



# WHAT YOU SHOULD KNOW ABOUT THE CIVIL RIGHTS RECORD OF WILLIAM BARR

A BRIEF BY

NAACP LEGAL DEFENSE AND EDUCATIONAL FUND, INC.



## What You Should Know about the Civil Rights Record of William Barr

On December 7, 2018, President Trump announced William P. Barr as his nominee for Attorney General of the United States, following the forced resignation of Jefferson (“Jeff”) Beauregard Sessions III. As head of the U.S. Department of Justice (DOJ) and the nation’s top law enforcement official, the position of Attorney General is one of unparalleled power within the Executive Branch and has profound implications for civil rights. The Attorney General must work to advance the full mission of DOJ which includes working to “ensure the fair and impartial administration of justice to all Americans,” including by monitoring and enforcing Americans’ constitutional and civil rights. It is therefore essential that any nominee’s record on civil rights is thoroughly and closely scrutinized before confirmation to this position of extraordinary public trust and firmly opposed if that record indicates a lack of commitment to the constitutional principles of fairness, equality, and the rule of law.

The importance of this inquiry is punctuated by the context in which it arises. The nomination of Mr. Barr must be viewed in the context of this unique and critical moment in our nation’s history, informing how one should evaluate Mr. Barr’s record and his fitness for office. This President is laboring under the cloud of multiple federal investigations into potential felonious activity involving collusion with a foreign power in the very election process that brought him to office and enabled the President to make this nomination. The investigation is ongoing and has resulted in multiple indictments and guilty pleas.<sup>1</sup> These investigations not only taint this President and undermines his credibility and legitimacy to even make nominations, they taint this confirmation process and the nominee.

Below is an initial overview of Mr. Barr’s record on civil rights throughout his career, including his time in the DOJ during the George H.W. Bush Administration, done with an understanding and through the lens of the current state of the Department of Justice he would lead.

### The Racial Justice Legacy of Attorney General Sessions

From February 2017 until November 2018, the DOJ was led by Mr. Sessions, who established policies, programs, and practices that undermined and attacked the civil rights of communities of color, including the dismantling of racial diversity efforts and withdrawal of guidance addressing racial disparities in school discipline, promoting voter suppression, and abdicating its obligation to protect the civil rights of persons who encounter the criminal justice system. We provide a non-exhaustive review below.

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<sup>1</sup> See, e.g., Editorial Bd., The Case for Robert Mueller’s Probe of Russian Meddling, NEWSDAY, Aug. 25, 2018, <https://www.newsday.com/opinion/editorial/robert-mueller-russian-election-meddling-1.20655665>; Sharon LaFraniere, Paul Manafort, Trump’s Former Campaign Chairman, Guilty of 8 Counts, N.Y. TIMES, Aug. 21, 2018, <https://www.nytimes.com/2018/08/21/us/politics/paul-manafort-trial-verdict.html>.

- The Administration has taken multiple actions that negatively impact the civil rights of students of color. At a time when schools are re-segregating and Black and brown students are increasingly attending racially isolated, under-resourced, high-poverty schools,<sup>2</sup> the Administration has made a concerted effort to dismantle diversity efforts from K through college. In July 2018, the Departments of Education and Justice withdrew several guidance documents on the voluntary use of race to achieve diversity and reduce racial isolation in K-12 schools and guidance on how to achieve diversity in higher education under Title VI of the Civil Rights Act of 1964. Moreover, these same Departments undermined efforts to address widespread racial disparities in the administration of school discipline shortly after Mr. Sessions's departure. In December 2018, under the guise of a Federal Commission on School Safety led by the Secretaries of the Departments of Education, Justice, Homeland Security and Health and Human Services,<sup>3</sup> the Trump Administration rescinded the 2014 Dear Colleague Letter on the Nondiscriminatory Administration of School Discipline.<sup>4</sup> The guidance did not address school safety, but rather informed school districts how to avoid engaging in racially discriminatory disciplinary practices by detailing the requirements of federal law and offering examples of promising school programs that keep students who experience behavioral problems in school and learning. Additionally, in August 2018, DOJ filed a court document in support of a lawsuit alleging that Harvard College's affirmative action policy discriminates against Asian-American students and seeking as a remedy a race-neutral admissions process that would demonstrably decrease the university's racial diversity and harm all students.<sup>5</sup> DOJ took this position even though there is U.S. Supreme Court precedent, most recently affirmed in 2016, stating that race can be one of many factors considered in the college admissions process to promote diversity.<sup>6</sup>
- Demonstrated through multiple actions, DOJ has become this Administration's voter suppression agency. Efforts to curtail voting rights and make it more difficult for people to vote intensified under the leadership of Mr. Sessions. For example, immediately following Mr. Sessions' appointment, DOJ reversed course to side with Texas in an effort to impose a racially discriminatory voter identification scheme, asking a federal appeals court to allow the state to enforce the law that a lower court found violated the Voting Rights Act and the 14<sup>th</sup> and 15<sup>th</sup> Amendments of the U.S. Constitution.<sup>7</sup> DOJ similarly sided with Ohio in an effort to unfairly purge voters from its rolls.<sup>8</sup> This reversed a position which spanned more than two decades and across

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<sup>2</sup> U.S. GOV'T ACCOUNTABILITY OFFICE (GAO), GAO-16-345, K-12 EDUCATION: BETTER USE OF INFORMATION COULD HELP AGENCIES IDENTIFY DISPARITIES AND ADDRESS RACIAL DISCRIMINATION (2016).

