching,” in which the government searches the content of vast quantities of electronic communications for “selection terms.” In other words, the NSA subjects the data and communications content of the global population to real-time surveillance as the agency scans for specific information of interest. Under EO 12333, the selection terms the NSA uses to search communications in bulk may include a wide array of keywords—such as the names of political parties or government officials—likely to result in the collection of significant volumes of information.⁵

Recent disclosures indicate that the U.S. government operates a host of large-scale programs under EO 12333. These programs have included, for example, the NSA's acquisition of 200 million text messages from around the world each day;⁶ its recording of every single cell phone call into, out of, and within at least two countries;⁷ and its collection of hundreds of millions of contact lists and address books from personal email and instant-messaging accounts of people around the world.⁸

In 2016, the U.S. government adopted policies that would permit, for the first time, 16 additional federal agencies to seek access to unreviewed, “unminimized” data collected by the NSA under EO 12333, and to use such information for purposes beyond protecting national security—including the investigation of domestic crimes.⁹

II. PPD-28

In January 2014, President Barack Obama issued PPD-28, an executive branch directive concerning the surveillance of communications and data. While PPD-28 recognizes the privacy interests of people who are not U.S. citizens or permanent residents, which the U.S. government defines as “non-U.S. persons,” the directive includes few meaningful reforms to safeguard privacy rights—and these reforms can easily be modified or revoked by the U.S. President. Moreover, a recently released U.S. court decision confirms that PPD-28 does not create any judicially enforceable rights.¹⁰

Most notably, with respect to bulk collection under EO 12333, PPD-28 authorizes the U.S. government to use data collected in bulk for six broadly defined purposes.¹¹ While this provision imposes some nominal limits on the U.S. government’s *use* of bulk data, it also serves as official confirmation that the U.S. government engages in mass, indiscriminate collection of communications and data of people around the world.

In addition, one purported safeguard is extremely weak: PPD-28 provides that the government may retain or disseminate personal information of “non-U.S. persons” only if the retention or dissemination of comparable information concerning U.S. persons would be permitted under EO 12333. Critically, however, EO 12333 is extremely permissive: it authorizes the retention and dissemination of information concerning U.S. persons in a wide array of circumstances—including, for example, when that information constitutes “foreign intelligence,” which is broadly defined. *See* EO 12333 §§ 2.3, 3.5(e).

The October 2018 disclosure of a report by the Privacy and Civil Liberties Oversight Board confirms that PPD-28’s protections are extremely weak. The report states that, in large part, PPD-28 simply prompted the U.S. intelligence community to memorialize its existing practices. It also appears that the U.S. government has not taken sufficient steps to address deficiencies in PPD-28’s implementation.¹² In short, the report shows that, in practice, PPD-28’s reforms are modest and rife with exceptions.

III. Section 702 of FISA

Section 702 authorizes the mass surveillance of international communications inside the United States, without individualized court orders or even any executive branch finding of probable cause.¹³

The resulting surveillance is extremely broad. The government reported that, in 2017, it monitored the communications of 129,080 foreign individuals and groups under Section 702.¹⁴ In 2011, Section 702 surveillance resulted in the collection of more than 250 million communications—a number that has likely grown significantly as the number of NSA targets has ballooned.¹⁵ Americans who communicate with the government’s many targets are swept up in this warrantless surveillance in large numbers. The exact number of Americans affected remains unknown, despite the fact that U.S. intelligence agencies under the Obama administration had committed to provide an estimate. The Trump administration reneged on that commitment in 2017.

The government relies on Section 702 to conduct at least two types of surveillance: “Upstream” and “PRISM.” PRISM surveillance involves the acquisition of communications content and metadata directly from U.S. Internet and social media companies like Facebook and Microsoft.¹⁶ Upstream surveillance, in contrast, involves the mass copying and searching of

Internet communications as they flow into and out of the United States. With the help of companies like Verizon and AT&T, the NSA conducts this surveillance by tapping directly into the physical infrastructure of the Internet inside the United States. The NSA then searches the metadata and content of international Internet communications transiting the links that it monitors.¹⁷ The agency searches for “selectors” associated with its many targets, which include identifiers such as email addresses or phone numbers. Following the mass searching of communications, those to and from selectors—as well as those that happen to be bundled with them in transit—are retained on a long-term basis for further analysis and dissemination.¹⁸

For many years, under Upstream surveillance, the U.S. government collected not only communications to and from the selectors associated with its foreign intelligence targets, but also the communications of any person *about* those selectors. Although the NSA is no longer “collecting” communications that are merely about a target, there is no indication that it has stopped the *mass copying and searching* of communications as they pass through its surveillance devices prior to what the government calls “collection”—*i.e.*, prior to the NSA’s retention, for long-term use, of communications to or from its targets.¹⁹

In 2017, the U.S. government released an opinion by the Foreign Intelligence Surveillance Court (FISC) that highlighted an array of significant violations of the court-ordered procedures governing Section 702 surveillance—including agency failures to complete required data purges; failures to comply with targeting and minimization procedures; improper querying of Section 702 data; improper FBI disclosures of data to third parties; and failures to provide prompt notification to the FISC when non-compliance is discovered.²⁰ These persistent violations illustrate the inadequacy of existing oversight structures and call into question whether effective oversight of a program of this scale is even possible.

