

The logo for the New York City Bar, featuring the text "NEW YORK CITY BAR" in a serif font, centered between two horizontal blue bars.

NEW YORK  
CITY BAR

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January 6, 2017

**Via Regular Mail and Facsimile**

The Honorable Chuck Grassley  
Chairman  
United States Senate Committee on the Judiciary  
224 Dirksen Senate Office Building,  
Washington, D.C. 20510-6050

The Honorable Dianne Feinstein  
Ranking Member  
United States Senate Committee on the Judiciary  
224 Dirksen Senate Office Building,  
Washington, D.C. 20510-6050

**Nomination of Sen. Jefferson B. Sessions III  
for Attorney General**

Dear Senator Grassley and Senator Feinstein:

I submit this letter on behalf of the New York City Bar Association (“City Bar”), a voluntary bar association founded in 1870 and having over 24,000 members, to offer comments on the nomination of Senator Jefferson B. Sessions III to serve as Attorney General of the United States.

While the City Bar regularly reviews and provides public assessments of the qualification of candidates to become judges in New York City federal, state and local courts, the New York Court of Appeals and the United States Supreme Court, the City Bar has never developed and communicated a public evaluation of whether a nominee for a Cabinet position is qualified for that position. We acknowledge that the Senate should afford the President substantial deference in the selection of Cabinet members when exercising its Constitutional function of advice and consent. At the same time, the Attorney General occupies a special position as the nation’s top law enforcement officer, and the City Bar’s mission centrally embraces advancement of the rule of law and the fair administration of justice, especially by those who are entrusted with important public responsibilities.

In light of the characteristics of Sen. Sessions’ candidacy set forth in this letter, the City Bar believes it is appropriate to urge the Judiciary Committee to pursue such searching inquiry regarding Sen. Sessions’ record and views as is necessary to confirm his commitment to preserving and advancing the rule of law, enforcing the law (including legislation or judicial decisions with which he disagrees), and protecting the rights of individuals who lack the power

to protect themselves. These inquiries should be predicated on the position – which the City Bar believes the Judiciary Committee shares – that whole-hearted commitment to these values is an essential component of a candidate’s qualification to serve as Attorney General of the United States.

After an extensive review of the materials provided in Sen. Sessions’ responses to the nominee questionnaires for his current candidacy and his 1986 candidacy for a federal district court judgeship, as well as other materials identified through research into his record as a public servant, the City Bar respectfully urges that the Judiciary Committee’s review of Sen. Sessions’ candidacy should include searching inquiry into a number of subjects:

#### I. The Apparent Incompleteness of Sen. Sessions’ Questionnaire Responses

As the Judiciary Committee has recognized, the questionnaire responses submitted by a candidate for a position requiring Senate confirmation are important sources of information for review of that candidacy. Questions have been raised as to the completeness of Senator Sessions’ questionnaire responses, submitted on December 9, 2016<sup>1</sup> and supplemented on December 23,<sup>2</sup> with respect to potentially important information concerning his public remarks and writings.<sup>3</sup>

While the generation of complete questionnaire responses after decades in public life as a U.S. Senator, State Attorney General and United States Attorney is undoubtedly a significant undertaking, we submit that it is appropriate, and even essential, for the Judiciary Committee to insist on receipt of comprehensive questionnaire responses. Some of the information that would be provided in a complete response to the questionnaire may not be publicly available by other means. Senator Sessions himself has asserted strong positions about the importance of completeness in questionnaire responses and the strength of the adverse inferences that should follow from incompleteness, including in connection with review of the judicial candidacies of Justice Sonia Sotomayor<sup>4</sup> and California Supreme Court Justice Goodwin Liu when he was being considered for a position on the U.S. Court of Appeals for the Ninth Circuit.<sup>5</sup>

The importance of ensuring that the Judiciary Committee’s vote is fully informed and based on as complete a record as possible argues strongly for postponing the closing of Sen. Sessions’ confirmation hearings and a vote on his nomination until the Committee can confirm that all information that appears obtainable has been supplied. Rigor in collecting a complete record appears particularly warranted because Sen. Sessions’ actions and statements in

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<sup>1</sup> <https://www.judiciary.senate.gov/imo/media/doc/Sessions%20SJC%20Questionnaire%20F.pdf>

<sup>2</sup> <https://www.judiciary.senate.gov/imo/media/doc/Sessions%20SJC%20Questionnaire%20-%202nd%20Supplement.pdf>; <http://www.judiciary.senate.gov/download/supplemental-appendix-12a>; <http://www.judiciary.senate.gov/download/supplemental-appendix-12d>; <http://www.judiciary.senate.gov/download/supplemental-appendix-12e>

<sup>3</sup> *Sen. Sessions Belatedly Supplements His Senate Judiciary Questionnaire- But Dozens of Items Still Missing and Records for Two Decades Still Largely Absent* (December 30, 2016 Report by National Council of Asian Pacific Americans, People for the American Way, and Alliance for Justice), available at <http://www.afj.org/wp-content/uploads/2016/12/Second-Sessions-Memo.pdf>