<sup>3</sup> *Federal Commission on School Safety*, ED.GOV, <https://www.ed.gov/school-safety>.

<sup>4</sup> Roger Clegg, *Great News: Administration Rescinds Obama School-Discipline Guidance* (Dec. 21, 2018, 2:55 PM), <https://www.nationalreview.com/corner/great-news-administration-rescinds-obama-school-discipline-guidance/>.

<sup>5</sup> *Students for Fair Admissions, Inc. v. Harvard Corp.*, No. 1:14 CV 14176 ADB, 2018 (D. Mass. Aug. 30, 2018), [http://cdn.cnn.com/cnn/2018/images/08/30/harvard\\_statement\\_of\\_interest\\_filed\\_0.pdf](http://cdn.cnn.com/cnn/2018/images/08/30/harvard_statement_of_interest_filed_0.pdf).

<sup>6</sup> See *Fisher v. University of Texas*, 579 U.S. \_\_\_ (2016).

<sup>7</sup> Jim Malewitz, *Trump's Justice Department Wants Texas to Keep Invalidated Voter ID Law*, TEX. TRIBUNE, Sep. 1, 2017, <https://www.texastribune.org/2017/09/01/trumps-doj-wants-texas-be-able-use-id-law-struck-discriminatory/>; *Veasey v. Abbott*, 265 F. Supp. 3d 684 (Aug. 23, 2017).

<sup>8</sup> *Husted v. Philip Randolph Institute*, 584 U.S. \_\_\_ (2018); Charlie Savage, *Justice Dept. Backs Ohio's Effort to Purge Infrequent Voters from Rolls*, N.Y. TIMES, Aug. 8, 2017.

Republican and Democratic Administrations alike, which interpreted the NVRA as prohibiting the exact type of racially discriminatory voter purges being conducted by Ohio.<sup>9</sup>

- DOJ has also abandoned its obligation to ensure that criminal laws are administered fairly and without regard to race. Despite a decades-long history of police abuse in Baltimore and Chicago,<sup>10</sup> DOJ took steps to prevent the approval of consent decrees to address documented civil rights violation; these are agreements it is authorized to negotiate pursuant to the Violent Crime Control and Law Enforcement Act of 1994, 42 U.S.C. § 14141 (re-codified at 34 U.S.C § 12601).<sup>11</sup>
- In January 2017, DOJ filed a motion to delay the court's approval of the proposed consent decree that Baltimore city officials and residents had negotiated for months with DOJ. The judge denied the federal government's 11<sup>th</sup> hour attempt to derail the consent decree, stating that "[i]t would be extraordinary for the court to permit one side to unilaterally amend an agreement already jointly reached and signed."<sup>12</sup> In Chicago, after DOJ reneged on an agreement in principle with city officials to negotiate a consent decree to address the civil rights violations detailed in DOJ's investigative report,<sup>13</sup> the Illinois Attorney General filed a separate civil rights lawsuit relying on DOJ's report and entered into a consent decree with Chicago city officials. Even though DOJ was not a party to the case, Mr. Sessions filed a letter of interest opposing the consent decree.<sup>14</sup>

In addition to the incredible damage to civil rights spearheaded by Mr. Sessions during his tenure as Attorney General, immediately upon his forced resignation, Matthew Whitaker, Mr. Sessions' former chief of staff, was installed as interim attorney general. There are serious questions and uncertainty about his qualifications for the position. However, equally, if not more, important, there are questions about the legality of the appointment itself, given that Mr. Whitaker was placed in the position without the Constitutionally required advice and consent of the Senate. In previous interviews and speeches, Mr. Whitaker has expressed views that courts "are supposed to be the inferior branch", questioned the Supreme Court's power to review legislative and executive acts and declare them unconstitutional, questioned key long-standing Supreme Court rulings and refused to recuse himself from the Mueller investigation despite the recommendation of the top ethics official at DOJ. For over three months, Mr. Whitaker has led DOJ without any oversight. This is the DOJ that will be inherited by the next

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<sup>9</sup> <https://www.naacpldf.org/files/about-us/16-980bsacNAACPLegalDefenseFundetal.pdf>.

<sup>10</sup> Baltimore, <https://www.justice.gov/crt/file/883296/download>; Chicago, <https://www.justice.gov/opa/file/925846/download>.

<sup>11</sup> This federal law allows the U.S. Department of Justice to investigate police departments to determine if there is a pattern or practice of unlawful policing, including any violation of antidiscrimination laws, such as Title VI of the Civil Rights Act of 1964. See, <https://www.justice.gov/crt/conduct-law-enforcement-agencies>.