In 2018, Congress reauthorized a modified version of Section 702. Instead of reforming the law, the modified version opened the door to more expansive surveillance practices. The new law contains language that could be used to argue that Congress has “codified ‘about’ collection” and expanded the scope of Section 702 beyond what the statute previously authorized.²¹

IV. Obstacles to Redress

In 2017, the United States represented to the Committee that “U.S. law provides a number of avenues of redress for individuals who have been the subject of unlawful electronic surveillance for foreign intelligence purposes.”²² In practice, the mechanisms highlighted by the U.S. government have failed to provide meaningful vehicles for redress. No civil lawsuit challenging Section 702 or EO 12333 surveillance has resulted in any kind of remedy. For the overwhelming majority of individuals subject to Section 702 and EO 12333 surveillance, the U.S. government’s invocation and interpretation of the “standing” and “state secrets” doctrines have thus far proven to be barriers to adjudication of the lawfulness of this surveillance.²³

V. Necessity and Proportionality

In 2014, the Committee recommended that the United States take measures to ensure that its interferences with the right to privacy are necessary and proportionate.²⁴ In 2015 and again in 2017, the United States responded that it “disagrees with the Committee’s view regarding the applicability of such concepts as ‘necessity’ and ‘proportionality’ in relation to interpreting the meaning of either ‘lawful’ or ‘arbitrary’ in the context of Article 17 of the ICCPR.”²⁵ The United States’ view is wrong and, if accepted, would profoundly undermine the right to privacy.²⁶ The

ACLU encourages the Committee to press the United States on this matter and to ensure that it complies with the necessity and proportionality standards.

VI. Recommended Questions

1. Provide an estimate of the volume of communications and data subject to Section 702 and EO 12333 surveillance, broken down by the volume of “U.S.-person” and “non-U.S.-person” communications and data.
2. Specify what, if any, legal constraints the U.S. government recognizes on its bulk collection of “non-U.S. persons” communications metadata or content?
3. What requirements, processes, and procedures does the U.S. government have in place for exchanging intelligence information with other governments and entities? In particular, how does the United States assess whether to share intelligence with governments that have a history of committing human rights abuses?
4. When foreign governments receive intelligence information from the United States, what privacy safeguards or guidelines must they follow, and what privacy protocols govern the treatment of data that the United States receives from foreign governments?
5. What auditing structures are in place to ensure that information-sharing with foreign governments does not contribute to human rights violations?

VII. Suggested Recommendations

1. The U.S. government should take all necessary measures to ensure that its surveillance activities, both within and outside the United States, conform to its obligations under the Covenant, including Article 17; in particular, measures should be taken to ensure that any interference with the right to privacy complies with the principles of legality, proportionality and necessity, regardless of the nationality or location of the individuals whose communications are under direct surveillance.
2. The U.S. government should prohibit any acquisition of communications or data that is not restricted by selectors associated with specific individuals or particular communications facilities (such as email addresses and phone numbers).
3. The U.S. government should prohibit “about” surveillance and other forms of surveillance premised on the scanning of the content of communications.
4. The U.S. government should prohibit information-sharing, including sharing of raw or unprocessed data, with any foreign government if there are reasonable grounds to believe sharing with that government could contribute to the violation of human rights.
5. The U.S. government should refrain from broad invocations of jurisdictional, secrecy, and immunity doctrines that prevent domestic courts’ judicial review of the merits of government surveillance programs that are alleged to violate privacy rights

¹ Exec. Order No. 12333, 46 FR 59941 (1981), *reprinted as amended in* 73 FR 45325 (2008), available at <https://www.dni.gov/index.php/ic-legal-reference-book/executive-order-12333> [hereinafter EO 12333]; *see also* John Napier Tye, *Meet Executive Order 12333: The Reagan Rule That Lets the NSA Spy on Americans*, Wash. Post (July 18, 2014), <https://www.washingtonpost.com/opinions/meet-executive-order-12333-the->

reagan-rule-that-lets-the-nsa-spy-on-americans/2014/07/18/93d2ac22-0b93-11e4-b8e5-d0de80767fc2_story.html; ACLU, *Comments to the Privacy & Civil Liberties Oversight Board On Its Review of EO 12333* (Jan. 13, 2016), <https://www.aclu.org/letter/aclu-comments-privacy-and-civil-liberties-oversight-board-its-review-executive-order-12333>.