<sup>4</sup> [http://blog.al.com/spotnews/2009/06/washington\\_us\\_sen\\_jeff.html](http://blog.al.com/spotnews/2009/06/washington_us_sen_jeff.html)

<sup>5</sup> <http://www.washingtonpost.com/wp-dyn/content/article/2010/04/07/AR2010040703034.html>

connection with his 1986 candidacy for a federal judgeship led the Judiciary Committee to the extremely rare step of a vote disapproving the presentation of his candidacy to the full Senate, and because certain statements and actions reflected in the incomplete currently available record present reasons for inquiry into the firmness of Sen. Sessions' commitment to enforcing certain areas of the law.

## II. Questions Presented by One of Sen. Sessions' Questionnaire Responses

Sen. Sessions' response to Section 15 of his questionnaire, asking him to describe the ten most significant matters he "significantly handled," identifies four civil rights cases dating from before 1986 that he did not mention when he was asked the same question in Section 18 of his 1986 questionnaire: *United States v. Conecuh County*, *Davis v. Board of School Commissioners of Mobile County*, *United States v. Dallas County Commission*, and *United States v. Marengo County Commission*.<sup>6</sup> Because it appears that Sen. Sessions may have listed these cases at least in part in an effort to demonstrate his record of commitment to enforcing the civil rights laws, and because others involved in these cases have publicly asserted that Sen. Sessions had no substantive involvement in the cases,<sup>7</sup> it appears appropriate for the Judiciary Committee to inquire about these matters sufficiently to enable it to understand fully what role Senator Sessions may have played in these cases and what relevance his citation of them may have to his candidacy.

## III. Statements and Actions by Sen. Sessions Warranting Inquiry

Over the course of Sen. Sessions' long career as a public servant, he has made many statements about what he believes the law should provide. The City Bar does not believe that statements advocating change in the law – even highly politicized ones – will generally support a finding that a candidate for Attorney General lacks the critical qualification of the required commitment to the rule of law. But at least some of the statements in which Sen. Sessions

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<sup>6</sup> <https://www.judiciary.senate.gov/imo/media/doc/Sessions%20SJC%20Questionnaire%20F.pdf> at 16, 18, 24, 26; *United States v. Conecuh County*, CV 83-1201-H (S.D. Ala. June 12, 1984); *Davis v. Board of School Commissioner of Mobile County*, CV 3003-63-H (S.D. Ala.) (describing how a consent decree was entered after nearly a decade of litigation and citing to *Davis v. Board of Sch. Comm'rs of Mobile Cnty.*, 1986 U.S. Dist. LEXIS 27519, at \*2-3 (S.D. Ala., Mar. 27, 1986) which states that the consent decree was adopted in 1982); *United States v. Dallas County Commission*, CV 78-578-H (S.D. Ala.) (describing litigation pending since 1978 that culminated in appellate decisions in 1988 in *Dallas*, 850 F.2d 1430 (11th Cir. 1988) and 850 F.2d 1433 (11th Cir. 1988)); *United States v. Marengo County Commission*, CV 78-474-H (S.D. Ala.) (describing litigation involving decisions including an appeal in *United States v. Marengo Cnty. Comm'n*, 731 F.2d 1546, 1572 (11th Cir. 1984)).

<sup>7</sup> For example, with respect to *Dallas County*, the lead DOJ Civil Rights Division attorney handling the case has stated, "He never filed anything in the Dallas County case that he wrote. Usually, the civil rights division filed the briefs and wrote them. His name would have been included in the CRD draft, which is standard operating procedure." <https://www.theatlantic.com/politics/archive/2016/12/which-schools-did-jeff-sessions-desegregate/509867> Similarly, with respect to *Davis*, a former Civil Rights Division attorney who worked on the case has stated, "My recollection is that Sessions had very little to do with it. He was the U.S. attorney, he was probably on the pleading, but I don't remember him playing a major role in it." <https://www.theatlantic.com/politics/archive/2016/12/which-schools-did-jeff-sessions-desegregate/509867> Sen. Sessions' supplemental questionnaire described his role in these cases as "to provide support for the Department of Justice, Civil Rights Division, attorneys." <https://www.judiciary.senate.gov/imo/media/doc/Sessions%20SJC%20Questionnaire%20-%20Supplement.pdf> Following Sen. Sessions' supplemental submission, Civil Rights Division attorneys who handled three of the four cases stated in an op-ed that Sen. "Sessions had no substantive involvement in any of" these three cases. [https://www.washingtonpost.com/opinions/jeff-sessions-says-he-handled-these-civil-rights-cases-he-barely-touched-them/2017/01/03/4ddfffa6-d0fa-11e6-a783-cd3fa950f2fd\\_story.html?utm\\_term=.2f3237cb3949](https://www.washingtonpost.com/opinions/jeff-sessions-says-he-handled-these-civil-rights-cases-he-barely-touched-them/2017/01/03/4ddfffa6-d0fa-11e6-a783-cd3fa950f2fd_story.html?utm_term=.2f3237cb3949)

indicated his disagreement with existing law, as Sen. Sessions has framed them, justify rigorous inquiry into Sen. Sessions' commitment to enforcing the law and energetically advancing all the protections that existing law affords even if he disagrees with the law. That inquiry appears to be warranted in at least the following areas:

- Senator Sessions has stated that, “In reality, federal courts are threatening our political institutions, not vice-versa. The federal courts have usurped one political issue after another. Abortion, homosexual rights, school busing, racial preferences, term limits, criminal procedure.”<sup>8</sup> His expression of this view warrants rigorous inquiry into his commitment to enforcing and supporting the judicial decisions he has criticized even though he disagrees with them.
- Although he has acknowledged the effectiveness of the Voting Rights Act, Senator Sessions also has criticized the law as “an intrusive piece of legislation.” That statement warrants inquiry into his commitment to enforcing this law.<sup>9</sup>
- Senator Sessions opposed the Shepard-Byrd hate crime law and the Violence Against Women Act,<sup>10</sup> and has criticized laws providing for efforts to mainstream special education students as “a big factor in accelerating the decline in civility and discipline in classrooms all over America” and “the single most irritating problem for teachers throughout America today.”<sup>11</sup> While opposition to passage of these laws reflects the nature of political debate and does not by itself present disqualification issues, these positions warrant inquiry into his current commitment to vigorously enforcing these laws as passed.
- Senator Sessions has commented about immigrants from the Dominican Republic as follows:

Fundamentally, almost no one coming from the Dominican Republic to the United States is coming here because they have a provable skill that would benefit us and that would indicate their likely success in our society. They come in because some other family member of a qualified relation is here as a citizen or even a green card holder. That is how they get to come. They are creating a false document to show these are relatives or their spouses and they are married when it is not so.<sup>12</sup>

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<sup>8</sup> <http://www.fed-soc.org/publications/detail/reflections-on-judicial-independence>

<sup>9</sup> *Hearings on the Nomination of Jefferson B. Sessions III* at 30-31, available at <https://www.scribd.com/document/15090183/Sessions-Hearing-Transcripts>; <http://talkingpointsmemo.com/dc/why-trump-s-choice-of-jeff-sessions-as-ag-is-alarming-voting-rights-advocates>

<sup>10</sup> [http://www.huffingtonpost.com/brian-levin-jd/trumps-attorney-general-nominee-was\\_b\\_13080004.html](http://www.huffingtonpost.com/brian-levin-jd/trumps-attorney-general-nominee-was_b_13080004.html); [http://www.senate.gov/legislative/LIS/roll\\_call\\_lists/roll\\_call\\_vote\\_cfm.cfm?congress=113&session=1&vote=00019](http://www.senate.gov/legislative/LIS/roll_call_lists/roll_call_vote_cfm.cfm?congress=113&session=1&vote=00019)

<sup>11</sup> <http://www.forbes.com/sites/tarahaele/2016/11/29/would-special-education-rights-be-safe-with-jeff-sessions-as-u-s-attorney-general/#45f68be45dd8>

<sup>12</sup> <http://www.sessions.senate.gov/public/index.cfm/floor-statements?ID=ee49e505-7e9c-9af9-731c-006d27095530>

These statements justify inquiry into Sen. Sessions' commitment to combating and treating as legally intolerable racial stereotyping and all forms of discrimination based on race, national origin or other legally protected points of difference.

IV. Follow-Up Questions from Sen. Sessions 1986 Judicial Nomination

The public record does not identify all the reasons why the Senate Judiciary Committee took the rare step of voting not to approve the presentation of Sen. Sessions' candidacy for a district court judgeship to the full Senate in 1986. Reports of these hearings suggest, though, that factors in the decision included the presence of accusations that Sen. Sessions had made racially offensive remarks on several occasions and had acted improperly in prosecuting unsuccessful claims of voter fraud against African-American civil rights workers in *United States v. Turner*. While the City Bar believes that Sen. Sessions' denials of having made the asserted statements and the passage of 30 years since those confirmation hearings should prevent that 1986 record from determining the outcome of the current confirmation process, the seriousness of the issues presented at the time – sufficient to provide an extremely rare rejection by this Committee – appears to warrant inquiry into whether Sen. Sessions categorically repudiates today, as improper and intolerable, the remarks and actions ascribed to him in the 1986 confirmation hearings.

Thank you for your attention to this important matter.

Respectfully yours,

A handwritten signature in black ink, appearing to read "John S. Kiernan", followed by a horizontal line extending to the right.

John S. Kiernan  
President, New York City Bar Association

CC:

Hon. Richard Blumenthal  
Hon. Christopher A. Coons  
Hon. John Cornyn  
Hon. Ted Cruz  
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Hon. Jeff Flake  
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