<sup>12</sup> Mike Hellgren, *Judge Approves Baltimore PD-DOJ Consent Decree, Denies DOJ's Request for Delay* (Apr. 7, 2017, 10:25 PM), <https://baltimore.cbslocal.com/2017/04/07/baltimore-police-department-of-justice-consent-decree/>.

<sup>13</sup> *Agreement in Principle Between the U.S. DOJ and the City of CHI. Regarding the CHI Police Department* (Jan. 13, 2017), <https://www.justice.gov/crt/case-document/file/925921/download>.

<sup>14</sup> Hellgren, M., <https://baltimore.cbslocal.com/2017/04/07/baltimore-police-department-of-justice-consent-decree/>.

attorney general and that person must be committed to restoring the integrity of the Department.

This is a summary of some of the devastating legacy of the prior Attorney General and the DOJ Mr. Barr will lead if confirmed. It is critical to assess whether Mr. Barr would continue to implement these policies or work to reverse them. A preliminary review of Mr. Barr's record is very troubling and reflects his promotion of policies and practices that have disproportionately harmed the civil rights of communities of color in particular. Additionally, a recent Washington Post op-ed co-authored by Mr. Barr wherein he praises the tenure of Mr. Sessions and references his leadership of DOJ as "outstanding", suggests that he may continue to steer DOJ in the same troubling and unacceptable manner as Mr. Sessions and will not engage in the necessary course correction to restore fairness and integrity to the Department.<sup>15</sup>

## Tenure as Attorney General in the George H.W. Bush Administration

In his zeal to expand executive and police power to incarcerate more Americans, build more prisons, and further the War on Drugs with all of attendant impacts on communities of color, Mr. Barr's tenure in the George H.W. Bush administration was marked by a callous lack of empathy and respect for constitutional rights and democratic norms. His record on criminal justice matters truly stands out as deeply concerning. Mr. Barr promoted the types of policies that would undermine the incremental progress that has been made in the criminal legal system and his rhetoric regarding policing demonstrates a complete lack of understanding, or a disingenuous denial, of the role of race in police interactions. The prospect of Mr. Barr enabling this Administration's worst undemocratic and authoritarian impulses is deeply troubling. But as alarming as Mr. Barr's record in the George H.W. Bush administration is, it may only hint at the harm that will be done to people of color, other marginalized groups, and our democracy, if Mr. Barr holds a key role in the Trump administration.

- As U.S. Attorney General from 1991 to 1993, Mr. Barr was a central architect of the out-dated, draconian "tough on crime" approach that fostered the "war on drugs" and so-called "law and order" policies which have caused incarceration rates in the United States to more than triple since the 1980s.<sup>16</sup> This rapid increase is largely attributable to the increased incarceration of non-violent drug offenders over the last three decades. Criminal justice policies like the ones developed by Mr. Barr led to this

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<sup>15</sup> William P. Barr, Edwin Meese III, and Michael B. Mukasey, *We are Former Attorneys General. We Salute Jeff Sessions* (Nov. 7, 2018), [https://www.washingtonpost.com/opinions/jeff-sessions-can-look-back-on-a-job-well-done/2018/11/07/527e5830-e2cf-11e8-8f5f-a55347f48762\\_story.html?utm\\_term=.cba198111a8c](https://www.washingtonpost.com/opinions/jeff-sessions-can-look-back-on-a-job-well-done/2018/11/07/527e5830-e2cf-11e8-8f5f-a55347f48762_story.html?utm_term=.cba198111a8c).

<sup>16</sup> U.S. Dep't of Justice, Bureau of Justice Statistics, *Correctional Populations in the United States 1998* (2002); Paige M. Harrison & Allen J. Beck, U.S. Dep't of Justice, Bureau of Justice Statistics, *Prisoners in 2003* (2004); <https://www.vox.com/policy-and-politics/2018/12/7/18129487/william-barr-trump-attorney-general-criminal-justice-reform>.

incarceration rate surge and continue to drive racial inequality and poverty, creating barriers to opportunity and devastating communities of color.