² One form of EO 12333 surveillance that takes place inside the United States is “International Transit Switch Collection” under “Transit Authority,” in which the U.S. government collects cable traffic that traverses U.S. territory but originates and terminates in foreign countries. *See, e.g.*, Signals Intelligence Directorate, *NSAW SID Intelligence Oversight Quarterly Report* (May 3, 2012), available at https://www.aclu.org/sites/default/files/field_document/sid_oversight_and_compliance.pdf; Charlie Savage, *Power Wars Document: Transit Authority and the 1990 Lawton Surveillance Memo*, *Power Wars Blog* (Nov. 18, 2015), <http://www.charliesavage.com/?p=557>.

³ *See* EO 12333 § 3.5(e) (defining “foreign intelligence” as “information relating to the capabilities, intentions, or activities of foreign governments or elements thereof, foreign organizations, foreign persons, or international terrorists”). In 2015, the U.S. government represented to the Committee that “signals intelligence information about the routine activities of a foreign person will not be disseminated by virtue of that fact alone unless it is otherwise responsive to an authorized foreign intelligence requirement.” One-Year Follow-Up Response of the U.S. to the Priority Recommendations on its Fourth Periodic Report, April 2015, U.S.T. No. 038-15, available at <https://www.state.gov/documents/organization/242228.pdf> (emphasis added) [hereinafter ICCPR U.S. Follow Up 2015]. Notably, however, the U.S. government’s “foreign intelligence requirements” are defined at a “high level of generality.” *See* Robert Litt, General Counsel, Office of the Dir. of Nat’l Intelligence, As Prepared Remarks on Signals Intelligence Reform at the Brookings Institute (Feb. 4, 2015) (transcript available at <http://icontherecord.tumblr.com/post/110632851413/odni-general-counsel-robert-litts-as-prepared>). Moreover, the U.S. government’s representation to the Committee does not alter EO 12333’s definition of “foreign intelligence,” nor does it alter the potential scope of collection under the executive order.

⁴ *See, e.g.*, U.S. Signals Intelligence Directive, NSA, SP0018, Legal Compliance and U.S. Persons Minimization Procedures § 4 (Jan. 25, 2011), <http://www.dni.gov/files/documents/1118/CLEANEDFinal%20USSID%20SP0018.pdf> [hereinafter USSID 18]; White House, *Presidential Policy Directive 28—Signals Intelligence Activities* at n.5 (Jan. 14, 2014), <https://obamawhitehouse.archives.gov/the-press-office/2014/01/17/presidential-policy-directive-signals-intelligence-activities> [hereinafter PPD-28].

⁵ *See* USSID 18, § 5.1.

⁶ James Ball, *NSA Collects Millions of Text Messages Daily in ‘Untargeted’ Global Sweep*, *Guardian* (Jan. 16, 2014), <http://www.theguardian.com/world/2014/jan/16/nsa-collects-millions-text-messages-daily-untargeted-global-sweep>.

⁷ Ryan Devereaux, Glenn Greenwald & Laura Poitras, *Data Pirates of the Caribbean: The NSA is Recording Every Cell Phone Call in the Bahamas*, *Intercept* (May 19, 2014), <https://firstlook.org/theintercept/2014/05/19/data-pirates-caribbean-nsa-recording-every-cell-phone-call-bahamas>.

⁸ Barton Gellman & Ashkan Soltani, *NSA Collects Millions of E-mail Address Books Globally*, *Wash. Post* (Oct. 14, 2013), http://www.washingtonpost.com/world/national-security/nsa-collects-millions-of-e-mail-address-books-globally/2013/10/14/8e58b5be-34f9-11e3-80c6-7e6dd8d22d8f_print.html.

⁹ *See* ODNI, *Procedures for the Availability or Dissemination of Raw Signals Intelligence Information by the National Security Agency Under Sec. 2.3 of Executive Order 12333*, <https://www.dni.gov/files/documents/icotr/RawSIGINTGuidelines-as-approved-redacted.pdf>.

¹⁰, [Redacted], Mem. Op. at 36 (FISC 2014), https://www.intelligence.gov/assets/documents/702%20Documents/declassified/Bates%20510-548_OCR.pdf.

¹¹ *See* PPD-28, § 2; NSA, *PPD-28 Section 4 Procedures* § 5 (Jan. 12, 2015), <https://www.nsa.gov/news-features/declassified-documents/nsa-css-policies/assets/files/PPD-28.pdf>.

¹² Privacy & Civil Liberties Oversight Board, *Report to the President on the Implementation of Presidential Policy Directive 28: Signals Intelligence Activities* (December 2016), available at https://www.aclu.org/sites/default/files/field_document/ppd-28_report_for_foia_release.pdf [hereinafter PCLOB PPD-28 Report]. For a more detailed discussion of the findings of this report, *see* ACLU & Access Now, *Letter to the European Commission* (Nov. 20, 2018), <https://www.aclu.org/letter/aclu-and-access-now-letter-european-commission-re-concerns-about-privacy-shield>.