- Mr. Barr acknowledges that he came into office as Attorney General with a specific agenda of imposing harsh criminal penalties.<sup>17</sup> The New York Times reported that Mr. Barr began his tenure as Attorney General by “shift[ing] the department to a more aggressive stance” by enacting “a series of anti-crime measures, mainly redeploying existing manpower on his violent crime priorities: gangs, drugs and guns.”<sup>18</sup>
- Mr. Barr has insisted the unrest in Los Angeles following the beating of Rodney King in 1991 underscored the need for a tough-on-crime stance. Mr. Barr maintains that what followed the acquittals of the officers who assaulted Rodney King “was not civil unrest or the product of some festering injustice,” but “was gang activity, basically opportunistic.”<sup>19</sup> Mr. Barr acknowledges his role in preparing a plan “overnight” to send over 2000 federal officers—FBI, SWAT, a border patrol special operations group, U.S. marshals, prison special operations, etc.—to Los Angeles to make clear that, in his own words, “we’re not going to tolerate any of this stuff out in the streets.”<sup>20</sup> Mr. Barr told President Bush that an alternative to his plan to send in the federal officers would be to send in “the regular army.” Mr. Barr stated, “We had just gone through an exercise two years earlier in St. Croix, so I was very familiar with how to use regular Army in a domestic situation.”<sup>21</sup> Mr. Barr regrets that DOJ did not pursue federal indictments against people in the Los Angeles community during the uprising.<sup>22</sup>
- A 1991 New York Times editorial on Mr. Barr’s nomination for Attorney General noted that Mr. Barr criticized Democrats as “pro-criminal” because they supported legislation that sought “nothing more than to preserve the right of state prisoners to appeal to Federal courts, as well as safeguards against racial discrimination in death penalty sentencing.”<sup>23</sup>
- In 1992, Mr. Barr released a report titled “The Case for More Incarceration.” The report argues against the concept of over-incarceration and urges the building of more prisons while decreasing the use of alternatives to incarceration for felonies in the criminal justice system. He also warns about insufficient sentences and early release. For example, Mr. Barr writes, “One proposition is abundantly clear: Failure to incarcerate convicted criminals will lead to additional crimes. There are two sources

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<sup>17</sup> Ronald J. Ostrow, *William Barr: A ‘Caretaker’ Attorney General Proves Agenda-Setting Consercation* (June 21, 1992), [http://articles.latimes.com/1992-06-21/opinion/op-1236\\_1\\_attorney-general](http://articles.latimes.com/1992-06-21/opinion/op-1236_1_attorney-general).

<sup>18</sup> David Johnston, *New Attorney General Shifts Department’s Focus*, N.Y. Times (Mar. 3, 1992), <https://www.nytimes.com/1992/03/03/us/new-attorney-general-shifts-department-s-focus.html>.

<sup>19</sup> William P. Barr Oral History, *supra* note 7.

<sup>20</sup> *Id.*

<sup>21</sup> *Id.*

<sup>22</sup> *Id.*

<sup>23</sup> Editorial, *A New Attorney General Steps Up*, N.Y. Times (Oct. 20, 1991), <https://www.nytimes.com/1991/10/20/opinion/a-new-attorney-general-steps-up.html>.

of direct evidence of this proposition. First, offenders placed on probation commit new crimes while on probation. Second, offenders who are released early commit new crimes during the period when they would otherwise have been confined in prison.”<sup>24</sup> As discussed earlier and below, the very policies promoting harsh sentencing with longer prison sentences exacerbates challenges to recidivism by reducing the formerly incarcerated individual’s opportunities to employment, and stable, safe and affordable housing all of which are foundational to successful re-entry and reduced recidivism. Moreover, studies show that the risk of recidivism reduces significantly over time for those with non-violent convictions, the types of individuals most impacted by “War on Drugs” and Mr. Barr’s policies.<sup>25</sup>

- Project Triggerlock was a particular hallmark of Mr. Barr’s tenure as Attorney General. According to Mr. Barr in 1991, Project Triggerlock uses federal firearms laws to prosecute “the most dangerous violent criminals in each community” in federal court “to take advantage of stiff mandatory sentences without the possibility of parole.”<sup>26</sup> In a 2001 interview, Mr. Barr said the following about Project Triggerlock: “That thing was great because you just give people a directive, and all of a sudden this machine starts. We were putting away over a thousand people, actually incarcerating a thousand people. By the end of the administration, we had done over 18,000 people in a very short period of time. . . .”<sup>27</sup>
- While Mr. Barr is proud of this achievement, as discussed above, these types of policies caused the number of Americans who have some sort of criminal record to increase significantly. Incarceration rates in the United States have more than tripled since the 1980s.<sup>28</sup> As a result of this increase, the United States currently constitutes approximately five percent of the world’s population but holds 25 percent of the world’s prison population.<sup>29</sup> From 1975 to 2005 the United States’ incarceration rate increased by 342 percent.<sup>30</sup> Criminal justice policies that led to this incarceration rate surge continue to drive racial inequality and poverty. If not for mass incarceration, one study reports that the overall poverty rate would have dropped by 20 percent between 1980 and 2004.<sup>31</sup> One-in-three Americans are estimated to have a criminal record<sup>32</sup> creating barriers to opportunity, such as employment.<sup>33</sup>

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<sup>24</sup> William P. Barr, *The Case for More Incarceration* 5 (1992), <https://www.ncjrs.gov/pdffiles1/Digitization/139583NCJRS.pdf>.

<sup>25</sup> Rebecca Vallas & Sharon Dietrich, *One Strike and You’re Out*, CENTER FOR AMERICAN PROGRESS 1 (Dec. 2014), <https://cdn.americanprogress.org/wp-content/uploads/2014/12/VallasCriminalRecordsReport.pdf>.

<sup>26</sup> William P. Barr, Office of the Att’y Gen., 1991 Annual Report of The Att’y Gen. of the U.S. 19. (quoted in Rachel E. Barkow, *Federalism and Criminal Law: What the Feds Can Learn from the States*, 109 Mich. L. Rev. 519, 575 (2011)).

<sup>27</sup> William P. Barr Oral History, *supra* note 7.

<sup>28</sup> U.S. Dep’t of Justice, Bureau of Justice Statistics, *Correctional Populations in the United States 1998* (2002); Paige M. Harrison & Allen J. Beck, U.S. Dep’t of Justice, Bureau of Justice Statistics, *Prisoners in 2003* (2004).

<sup>29</sup> Marc Mauer, *Race to Incarcerate*, 15-14 (1999).

<sup>30</sup> Robert DeFina & Lance Hannon, *The Impact of Mass Incarceration on Poverty*, SAGE JOURNALS Vol. 59, Issue 4 (2013) <http://journals.sagepub.com/doi/abs/10.1177/0011128708328864>.

<sup>31</sup> *Id.* at 20.

<sup>32</sup> Rebecca Vallas & Sharon Dietrich, *One Strike and You’re Out*, CENTER FOR AMERICAN PROGRESS 1 (Dec. 2014), <https://cdn.americanprogress.org/wp-content/uploads/2014/12/VallasCriminalRecordsReport.pdf>.

<sup>33</sup> *Id.*

Unfortunately, data show that one year after their release, 60 percent of formerly incarcerated individuals remain unemployed.<sup>34</sup> And, for those able to find employment, most have considerably diminished earnings.<sup>35</sup>

- The impact of the criminal justice system particularly resonates in communities of color. People of color are disproportionately represented in our prison system as they represent more than 60 percent of the prison population,<sup>36</sup> but makeup 37.9 percent<sup>37</sup> of the U.S. population. African Americans and Latinos in particular are overrepresented in the prison system. African Americans make up less than 13 percent<sup>38</sup> of the U.S. population but are 40 percent of the prison population.<sup>39</sup> The prevalence of arrest rates and criminal convictions are far higher among African Americans and Latinos than for whites: African Americans are 2.5 times more likely to be arrested than whites.<sup>40</sup> These racial disparities are not explained by disproportionate rates of criminal activity—one study found that in 2005, African Americans represented 14% of current drug users, yet they constituted 33.9% of persons arrested for drug offenses.<sup>41</sup> Rather, they demonstrate the roles that racial profiling and discriminatory criminal justice policies have played and continue to play in our criminal justice system.<sup>42</sup>
- As Attorney General, Mr. Barr believed the criminal justice system was fair because he saw no evidence of intentional bias. He acknowledged that the system may have

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<sup>34</sup> Rebecca Vallas et al., *Removing Barriers to Opportunity for Parents with Criminal Records and Their Children*, CENTER FOR AMERICAN PROGRESS 4 (Dec. 2015), <https://cdn.americanprogress.org/wp-content/uploads/2015/12/09060720/CriminalRecords-report2.pdf>.

<sup>35</sup> *Id.*

<sup>36</sup> Trends in U.S. Corrections, The Sentencing Project, <http://sentencingproject.org/wp-content/uploads/2016/01/Trends-in-US-Corrections.pdf>.

<sup>37</sup> See U.S. Census, Quick Facts <https://www.census.gov/quickfacts/table/PST045216/00>.

<sup>38</sup> *Id.*

<sup>39</sup> Peter Wagner and Bernadette Rabuy, *Mass Incarceration*, PRISON POLICY INITIATIVE (Mar. 14, 2017), <https://www.prisonpolicy.org/reports/pie2017.html>.

<sup>40</sup> Recent statistics from the FBI show that African Americans accounted for more than 3 million arrests in 2009 (28.3% of total arrests), even though they represented just 12.9% of the general population; whites, who formed 75.6% of the general population, accounted for fewer than 7.4 million arrests (69.1% of total arrests). Crime in the United States, 2009 U.S. Department of Justice — Federal Bureau of Investigation (Sept. 2010) tbl. 43, <http://www2.fbi.gov/ucr/cius2009/arrests/index.html>. Among persons arrested on felony charges in 2006, 29% were white, while 45% were black and 24% were Latino. Bureau of Justice Statistics, U.S. Dep't of Justice, *Felony Defendants in Large Urban Counties, 2006*, app. tbl. 2 (2010). Similar disparities are seen in conviction rates as well. One recent estimate found that nearly one-fourth of the black adult male population (23.3%) has at least one felony conviction but is not currently under any form of criminal justice supervision, while that figure is only 9.2% for the adult male population as a whole. Christopher Uggen, Jeff Manza & Melissa Thompson, *Citizenship, Democracy and the Civic Reintegration of Criminal Offenders*, 605 *Annals Am. Acad. Pol. & Soc. Sci.* 281, 288 & tbl. 2 (2006); see also Marc Mauer and Ryan S. King, *Uneven Justice: State Rates of Incarceration by Race and Ethnicity*, 3 (2007), [http://www.sentencingproject.org/doc/publications/rd\\_stateratesofinbyraceandethnicity.pdf](http://www.sentencingproject.org/doc/publications/rd_stateratesofinbyraceandethnicity.pdf) (finding African Americans incarcerated 5.6 times rate of whites, Hispanics incarcerated at 1.8 times rate of whites).