¹³ *See* 50 U.S.C. § 1881a; For a more detailed discussion of this surveillance *see* ACLU, *Summary of U.S. Foreign Intelligence Surveillance Law, Practice, Remedies, and Oversight*, Report for the Court of Justice of the European Union (Aug. 2018), <https://www.aclu.org/report/summary-us-foreign-intelligence-surveillance-law-practice-remedies-and-oversight-expert> [hereinafter ACLU Summary Report].

¹⁴ ODNI, *Statistical Transparency Report Regarding the Use of National Security Authorities for Calendar Year 2017* at 14 (Apr. 2018), <https://www.dni.gov/files/documents/icotr/2018-ASTR----CY2017---FINAL-for-Release-5.4.18.pdf>.

¹⁵ *See* [Redacted], 2011 WL 10945618, at *9–10 (FISC Oct. 3, 2011) [hereinafter [Redacted]]; PCLOB, *Report on the Surveillance Program Operated Pursuant to Section 702 of FISA 116* (2014), <https://www.pclob.gov/library/702-Report.pdf> [hereinafter PCLOB Section 702 Report].

¹⁶ *See* PCLOB Section 702 Report, 33–34; [Redacted], at *9–10 & n.24; *NSA Program Prism Slides*, *Guardian* (Nov. 1, 2013), <https://www.theguardian.com/world/interactive/2013/nov/01/prism-slides-nsa-document>.

¹⁷ *See, e.g.*, [Redacted], at *10, *15; PCLOB Section 702 Report 35–41; Charlie Savage, *N.S.A. Halts Collection of Americans’ Emails About Foreign Targets*, *N.Y. Times* (Apr. 28, 2017), <https://www.nytimes.com/2017/04/28/us/politics/nsa-surveillance-terrorism-privacy.html>; Charlie Savage, *N.S.A. Said to Search Content of Messages to and From U.S.*, *N.Y. Times* (Aug. 8, 2013), <http://www.nytimes.com/2013/08/08/us/broader-sifting-of-data-abroad-is-seen-by-nsa.html>.

¹⁸ *See, e.g.*, PCLOB Section 702 Report 35–41.

¹⁹ *See, e.g.*, NSA, *NSA Stops Certain Section 702 “Upstream” Activities*, Release No: PA-014-18 (Apr. 28, 2017), <https://www.nsa.gov/news-features/press-room/Article/1618699/nsa-stops-certain-section-702-upstream-activities/>.

²⁰ *See*, [Redacted], Mem. Op. & Order at 68–95 (FISC Apr. 26, 2017), https://www.dni.gov/files/documents/icotr/51117/2016_Cert_FISC_Memo_Opin_Order_Apr_2017.pdf.

²¹ For further discussion of Congress’s 2018 reauthorization bill, *see* ACLU, *Re: The European Commission’s Annual Review of the E.U.-U.S. Privacy Shield* (Aug. 15, 2018), https://www.aclu.org/sites/default/files/field_document/final_letter_pdf_with_attached_exhibits_a-d_2.pdf.

²² Human Rights Comm., Information received from the United States of America on follow-up to the concluding observations, U.N. Doc. C/USA/CO/4/Add. 1, ¶ 38 (Oct. 11, 2017) [hereinafter ICCPR U.S. Follow Up 2017].

²³ For further discussion of these two doctrines as obstacles to redress, see ACLU Summary Report § II, *supra* note 13. Although the U.S. government argues that individuals have obtained redress through the Administrative Procedure Act for the bulk collection of call records under Title V of FISA, see ICCPR U.S. Follow Up 2017 at ¶ 41, the case that it cites—*ACLU v. Clapper*—is an exceptional one. See 785 F.3d 787, 801 (2d Cir. 2015). There, the U.S. government officially acknowledged the authenticity of a court order directing Verizon Business Network Services, Inc. to produce to the National Security Agency all call detail records of its customers’ calls. In light of this official acknowledgment, and the fact that the ACLU was a Verizon Business Network Services customer, it was indisputable that the ACLU’s call records were among those collected under the program—and, thus, it had standing to sue. With the exception of this unprecedented disclosure, parties who challenge U.S. government surveillance continue to encounter severe obstacles when seeking remedies in U.S. courts.

²⁴ Human Rights Comm., Concluding observations on the fourth periodic report of the United States of America, ¶ 22(a), U.N. Doc. C/USA/CO/4 (April 23, 2014)

²⁵ ICCPR U.S. Follow Up 2015 at ¶ 33 ICCPR U.S. Follow Up 2017 at ¶ 21

²⁶ *Privacy Rights in the Digital Age: A Proposal for a New General Comment on the right of Privacy under Article 17 of the ICCPR*, ACLU (March 2014), <https://www.aclu.org/sites/default/files/assets/jus14-report-icpr-web-rel1.pdf>.