<sup>41</sup> Marc Mauer, *Justice for All? Challenging Racial Disparities in the Criminal Justice System*, Am. Bar Ass'n (2010). A recent report by the American Civil Liberties Union (“ACLU”) found that “Black people are 3.7 times more likely to be arrested for marijuana possession than white people despite comparable usage rates.” Press Release, ACLU, *New ACLU Report Finds Overwhelming Racial Bias in Marijuana Arrests* (June 4, 2013), <https://www.aclu.org/criminal-law-reform/new-aclu-report-finds-overwhelming-racial-bias-marijuana-arrests>.

<sup>42</sup> See, e.g., Michelle Alexander, *The New Jim Crow: Mass Incarceration in the Age of Colorblindness* (2010); Marc Mauer, *Mass Imprisonment and the Disappearing Voters*, in *Invisible Punishment* 53 (Marc Mauer & Meda Chesney-Lind eds., 2002) (discussing war on drugs).

a disparate impact on black people, including the crack/powder cocaine disparity, but that was not itself a reason to believe the system was operating unfairly.<sup>43</sup>

- Mr. Barr was the architect of President Bush’s controversial signing statement used to enact the Civil Rights Act of 1991. According to a New York Times article, Republicans and Democrats both criticized the statement for endorsing “a hotly debated interpretation of certain provisions of the new anti-discrimination law that gives employers the broadest discretion in citing ‘business necessity’ to defend policies that exclude blacks, women and other minority groups from hiring.”<sup>44</sup> In a 2001 interview, Mr. Barr said that the signing statement was to help guide future courts in their interpretation, for legislative history purposes:

This raises the whole debate that came up that we felt that the President could refuse to enforce unconstitutional laws, especially if they dealt with his prerogatives. Congress’s game is to take a piece of must-pass legislation and throw something that’s quite offensive on it that derogates some Presidential power, that’s one of their tactics. So our attitude was Fine, we’ll sign the bill. We’re just not going to enforce the unconstitutional part. There was a mini debate about whether it’s appropriate not to enforce the law.<sup>45</sup>

- Mr. Barr is a proponent of using signing statements to raise constitutional objections, including objecting to legislative checks on executive power. As Deputy Attorney General, Mr. Barr wrote a memo in which he “identified ten categories of legislative action he considered constitutionally problematic and noted that the Administration had objected to many of these perceived intrusions through the issuance of signing statements.”<sup>46</sup>
- Mr. Barr believes there are limits on when DOJ should defend the constitutionality of congressional enactments. In 2001, he said that the rule at DOJ followed under his leadership was that “[t]here’s a presumption that you will defend the constitutionality of congressional enactments, with an exception, which is that any statute that impinges on executive prerogative we will not defend.”<sup>47</sup> This is consistent with his views of executive power. In a 1989 memo, Mr. Barr urged federal officials to “consistently and forcefully” resist “congressional incursions” into “executive branch prerogatives” such as what executive branch officials the President can appoint and remove.<sup>48</sup>

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<sup>43</sup> Ostrow, Ronald J., [http://articles.latimes.com/1992-06-21/opinion/op-1236\\_1\\_attorney-general](http://articles.latimes.com/1992-06-21/opinion/op-1236_1_attorney-general).

<sup>44</sup> Andrew Rosenthal, *Reaffirming Commitment, Bush Signs Rights Bill*, N.Y. Times (Nov. 22, 1991), <https://www.nytimes.com/1991/11/22/us/reaffirming-commitment-bush-signs-rights-bill.html>.

<sup>45</sup> William P. Barr Oral History, *supra* note 7.

<sup>46</sup> Department of Justice, Office of Legal Counsel, “Common Legislative Encroachments on Executive Branch Authority,” 13 U.S. Op. Off. Legal Counsel, 248, 249 (1989) (quoted in Todd Garvey, *Presidential Signing Statements: Constitutional and Institutional Implications* 4 (2012), <https://fas.org/sgp/crs/natsec/RL33667.pdf>).

<sup>47</sup> George H.W. Bush Oral History Project April 5, 2001, <https://millercenter.org/the-presidency/presidential-oral-histories/william-p-barr-oral-history-assistant-attorney-general>.

<sup>48</sup> *Common Legislative Encroachments on Executive Branch Authority* (July 27, 1989), <https://www.justice.gov/file/24286/download>.

The Trump administration's assault on civil and constitutional rights would continue uninterrupted with the appointment of William Barr. Certain trends, like the increased militarization of the police force and the growing number of jails, would continue under the policies favored by Mr. Barr, while others, like the slight but steady decrease in national incarceration and the bipartisan movement to end cash bail and provide alternatives to incarceration, would likely be derailed. If it were not already clear when Mr. Barr was Attorney General in the early 1990s, the ensuing years have demonstrated clearly that his policies and worldview are disastrous, extreme, and obsolete. In fact, the stakes may be higher arguably now than in 1992, as this Administration unleashes new threats to the Constitution and to our democratic system on a regular basis. Nothing in Mr. Barr's record shows that he will be a moderating voice in this administration.

## Career After the Department of Justice

Since leaving DOJ Mr. Barr has had an extensive and lucrative career in corporate and private law practice. His time away from DOJ has not caused his views on criminal justice, LGBTQ rights and other issues to evolve. In fact, his writings, interviews and affiliations demonstrate problematic thinking and ideals regarding subjects which will comprise a substantial portion of the work he would oversee as Attorney General.

- In 2015, Mr. Barr opposed the Sentencing Reform and Corrections Act of 2015, S. 2123 which would have helped reduce the impact of the criminal justice systems' overly harsh sentencing policies and laws. In the opposition letter, he insists, "Our system of justice is not broken."<sup>49</sup> The letter also credits the decline in the national crime rate to "[m]andatory minimums and proactive law enforcement measures."<sup>50</sup>
- In November 2018, Mr. Barr co-authored a piece with former Attorneys Generals Ed Meese and Michael Mukasey honoring Mr. Sessions. The op-ed claims that President Obama's DOJ "undermined police morale, with the spreading 'Ferguson effect' causing officers to shy away from proactive policing out of fear of prosecution."<sup>51</sup> The piece also praises the reinstatement of the practice of U.S. Attorneys pursuing "the most serious, readily provable offense."<sup>52</sup> Mr. Barr and his co-authors also praise Mr. Sessions for "breaking the record for prosecution of illegal-entry cases and increasing by 38 percent the prosecution of deported immigrants who reentered the country illegally." The piece states that Mr. Sessions "help[ed] restore the rule of law" by "oppos[ing] nationwide injunctions by federal district courts" and "forbid[ding]

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<sup>49</sup> Letter from John Ashcroft et al. to Sen. Mitch McConnell and Sen. Harry Reid re Sentencing Reform and Corrections Act of 2015, Dec. 10, 2015, <http://nafusa.org/wp-content/uploads/2016/01/Sentencing-Dear-Colleague-Letter-with-Attachment.pdf>.

<sup>50</sup> *Id.*

<sup>51</sup> William P. Barr et al., *We are Former Attorneys General. We Salute Jeff Sessions*. Wash. Post (Nov. 7, 2018), [https://www.washingtonpost.com/opinions/jeff-sessions-can-look-back-on-a-job-well-done/2018/11/07/527e5830-e2cf-11e8-8f5f-a55347f48762\\_story.html?noredirect=on&utm\\_term=.46b45b17219e](https://www.washingtonpost.com/opinions/jeff-sessions-can-look-back-on-a-job-well-done/2018/11/07/527e5830-e2cf-11e8-8f5f-a55347f48762_story.html?noredirect=on&utm_term=.46b45b17219e).

<sup>52</sup> *Id.* (citing Memorandum from Attorney General Jeff Sessions re: Department Charging and Sentencing Policy, Office of the Attorney General, May 10, 2017, <https://www.justice.gov/opa/press-release/file/965896/download>).

settlements in which the Justice Department has directed payments from settling defendants to third parties so as to circumvent the appropriate authority of Congress.”

- Mr. Barr appears to have had close associations with the American Legislative Exchange Council (ALEC). In 1994, Mr. Barr “unveiled the ALEC agenda” regarding prison privatization and tough-on-crime legislation to state officials in Pennsylvania at a media event.<sup>53</sup> In the forward to a 1994 report by ALEC, Mr. Barr wrote, “This study makes a strong case that increasing prison capacity is the single most effective strategy for controlling crime.”<sup>54</sup> It unclear whether Mr. Barr has maintained his association with ALEC.
- In a 1993 interview, Mr. Barr expressed hostile views toward assertions that our criminal justice system operates unfairly despite ample evidence of its bias and vigorous support for harsh sentencing and mandatory minimums. Specifically, he said:

The notion that there are sympathetic people out there who become hapless victims of the criminal justice system and are locked away in federal prison beyond the time they deserve is simply a myth. The people who have been given mandatory minimums generally deserve them—richly. This country has spent a decade trying to get across two essential messages: First, that we have a tough federal criminal-justice system—if you do the crime, you’ll do the time. Second, that participating in drug trafficking is morally reprehensible. Backpedaling on mandatory minimums subverts these messages at just the wrong time.<sup>55</sup>

- After leaving the Bush Administration, Mr. Barr dedicated himself to trying to end parole in Virginia by co-chairing former Governor George Allen’s Commission on Parole Abolition and Sentencing Reform.<sup>56</sup> The Commission released a plan in 1994 “that would abolish parole, increase sentences for violent criminals by as much as 700 percent and require the construction of dozens of new prisons in the next decade.”<sup>57</sup>

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<sup>53</sup> Brigitte Sarabi & Edwin Bender, *The Prison Payoff: The Role of Politics and Private Prisons in the Incarceration Boom* 5 (2000), [https://www.prisonpolicy.org/scans/Prison\\_Payoff\\_Report\\_WPP\\_2000.pdf](https://www.prisonpolicy.org/scans/Prison_Payoff_Report_WPP_2000.pdf); see also Lee Hall, *Nomads Under the Tent of Blue: Migrants Fuel the U.S. Prison Industry*, 6 Rutgers Race & L. Rev. 265, 306-07 (“The American Legislative Exchange Council, or ALEC, has risen to the occasion, offering bills to support privatization and ensure a flow of detainees. By 1994, ALEC was pressing its policies in Pennsylvania with the assistance of William Barr, Attorney General from the first Bush administration.”).