Solitary Confinement

I. Issue Summary

On any given day, the best research suggests there are approximately 80,000 – 100,000 people held in solitary confinement in prisons across the United States.¹ That figure does not include the thousands of men, women and children subject to solitary confinement in local jails and juvenile detention centers. Indeed, over the course of a year, approximately 20% of all U.S. prisoners and 18% of jail detainees spend some time in solitary confinement for punishment, protection, or institutional convenience.² The numbers are staggering and so is the duration. While some prisoners spend days or weeks in isolation, too frequently prisoners are subject to solitary for months, years, and even decades. In the federal prison system and at least 19 states, corrections officials may hold people in solitary confinement indefinitely.³ By any measure, the United States is an egregious global outlier in its use of solitary confinement.

Any prisoner or detainee, regardless of age, gender, or physical or mental health, may be subject to solitary confinement. Persons with mental disabilities are dramatically overrepresented in solitary confinement.⁴ Children are subjected to solitary confinement in juvenile facilities as well as in jails and prisons that otherwise house adults.⁵ Vulnerable LGBTI prisoners and immigration detainees are also placed in solitary confinement, in both civil and criminal detention facilities.⁶

Solitary confinement is widely recognized as painful and difficult to endure for all human beings.⁷ But when people with severe mental illness are subjected to solitary confinement, they can deteriorate even more dramatically. In addition to increased psychiatric symptoms generally, suicide rates and incidents of self-harm are much higher for prisoners in solitary confinement. A recent study in the *American Journal of Public Health* found that detainees in solitary confinement in New York City jails were nearly seven times more likely to harm themselves than those in general population, and that the effect was particularly pronounced for youth and people with severe mental illness.⁸

Increasingly, neuroscientists are also raising concerns over the potential impact of solitary confinement on the human brain. An expert panel convened by the American Association for the Advancement of Science pointed out that although few human studies have been done, there is a vast body of research about how the brain responds to elements of solitary confinement, such as lack of physical interaction with the natural world, lack of social interaction, lack of tactile and visual stimulation – and each of these elements alone can dramatically alter the brain.⁹

II. Concluding Observations and ICCPR Legal Framework

In its 2014 Concluding Observations, the Committee reiterated its concern over the continued practice of holding persons deprived of their liberty, including youth and people with mental disabilities, in prolonged solitary confinement, as well as the practice of subjecting pretrial detainees to solitary confinement. The Committee further noted the poor detention conditions and isolation in death-row facilities (citing arts. 7, 9, 10, 17, 24). Accordingly, the Committee recommended that the United States should: monitor detention in prisons, including private detention facilities; impose strict limits on the use of solitary confinement, both pretrial

and post-conviction; abolish solitary confinement with respect to anyone under the age of 18 and for prisoners with serious mental illness; and bring the detention conditions of prisoners on death row into line with international standards.¹⁰ The United States has yet to fully implement these recommendations.

III. Current U.S. Government Policy or Practice

Attention to the problem of solitary confinement has reached the highest levels of government. In a historic op-ed in the *Washington Post*, President Barack Obama denounced solitary confinement as practiced in the United States: “How can we subject prisoners to unnecessary solitary confinement, knowing its effects, and then expect them to return to our communities as whole people? It doesn’t make us safer. It’s an affront to our common humanity.”¹¹ A national review of “restrictive housing” (a euphemism for solitary confinement) practices and alternatives was also conducted by the U.S. Attorney General and the resulting guidelines and recommendations were released in 2016.¹² Following this national review, the federal Bureau of Prisons (BOP) did revise some of its policies aimed at reducing the number of prisoners held in “restrictive housing.” However, as of January 4, 2019, the BOP still held **11,876 people** in some form of “restrictive housing.”¹³

Despite the overall lack of progress in reducing the number of people in solitary confinement at the federal level, the United States Congress did recently pass the *First Step Act of 2018*, which contains prohibitions on the solitary confinement of juveniles held under federal jurisdiction.¹⁴ This law, however, covers only a small fraction of incarcerated youth in the United States, as most youth are held in state and local facilities.¹⁵

IV. Other UN Body Recommendations

Interim Report of the Special Rapporteur of the Human Rights Council on torture and other cruel, inhuman or degrading treatment or punishment, U.N. Doc. A/66/268 (Aug. 5, 2011).

V. Recommended Questions

1. Please provide data regarding the use of solitary confinement in the Federal Bureau of Prisons, including:
 - A. State the number of prisoners in the custody of the Federal Bureau of Prisons who have been continuously held in solitary confinement or “restrictive housing” for more than 15 days.
 - a. State the percentage of prisoners, out of the total incarcerated population, who are assigned to solitary confinement or “restrictive housing” over the course of a one-year period.
 - b. State the percentage of prisoners continuously held in solitary confinement or “restrictive housing” for more than 15 days, 30 days, 6 months, 1 year, 3 years and 10 years.
 - B. For those prisoners identified in Question 1A, state the following:
 - a. The facilities where the prisoners are held and the number of prisoners in solitary confinement or “restrictive housing” in each facility;
 - b. The mean and median length of stay in solitary confinement or “restrictive housing” in each facility;

- c. The age, gender, and race of each prisoner held in solitary confinement or “restrictive housing” in the last 12 months;
 - d. The number of prisoners held in solitary confinement or “restrictive housing” in the last 24 months who have a Medical Duty Status (MDS) Assignment for mental illness or mental retardation, as set forth in Chapter 2 of the Federal Bureau of Prisons, Program Statement 5310.12 "Psychology Services Manual" (pp. 12-13);
 - e. The reason for placement in or classification to solitary confinement or “restrictive housing” for each prisoner so held; and
 - f. The number of suicides or other incidents of self-harm in the last 24 months for prisoners held in solitary confinement or “restrictive housing.”
2. Please provide the data requested in Question 1 for detainees held in solitary confinement or “restrictive housing” in federal civil detention in connection with their immigration status (or held under contract in facilities that hold such detainees) and in federal juvenile facilities (or held under contract in facilities that hold such detainees).
 3. Please provide the data requested in Question 1 for all individuals in the United States held in solitary confinement or “restrictive housing” by state and local officials in juvenile facilities, jails, prisons, or any other places of detention.
 4. Please identify all federal, state, and local laws, policies and practices that limit or regulate the imposition of solitary confinement or “restrictive housing” on particularly vulnerable detainees, including youth, non-citizens, the elderly, pregnant women, persons with mental disabilities, persons with physical disabilities, and LGBTI persons.

VI. Suggested Recommendations

1. The federal, state, and local governments should promote transparency with regard to all physical and social isolation practices by making public all rules and regulations governing placement and conditions in isolation, the costs associated with these practices, and data about rates and duration of solitary confinement.
2. The federal, state, and local governments should ban prolonged solitary confinement in excess of 15 consecutive days in compliance with the Nelson Mandela Rules and should strictly regulate all other physical and social isolation practices.
3. The federal, state, and local governments should ban the solitary confinement of youth, pregnant women, and persons with mental and physical disabilities.
4. The federal, state, and local governments should compile data on the effect of solitary confinement on children.

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³ Jaeah Lee and Ryan Jacobs, *Maps: Solitary Confinement, State by State*, Mother Jones, (2012), <http://www.motherjones.com/politics/2012/10/map-solitary-confinement-states>

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- ⁶ *Invisible in Isolation: The Use of Segregation and Solitary Confinement in Immigration Detention*, Heartland Alliance's Nat'l Immigrant Just. Ctr. & Physicians for Hum. Rts. (Sept. 2012) available at http://www.immigrantjustice.org/press_releases/invisible-in-isolation#.UMOu05Pjmq8.
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Death Penalty

I. Issue Summary

The death penalty in the United States is in large part declining and limited to select jurisdictions, though substantial problems remain that stand in violation of its international legal obligations under the ICCPR. Since 1976, when the modern death penalty era began, the United States has executed 1,490 people.¹ As of mid-2018, more than 2,738 people remained on death row across the United States.² Thirty states formally retain the death penalty, as does the federal system and the military.³ In these jurisdictions, the death penalty is applied in an arbitrary and discriminatory manner, based on race, geography, socioeconomic status, and the quality of representation. There remains an intolerably high risk that innocent people will be sentenced to death or executed. States have turned to risky and untested methods of execution, and increased secrecy surrounding their procedures.

II. 2014 Committee's Concluding Observations on the Death Penalty in the United States:

While welcoming the overall decline in the number of executions and the increasing number of states that have abolished the death penalty, the Committee expressed concern about the continuing use of the death penalty and, in particular, racial disparities in its imposition that disproportionately affects African Americans. The Committee also expressed concerns regarding the high number of persons wrongly sentenced to death and use of untested lethal drugs and lack of transparency for their use. The Committee made the following recommendations:

1. Take measures to effectively ensure that the death penalty is not imposed as a result of racial bias;
2. Strengthen safeguards against wrongful sentencing to death and subsequent wrongful execution by ensuring, inter alia, effective legal representation for defendants in death penalty cases, including at the post-conviction stage;
3. Ensure that retentionist states provide adequate compensation for persons who are wrongfully convicted;
4. Ensure that lethal drugs used for executions originate from legal, regulated sources, and are approved by the United States Food and Drug Administration and that information on the origin and composition of such drugs is made available to individuals scheduled for execution; and
5. Consider establishing a moratorium on the death penalty at the federal level and engage with retentionist states with a view to achieving a nationwide moratorium.