<sup>54</sup> Quoted in Frank Green, *Trump’s Nominee for Attorney General Helped Create Virginia’s Current Criminal Sentencing System*, *Richmon Times-Dispatch* (Dec. 16, 2018), [https://www.richmond.com/news/local/crime/trump-s-nominee-for-attorney-general-helped-create-virginia-s/article\\_3c51f303-ee9b-5b68-98b9-abf9c1a9248f.html](https://www.richmond.com/news/local/crime/trump-s-nominee-for-attorney-general-helped-create-virginia-s/article_3c51f303-ee9b-5b68-98b9-abf9c1a9248f.html).

<sup>55</sup> *Barr: Clinton Administration Soft on Crime, Going AWOL on Drug War*, *Conn. Law Tribune* (Aug. 23, 1993).

<sup>56</sup> Frank Green, *Trump’s Nominee for Attorney General Helped Create Virginia’s Current Criminal Sentencing System*, *Richmon Times-Dispatch* (Dec. 16, 2018), [https://www.richmond.com/news/local/crime/trump-s-nominee-for-attorney-general-helped-create-virginia-s/article\\_3c51f303-ee9b-5b68-98b9-abf9c1a9248f.html](https://www.richmond.com/news/local/crime/trump-s-nominee-for-attorney-general-helped-create-virginia-s/article_3c51f303-ee9b-5b68-98b9-abf9c1a9248f.html).

<sup>57</sup> Peter Baker, *Allen Offers Plan to Abolish Parole*, *Wash. Post* (Aug. 17, 1994), [https://www.washingtonpost.com/archive/politics/1994/08/17/allen-offers-plan-to-abolish-parole/aa89f603-818d-42aa-9b7d-40a09054b70e/?noredirect=on&utm\\_term=.325ad6331fcc](https://www.washingtonpost.com/archive/politics/1994/08/17/allen-offers-plan-to-abolish-parole/aa89f603-818d-42aa-9b7d-40a09054b70e/?noredirect=on&utm_term=.325ad6331fcc).

- Mr. Barr holds hostile views toward members of the LGBTQ community, as well as ideas about the role of government in enforcing religious-based concepts that are antithetical to the First Amendment and civil rights. In 1995, Mr. Barr wrote a law review article arguing against secularism in government and in favor of the state imposing a religiously based “transcendent moral order” that “flows from God’s eternal law.”<sup>58</sup> Mr. Barr calls upon the law to “restrain sexual immorality,” and condemns a District of Columbia law that was applied “to compel Georgetown University to treat homosexual activist groups like any other student groups.”<sup>59</sup> “This kind of law,” according to Mr. Barr, “dissolves any kind of moral consensus in society.”<sup>60</sup> More recently, Mr. Barr praised Mr. Sessions for withdrawing policies that protect people from discrimination based on gender identity.<sup>61</sup>

## Conclusion

At this critical moment in our history, it is essential that DOJ is led by an Attorney General who will respect the independence of the special counsel, uphold the rule of law and enforce our nation’s civil rights laws. A review of his record before, during and after his service in the Bush Administration demonstrates that Mr. Barr is hostile to sensible criminal justice reform, marginalized communities and legislative checks on executive power. Indeed, given the current attacks on our civil rights, Mr. Barr bears the burden of showing that he will indeed promote these principles and will not continue or extend the rollbacks of our civil rights ushered in by this Administration. It is the Senate’s constitutional duty to review his record thoroughly and impartially and to consider whether Mr. Barr will defend civil rights and the rule of law.

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<sup>58</sup> William P. Barr, *Legal Issues in a New Political Order*, 36 *The Catholic Lawyer* 1, 3 (1995), <https://scholarship.law.stjohns.edu/cgi/viewcontent.cgi?article=2355&context=tcl>.

<sup>59</sup> *Id.* at 9.

<sup>60</sup> *Id.*

<sup>61</sup> William P. Barr et al., *We are Former Attorneys General. We Salute Jeff Sessions*. Wash. Post (Nov. 7, 2018), [https://www.washingtonpost.com/opinions/jeff-sessions-can-look-back-on-a-job-well-done/2018/11/07/527e5830-e2cf-11e8-8f5f-a55347f48762\\_story.html?noredirect=on&utm\\_term=.46b45b17219e](https://www.washingtonpost.com/opinions/jeff-sessions-can-look-back-on-a-job-well-done/2018/11/07/527e5830-e2cf-11e8-8f5f-a55347f48762_story.html?noredirect=on&utm_term=.46b45b17219e).