III. Current U.S. Government Policy or Practice

In 2018, Washington became the 20th state to abolish the death penalty when its highest court ruled the death penalty unconstitutional under the Washington state constitution, on grounds that the punishment was applied in an arbitrary and racially discriminatory manner.⁴ Even in many states that retain the death penalty, it has been abandoned in practice. The governors of Oregon, Colorado, and Pennsylvania have imposed moratoria on executions in their states,⁵ with no execution taking place in these three states in ten or more years. Eight additional states, as well as the federal government and military, have not held an execution in ten or more years, and four additional states have not held an execution in five or more years.⁶

In 2018, only 42 people were sentenced to death, down dramatically from its peak of 315 new death sentences in 1996, and only a slight increase from the 39 new death sentences of 2017. No one was sentenced to death in Georgia, North Carolina, South Carolina, or Virginia –states that have produced high numbers of death sentences and executions in the past.⁷ Twenty-five people were executed in 2018, down from a high of 98 people in 1999. Public support for the death penalty, too, has dropped significantly. Fewer than 50% of Americans now believe the death penalty is fairly applied.⁸

Despite these positive developments, the death penalty system in the United States remains broken. In the modern period, 164 innocent people have been exonerated from death rows.⁹ Tragically, not all innocent people have escaped execution. Arkansas executed Ledell Lee, though he had steadfastly maintained his innocence, and the courts denied him the opportunity to conduct critical DNA testing that could have exculpated him of the crime.¹⁰

The death penalty's geographic disparities are stark. Texas, Florida, California, and Alabama remain leaders in new death sentences, and Texas alone was responsible for 13 of the 25 executions in 2018.¹¹ Racial bias continues to play an unacceptable role in all stages of capital proceedings – from jury selection to sentencing. The race of the victim is a major factor in determining who will face a capital prosecution and receive a death sentence.¹² The Supreme Court has taken multiple cases in recent years to address the failure of the lower courts to address racial discrimination in jury selection¹³ and in sentencing,¹⁴ and will review another this term.¹⁵ The federal government has never fulfilled its commitment in the UPR process to study racial disparities in the death penalty¹⁶.

Other forms of discrimination also plague the death penalty system. Jurors sentenced Charles Rhines to death in South Dakota because they believed that, as a gay man, he would enjoy a life sentence.¹⁷ Rhines is again seeking review of his case before the United States Supreme Court.

Facing a shortage of drugs to use in lethal injection procedures, state departments of correction across the country have been experimenting with new drug combinations in lethal injection protocols, as well as alternative methods of execution. States have also resorted to unregulated means to obtain lethal injection drugs.¹⁸ Arkansas scheduled eight men for execution in a 10-day period in 2017 in the state's rush to execute as many people as possible before the expiration of its stock of midazolam.¹⁹ The state ultimately put four of these men to death. Oklahoma, Alabama, and Mississippi have now authorized execution by nitrogen gas as an alternative to lethal injection but have yet to attempt this untested procedure.²⁰ The State of Tennessee executed two men by electric chair in late 2018, though some states have already ruled prohibited that method of execution.²¹ The Supreme Court is considering a challenge to lethal injection in the case of Russell Bucklew, who, due to his unique and severe medical condition, argues that the method would be cruel and unusual as applied to him.²² The IACHR has already ruled in his case that his execution should not proceed.²³

Prisoners with intellectual disabilities and severe mental illness continue to face execution and those with strong claims of intellectual disability remain on death row, despite Supreme Court's decision in *Atkins v. Virginia*. Bobby Moore, a Texas prisoner, remains on death row, despite the fact that the Court had condemned the non-scientific standards Texas courts were

using to determine intellectual disability claims.²⁴ Moore is now asking the Court to review his case again.

While the death penalty in the United States is practiced predominantly at the state level, there has been a rise in federal capital prosecutions since the start of the Trump Administration.²⁵ President Trump has also called for expanded use of the death penalty to include drug offenses.²⁶ Death penalty prosecutions continue at the Guantanamo military commissions, with troubling due process and fair trial violations²⁷.

IV. Recommended Questions

1. What steps is the United States taking to ensure that the death penalty is not imposed disproportionately based on race, geography, socioeconomic status, and quality of counsel?
2. What precautions will the United States take to ensure that it will not continue to impose the death penalty against and execute the innocent? People with intellectual disability? People with severe mental illness?
3. What measures will the United States take to ensure that it will not subject persons under sentence of death to cruel, inhuman, and degrading treatment?

V. Suggested Recommendations

1. The U.S. should impose a moratorium on all federal and military death penalty trials as well as executions.
2. Congress should amend the habeas-related provisions of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) so that federal courts are more accessible to prisoners asserting claims of constitutional violations.
3. The U.S. should create and adequately fund state defender organizations independent of the judiciary and with sufficient resources to provide quality representation to indigent capital defendants at all levels. States must ensure that capital defense lawyers have adequate time, compensation, and resources for their work to ensure the enhanced fair trial rights guaranteed under the ICCPR are protected.

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² *Death Row U.S.A.: Summer 2018*, NAACP Legal Defense Fund (July 1, 2018), available at <https://www.naacpldf.org/wp-content/uploads/DRUSASummer2018.pdf>.

³ DPIC, With and Without the Death Penalty (Oct. 11, 2018), available at <https://deathpenaltyinfo.org/states-and-without-death-penalty>.

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⁵ *The Death Penalty in 2018: Year End Report*, DPIC at 3 (Dec. 2018), available at <https://deathpenaltyinfo.org/documents/2018YrEnd.pdf> [hereinafter DPIC Report 2018].

⁶ DPIC, Jurisdictions with no recent executions (Nov. 21, 2018), available at <https://deathpenaltyinfo.org/jurisdictions-no-recent-executions>.

⁷ DPIC Report 2018 at 4

⁸ DPIC Report 2018 at 3

⁹ DPIC, Innocence: List of Those Freed From Death Row (Nov. 5, 2018), available at <https://deathpenaltyinfo.org/innocence-list-those-freed-death-row>.

¹⁰ Elizabeth Vartkessian, *Ledell Lee Never Had a Chance*, The Marshall Project (Apr. 27, 2017), <https://www.themarshallproject.org/2017/04/27/ledell-lee-never-had-a-chance>.

¹¹ DPIC Report 2018 at 4

¹² See generally DPIC, Race and the Death Penalty, available at <https://deathpenaltyinfo.org/race-and-death-penalty>.

¹³ *Foster v. Chatman*, 136 S.Ct. 1737 (2016).

¹⁴ *Buck v. Davis*, 137 S.Ct. 759 (2017).

¹⁵ *Flowers v. Mississippi*, SCOTUSblog, available at <http://www.scotusblog.com/case-files/cases/flowers-v-mississippi-2/>.

¹⁶ Draft Report of the Working Group on the Universal Periodic Review on its Twenty-Second Session: United States of America, ¶ 176.1-292, U.N. Doc. A/HRC/WG.6/22/L.10 (May 21, 2015)

¹⁷ Ria Tabacco Mar, *A Jury May Have Sentenced a Man to Death Because He is Gay. It's Time for a Federal Court to Hear His Bias Claim*, ACLU: Speak Freely (Aug. 6, 2018), <https://www.aclu.org/blog/lgbt-rights/criminal-justice-reform-lgbt-people/jury-may-have-sentenced-man-death-because-he>.

¹⁸ See generally DPIC, *Lethal Injection*, available at <https://deathpenaltyinfo.org/lethal-injection>.

¹⁹ Matthew Haag and Richard Fausset, *Arkansas Rushes to Execute 8 Men in the Space of 10 Days*, N.Y. Times (Mar. 3, 2017), <https://www.nytimes.com/2017/03/03/us/arkansas-death-penalty-drug.html>.

²⁰ Denise Grady and Jan Hoffman, *America to trial using nitrogen gas as method of execution*, The Independent (May 17, 2018), <https://www.independent.co.uk/news/world/americas/america-death-penalty-nitrogen-gas-execution-method-oklahoma-alabama-mississippi-a8340896.html>.

²¹ See generally DPIC, *Methods of Execution*, <https://deathpenaltyinfo.org/methods-execution>.

²² *Bucklew v. Precythe*, SCOTUSblog, available at <http://www.scotusblog.com/case-files/cases/bucklew-v-precythe/>.

²³ *IACHR Concludes that the United States Violated Russell Bucklew's Fundamental Rights, that His Execution Should Not Proceed and His Sentence Should be Commuted*, OAS – IACHR: Press Release (March 19, 2018), http://www.oas.org/en/iachr/media_center/PReleases/2018/054.asp.

²⁴ *Moore v. Texas*, 137 S.Ct. 1039 (2017).

²⁵ Jim Mustian, *Under Trump, federal death penalty cases are ticking up*, AP News (Oct. 31, 2018), <https://www.apnews.com/20bb9bfc954248bda8b13b4a4240adad>.

²⁶ Amanda Holpuch, Jessica Glenza, and Ben Jacobs, *Trump calls for death penalties for drug dealers as focus of opioids plan*, The Guardian (Mar. 19, 2018), <https://www.theguardian.com/us-news/2018/mar/19/donald-trump-death-penalty-drug-dealers-opioids-new-hampshire>.

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ACLU

January 2019

The Department of Injustice Under Jeff Sessions



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CONTENTS

INTRODUCTION	1
VOTING RIGHTS	2
IMMIGRANTS' RIGHTS	3
CRIMINAL JUSTICE	6
DISABILITIES	9
HEALTH CARE	10
RELIGIOUS LIBERTY	10
LGBT RIGHTS	10
CRIMINALIZATION OF POVERTY	11
AFFIRMATIVE ACTION	12
WORKERS' RIGHTS	12
FREE PRESS AND PROTEST RIGHTS	12
PRIVACY RIGHTS	13
SEPARATION OF POWERS	15
POLITICIZED ANALYSIS AND PERSONNEL	15

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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